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LEGITIMACY IN INTERNATIONAL LAW: FOCUS ON THE LEGITIMACY OF INTERNATIONAL COURTS

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ABSTRACT

The idea or notion of legitimacy has usually been invoked when discussing various aspects of international law and its diverse institutions, such as international courts. Regarding international courts, a wide array of international actors, ranging from heads of state to diverse media sectors, have invoked legitimacy to, harshly or constructively, criticize or endorse the law and, especially, the practice of international courts such as the International Court of Justice. Against this background, the present article aims to answer the following research question: What could be a conceptually sound framework to assess the legitimacy of international law, especially that of international courts? By adopting a primarily normative-oriented approach and relying on relevant scholarship, it is argued herein that the said framework should combine two important components. First, legitimacy ought to be considered at a triple level, namely, legitimacy concerning the origin, procedure, and outcomes of international law, particularly (within this article's scope), the law and practice of international courts. Second, this should be substantially complemented and enriched by the application of legitimacy standards such as human rights. Thus, overall, this framework could be useful for determining whether and to what extent the law and, especially, the practice of an international court can be regarded as legitimate.

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I. INTRODUCTION

In general, the notion of legitimacy has usually been invoked in discussions of diverse aspects of international law and its myriad institutions. For instance, with regard to the use of force, the assessment of actions under the umbrella of humanitarian intervention and/or the responsibility to protect—including strikes launched by the North Atlantic Treaty Organization in Serbia in 1999, or Libya in 2011—have involved not only doctrinal considerations of lawfulness or legality under international law but also, and importantly, whether and to what extent those actions (and/or omissions) can be considered as legitimate.¹

At a more institutionally oriented level in international law, a wide array of international actors has invoked legitimacy to harshly (most often) or constructively criticize or endorse the law and, especially, the practice of international courts. Among others, this group of actors has included heads of state and other high-ranking state officers regarding the International Criminal Court.²

Diverse voices have also questioned, to varying degrees, the legitimacy of the International Court of Justice, involving different levels and types of legitimacy-related critical remarks ranging from high-level state officers, some

1. See generally Deepak Bhojwani, *Responsibility to Protect Issues of Legality and Legitimacy*, 46 ECON. & POL. WKLY. 28-30 (2012) (analyzing the tension between legality and legitimacy in humanitarian intervention and contending that legitimacy assessments under the Responsibility to Protect framework must complement, rather than replace, evaluations of formal legality under international law); Edward Newman, *The Responsibility to Protect, multilateralism and international legitimacy*, in- THE RESPONSIBILITY TO PROTECT, NORMATIVE THEORY AND GLOBAL GOVERNANCE 125-43 (Ramesh Thakur and William Maley eds., 2015); DAVID HARRIS & SANDESH SIVAKUMARAN, CASES AND MATERIALS ON INTERNATIONAL LAW 799-813 (9th ed. 2020); Edward Newman, *Illegal but Legitimate? The UK's Doctrine of Humanitarian Intervention*, EUR. CTR. FOR RESP. TO PROTECT (ECR2P) FRESH PERSPS. (Apr. 12, 2021), <https://ecr2p.leeds.ac.uk/illegal-but-legitimate-the-uks-doctrine-of-humanitarian-intervention/> [<https://perma.cc/92HS-L45D>]; Juan-Pablo Perez-Leon-Acevedo, *Stopping mass atrocities in Africa and the Pretoria Principles: Triggering military intervention in Darfur (Sudan) and Libya under article 4(h) of the Constitutive Act of the African Union*, 16 AFR. HUM. RTS. L.J. 476 (2016).

2. See generally Mark Caldwell, *African Union criticizes International Criminal Court*, DEUTSCHE WELLE (Nov. 19, 2015), <https://www.dw.com/en/african-union-criticizes-international-criminal-court-at-member-states-meeting/a-18862799> [<https://perma.cc/J9TP-864N>] (reporting on African Union leaders' criticism of the International Criminal Court as disproportionately targeting African states and reflecting broader tensions between the Court's prosecutorial practices and state sovereignty concerns); *Imposing Sanctions on the International Criminal Court*, WHITE HOUSE (Feb. 6, 2025), <https://www.whitehouse.gov/presidential-actions/2025/02/imposing-sanctions-on-the-international-criminal-court/> [<https://perma.cc/D3MK-P2AF>]; BBC NEWS, *President Donald Trump sanctions International Criminal Court* (YouTube, Feb. 7, 2025), <https://www.youtube.com/watch?v=E2019XVJF0I> [<https://perma.cc/9R6V-PETS>]; *Hungary says it will withdraw from ICC as Israel's Netanyahu visits*, ALJAZEERA (Apr. 3, 2025), <https://www.aljazeera.com/news/2025/4/3/hungary-says-it-will-withdraw-from-icc-as-israels-netanyahu-visits> [<https://perma.cc/WS82-TETM>].

media sectors, and academics.³

In this scenario set by claims of lack of legitimacy of international courts such as the International Court of Justice, the present article aims to answer the following main research question: What could be a conceptually sound framework to assess the legitimacy of international law, especially that of international courts? By adopting a primarily normative-oriented approach and relying on relevant scholarship, it is argued herein that the said framework should combine two important components. First, legitimacy ought to be considered at a triple level, namely, legitimacy concerning the origin, procedure, and results of international law, in particular (within this article's scope), the law and practice of international courts. Second, this should be substantially complemented and enriched by the application of legitimacy standards such as human rights.

Overall, this framework could be useful for determining whether and to what extent the law and, especially, the practice of an international court can be regarded as legitimate. Illustrative references mainly concern the practice of the International Court of Justice. Thus, this article relies on and/or is connected to relevant academic literature that has examined the legitimacy of international

3. See generally Bethan McKernan, *Israeli officials accuse international court of justice of antisemitic bias*, GUARDIAN (Jan. 26, 2024, at 12:51 EST), <https://www.theguardian.com/world/2024/jan/26/israeli-officials-accuse-international-court-of-justice-of-antisemitic-bias#:~:text=Israeli%20officials%20accuse%20international%20court,Israel%20Gaza%20war%20%7C%20The%20Guardian> [<https://perma.cc/YFM4-MZ9A>] (reporting on Israeli officials' allegations that the International Court of Justice exhibited antisemitic bias in its handling of proceedings concerning the Israel-Gaza conflict, and reflecting state-level challenges to the Court's impartiality and moral authority); see generally Gerald M. Steinberg, *The ICJ is not a court - opinion*, JERUSALEM POST (Feb. 2, 2024, at 10:44 ET), <https://www.jpost.com/opinion/article-784576> [<https://perma.cc/2QRV-PF5V>] (arguing that the ICJ functions as a politicized body rather than an impartial judicial forum, thereby undermining its credibility and legitimacy in disputes involving Israel and other states); Brooke Goldstein & Gerard Filitti, *The ICJ is illegitimate, but it is an existential threat to Israel - opinion*, JERUSALEM POST (Jan. 12, 2024), <https://www.jpost.com/opinion/article-781784> [<https://perma.cc/8YWS-YVLZ>]; see generally Dina Lupin, *Looking for an African perspective on the ICJ's Climate Advisory Opinion*, COLUM. L. SCH.: CLIMATE L.: SABIN CTR. Blog (Oct. 2, 2025), <https://blogs.law.columbia.edu/climate-change/2025/10/02/looking-for-an-african-perspective-on-the-icjs-climate-advisory-opinion/> [<https://perma.cc/3MVC-PACE>] (examining African scholars' and policymakers' responses to the ICJ's forthcoming Climate Change Advisory Opinion, highlighting regional concerns about equitable participation and representativeness in shaping international adjudicatory legitimacy).

law⁴ and/or, more specifically, the legitimacy of international courts.⁵

To answer the main research question and unpack the argument, the present article comprises the following parts. Section II presents the conceptual or theoretical context in which legitimacy plays a role, as well as a working definition of legitimacy of a primarily normative nature. Having in mind international courts, section III examines legitimacy at a triple level: origin legitimacy, procedural legitimacy, and outcome legitimacy. Section IV argues that human rights can serve as a standard for assessing the legitimacy of international courts. Thus, it examines legitimacy standards and human rights in general, as well as justifies human rights as a legitimacy standard. Finally, section V contains the conclusion.

II. CONCEPTUAL CONTEXT AND A DEFINITION OF LEGITIMACY

A. Conceptual Context

This sub-section enquires into the conceptual context in which legitimacy operates, to, in later sections, approach the “legitimacy” conceptual framework itself employed. It should first be noted that supranational (judicial) institutions like the International Court of Justice and decisions thereof have been called to be more or less “legitimate” and there have been “legitimacy crises” of international institutions caused by, *inter alia*, their “democratic deficit.”⁶ Yet,

4. See generally Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?* 93 AM. J. INT'L L. 596, 596-624 (1999) (analyzing the concept of legitimacy in international governance, distinguishing between normative, sociological, and pragmatic dimensions, and arguing that international environmental law's effectiveness depends on maintaining both procedural and substantive legitimacy) [hereinafter *The Legitimacy of International Governance*]; Daniel Bodansky, *Legitimacy*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 704, 704-24 (Daniel Bodansky, Jutta Brunnée & Ellen Hey eds., 1st ed. 2008) [hereinafter *Legitimacy*]; MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, LEGITIMACY IN INTERNATIONAL LAW (Rüdiger Wolfrum & Volker Röben eds., 2008); Rüdiger Wolfrum, *Legitimacy in International Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ON-LINE VERSION (Anne Peters & Rüdiger Wolfrum eds., 2011).

5. See generally Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMP. L. REV. 61 (2013) (developing a normative framework for assessing the legitimacy of international courts, emphasizing the importance of representativeness, procedural fairness, and accountability in sustaining their moral and political authority); THE LEGITIMACY OF INTERNATIONAL HUMAN RIGHTS REGIMES: LEGAL, POLITICAL AND PHILOSOPHICAL PERSPECTIVES (Andreas Føllesdal, Johan Karlsson Schaffer & Geir Ulfstein eds., 2015); LEGITIMACY OF INTERNATIONAL CRIMINAL TRIBUNALS (Nobuo Hayashi & Cecilia Bailliet eds., 2017); LEGITIMACY AND INTERNATIONAL COURTS (Nienke Grossman et al. eds., 2018); INTERNATIONAL JUDICIAL PRACTICE ON THE ENVIRONMENT: QUESTIONS OF LEGITIMACY (Christina Voigt ed., 2019); Juan-Pablo Perez-Leon-Acevedo, *The Inter American Court of Human Rights: The Legitimacy of International Courts and Tribunals*, by Natalia Torres, 40 NORD. J. HUM. RIGHTS 503 (2022) (reviewing Natalia Torres Zúñiga, THE INTER AMERICAN COURT OF HUMAN RIGHTS: THE LEGITIMACY OF INTERNATIONAL COURTS AND TRIBUNALS (2022)).

6. *Legitimacy*, *supra* note 4, at 705.

the term “legitimacy” has a specific meaning in legal or political theory and sociology, which usually contrasts with more colloquial usages of “legitimacy” by international law practitioners and scholars.

A second point to bear in mind is that, while legitimacy may go beyond international law itself or be regarded as indeterminate, it remains a conceptual framework that, if approached carefully, “can prove illuminating for international law scholarship and practice,” and legal thinking can also contribute to interdisciplinary discussions on legitimacy.⁷ Indeed, “legitimacy” etymologically comes from the Latin “*legitimus* (lawful), as derived from *lex* (law).”⁸

A third consideration is that legitimacy can be better understood when contrasted with other governance bases—such as rational persuasion and power—since legitimacy lies somewhere in between the other two.⁹ Unlike persuasion, legitimacy implies deference or obedience, namely, acting not because the act is right “on the merits [. . .] but simply because another has directed it.”¹⁰ Nevertheless, legitimacy also differs from compulsion, which, like legitimacy, includes obedience.¹¹ That is, legitimacy has a normative quality, which means that an institution with legitimate authority has “the right to rule” and its subjects are correspondingly obligated to obey.¹²

A fourth aspect to take into account is that legitimacy as a meta-concept applies to diverse objects in international law: systems, institutions, actions, norms, and actors.¹³ While a specific decision may be controversial, it could be justified when rendered by a legitimate institution.¹⁴ Moreover, legitimacy crucially involves subjects who should support these objects—namely, and traditionally, states as the main subjects of international law.¹⁵ Nonetheless, legitimacy subjects also include individuals since their status as subjects of international law has gained considerable strength. Some have even suggested that, morally if not formally, individuals are the true subjects of international law.¹⁶

Finally, the notion or idea of legitimacy interacts with other concepts, such as “effectiveness,” to assess international institutions like the International

7. James Crawford, *The Problems of Legitimacy-Speak*, 98 PROCEEDINGS OF THE ASIL ANNUAL MEETING 271, 271, 273 (2004); Christopher Thomas, *The Uses and Abuses of Legitimacy in International Law*, 34 OXFORD J. LEGAL STUD. 729, 732 (2014).

8. *Id.* at 734.

9. *Legitimacy*, *supra* note 4, 706-07.

10. *Id.* at 707.

11. *Id.* at 708.

12. *Id.*

13. See KATHARINA COLEMAN, INTERNATIONAL ORGANISATIONS AND PEACE ENFORCEMENT: THE POLITICS OF INTERNATIONAL LEGITIMACY 20-23 (2007).

14. Thomas, *supra* note 7, at 746.

15. *Id.* at 747.

16. Thomas, *supra* note 7, at 747; Jeremy Waldron, *The Rule of International Law*, 30 HARV. J.L. & PUB. POL'Y 15, 23 (2006).

Court of Justice.¹⁷ These institutions often lack both the democratic legitimation held by national institutions and the strong law-enforcement mechanisms available domestically, requiring supranational institutions to seek “legitimacy-enhancing and effectiveness-bolstering factors to perform their functions” satisfactorily.¹⁸ A more legitimate international court is expected to work more effectively and a more effective international court may be regarded as more legitimate.¹⁹ While international courts can strategically use legitimacy to enhance their effectiveness (achieving their goals), effectiveness can become a legitimacy-enhancing factor when judicial goals or their impact are legitimate and when the court is accepted and supported.²⁰ Sometimes, however, legitimacy-detracting and effectiveness-decreasing factors may be mutually undermining or they “may pull in opposite directions.”²¹

B. A Definition of Legitimacy

Tailored to the international system, in 1990, Thomas Franck seminally defined “legitimacy” as “a property of a rule or rulemaking institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.”²² Such a definition contains two legitimacy dimensions: i) the first is a *normative*, objective, or moral dimension; and ii) the second is a *sociological*, social, subjective, empirical, or descriptive dimension. These dimensions have been recognized by scholars assessing the legitimacy of both international law²³ and international courts,²⁴ including the International Court of Justice.²⁵

17. See Yuval Shany, *Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions*, in LEGITIMACY AND INTERNATIONAL COURTS, *supra* note 5, 354-71.

18. *Id.* at 354.

19. *Id.*

20. *Id.* at 370.

21. *Id.* at 363, 370.

22. THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 24 (1990).

23. See, e.g., Shotaro Hamamoto, *Legitimacy of International Adjudication*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL PROCEDURAL LAW ONLINE VERSION, ¶ 6 (Hélène Ruiz-Fabri, ed., 2020); Johan Schaffer, Andreas Føllesdal & Geir Ulfstein, *International human rights and the challenge of legitimacy*, in THE LEGITIMACY OF INTERNATIONAL HUMAN RIGHTS REGIMES: LEGAL, POLITICAL AND PHILOSOPHICAL PERSPECTIVES, *supra* note 5, at 1, 13-14.

24. See, e.g., Harlan Cohen et al., *Legitimacy and International Courts: A Framework*, in LEGITIMACY AND INTERNATIONAL COURTS, *supra* note 5, at 1, 3-4; Schaffer, Føllesdal & Ulfstein, *supra* note 23, at 13-14; Silje Langvatn & Theresa Squatrito, *Conceptualising and Measuring the Legitimacy of International Criminal Tribunals*, in LEGITIMACY OF INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 5, at 41, 43-44.

25. Nienke Grossman, *Solomonic Judgments and the Legitimacy of the International Court of Justice*, in LEGITIMACY AND INTERNATIONAL COURTS, *supra* note 5, at 43, 43-61; Neil Nupur, *Infallible or Final?: Revisiting the Legitimacy of the International Court of Justice as the*

Normative legitimacy concerns whether there are “good reasons” why an institution “should have the right to make the decisions it does,” which is a question of political philosophy.²⁶ It asks whether an authority claim is objectively well-founded, and thus whether an institution such as the International Court of Justice is legitimate if good reasons support its claims to authority.²⁷ Normative legitimacy is framed “in terms of who has the ‘right to rule,’” namely, in how an actor’s power exercised over another can be justified normatively or morally.²⁸ Indeed, “whether an institution *objectively* has a right to rule,”—that is, whether its claim is somehow true—determines normative legitimacy, focusing on the ruler’s qualities such as expertise, transparency, and democratic pedigree that can justify its authority morally.²⁹ Thus, normative legitimacy concerns whether an international court “objectively fulfils normative standards.”³⁰

Sociological legitimacy, whose study Max Weber started,³¹ asks whether the authority of an institution is factually “accepted by those whom it purports to govern,” including states or individuals, and is a question in sociology and political science.³² That is “whether actors *subjectively* believe that an institution has a right to rule,” focusing on the attitudes of the ruled actors rather than on the qualities of the ruler.³³ It hence inquires whether an international court is believed or perceived to be legitimate.³⁴

Although these two legitimacy dimensions are conceptually distinct, they are interrelated.³⁵ Subjects frequently consider that they possess justifiable or good reasons for regarding certain authorities as (il)legitimate. If an agent possesses a reason to believe that others also endorse a norm, based on *inter alia* legitimacy perceptions, they may determine whether that subject is morally motivated or obligated to comply.³⁶ The two legitimacy dimensions cannot be completely detached from each other, and they overlap in several ways.³⁷ Clarifying the normative grounds for beliefs regarding the legitimacy of

‘Invisible’ *International Supreme Court*, 18 L. & PRAC. INT. CTS. & TRIBUNALS 145 (2019); Roger-Claude Liwanga & Casandra Turner, *Demystifying the Legitimacy of International Tribunals: Case Study of the International Court of Justice and Its Decisions on Armed Activities in the Congo*, 35 EMORY INT’L L. REV. 413 (2021).

26. *Legitimacy*, *supra* note 4, at 709.

27. *The Legitimacy of International Governance*, *supra* note 4, at 601.

28. Thomas, *supra* note 7, at 738.

29. Daniel Bodansky, *Legitimacy in International Law and International Relations*, in INTERDISCIPLINARY PERSPECTIVE ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 321, 327 (Jeffrey Dunoff & Mark Pollack eds., 2013).

30. Langvatn & Squatrito, *supra* note 24, at 43.

31. See MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 31-38, 212-301 (Guenther Roth & Claus Wittich eds., 1968).

32. *Legitimacy*, *supra* note 4, at 709.

33. Bodansky, *supra* note 29, at 327.

34. Langvatn & Squatrito, *supra* note 24, at 43.

35. *The Legitimacy of International Governance*, *supra* note 4, at 601-02.

36. Schaffer, Føllesdal & Ulfstein, *supra* note 23, at 13.

37. Langvatn & Squatrito, *supra* note 24, at 43-44.

international courts can enhance their legitimation as, in Hart's terms,³⁸ "autonomous" authority sites in the eyes of states and individuals.³⁹ In turn, the contestation of an international court's normative legitimacy may affect its *de facto* and normative authority, undermining its mandate.⁴⁰

The present article mainly, but not exclusively, focuses on normative legitimacy for these reasons. First, normative legitimacy can provide objective standards for assessing international courts and determining whether they deserve the "right to rule."⁴¹ This can help to identify deficits of international courts and what can or should be done to strengthen them.⁴² Second, normative legitimacy "can influence sociological legitimacy [. . .] and thereby, the extent to which we undergird or undercut the work of international courts."⁴³ Third, normative legitimacy is conceptually prior to sociological legitimacy, since the latter presupposes the former; however, that an institution is sociologically legitimate on the basis of tradition or charisma does not necessarily mean that its authority claim is well-founded, as Nazi Germany tragically illustrates.⁴⁴ And fourth, normative legitimacy is intrinsically related to legal studies and to the question of legal authority. Additionally, it is "central to the description and evaluation of the exercise of power through law."⁴⁵ Conversely, sociological legitimacy lacks a legal or moral framework to which believers subscribe.⁴⁶ Certain normative legitimacy accounts, which also incorporate sociological elements, can be useful for better approaching supranational judicial authority.⁴⁷ For example, under Joseph Raz's normal justification thesis, an institution has (legitimate) authority over a subject if the latter "accepts the directives of the alleged authority as authoritatively binding and tries to follow them" rather than proceeding independently.⁴⁸

To avoid confusion, "legal legitimacy" should not be used when it is meant "legality"; simply "legality" ought to be employed in those cases.⁴⁹ Accurate terminological usage is useful for properly assessing the practice of international courts. For example, the International Court of Justice in *Armed Activities on*

38. See generally H.L.A. HART, *THE CONCEPT OF LAW* (1961) (explaining that a legal system's legitimacy arises not merely from coercive enforcement but from the internal acceptance of its rules and authority as rightful by those subject to them).

39. Neus Torbisco-Casals, *The Legitimacy of International Courts: The Challenge of Diversity*, 52 J. SOC. PHIL. 491, 494 (2022).

40. *Id.*

41. Grossman, *supra* note 5, at 63-64.

42. *Id.* at 64.

43. *Id.*

44. *Legitimacy*, *supra* note 4, at 709.

45. Thomas, *supra* note 7, at 740.

46. *Id.* at 741.

47. See Steven Wheatley, *On the Legitimate Authority of International Human Rights Bodies*, in *THE LEGITIMACY OF INTERNATIONAL HUMAN RIGHTS REGIMES: LEGAL, POLITICAL AND PHILOSOPHICAL PERSPECTIVES* *supra* note 5, at 84, 95.

48. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 53 (1986).

49. Langvatn & Squatrito, *supra* note 24, at 44.

the Territory of the Congo (New Application) (Democratic Republic of Congo v. Rwanda) was decided in a *legally* correct manner, namely, the Court dismissed the case due to Rwanda's lack of recognition of the contentious jurisdiction of the International Court of Justice.⁵⁰ Nevertheless, this was arguably *illegitimate*, since victims of mass atrocities, who could have ultimately benefited from reparations ordered for the Democratic Republic of the Congo through state redistribution, were precluded from receiving them.⁵¹

In turn, while theorists appropriately refer to legitimacy as content-independent to affirm that a legitimate authority can bind its subjects regardless of the content of its decisions, others speak of authority.⁵² The latter would allow room for how acceptable and legal "the lower levels have to be without losing its legitimacy and legal character."⁵³ Legitimacy can manifest in degrees.⁵⁴

Regarding the relationship between legitimacy and reparations, in general, reparations can enhance the legitimacy of states and, *mutatis mutandis*, international institutions such as international courts.⁵⁵ This "legitimizing" effect can additionally spill over to other actors beyond (direct) reparation claimants or beneficiaries.⁵⁶ An adequate legitimacy theory should account for the possibility that reparations may bolster the legitimacy of states and other international law subjects vis-à-vis "persons or groups who were the target of injustice," and beyond them, producing both personal and general legitimizing reparative effects.⁵⁷

Reparations are, arguably, central to legitimacy. This is because rectification of wrongful acts is essential to a state's process of becoming "itself fully legitimate," which, *mutatis mutandis*, can also apply to—or involve—international courts.⁵⁸ Theoretical legitimacy considerations concerning reparations explain how reparations impact the right to rule held by a subject of international law over those affected; they also allow for an appreciation of how that subject can be—or can become—(more) legitimate.⁵⁹

50. Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. 6 (Feb. 3).

51. Liwanga & Turner, *supra* note 25, at 420. On reparations for serious violations of international law, see, e.g., Juan-Pablo Pérez-León-Acevedo, *Non-compensatory Reparation Modalities in United Nations Legal Sources: Focus on Gross Violations of Human Rights*, in THE GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE: 2022, 155 (Giuliana Ziccardi Capaldo ed., 2023); Juan-Pablo Pérez-León-Acevedo, *Compensation in Cases of Mass Atrocities at the International Court of Justice and the International Criminal Court*, 22 LAW & PRAC. INT'L CTS. & TRIBUNALS 30 (2023).

52. See RAZ, *supra* note 48; *Legitimacy*, *supra* note 4, at 708; see John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 805 (1997).

53. Langvatn & Squatrito, *supra* note 24, at 53.

54. *Id.* at 54.

55. Stephen Galoob & Stephen Winter, *Injustice, Reparation, and Legitimacy*, in 5 OXFORD STUDIES IN POLITICAL PHILOSOPHY, 65 (David Sobel Peter Vallentyne & Steven Wall eds., 2019).

56. *Id.*

57. *Id.* at 65, 72-73.

58. JOHN SIMMONS, BOUNDARIES OF AUTHORITY 247 (2016).

59. Galoob & Winter, *supra* note 55, at 89.

While the International Court of Justice under Article 38(1) of its Statute decides “in accordance with international law such disputes as are submitted to it,” its mandate arguably exceeds dispute settlement and includes international law development.⁶⁰ Concerning the latter, however, the International Court of Justice has been said to be constrained, which impacts its normative legitimacy; namely, constraints that (may) affect such legitimacy include: i) the existence of conflicting judicial interpretations of the *res judicata* doctrine; ii) the inapplicability of the *stare decisis* doctrine; iii) the fact that the contentious jurisdiction of the International Court of Justice involves only inter-state proceedings, excluding individuals; and iv) the underdeveloped jurisprudence of the International Court of Justice in the fields of international human rights law and international humanitarian law.⁶¹

Constraints that (may) undermine the sociological legitimacy of an international court, such as the International Court of Justice, may involve, for instance: i) a state’s displeasure that can be manifested through its non-participation in proceedings at the International Court of Justice; ii) compliance with the judgments of the International Court of Justice that are subject to the state’s will (including state’s repudiation); iii) issues related to the election of the judges of the International Court of Justice; and iv) withdrawal from the contentious jurisdiction of the International Court of Justice.⁶²

In turn, the so-called “Solomonic” judgments of the International Court of Justice can negatively affect its legitimacy.⁶³ Furthermore, even some judges of the International Court of Justice occasionally voice their frustration about “missed opportunities” to develop the reparation jurisprudence of the International Court of Justice,⁶⁴ which affects “the authority and persuasiveness that its Judgments command in the field of international law.”⁶⁵

III. TRIPLE LEVEL OF LEGITIMACY

Under a mixed conception of legitimacy, which approaches an authority’s legitimacy as a combination of qualities,⁶⁶ authors have considered that the normative and sociological dimensions of legitimacy can apply at a triple level: i) a first level corresponds to *origin*, source, or pedigree legitimacy; ii) a second level consists of *procedural* or input legitimacy; and iii) a third level is *outcome*,

60. Nucup, *supra* note 25, at 151.

61. *Id.* at 152-55.

62. *Id.* at 147-50.

63. Grossman, *supra* note 25, at 45.

64. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Reparations Judgment, 2002 I.C.J. 145, ¶ 2 (Feb. 9) (separate opinion of Yusuf, J.).

65. *Id.* ¶ 28.

66. Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT’L AFF. 405, 405, 409 (2006); Langvatn & Squatrito, *supra* note 24, at 50.

result, or output legitimacy.⁶⁷ These three categories are the “building blocks of institutional legitimacy,” and hence, strength in one legitimacy level may “compensate for weakness in another aspect.”⁶⁸ Additionally, the degree of legitimacy of an international court at each level can fluctuate over time.⁶⁹

A. Origin Legitimacy

Origin legitimacy first inquires how an international court came into existence, including an assessment of its creation by “sufficiently right agents” and in a manner consistent with recognized procedural traditions and sufficiently just.⁷⁰ When an international court is created by a competent “body” such as a group of states or an international organization’s organ in a fair, lawful, and proper way, it possesses an “initial source legitimacy capital,” which legitimizes its operations.⁷¹ Its designation as an “international court” and its incorporation into international governance structures, particularly in areas such as international human rights law, further legitimizes its establishment.⁷²

Origin legitimacy has closely been related to legitimization through state consent: (1) specific consent to certain decisions or obligations via, for example, treaty ratification, adoption of a resolution of the United Nations, or acceptance of the jurisdiction of the International Court of Justice over a case; and (2) general consent to an existing governance system, for example, ratification of the United Nations Charter that establishes quasi-legislative and adjudicatory institutions.⁷³ While specific state consent is static and linked to a specific obligation, general state consent is (more) dynamic since a newly established governance system develops its own legal life through the formulation of obligations.⁷⁴

State consent in principle suffices to legitimize a specific measure, even for a continuing obligation, if the substance and scope of the obligation remain the same.⁷⁵ However, the legitimizing effects of the original consent may factually fade over time, despite international law’s assumption that a single original consent can establish continuous obligations.⁷⁶ The renunciation and/or withdrawal of an obligation that changed, namely, the *rebus sic stantibus* clause, and review processes are mechanisms to re-establish legitimacy if an obligation

67. E.g., *The Legitimacy of International Governance*, *supra* note 4, at 612; Rüdiger Wolfrum, *Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations*, in *LEGITIMACY IN INTERNATIONAL LAW*, *supra* note 4, at 1, 6-7; Langvatn & Squatrito, *supra* note 24, at 51; Grossman, *supra* note 25, at 45; Shany, *supra* note 17, at 357.

68. Shany, *supra* note 17, at 359.

69. *Id.* at 360.

70. Langvatn & Squatrito, *supra* note 24, at 51-52.

71. Shany, *supra* note 17, at 357.

72. *Id.* at 357-58.

73. *The Legitimacy of International Governance*, *supra* note 4, at 604.

74. Wolfrum, *supra* note 67, at 9.

75. *Id.*

76. *Id.*

becomes illegitimate.⁷⁷

International treaty law relies on a consensual basis, and international treaties are the main source of international law.⁷⁸ While agreements reached by non-democratic states may challenge the legitimacy of international law, especially in areas involving international human rights law, the situation of customary international law changes depending on the considered legitimizing source.⁷⁹ Under social contract theory, general consent can strongly legitimize treaty-based mechanisms, even those involving non-consensus decision-making, if an international regime remains within its constitutional limits (“legality” or “legal legitimacy”) and its outcomes bind consenting states.⁸⁰

State consent has traditionally been a relatively solid foundation for international law and institutions thereof.⁸¹ Nevertheless, it has increasingly been considered insufficient due to, for example, the need for more flexible and expeditious law-making approaches that do not depend on state consensus and the growing participation of other international law subjects, such as individuals, beyond purely inter-state relationships, for whom state consent may provide limited legitimization.⁸²

Whether state consent remains an adequate basis for legitimizing international institutions may be questioned, particularly regarding human rights issues, since, increasingly, the decisions of those institutions directly affect individuals.⁸³ General consent may be insufficient to address legitimacy crises of international institutions such as the United Nations or bodies thereof, since the autonomy to surrender is greater under general consent than under specific consent mechanisms.⁸⁴

It has been questioned whether democracy can complement or replace state consent, based on considerations of states as free and equal (like individuals) and on the “one state, one vote rule” as a manifestation of the sovereign equality principle, a fundamental international law axiom.⁸⁵ Article 2(1) of the United Nations Charter recognises the latter: “The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles. The Organization is based on the principle of the sovereign equality of all its Members.”⁸⁶ However, such an approach has been challenged due to the lack of intrinsic reasons to treat states as equals because of (1) their disparity in power, population, and wealth; (2) the absence of a global legislature; and (3) the lack of a (truly) global “demos” or “shared sense of

77. *Id.*

78. *Id.* at 7.

79. *Id.* at 7-8.

80. *The Legitimacy of International Governance*, *supra* note 4, at 609.

81. *Id.* at 606.

82. *Id.*

83. Wolfrum, *supra* note 67, at 10-12, 16.

84. *The Legitimacy of International Governance*, *supra* note 4, at 609.

85. *Id.* at 614.

86. U.N. Charter art. 2, ¶ 1.

community.”⁸⁷ Some authors have rejected general state consent as too limited and complete global democracy as excessive for legitimizing global governance institutions.⁸⁸

The legitimacy of international courts, in democratic terms, is grounded in state consent to submit to supranational jurisdiction, which was traditionally conceived as “arbitration” to settle disputes between two parties, and hence legitimacy matters would mainly consist in scrutinizing how consent to international judicial authority is conveyed.⁸⁹ Nevertheless, such indirect democratic bases for the exercise of public authority by international courts do not fully encapsulate the new roles of international courts as relatively autonomous institutions holding “significant law-making power.”⁹⁰ Furthermore, rationales supporting the legitimacy of national courts cannot easily be extrapolated to international courts, as the latter remain highly fragmented and horizontally structured. Additionally, robust democratic bases for their supremacy claims are still missing, all of which is more pressing amidst conservative populist waves that aggressively challenge international institutions for their democratic deficits.⁹¹

All in all, the legitimacy of, for instance, the International Court of Justice substantially rests on state consent to its jurisdiction and to its work within these confines: the International Court of Justice cannot bind independent and sovereign states without their consent, nor can it render *ultra vires* decisions exceeding its delegated authority.⁹² As the International Court of Justice has recognised, its jurisdiction is “based on the consent of the parties and is confined to the extent accepted by them.”⁹³ The International Court of Justice has also determined that even the *erga omnes* or *jus cogens* character of an international law rule cannot provide a jurisdictional basis itself since Article 36 of the Statute of the International Court of Justice requires the consent of states parties to exercise its jurisdiction over a dispute, as well as the fact that *erga omnes* obligations and *jus cogens* rules, on the one hand, and the rule of consent to jurisdiction, on the other one, are different categories.⁹⁴

The consensual element for the exercise of jurisdiction is clearly present in the first three paragraphs of Article 36 of the Statute of the International Court

87. *The Legitimacy of International Governance*, *supra* note 4, at 614-17.

88. Buchanan & Keohane, *supra* note 66, at 413, 416; Euan MacDonald, *Human Rights, Legitimacy, and Global Governance*, in *THE STRUGGLE FOR HUMAN RIGHTS: ESSAYS IN HONOUR OF PHILIP ALSTON* 70 (Nehal Bhuta et al. eds., 2021).

89. Torbisco-Casals, *supra* note 39, at 494.

90. *Id.*

91. *Id.*

92. Grossman, *supra* note 25, at 45.

93. Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. 6, ¶ 88 (Feb. 3); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, 2011 I.C.J. 70, ¶ 131 (Apr. 1).

94. East Timor (Portugal v. Australia), Judgment, 1995 I.C.J., 90, ¶ 29 (June 30); Armed Activities on the Territory of the Congo (New Application: 2002), 2006 I.C.J. ¶ 64.

of Justice:

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
2. The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
 - a. the interpretation of a treaty;
 - b. any question of international law;
 - c. the existence of any fact which, if established, would constitute a breach of an international obligation;
 - d. the nature or extent of the reparation to be made for the breach of an international obligation.
3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.⁹⁵

Otherwise, the International Court of Justice would go too far. That is, the Court would be involved in law-making as if it were amending its Statute, which only states can do by expressing consent.⁹⁶ Moreover, judgments exceeding the delegated authority of the International Court of Justice can threaten its legitimacy as they go beyond the original state consent, despite claims of state consent to jurisdiction as conferring a “normative and quasi-legislative power” to an international court for dispute settlement.⁹⁷

B. Procedural Legitimacy

Procedural legitimacy derives from the process by which “decisions are made, including factors such as transparency, participation, and representation,” and inquires, *inter alia*, whether decisions come from democratic processes or involve proper deliberation and whether civil society sufficiently participated.⁹⁸ Thus, it involves that the procedure is consistent with the law and recognized traditions, as well as being just or fair enough.⁹⁹ Authority can be legitimate

95. Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

96. Armed Activities on the Territory of the Congo (New Application: 2002), 2006 I.C.J. ¶ 13 (separate opinion of Dugard, J.); *see also* Carlos Espósito, *Human Rights, in THE CAMBRIDGE COMPANION TO THE INTERNATIONAL COURT OF JUSTICE* 508 (Carlos Espósito & Kate Parlett eds., 2023).

97. Grossman, *supra* note 25, at 45-47; Prosper Weil, “*The Court Cannot Conclude Definitively . . .*” *Non Liqueur Revisited*, 36 COLUM. J. TRANSNAT’L L. 109, 115 (1997).

98. Bodansky, *supra* note 29, at 330.

99. Langvatn & Squatrito, *supra* note 24, at 51.

when it involves fair procedures, and judicial authority has (partially) been legitimised procedurally when, for instance, parties can fully exercise their rights to be heard, confront witnesses, and be judged by an impartial adjudicator.¹⁰⁰

Under procedural legitimacy, the legitimacy of an authority depends on exercising its power through adequate and fair procedures, including procedural rules governing institutional establishment or composition, as well as decision-making.¹⁰¹ Manners to potentially enhance the procedural legitimacy of an international court include: i) having judges craft their reasoning based on the previous jurisprudence of the same international court, which indicates that norms rather than (excessive) discretion determine their decision; and ii) the reduction in dissent among judges, especially in controversial decisions when a united front is pivotal or highly advisable.¹⁰² The International Court of Justice in *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* (hereinafter *Corfu Channel case*)¹⁰³ has been said to use rhetoric to establish that its decision was consistent with international law, which would exemplify that there is always space for judicial discretion.¹⁰⁴

Determining the purposes or goals of an international court is important to establish whether its proceedings are so unjust that they undermine its legitimacy, albeit its strong origin and results.¹⁰⁵ If providing victims of human rights and international humanitarian law violations with a voice is a main aim of an international court, this affects how the sufficient procedural justice threshold is interpreted; for example, procedural representation or participation of victims would be advisable or required.¹⁰⁶

Procedural legitimacy has been associated with legality (“legal legitimacy”), which connects “an institution’s continuing authority to its original basis in state consent.”¹⁰⁷ While, for instance, the authority of the International Court of Justice derives from its Statute and is consented to by member states of the United Nations (“origin legitimacy”), its “continuing authority depends on its acting in accordance with the Statute.”¹⁰⁸ This means its actions against or outside the Statute would lack (procedural) legitimacy.¹⁰⁹ However, whether the decisions of an international court constitute justified interpretations of the law, consented to by states and consistent with applicable

100. *The Legitimacy of International Governance*, *supra* note 4, at 612.

101. Franck, *supra* note 22, at 91; Wolfrum, *supra* note 4, ¶ 7.

102. Shai Dothan, *How International Courts Enhance Their Legitimacy*, 14 THEORETICAL INQUIRIES L. 455, 470-71 (2013).

103. *The Corfu Channel Case (UK of Gr. Brit. and N. Ir. v. Alb.)*, Judgment, 1949 I.C.J. 4 (Apr. 9).

104. *See* Dothan, *supra* note 102, at 469.

105. *See* Langvatn & Squatrito, *supra* note 24, at 56.

106. *Id.*

107. *The Legitimacy of International Governance*, *supra* note 4, at 605.

108. *Id.*

109. *Id.*

rules, is sometimes difficult to establish.¹¹⁰

Since legality obliges an international institution to stay within its original mandate limits and under established decision-making proceedings, legality induces “legitimacy through procedure.”¹¹¹ As international institutions, such as international courts, have assumed governance functions, they should adhere to principles of the rule of law, including judicial review.¹¹² Legality limits the power of international institutions.¹¹³ Legality adopts an internal perspective of procedural legitimacy, namely that institutional actions are justified if they are consistent with rules on “who can exercise authority, according to what procedures, and subject to what restrictions.”¹¹⁴

As legality does not fully determine whether the governance arrangements of an international court, for example, the institution’s composition and decision-making mechanisms, are legitimate themselves,¹¹⁵ it has been discussed whether “standard” democratic features such as fair proceedings (for instance, political equality, universal and majority voting), transparency, public participation, and accountability can be alternative or complementary procedural legitimacy bases.¹¹⁶

These features can and have been, *mutatis mutandis*, extrapolated from the national to the international level, constituting an important source of procedural legitimacy; however, their application also presents challenges: for example, even in open international meetings, very few members of the public can participate.¹¹⁷ Despite the underlying democratic values of international institutions, their connection with people remains mediated and remote.¹¹⁸ Yet individuals have increasingly assumed a prominent role in international dispute settlement.¹¹⁹

For instance, concerning reparations rendered by international courts, explicit reasons justifying awards are arguably necessary to safeguard due process against judicial abuse, negligence, or overreach.¹²⁰ Such a justification may demand “judicial modesty” plus some reasonable support, as suitable reparation measures may be difficult to determine.¹²¹ A key due process component is the judicial motivation of awards, especially when these orders may be regarded as an exercise of expansive powers “to intervene in state

110. *Id.* at 606.

111. Wolfrum, *supra* note 4, ¶ 23.

112. *Id.* ¶ 23-24.

113. Steven Bernstein, *Legitimacy in Global Environmental Governance*, 1 J. INT’L L. & INT’L RELS. 139, 154 (2004).

114. *The Legitimacy of International Governance*, *supra* note 4, at 608.

115. *Id.*

116. *Id.* at 605, 613, 617.

117. *Id.* at 613, 617.

118. Wolfrum, *supra* note 4, ¶ 18.

119. *Id.* ¶ 20.

120. David L. Attanasio, *Extraordinary Reparations, Legitimacy, and the Inter-American Court*, 37 U. PA. J. INT’L L. 813, 861 (2016).

121. *Id.*

policy.”¹²²

Pursuant to Article 92 of the United Nations Charter, “The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.”¹²³ In turn, under Article 38(1) of its Statute:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.¹²⁴

Member states have tasked the International Court of Justice with judicial adjudication, namely, the application of international law to the facts of a case, which differs from political or other functions, such as mediation.¹²⁵ This has been acknowledged by some judges of the International Court of Justice.¹²⁶ Different factors can contribute to the procedural legitimacy of international courts, such as the International Court of Justice.

The first factor to be considered is fairness and unbiasedness, namely, whether parties can equally express their arguments and have their cases heard throughout the proceedings. This is implemented *inter alia* via clear procedural rules of the International Court of Justice on inter-party documentary exchange and party’s submissions of motions, as well as procedural modifications jointly proposed by the parties under Article 101 of the Rules of the International Court of Justice.¹²⁷ Article 101 reads as follows:

The parties to a case may jointly propose particular modifications or

122. *Id.* at 871.

123. U.N. Charter art. 92.

124. Statute of the International Court of Justice art. 38 ¶ 1, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

125. LEGITIMACY AND INTERNATIONAL COURTS, *supra* note 5, at 141; *see also* Cesare P.R. Romano, Karen J. Alter & Yuval Shany, *Mapping International Adjudicative Bodies, the Issues, and Players*, in THE OXFORD HANDBOOK OF INT’L ADJUDICATION 3, 4-5 (2014).

126. Questions of Interpretation & Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), Provisional Measures, Ord., 1992 I.C.J. 50, 56 (Weeramantry, J., dissenting) (Apr. 14).

127. Liwanga & Turner, *supra* note 25, at 426-27.

additions to the rules contained in the present Part (with the exception of Articles 93 to 97 inclusive), which may be applied by the Court or by a Chamber if the Court or the Chamber considers them appropriate in the circumstances of the case.¹²⁸

Unbiased judicial personnel at the International Court of Justice are crucial to guarantee the principles of judicial impartiality and independence.¹²⁹ Another factor to consider is the sound interpretation and application of international law in the specific dispute. For example, should an international court often and inconsistently interpret and apply the principle of integral reparations for violations of human rights, the parties may reject awards, and potential parties may abstain from submitting their disputes to that court.¹³⁰

A final factor to regard is transparency, which allows litigating parties to know whether an international court conducts fair and unbiased proceedings and properly interprets applicable law. This can be implemented through public hearings, public information on judges and parties, and well-reasoned judgments.¹³¹

Since fairness, justice and equity considerations require international courts such as the International Court of Justice to generally recognize that a party has a (much) stronger or weaker case rather than split remedies or rights equally, “Solomonic judgments” should be avoided unless the parties explicitly manifested their intention to have their dispute *ex aequo et bono* settled, which also enables international courts like the International Court of Justice to adopt *ultra vires* decisions.¹³² Indeed, Article 38(2) of the Statute of the International Court of Justice states that “[t]his provision [Article 38] shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.”¹³³ In any event, the International Court of Justice may still appease the losing party through rhetoric, for instance, while the International Court of Justice rhetorically criticized the United States of America and supported the claims of Iran in *Oil Platforms (Islamic Republic of Iran v. United States of America)*,¹³⁴ its decision suited American interests.¹³⁵

Importantly, it should be mentioned that, sometimes, the Judges of the International Court of Justice, through separate or dissenting votes, have severely criticized how the majority of the Court interpreted or applied the law. For instance, Judge Patrick Robinson in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (hereinafter *Armed*

128. Rules of Court, 1978 I.C.J. Acts & Docs. 8, art. 101.

129. Liwanga & Turner, *supra* note 25, at 427.

130. *Id.* at 428.

131. *Id.* at 428-29.

132. Grossman, *supra* note 25, at 49, 51, 61.

133. Statute of International Court of Justice art. 38 ¶ 2, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

134. *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161 (Nov. 6).

135. Dothan, *supra* note 102, at 461-62.

Activities) expressed that “the reliance placed by the Court on the EECC’s [Eritrea-Ethiopia Claims Commission] Award is wholly misplaced [. . .] the Court should have become more active and more engaged in fixing compensation by introducing its own determination of the extent and valuation of the damage or injury.”¹³⁶ Judge Peter Tomka also remarked that, under Article 56(1) of the Statute of the International Court of Justice, “‘the judgment shall state the reasons on which it is based’ [. . .] I doubt that the reader will be able to understand how the Court arrived at the particular amounts of compensation for various heads of damages.”¹³⁷ In fleshing out this provision, Article 95 of the Rules of Court establishes that:

1. The judgment, which shall state whether it is given by the Court or by a Chamber, shall contain: the date on which it is read; the names of the judges participating in it; the names of the parties; the names of the agents, counsel and advocates of the parties; a summary of the proceedings; the submissions of the parties; a statement of the facts; the reasons in point of law; the operative provisions of the judgment; the decision, if any, in regard to costs; the number and names of the judges constituting the majority; a statement as to the text of the judgment which is authoritative.
2. Any judge who so desires may attach an individual opinion to the judgment, whether dissenting from the majority or not; a judge who wishes to record concurrence or dissent without stating reasons may do so in the form of a declaration. The same shall also apply to orders made by the Court.¹³⁸

C. Result Legitimacy

Result legitimacy¹³⁹ derives from governance results, namely, whether a regime, *inter alia*, effectively solves problems, reaches equitable outcomes, maintains stability, or respects human rights.¹⁴⁰ The success of an authority can be legitimized through the production of desired results, such as international peace, which explains why the League of Nations lost legitimacy and, thus, people would accept the decisions of an international institution if they consider that such institution “has generally done a good job and therefore is justified in its right to govern.”¹⁴¹ An influential normative account of output-based legitimacy is Joseph Raz’s “service conception of authority,” which asserts that

136. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Reparations Judgment, 2022 I.C.J. 145, 166, 181 (Feb. 9) (separate opinion by Robinson, J.).

137. *Id.* at 142 (separate opinion by Tomka, J.).

138. *Rules of Court, 1978 I.C.J. Acts & Docs* 8, art. ¶ 9.

139. Result legitimacy is also referred to as “output-based legitimacy.” See Bodansky, *supra* note 29, at 330.

140. *Id.*

141. *The Legitimacy of International Governance*, *supra* note 4, at 612.

“authorities are legitimate only if their directives enable their subjects to better conform to reason.”¹⁴²

Thus, result legitimacy concerns the outcomes produced by an international institution, which should support and strengthen the institution’s purposes, provided that such purposes should also be morally justifiable or sufficiently fair.¹⁴³ For instance, result legitimacy may arise: (1) when the case selection and judgments of an international court support, enhance, or are consistent with its purposes (effectiveness); (2) when the case selection and decisions of an international court are morally justifiable or sufficiently just; and (3) when the broader effects of an international court’s practices, such as norm projection and impact on victims or their communities, are morally justifiable or sufficiently just.¹⁴⁴ Examples of results include norm projection, human rights protection, and reparations.¹⁴⁵

Unlike origin and procedural legitimacy, which are assessed independently of the support for or opposition to a judicial decision, result legitimacy is not content-independent, as it evaluates whether international courts’ decisions are compatible “with applicable legal norms and substantive standards of justice.”¹⁴⁶ Furthermore, a goal-based approach to the effectiveness of international courts, namely, the fulfilment of goals of an international court established by “their mandate providers . . . and other relevant constituencies,” may overlap with the result legitimacy of an international court.¹⁴⁷

Expertise has been regarded as a source of result legitimacy, which sharply contrasts with democratic-related legitimacy justifications such as public participation.¹⁴⁸ Expert decision-making relies on: (1) decisions in question have better and worse answers; (2) some persons have expertise or special knowledge about those answers; and (3) non-experts can identify individuals possessing such knowledge, which usually is the most complicated aspect since “expert” identification can be debated.¹⁴⁹

Because states and other international law subjects, including individuals, hold diverse interests and different perceptions of what “successful” results are, they, rather than experts, should decide what to do.¹⁵⁰ Furthermore, even concerning pure “expert” components of international decision-making, uncertainties may preclude an answer; however, expertise can be useful for decision-making about issues with no significant value-related disagreement and where subjects share the same goals, namely, “an institution’s problem-

142. Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 MINN. L. REV. 1003, 1018 (2006).

143. Langvatn & Squatrito, *supra* note 24, at 51, 61.

144. *Id.* at 51-52.

145. *Id.* at 62, 64.

146. Shany, *supra* note 17, at 358-59.

147. *Id.* at 361, 363.

148. *The Legitimacy of International Governance*, *supra* note 4, at 620.

149. *Id.*

150. *Id.* at 621.

solving effectiveness can give it legitimacy [. . .] since the outcomes can leave everyone better off, they can provide a basis for a regime's substantive legitimacy."¹⁵¹

Because expert opinion plays a central role in international law, human rights treaty bodies rely on internationally recognized experts as a legitimacy-inducing mechanism, which, in turn, requires greater transparency in expert selection.¹⁵² While expert opinion as a legitimacy basis of international governance is less rooted in state consent and moves away from national democratic governance templates, expertise is indeed part of the identity of the international judicial bench and acts as a source of its legitimacy.¹⁵³

At the International Court of Justice, the aftermaths of cases such as *South West Africa (Liberia v. South Africa)*¹⁵⁴ and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*¹⁵⁵ have plausibly evidenced that result legitimacy concerns "can seriously affect the acceptance of the court's authority by important constituencies."¹⁵⁶ If key decisions of international courts are perceived as fundamentally unfair or without proper legal foundations, their legitimacy can be seriously compromised, even if the international court was properly established and followed fair proceedings, especially when outcome-related issues occur frequently.¹⁵⁷

Should an international court be aware of the high risk of judgment rejection by target audiences or of politically problematic cases for its adjudication, it may decide not to exercise jurisdiction or find the case inadmissible to dodge legitimacy damages.¹⁵⁸ To avoid outcomes that could affect the legitimacy of the International Court of Justice, this international court has sometimes seemingly avoided exercising its jurisdiction by finding a lack of jurisdiction when it had foreseen non-compliance with a potential judgment.¹⁵⁹

For example, as part of the merits judgment or as a separate judgment, reparation outcomes impact the legitimacy of an international court and, thus, the court may try to design or "manipulate" reparations ordered in manners to preserve its legitimacy.¹⁶⁰ Under "just satisfaction," which is included in Article 41 of the European Convention on Human Rights, the European Court of Human Rights usually orders states to pay compensatory amounts that are

151. *Id.* at 622-23.

152. LEGITIMACY IN INTERNATIONAL LAW, *supra* note 4, at 24.

153. Wolfrum, *Legitimacy in International Law*, *supra* note 4, ¶ 27; see IDENTITY AND DIVERSITY ON THE INTERNATIONAL BENCH: WHO IS THE JUDGE? (Freya Baetens ed., 2020).

154. *South West Africa (Liber. v. S. Afr.)*, Second Phase, Judgment, 1966 I.C.J. 6 (July 18).

155. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, Judgment, 1986 I.C.J. 14 (June 27).

156. Shany, *supra* note 17, at 7.

157. *Id.* at 7-8.

158. Dothan, *supra* note 102, at 473.

159. *Id.*

160. *Id.* at 471.

generally low and do not financially burden most states, which often pay these amounts timely, and, also, very low amounts may indicate that the court does not regard the violation(s) as particularly serious, which may help reduce state resistance to comply with the award.¹⁶¹ The referred Article 41 indicates that: “If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.” While the International Court of Justice in *Corfu Channel* found that the United Kingdom violated international law, it did not ask the United Kingdom to take any action.¹⁶² This, coincidentally, reduced the risk of criticism against the judgment portion, which was arguably based on flimsy legal grounds.¹⁶³

Award outcomes in the emerging reparation jurisprudence of the International Court of Justice reveal remarkably large differences between the compensatory amounts requested by the applicant state and those ordered by the International Court of Justice, which may cast doubt on the result legitimacy of the International Court of Justice. While Costa Rica requested the International Court of Justice order Nicaragua to pay US\$ 6,708,776.96 plus US\$ 522,733.19 (pre-judgment interest) for environmental damages in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, the International Court of Justice only awarded US\$ 378,890.59 (pre-judgment interest included).¹⁶⁴ This showcases the discrepancy, as the final award was only 5.24% of the requested amount.

Furthermore, the International Court of Justice in *Armed Activities* ordered Uganda to pay the US\$ 325,000,000 “global sum.”¹⁶⁵ This was substantially lower than the requested US\$ 13,478,122,950 for compensation, plus US\$ 125 million for satisfaction of non-material damage, sought by the Democratic Republic of Congo in a scenario involving large-scale and serious violations of the prohibition on the use of force, international human rights law, and international humanitarian law.¹⁶⁶ This award totalled 2.39% of the requested amount. Such a problematic outcome in *Armed Activities* has been further exposed by the critical separate or dissenting opinions of the Judges of the International Court of Justice, especially considering that this case concerned mass atrocities.¹⁶⁷

161. *Id.* at 471-72.

162. The *Corfu Channel* Case (UK of Gr. Brit. and N. Ir. v. Alb.), Judgment, 1949 I.C.J. 4 (Apr. 9).

163. Dothan, *supra* note 102, at 472-73.

164. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)*, Judgment, 2018, I.C.J. 15 ¶¶ 20, 156 (Feb. 2).

165. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Reparations Judgment, 2022 I.C.J. 145, ¶ 405 (Feb. 9).

166. *Id.* ¶ 45.

167. *Id.* ¶ 9 (separate opinion by Tomka, J.); *Id.* ¶¶ 5, 15, 39-40 (separate opinion by Robinson, J.); *Id.* ¶¶ 1-2, 24 (Daude, J., dissenting).

Beyond purely quantitative considerations, supranational judicial reparations for serious violations of international law rules, including international human rights law, may be legitimate if they aim to redress social bonds, especially if the international court expressly establishes that the said violations affected the trust of victims in the state and finds that the reparation measures could redress that breached trust.¹⁶⁸

IV. HUMAN RIGHTS AS A POTENTIAL STANDARD TO ASSESS THE LEGITIMACY OF INTERNATIONAL COURTS

A. Legitimacy Standards

The international system, in Hart's terms, may still be relatively "primitive."¹⁶⁹ However, there is arguably a true international community in which its members, overall, accept being governed by common rules, following Ronald Dworkin's characterization.¹⁷⁰ In this scenario, the issue of legitimacy of international institutions raises the question of, normatively (and descriptively), what standards are used and/or should be used to evaluate such legitimacy.¹⁷¹ Legitimacy involves identifying appropriate standards to examine the law and practice of international courts.¹⁷²

Based on scholarship¹⁷³ and the practice of the organs of the United Nations,¹⁷⁴ the rule of law, democracy, and human rights can be identified as standards to assess the legitimacy of international institutions, including international courts such as the International Court of Justice.¹⁷⁵ While this sub-

168. Attanasio, *supra* note 120, at 861.

169. HART, *supra* note 38, at 209.

170. RONALD DWORKIN, LAW'S EMPIRE 196-214 (1986).

171. Bodansky, *supra* note 29, at 322.

172. Mortimer Sellers, *Democracy, Justice, and the Legitimacy of International Courts*, in LEGITIMACY AND INTERNATIONAL COURTS, *supra* note 5, at 338, 340.

173. E.g., *The Legitimacy of International Governance*, *supra* note 4; Erika de Wet, *The International Constitutional Order*, 55 INT'L & COMP. L.Q. 51 (2006); Geir Ulfstein, *Institutions and Competences*, in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 45-80 (Jan Klabbers, Anne Peters & Geir Ulfstein eds., 2009) [hereinafter *Institutions and Competences*]; Geir Ulfstein, *The International Judiciary*, in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW, *supra*, at 126-52 [hereinafter *The International Judiciary*]; Antje Wiener et al., *Global Constitutionalism: Human Rights, Democracy and the Rule of Law* 1 GLOB. CONSTITUTIONALISM 1 (2012); Bodansky, *supra* note 29.

174. E.g., U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General*, ¶¶ 133-52, U.N. Doc. A/59/2005 (Mar. 21, 2005) [hereinafter *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General*]; Human Rights Council Res. 19/36, U.N. Doc. A/HRC/RES/19/36 (Apr. 19, 2012); U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, U.N. Doc. S/2004/616, (Aug. 23, 2004) [hereinafter *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*].

175. See Grossman, *supra* note 5.

section briefly examines the rule of law and democracy, human rights as a legitimacy standard are discussed later.

Although the rule of law concept is very broad, it concerns the regulation of a community under law and justice rather than power.¹⁷⁶ International law sources also recognize the rule of law as a fundamental guiding principle.¹⁷⁷ It involves that persons can know the law rules and abide by them, plus “the law should be such that people will be able to be guided by it.”¹⁷⁸ The rule of law is a principle of national and international governance where international law subjects—such as states, international institutions, and individuals—are “accountable to laws that are publicly promulgated, equally enforced and independently adjudicated,” and these laws are consistent with international human rights law.¹⁷⁹

From these definitional components of the rule of law, scholars have mainly derived elements applied to legitimacy assessments of international institutions, including international courts. These elements include: i) adherence to law supremacy, namely, power governed by the law and no arbitrary power; ii) equality before the law; iii) independent and impartial courts established by law, which *inter alia* protect rights; iv) separation of powers; v) judicial review; vi) non-retroactive laws, consistent decisions and legal predictability; and vii) procedural principles for decision-making such as due process, fair hearings, equal access to justice, expertise, transparency, and accountability.¹⁸⁰ Although the rule of law conceptually differs from “justice,”¹⁸¹ they are closely related.¹⁸² Some practices of the International Court of Justice have directly engaged with elements of the rule of law, such as the judicial review of the legality of the actions of the United Nations Security Council.¹⁸³

Democracy relies on the governed individuals’ consent manifested via free and periodic elections where leaders and policies can be changed, involving

176. *Institutions and Competences*, *supra* note 173, at 59.

177. *E.g.*, U.N. GAOR, 77th Sess., UN Doc A/RES/62/70, (Jan. 8, 2001); *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, *supra* note 174, ¶ 6.

178. JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 213 (1st ed. 1979).

179. *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, *supra* note 174, ¶ 6.

180. *See Institutions and Competences*, *supra* note 173, 60-70; *The International Judiciary*, *supra* note 173, 127-46; JAMES CRAWFORD, *CHANCE, ORDER, CHANGE: THE COURSE OF INTERNATIONAL LAW*, *GENERAL COURSE ON PUBLIC INTERNATIONAL LAW* 24-25 (2013); Tullio Treves, *Aspects of Legitimacy of Decisions of International Courts and Tribunals*, in *LEGITIMACY IN INTERNATIONAL LAW*, *supra* note 4, at 173-77; *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, *supra* note 174, ¶ 6.

181. RAZ, *supra* note 178, at 210-11.

182. Sellers, *supra* note 172, at 347.

183. Questions of Interpretation & Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, (Libyan Arab Jamahiriya v. U.K.), Provisional Measures, Ord., 1992 I.C.J. 50, 54-59 (Apr. 14) (Weeramantry, J., dissenting); Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosn. and Herz. v. Serb. And Montenegro), Order, 1993 I.C.J. 3 (Apr. 8).

“fair procedures (universal suffrage, majority voting, political equality),” and plausibly producing “the best results.”¹⁸⁴ In international law, “democracy” means: i) the same as at the national level, namely, a government system based on majority voting and universal elections; ii) inter-state political equality, including the ‘one state, one vote’ rule; and iii) open government features, especially public participation and transparency.¹⁸⁵

Despite the democratic deficit of international institutions, binding international decisions ought to be ideally undertaken by democratic and accountable bodies with members directly elected and should be “supported by public debate, transparency,” participation of civil society actors, and due power allocation between supranational institutions and domestic bodies.¹⁸⁶ With regard to democratic control, international courts must be independent of political control by states and international organizations in their judicial functions.¹⁸⁷

However, the appropriateness of democracy for assessing the legitimacy of international institutions has been questioned.¹⁸⁸ “Building blocks” such as inclusion, public debate, or transparency have been suggested instead, which can be associated with democracy.¹⁸⁹ Yet, democracy has gained importance in international law, *inter alia*, to realize human rights.¹⁹⁰ The practice of United Nations bodies evidences so.¹⁹¹ Certain practices of the United Nations have concerned democracy-related issues or democracy-connected legal sources.¹⁹²

B. Justification of Human Rights as a Legitimacy Standard

1. On Human Rights

In general, human rights can be conceived as: i) given rights that an individual is entitled to because of being a human being, which is the main human rights orthodoxy (“natural scholars”); ii) political values chosen by liberal societies, established via societal agreement (“deliberative scholars”); iii) rightful claims to redress injustices (“protest scholars”); and/or iv) a powerful

184. *The Legitimacy of International Governance*, *supra* note 4, at 613.

185. *Id.*

186. *Institutions and Competences*, *supra* note 173, at 55, 57.

187. *The International Judiciary*, *supra* note 173, at 147.

188. *E.g.*, Bodansky, *supra* note 29, at 330; Andreas Follesdal, *Constitutionalization, Not Democratization: How to Assess the Legitimacy of International Courts*, in *LEGITIMACY AND INTERNATIONAL COURTS*, *supra* note 5, at 307-37; Sellers, *supra* note 172, at 352.

189. Follesdal, *supra* note 188, at 337.

190. de Wet, *supra* note 173, at 63.

191. *E.g.*, *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary General*, *supra* note 174, ¶¶ 148-52.

192. *E.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 136-38 (July 9); Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22).

language to voice political claims (“discourse scholars”).¹⁹³

At a more specific level, human rights arguably constitute a subset of “universal moral rights” protecting fundamental human rights interests against political institutions’ (non-intervention),¹⁹⁴ leading to a duty bearer’s obligation to respect them vis-à-vis the holder of human rights.¹⁹⁵ These rights can become “legal human rights,” namely, general and fundamental moral interests legally recognized as important enough to produce moral duties.¹⁹⁶

As a matter of law, international human rights law guarantees rights (usually *erga omnes*) to individuals subject to the jurisdiction of a state and (arguably) vis-à-vis international organizations, obliging states and (plausibly) international organizations to protect them as “human rights.”¹⁹⁷ Based on human dignity, which international human rights law recognizes, human rights convey the entitlement of the holder and the obligation of the duty bearer, protecting individuals and communities,¹⁹⁸ limiting state sovereignty,¹⁹⁹ and being recognized in international law because of their universality and importance.²⁰⁰

As international human rights law acknowledges,²⁰¹ there is a minimum core of human rights that cannot be violated in any circumstance, including the right to life, freedom from torture, and freedom from slavery.²⁰² They are seriously breached when international crimes, whose prohibition constitutes *jus cogens*, are committed, linked or not to armed conflicts.²⁰³

Under international human rights law, human rights are civil, political, and socio-economic rights of individuals and groups recognized in treaties, customary law and other international law sources, originally referred to in the Charter of the United Nations and developed in the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the

193. Marie-Bénédicte Dembour, *What Are Human Rights? Four Schools of Thought*, 32 HUM. RTS. Q. 1, 2-4 (2010).

194. Samantha Besson, *The Legitimate Authority of International Human Rights*, in THE LEGITIMACY OF INTERNATIONAL HUMAN RIGHTS REGIMES: LEGAL, POLITICAL AND PHILOSOPHICAL PERSPECTIVES, *supra* note 5, at 32, 48.

195. Joseph Raz, *On the Nature of Rights*, 93 MIND 194, 195 (1984).

196. Besson, *supra* note 194, at 51.

197. *Id.* at 54.

198. Allen Buchanan, *Human Rights and the Legitimacy of the International Order*, 14 LEGAL THEORY 39, 45-46, 49-50 (2008).

199. Joseph Raz, *Human Rights without Foundations*, in THE PHILOSOPHY OF INTERNATIONAL LAW 321, 328-33 (Samantha Besson & John Tasioulas eds., 2010).

200. Joseph Raz, *Human Rights in the Emerging World Order*, 1 TRANSNAT'L LEGAL THEORY 31, 39 (2010) https://scholarship.law.columbia.edu/faculty_scholarship/1607 [<https://perma.cc/E6PG-SCQ2>]; Wheatley, *supra* note 47, at 96.

201. International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, 999 U.N.T.S. 171; American Convention on Human Rights art. 27, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Convention for the Protection of Human Rights and Fundamental Freedoms art 15, Nov. 4, 1950, 213 U.N.T.S. 221.

202. Grossman, *supra* note 5, at 97-98.

203. *Id.* at 98-99.

International Covenant on Economic, Social and Cultural Rights (“International Bill of Rights”), as well as regional instruments such as the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples’ Rights.²⁰⁴

Non-human rights courts, such as the International Court of Justice in its *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion, have used diverse human rights generations, disproving that only certain types of human rights (usually civil and political) are justiciable and confirming their application also during armed conflicts.²⁰⁵ Human rights have had spillover effects in inter-state adjudication, including the fact that, despite not being parties to international human rights law, states have benefited from the effects of its due process rights, such as procedural equality before the court, the right to be heard, and independent and impartial adjudicators.²⁰⁶

2. Justification

The following grounds can justify human rights as a legitimacy standard. First, under legitimacy literature, including political philosophy and global constitutionalism approaches, human rights are a standard to assess the legitimacy of international law and institutions thereof, including international courts. Human rights, particularly minimum core rights such as the right to life and freedom from torture, fall between morality and justice, and are useful for judging the law.²⁰⁷ Human rights are legitimacy benchmarks and necessary standards for the legitimacy of international law.²⁰⁸

The legitimacy of supranational authority depends on its respect for human dignity.²⁰⁹ Human rights can challenge authority, as they could delimit the legitimacy conditions for authority; as well as they are appropriate for “interventionist accounts” or actions of international institutions vis-à-vis states,

204. Thomas Buergenthal, *Human Rights*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ON-LINE VERSION, *supra* note 4, ¶¶ 1, 8-10.

205. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 88, 102-13, 130-36 (July 9); Martin Scheinin, *How and Why to Assess the Relevance of Human Rights Norms in ‘Other’ International Courts*, in HUMAN RIGHTS NORMS IN ‘OTHER’ INTERNATIONAL COURTS 1, 22 (Martin Scheinin ed., 2019); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168 ¶ 216 (Dec. 19).

206. Scheinin, *supra* note 205, at 17.

207. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 184 (1978); Seyla Benhabib, *The Legitimacy of Human Rights* 137 *DAEDALUS* 94, 102 (2008), <https://campuspress-test.yale.edu/seylabenhabib/files/2016/05/The-Legitimacy-of-Human-Rights-1q8rszd.pdf> [<https://perma.cc/C69L-38BA>].

208. See JOHN RAWLS, *THE LAW OF PEOPLES* 65 (1993); John Rawls, *The Law of Peoples*, 20 *CRITICAL INQUIRY* 36, 65 (1993); John Tasioulas, *Human Rights, Legitimacy, and International Law*, 58 *AM. J. JURIS.* 1, 8-9 (2013).

209. See RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 191-218 (2011); Tasioulas, *supra* note 208, at 10.

thereby limiting the latter's sovereignty.²¹⁰ International law developments have signalled a transition from an international system focused on inter-state peace to one in which human rights are a primary goal.²¹¹

Regardless of their specific mandate, international courts, which decide international disputes and promote normative regimes like human rights, gain legitimacy by helping states better meet their human rights obligations; they cannot be legitimate when facilitating violations of those obligations perpetrated by states.²¹² Human rights provide key legitimacy elements to global governance institutions.²¹³ Even though international organizations cannot generally become parties to human rights treaties, they have increasingly focused on human rights, leading to an emerging international constitutional order.²¹⁴

International institutions, such as international courts, are increasingly affecting individuals' human rights.²¹⁵ International dispute settlement should meet minimum international human rights law standards because it not only protects the interests of states, but also increasingly protects general human interests, such as the protection of human rights.²¹⁶ International treaties that are linked to the settlement of international disputes usually pursue normative objectives, for example, the protection of human rights.²¹⁷

Since the protection of human rights is fundamental in both domestic and international law, the best national (procedural) standards of human rights protection should, analogously, guide international courts.²¹⁸ When human rights violations are not protected by national law, international courts can step in.²¹⁹ The elevated status of human rights in the international legal system is legally grounded, *inter alia*, in certain provisions of the United Nations Charter.²²⁰ This includes Article 1(3), namely, the purpose of the United Nations: "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. . . ."²²¹

Second, human rights closely interact with other legitimacy standards, such as the rule of law and democracy, when evaluating the legitimacy of international institutions like international courts. Scholars²²² and the practice of

210. See for related or similar considerations, RAZ, *supra* note 48, at 46; Raz, *supra* note 199, at 331; Wheatley, *supra* note 47, at 95-96.

211. Buchanan, *supra* note 198, at 39.

212. Grossman, *supra* note 5, at 104.

213. Schaffer, Føllesdal & Ulfstein, *supra* note 23, at 18-19.

214. *Institutions and Competences*, *supra* note 173, at 77.

215. *Id.*; Wolfrum, *supra* note 4, ¶ 16.

216. *The International Judiciary*, *supra* note 173, at 128, 132.

217. *Id.* at 132.

218. *Id.* at 148, 151-52.

219. *Id.* at 152.

220. de Wet, *supra* note 173, at 57.

221. U.N. Charter art. 1 ¶ 3; see also U.N. Charter arts. 55-56, 62, 68.

222. See, e.g., THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (Jan Klabbers, Anne Peters & Geir Ulfstein eds., 2009); Wiener et al., *supra* note 173.

the United Nations²²³ have approached these three concepts jointly. The (international) rule of law has traditionally respected human rights,²²⁴ included human rights protection by independent courts,²²⁵ and considered the consistency of the international judicial mandate with international human rights law.²²⁶

Human rights and democracy: i) are co-original and interrelated;²²⁷ ii) are expressions of the same autonomy notion, or have equal status, and (empirically) democracy can hardly be realized when human rights are breached; and iii) where there is no democracy, human rights are usually violated.²²⁸ With regard to, for example, reparations for mass atrocities, scholars have invoked links between the rule of law and victims' human rights to reparations²²⁹ and the resulting enhancement of the legitimacy of international courts.²³⁰

Third, human rights can be a legitimizing factor when international law and its institutions address fragmentation issues. Human rights and/or international human rights law foster convergence²³¹ and coherence of the international legal order.²³² They can be a vector for reasserting the role of the International Court of Justice in discussions on fragmentation and convergence.²³³ Fragmentation may threaten the legitimacy of international courts.²³⁴

Regarding substantive fragmentation, since an international court is not isolated, its reliance on, for instance, sources of substantive international human rights law can lead to convergence.²³⁵ "Non-human rights" courts, like the

223. E.g., G.A. Res. 60/1, ¶¶ 119-120, 135 (Oct. 24, 2005); G.A. Res. 57/221, ¶ 7 (Feb. 27, 2003); *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, *supra* note 174, ¶¶ 6, 25.

224. James Crawford, *International Law and the Rule of Law*, 24 ADELAIDE L. REV. 3, 6 (2003).

225. *Institutions and Competences*, *supra* note 173, at 60.

226. Prosecutor v. Tadić, IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 42-48 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

227. Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29 POL. THEORY 766-67 (2001).

228. Schaffer Føllesdal & Ulfstein, *supra* note 23, at 19.

229. Heidy Rombouts, Pietro Sardaro & Stef Vandeginste, *The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights*, in OUT OF THE ASHES: REPARATIONS FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS 346 (Koen de Feyter et al., eds., 2005).

230. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 85-86 (3rd ed. 2015).

231. Mads Andenas & Eirik Bjorge, *Introduction: From Fragmentation to Convergence in International Law*, in A FAREWELL TO FRAGMENTATION 3 (Mads Andenas & Eirik Bjorge eds., 2015).

232. See Mads Andenas & Ludovica Chiussi, *Cohesion, Convergence and Coherence of International Law*, in GENERAL PRINCIPLES AND THE COHERENCE OF INTERNATIONAL LAW 18 (Mads Andenas et al. eds., 2019).

233. Andenas & Bjorge, *supra* note 231, at 3.

234. Scheinin, *supra* note 205, at 4.

235. Andenas & Bjorge, *supra* note 231, at 5.

International Court of Justice, may adjudicate inter-state disputes in which human rights treaties are central.²³⁶

Regarding institutional fragmentation, Sir Christopher Greenwood, a former Judge of the International Court of Justice, remarked in *Ahmadou Sadio Diallo, (Republic of Guinea v. Democratic Republic of the Congo)* (hereinafter *Diallo*): “‘international law is not a series of fragmented specialist and self-contained bodies of law [. . .] it is a single, unified system of law and each international court can, and should, draw on’ the jurisprudence of other international courts.”²³⁷ For instance, within an inter-institutional communicative framework grounded on, *inter alia*, relationships between Article 38(1)(c) (“general principles of law”) of the Statute of the International Court of Justice, and the international judiciary, human rights-origin principles such as non-discrimination apply across international courts.²³⁸

With regard to methodological fragmentation,²³⁹ attention should be brought to systemic integration found in: i) Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which establishes that, in interpreting a treaty, “There shall be taken into account, together with the context: [. . .] (c) any relevant rules of international law applicable in the relations between the parties”; as well as ii) the work of the United Nations International Law Commission.²⁴⁰ Systemic integration enables international institutions, such as international courts, to use “external” international human rights law sources for interpretation purposes even when the institution’s instruments are silent on human rights; however, the degree of this depends on the specific mandate of each international court.²⁴¹ Additionally, the instruments of international courts may contain provisions requesting that the court’s interpretation and application of its own law be consistent with international human rights law, thereby promoting integration.²⁴²

Regarding practice, Martti Koskenniemi, commenting on the International Court of Justice’s advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*²⁴³, noted that the Court can reconstitute an international law field “in

236. Scheinin, *Taking Stock: Relevance of Human Rights Norms in “Other” International Courts*, in HUMAN RIGHTS NORMS IN ‘OTHER’ INTERNATIONAL COURTS, *supra* note 205, at 440.

237. Ahmadou Sadio Diallo (Rep. Guinea v. Dem. Rep. Congo), Judgment, 2012 I.C.J. 324, 391, ¶ 8 (June 19) (declaration by Greenwood, J.).

238. Andenas & Chiussi, *supra* note 232, at 18-19.

239. Andenas & Bjorge, *supra* note 231, at 8-12.

240. Int’l L. Comm’n, Fragmentation of International Law-Difficulties Arising from the Diversification and Expansion of International Law, ¶¶ 17-19, U.N. Doc. A/CN.4/L.702 (July 18, 2006).

241. Scheinin, *supra* note 236, at 441-42.

242. *E.g.*, Rome Statute of the International Criminal Court art. 21(3), July 17, 1998, 2187 U.N.T.S. 90; *see generally*, PHILIPPA WEBB, INTERNATIONAL JUDICIAL INTEGRATION AND FRAGMENTATION 165 (2013) (analyzing the use of human rights law to ensure coherence among international courts).

243. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

the language of [for example] human rights.”²⁴⁴ International human rights law has also enriched treaty interpretation methods across supranational adjudicatory bodies.²⁴⁵

Fourth, human rights underlie and manifest the status of individuals as subjects of international law. Such a status has been increasingly recognised, although states remain the primary or full-fledged international law subjects, and the status of individuals is derived or limited.²⁴⁶ Such international legal personality has two dimensions that can be exercised before international courts: i) the existence of a passive dimension, namely, individuals are accountable for international crimes; and ii) the existence of an active dimension, under which individuals may exercise their rights,²⁴⁷ including the right of access to justice, the right to participation in judicial proceedings, and the right to reparations for the harm suffered.²⁴⁸

The legitimacy of international law and its institutions may depend, *inter alia*, on the enhanced role of individuals in international dispute settlement.²⁴⁹ The exclusion of individuals from proceedings in which their entitlements and interests are adjudicated may threaten the authority of international courts.²⁵⁰ In this regard, Article 34(1) of the Statute of the International Court of Justice is problematic as it excludes individuals from the contentious jurisdiction of the Court due to the fact that “Only states may be parties in cases before the Court.”²⁵¹

Fifth, human rights underlie what victims of mass atrocities claim and want to receive. For victims, reparations usually constitute the most tangible manifestation of states’ efforts to redress the harms they have suffered, which explains why reparations potentially have the most direct impact on victims and why they are pivotal to transitional justice.²⁵² For instance, empirical research on reparations for victims of mass atrocities before international courts, especially the International Criminal Court, demonstrates that victims both

244. MARTTI KOSKENNIEMI, *THE POLITICS OF INTERNATIONAL LAW* 142 (2011).

245. *See, e.g.*, EIRIK BJØRGE, *THE EVOLUTIONARY INTERPRETATION OF TREATIES* (2014).

246. MALCOLM N. SHAW, *INTERNATIONAL LAW* 238-39 (9th ed. 2021); JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 111 (9th ed. 2019).

247. SHAW, *supra* note 246, at 238-39; THEODOR MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* 317-18 (2006).

248. *See* ANTÔNIO-AUGUSTO CANÇADO-TRINDADE, *THE ACCESS OF INDIVIDUALS TO INTERNATIONAL JUSTICE* (2011).

249. Wolfrum, *supra* note 4, at ¶ 15.

250. Grossman, *supra* note 5, at 95-96.

251. Statute of the International Court of Justice art. 34, ¶ 1, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

252. PABLO DE GREIFF, *Introduction: Repairing the Past: Compensation for Victims of Human Rights Violations*, in *THE HANDBOOK OF REPARATIONS* 1, 2 (Pablo de Greiff, ed., 2006); Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, ¶ 43, U.N. Doc. A/67/368, (Sep. 13, 2012).

expect and want reparations.²⁵³

In *Armed Activities* at the International Court of Justice, Judge Nawaf Salam indeed referred to the United Nations General Assembly Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law as “victim oriented.”²⁵⁴

Finally, human rights as a standard of legitimacy correspond to the increasing use of international human rights law and/or the filing of human rights-related cases before the International Court of Justice. This includes both cases involving the human rights of individuals—for example, *Diallo*²⁵⁵ and cases concerning large-scale and serious human rights violations, for instance, *Armed Activities*.²⁵⁶ The latter category may be constitutive of international crimes, including genocide, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.²⁵⁷

V. CONCLUSION

As applied to international courts such as the International Court of Justice, legitimacy has two interrelated dimensions: i) a normative dimension, namely, whether an international court possesses the right to rule under normative standards; and ii) a sociological dimension, namely, whether those ruled by an international court believe that this court is legitimate. This article mainly (but not exclusively) followed the former.

Additionally, and crucially, legitimacy involves three levels. First, origin legitimacy, namely, how the international court itself and its jurisdiction over a dispute were established. It involves specific and general state consent, and the scope thereof, potentially complemented by adapted alternative bases, such as democracy. Second, procedural legitimacy, namely, whether the proceedings and decision-making of an international court are consistent with due process guarantees and are sufficiently fair. It involves legality, which requires that the practice of an international court be consistent with its law, plus features such as fairness, transparency, public participation, and accountability. Third, result legitimacy, namely, whether the outcomes (decisions) of an international court

253. STEPHEN CODY ET AL., THE VICTIMS' COURT? A STUDY OF 622 VICTIM PARTICIPANTS AT THE INTERNATIONAL CRIMINAL COURT 2-3 (2015), <https://www.law.berkeley.edu/wp-content/uploads/2015/04/The-Victims-Court-November-2015.pdf> [<https://perma.cc/3KXF-2NPJ>].

254. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2002 I.C.J. 185, 190, ¶ 20 (Feb. 9) (declaration by Salam, J.).

255. *See, e.g., Ahmadou Sadio Diallo (Rep. Guinea v. Dem. Rep. Congo)*, Judgment, 2010 I.C.J. 639 (Nov. 30).

256. *See, e.g., Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168 (Dec. 19).

257. *See, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. 43 (Feb. 26).

are consistent with its objectives and fair enough. It concerns the effectiveness, norm projection, and expertise of an international court.

At a more specific stage, the above framework applies through legitimacy standards. Human rights are employed herein as the legitimacy standard because: i) they can be an objective, normative criterion to assess the law and practice of international courts such as the International Court of Justice; ii) they interact with other legitimacy standards such as the rule of law and democracy; iii) they can be a legitimizing factor when international courts face fragmentation issues; iv) they underlie and express the status of individuals as subjects of international law; v) they underlie the expectations of victims; and vi) they correspond to the increasing involvement of “non-human rights” international courts such as the International Court of Justice with international human rights law. In turn, human rights-based outcomes may have legitimizing effects for both states and international courts.

Last but not least, the two figures below aim to illustrate how the above-analysed triple level of legitimacy (origin, procedural, and outcome legitimacy) and human rights as a legitimacy standard can interact in order to assess whether and to what extent the law/practice of an international court and/or the international court itself can be considered to be legitimate.

ANNEX

Figure 1: Axis diagram showing the interaction between triple-level legitimacy and human rights as a legitimacy standard

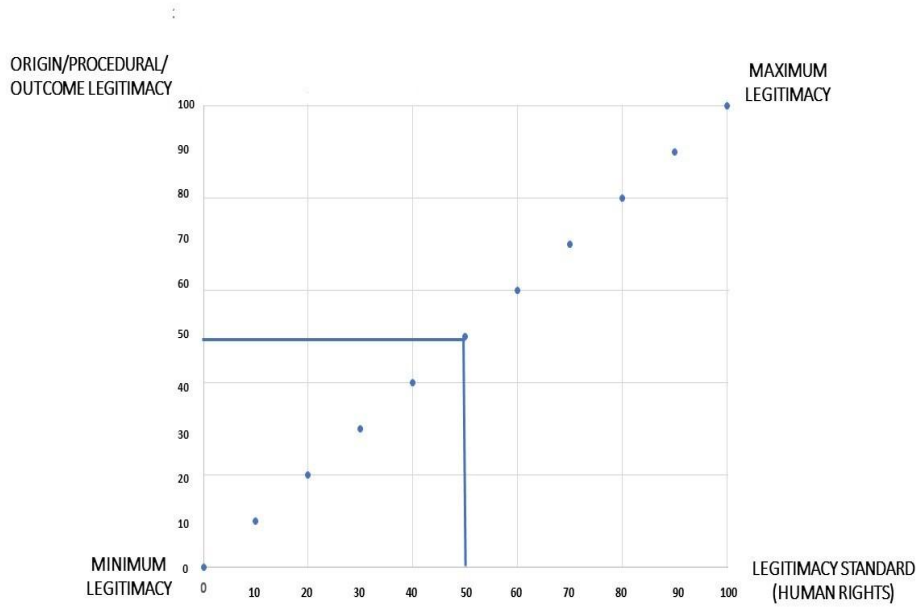


Figure 2: Double-entry chart illustrating potential correlations between triple-level legitimacy and human rights as a legitimacy standard

Level Standard	Origin Legitimacy	Procedural Legitimacy	Outcome Legitimacy
Human Rights	0 - 100	0 - 100	0 - 100
Average / Final score			0 - 100

INDIGENOUS RENAISSANCE: ENVIRONMENTAL PERSONHOOD IN THE CNMI

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ABSTRACT

The Indigenous peoples of the Commonwealth of the Northern Mariana Islands (“CNMI”) seek to resettle their ancestral home in the Northern Islands, known in Chamorro as the Gani Islands. A 1981 volcanic eruption on Pagan forced the evacuation of its Indigenous inhabitants. While many former residents, including CNMI Indigenous leader Cinta Kaipat, have since passed, others have waited nearly half a century to return. Despite legislative initiatives aimed at resettlement, progress has been ineffective. The approval of U.S. federal funding for Pagan’s airstrip rehabilitation offers encouragement but also presents a potential conflict: the desire to resettle Indigenous homelands versus the increasing threat of U.S. militarization to land rights in the region. Advances in environmental personhood within environmental law, such as New Zealand’s Te Awa Tupua (Whanganui River Claims Settlement) Act, offer a compelling comparative case study for advancing protections for Indigenous rights in the CNMI. Implementing similar legislation to establish the Gani Islands as a protected zone via environmental personhood could provide a sustainable strategy to ensure Indigenous cultural survival.

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I. THE ISSUE OF INDIGENOUS RESETTLEMENT IN THE CNMI

From the early 1970s, when the late Professor Christopher Stone asked, “*Should Trees Have Standing?*” the global movement to recognize the rights of the environment and nature has grown alongside international human and Indigenous rights law.¹ New Zealand’s 2017 Te Awa Tupua (“Whanganui River Claims Settlement”) Act² and similar legislation in India, Bolivia, and elsewhere³ provide examples of environmental personhood actions. Environmental personhood⁴ bestows the legal rights and responsibilities of a person on natural entities such as rivers and land. This type of legal action is similar to corporate personhood, in which the United States Supreme Court ruled that corporations are individuals entitled to free speech rights and other legal protections.⁵

Environmental personhood could support cultural survival by granting protected status to natural areas sacred to Indigenous peoples.⁶ Self-determination and decolonization are processes, not singular events; environmental personhood offers a potential vehicle for an Indigenous renaissance to continue rebuilding cultural identity free from over-militarization⁷ or corporate

1. See generally CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING?* (3d. ed. 2010) (seminal work launching modern environmental rights discourse by proposing legal standing for natural objects); see also Kristen Stilt, *Rights of Nature, Rights of Animals*, 134 HARV. L. REV. F. 276, 278 (2021) (tracing the conceptual and legal evolution of rights for nature alongside animal rights frameworks); *Rights of Nature Law and Policy*, HARMONY WITH NATURE, <http://www.harmonywithnatureun.org/rightsOfNature/> [https://perma.cc/4XBN-NTVP] (last visited: June 8, 2023) (cataloging global legislative and judicial developments recognizing legal rights for natural ecosystems); Alexis Buntén, *What Do the Rights of Nature Have to do with Indigeneity?*, BIONEERS (Mar. 27, 2017), <https://bioneers.org/rights-nature-indigeneity/> [https://perma.cc/344R-VR5N] (exploring intersections between Indigenous worldviews and contemporary rights-of-nature initiatives).

2. Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (N.Z.).

3. Rafi Youatt, *Personhood and the Rights of Nature: The New Subjects of Contemporary Earth Politics*, 11 INT’L POL. SOCIO. 39 (2017).

4. See generally Gwendolyn J. Gordon, *Environmental Personhood*, 43 COLUM. J. ENV’T L. 49 (2018) (arguing that legal systems can recognize natural entities as juridical persons capable of holding rights and being represented in legal proceedings).

5. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 364-66 (2010).

6. *The “Landback” Movement Would Return Stolen Land to Indigenous Stewardship*, IN THESE TIMES (July 27, 2021), <https://inthesetimes.com/article/landback-movement-indigenous-land-decolonization-liberation/> [https://perma.cc/SB3A-WFCJ].

7. *Pagan out in revised CJMT*, SAIPAN TRIB. (Apr. 1, 2022), <https://www.saipantribune.com/index.php/pagan-out-in-revised-cjmt/> [https://perma.cc/2RH5-QRBV]; Anita Hofschneider, *Military Won’t Proceed With Marianas Bombing Range But The New Plan Is Unclear*, HONOLULU CIV. BEAT (Apr. 8, 2022), <https://www.civilbeat.org/2022/04/military-wont-proceed-with-marianas-bombing-range-but-the-new-plan-is-unclear/> [https://perma.cc/BV6K-Y8FN].

exploitation.⁸ As paradoxical as it may sound, corporations are people,⁹ money is speech,¹⁰ and nature has legal personhood.¹¹ As science catches up with Indigenous wisdom in realms such as resource management¹² and mental health,¹³ the legal world now also reflects animistic perspectives by recognizing spirituality within natural entities, which can therefore be recognized as persons through environmental personhood.

As Northern Islands Municipal Council Vice Chairwoman Antonia Manibusan Tudela stated in August of 2023, “[T]he native residents have long been displaced and dislocated not by choice, but by government edict, yet these residents have not lost their sense of place and identity and their spiritual and physical connection to their ancestral lands in the Northern Islands or *Gani*.”¹⁴ Environmental personhood legislation could potentially answer the call for resettlement of the Chamorros’ ancestral lands with Indigenous oversight against exploitation.

A. CNMI Background

The Marianas archipelago, comprising the CNMI and Guahan (Guam), was home to a culturally united people for millennia, sharing the same language and customs.¹⁵ The two territories are now separated, and their peoples pushed to near cultural extinction as a result of genocidal colonization by Spain starting in 1521, which led to the deaths of approximately 90% of the Indigenous

8. Steve Limtiaco, *Activist: Pagan’s fate key to saving CNMI’s Northern Islands*, USA TODAY (Mar. 11, 2019, at 3:41 ET), <https://www.usatoday.com/story/news/local/2019/03/11/activist-pagans-fate-key-saving-cnmi-northern-islands/3127299002/> [<https://perma.cc/KV8P-W7SX>].

9. Kent Greenfield, *Corporations are People Too (And They Should Act Like it)*, HARV. L. SCH. F. CORP. GOV’T (Jan. 30, 2019), <https://corpgov.law.harvard.edu/2019/01/30/corporations-are-people-too-and-they-should-act-like-it/> [<https://perma.cc/9YA9-CJ9D>].

10. Daniel I. Weiner, *Citizens United, Explained*, BRENNAN CTR. FOR JUST. (Dec. 12, 2019), <https://www.brennancenter.org/our-work/research-reports/citizens-united-explained> [<https://perma.cc/6NKX-VGFV>].

11. Sequoia L. Butler, “I am the River, the River is Me”: How Environmental Personhood Can Protect Tribal Food Systems, 38 WIS. INT’L L.J. 79, 80 (2021).

12. Khin Htet Htet Pyone, *Indigenous knowledge in natural resource management: integrating local perspectives into conservation strategies*, YALE ENV’T REV. (Sep. 24, 2019), <https://environment-review.yale.edu/indigenous-knowledge-natural-resource-management-integrating-local-perspectives-conservation> [<https://perma.cc/XWV8-YT9M>].

13. José Carlos Bouso & Constanza Sánchez-Avilés, Traditional Healing Practices Involving Psychoactive Plants and the Global Mental Health Agenda: Opportunities, Pitfalls, and Challenges in the “Right to Science” Framework, 22 HEALTH HUM. RTS. J. 145 (2020).

14. *DPL urged to act on Northern Islands resettlement*, MARIANAS VARIETY (Aug. 25, 2023), https://www.mvariety.com/news/dpl-urged-to-act-on-northern-islands-resettlement/article_f4fb70a2-4292-11ee-eb26af7d07f6.html [<https://perma.cc/885K-Y2NF>].

15. See generally Julie Mushynsky et al., *The Foundation of Island Identity: Chamorro Maritime Practices and Resistance in the Commonwealth of the Northern Mariana Islands*, 18 ALTER NATIVE 299, 299-312 (2022) (documenting the shared Chamorro cultural heritage across the Marianas, including unified language, customs, and maritime practices predating European contact).

Chamorro inhabitants from disease and war.¹⁶ Subsequently, Spain sold the CNMI to Germany in the wake of the Spanish-American War of 1898, while the lands of Guahan were ceded to the United States of America. Japan replaced Germany in the CNMI around World War I, and then Americans replaced the Japanese during World War II. This culminated in the Covenant, a U.S. federal law integrating the CNMI into the U.S. as an unincorporated territory. The CNMI, a 14-island Micronesian U.S. territory closer to China than California, along with Guahan, provides invaluable geostrategic footing for the American “Pivot to Asia”¹⁷ strategy by acting as the militaristic “Tip of the Spear.”¹⁸

A volcanic eruption on the island of Pagan in 1981 forced an evacuation of the Indigenous peoples inhabiting the Gani Islands (CNMI islands north of Saipan).¹⁹ Several decades later, the former residents still face challenges in resettling their ancestral homelands. Impractical requirements, such as mandating that eligible voters reside in the Gani islands for at least one year before being granted land,²⁰ were only recently, and arguably unsuccessfully, addressed through legislation.²¹ Complicating Indigenous resettlement were previous American military plans to turn Pagan into a live-fire weapons testing site, a move that highlighted the vulnerability of Chamorro ancestral land rights.²² Although the U.S. military no longer plans to use Pagan for live-fire weapons testing,²³ nothing is structurally preventing the military from changing its mind *again* in the future and proceeding with weapons testing in the Gani Islands. Furthermore, recent announcements of U.S. federal funding to

16. Nicholas J. Goetzfridt, *Spanish Response to Chamoru/Chamorro Depopulation*, GUAMPEDIA, <https://www.guampedia.com/spanish-response-to-chamorro-depopulation> [https://perma.cc/DY7W-4QEX] (last visited Jan. 22, 2026).

17. Anita Hofschneider, *Can These Islands Survive America's Military Pivot to Asia?*, HONOLULU CIV. BEAT (Dec. 12, 2016), <https://www.civilbeat.org/2016/12/can-these-islands-survive-americas-military-pivot-to-asia/> [https://perma.cc/D34C-X9DN].

18. Matthew Olay, *Hegseth Brings DoD's Message to Troops on Guam*, U.S. DEP'T WAR. (Mar. 27, 2025), <https://www.defense.gov/News/News-Stories/Article/Article/4137181/hegseth-brings-dods-message-to-troops-on-guam/> [https://perma.cc/Q6KB-RPPT].

19. Steve Limtiaco, *CNMI will resettle island U.S. military wants for training*, PAC. DAILY NEWS (Mar. 10, 2019), https://www.guampdn.com/news/local/cnmi-will-resettle-island-u-s-military-wants-for-training/article_dbd05461-5073-5a75-852c-ca184b2ac812.html [https://perma.cc/5923-JLNQ].

20. Steve Limtiaco, *Here's why Pagan homestead applicants are having trouble getting permits to live on island*, PAC. DAILY NEWS (Aug. 11, 2019), https://www.guampdn.com/news/local/heres-why-pagan-homestead-applicants-are-having-trouble-getting-permits-to-live-on-island/article_7988e5e8-6443-5c3b-8d93-215262c9d725.html [https://perma.cc/7MD7-WXXW].

21. Ferdie De La Torre, *New law loosens rules to avail of agricultural homesteads on Pagan*, SAIPAN TRIB. (Feb. 10, 2021), <https://www.saipantribune.com/index.php/new-law-loosens-rules-to-avail-of-agricultural-homesteads-on-pagan/> [https://perma.cc/E76U-C34T].

22. *Defending the Northern Mariana Islands*, EARTHJUSTICE (Apr. 14, 2016), <https://earthjustice.org/cases/2016/defending-the-northern-mariana-islands> [https://perma.cc/5VDJ-P82R].

23. *Pagan Out, No High Caliber Live Fire on Tinian*, OFF. OF THE GOVERNOR, COMMONWEALTH OF N. MAR. I. (Apr. 1, 2022, at 09:00 EST), <https://governor.cnmi.gov/archived-news/pagan-out-no-high-caliber-live-fire-on-tinian/> [https://perma.cc/ZD9T-NG95].

rehabilitate the Pagan airstrip²⁴ raise the question of whether Pagan is to be used as a foundation for an Indigenous renaissance or exploited for potentially destructive resource extraction.²⁵

The Indigenous peoples of the CNMI could explore environmental personhood legislation to strengthen cultural survival and to resettle the Gani Islands in accordance with Indigenous principles. The Chamorros' Polynesian neighbors, the Indigenous Māori of colonial New Zealand, have successfully championed multiple environmental personhood acts, including the Te Awa Tupua Act,²⁶ the Te Urewera Act 2014,²⁷ and the Te Ture Whakatupua mō Te Kāhui Tupua/Taranaki Maunga Collective Redress Act.²⁸ These acts granted legal personhood to a sacred river, a former national park, and a sacred mountain, respectively—all now under the management of the Māori people. These natural entities are considered ancestral *and* living spirits²⁹ similar to the Chamorros' traditional views of the Pacific Banyan trees as the abodes of their *Taotaomo'na* ancestral spirits.³⁰ Recognizing the growing Indigenous rights movements, courageous cultural revival, and decolonization efforts in the Marianas, this article explores the potential implementation of environmental personhood in the Gani Islands, using the Māori's innovative Te Awa Tupua Act as a comparative case study.

B. Environmental Personhood as Indigenous Rights in the CNMI

“Landback” is a contemporary movement focused on returning environmental stewardship to Indigenous peoples who have experienced colonial land theft.³¹ Although the CNMI's Indigenous land rights are protected

24. *FAA to award CNMI \$110,000 for pagan airstrip*, SAIPAN TRIB. (Dec. 21, 2021), <https://www.saipantribune.com/index.php/faa-to-award-cnmi-110000-for-pagan-airstrip/> [https://perma.cc/XW42-QPET].

25. *Permit Given to Mine on CNMI's Pagan Island*, RNZ (Sep. 9, 2015, at 5:52 AM), <https://www.rnz.co.nz/news/pacific/254091/permit-given-to-mine-on-cnmi-s-pagan-island> [https://perma.cc/MF9T-9RJW].

26. Kennedy Warne, *This river in New Zealand Is a legal person. How will it use its voice?*, NAT'L GEOGRAPHIC (Apr. 22, 2019), <https://www.nationalgeographic.com/culture/article/maori-river-in-new-zealand-is-a-legal-person-article> [https://perma.cc/E549-3EWG].

27. Te Urewera Act 2014 (N.Z.).

28. Te Ture Whakatupua mo Te Kahui Tupua/Taranaki Maunga Collective Redress Act 2025, (N.Z.).

29. *A New Zealand mountain is granted personhood, recognizing it as sacred for Maori*, NPR (Jan. 31, 2025), <https://www.npr.org/2025/01/31/nx-s1-5281937/new-zealand-mountain-personhood-maori#:~:text=Mount%20Taranaki%20%E2%80%94%20now%20known%20as,sacred%20land%20are%20people%20before> [https://perma.cc/V6A6-VQRH].

30. Michael Lujan, *Taotaomo'na*, GUAMPEDIA, <https://www.guampedia.com/taotaomona-taotaomona/> [https://perma.cc/3H95-LH8C] (last visited Jan. 25, 2026).

31. *Landback*, LANDBACK, <https://landback.org/> [https://perma.cc/93GH-JQ9H] (last visited Jan. 25 2026).

by Article 12 of the CNMI Constitution,³² these protections are not immune to threats, even from within its own Indigenous community.³³ A state of extreme poverty, with over 50% of the population impoverished due to the legacies of 500 years of genocidal colonialism and acculturation, could create desperation.³⁴ These dire economic conditions might incentivize a departure from cultural protections and values based on “Indigenous lands in Indigenous hands,”³⁵ leading to potentially short-sighted financial gains from selling ancestral lands to the highest bidder. Environmental personhood could prevent such tragedies by legally safeguarding the land to ensure future Indigenous cultural survival.

The CNMI could pursue several legal avenues to ensure the cultural survival of ancestral lands. One approach involves legislation modeled after the “Universal Declaration of the Rights of Mother Earth,”³⁶ which acknowledges that nature is a living being deserving of rights and protections akin to humans. Another route is the local and federal implementation of legislation based on the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”), similar to the models adopted by British Columbia³⁷ and Canada.³⁸ Canada enacted UNDRIP-based legislation in 2021, mandating its government to align laws, regulations, and policies with the Declaration.³⁹ Local and federal UNDRIP legislative implementation is perhaps the strongest legal action for Indigenous cultural survival that incorporates environmental protection. This option was discussed by the authors in “Indigenous Rights: A Pathway to End American Second-Class Citizenship”.⁴⁰ A third option could be for the CNMI to replicate an Italian law that protects 22,000 “monumental trees.”⁴¹ This approach emphasizes community participation in recognizing and protecting

32. *Constitution*, COMMONWEALTH L. REV. COMM’N, <https://cnmilaw.org/cons.php#gsc.tab=0> [https://perma.cc/RUK4-PF4D] (last visited June 8, 2023).

33. K-Andrea Evarose Limol, *Millennials voice concerns about proposal to amend Article 12*, MARIANAS VARIETY, https://mvariety.com/news/millennials-voice-concerns-about-proposal-to-amend-article-12/article_3ed89598-a343-11eb-a84d-07b80da12bda.html [https://perma.cc/ZZ8R-K2V3] (last updated Apr. 23, 2021).

34. *Overview of the State – Northern Mariana Islands – 2020*, U.S. DEP’T HEALTH & HUM. SERV., <https://mchb.tvisdata.hrsa.gov/Narratives/Overview/ad48c169-b39e-4883-84a0-ea7e5bcf9695> [https://perma.cc/R6MZ-CKDC] (last visited June 8, 2023).

35. Mary Meade, *Native Land in Native Hands: Why the Land Back Movement Makes Economic Sense*, GREEN AM. (Oct. 29, 2020), <https://greenamerica.org/divided-we-fall/native-land-native-hands-why-land-back-movement-makes-economic-sense> [https://perma.cc/C8KG-RUXV].

36. *Universal Declaration for the Rights of Mother Earth*, GLOB. ALL. FOR RTS. NATURE (Apr. 22, 2010), <https://www.garn.org/universal-declaration/> [https://perma.cc/MCL5-L3LC].

37. Declaration on the Rights of Indigenous Peoples Act, S.B.C. 2019, c. 44 (Can.).

38. United Nations Declaration on the Rights of Indigenous Peoples Act, S.C. 2021, c. 14 (Can.).

39. *Id.* §§ 4-7 (Can.).

40. William J. Fife III & Beylul Solomon, *Indigenous Rights: A Pathway to End American Second-Class Citizenship*, 32 S. CAL. REV. L. & SOC. JUST. 59, 86-91 (2022).

41. Jonathan Moens, *See the beautiful, ecologically priceless trees Italy is protecting forever*, NAT’L GEOGRAPHIC (Sep. 8, 2021), <https://www.nationalgeographic.com/environment/article/see-the-beautiful-ecologically-priceless-trees-italy-is-protecting-forever> [https://perma.cc/882J-UDFZ].

sacred sites and beings, such as the *Tronkon Nunu* (Pacific banyan fig), a tree widely found across the islands and revered within Indigenous Chamorro epistemologies.⁴² Legal protection for culturally sacred fig trees blends *Inafa'maolek*⁴³ (Chamorro cultural philosophy emphasizing harmonious relationships with one another and nature) with scientific reasoning by ensuring eco-diversity through the survival of critical keystone species.⁴⁴

This article will focus on the emerging legal concept of environmental personhood, which acknowledges the important connection between cultural or spiritual symbolism and nature for Indigenous peoples. Historically, the sacred *Tronkon Nunu* has stood as a symbol of spiritual embodiment within the Chamorro worldview.⁴⁵ *Taotaomo'na*, the sacred Chamorro ancestral spirits, are believed to reside within the *Tronkon Nunu*.⁴⁶ While often referred to as a “Banyan tree,” the *Tronkon Nunu* is technically *Ficus prolixa*⁴⁷ (distinct from *Ficus benghalensis*, the original Banyan).⁴⁸ Sacred fig trees are worshipped in cultures around the world and could even provide a bridge between the cultural origins of the Chamorro people and the ancient Indus Valley Civilization (“IVC”)—and possibly even farther west into Africa.⁴⁹ The link between the sacred trees and the Gani Islands also involves a volcanic connection; fig trees are known to catalyze life on volcanic islands, and the Gani Islands contain

42. Tiara R. Na'puti, Archipelagic Rhetoric: Remapping the Marianas and Challenging Militarization From “A Stirring Place”, 16 COMM'C'N & CRITICAL/CULTURAL STUDS. 4, 4 (2019).

43. Lilli Perez Iyechad, *Inafa'maolek: Striving for Harmony*, GUAMPEDIA, <https://www.guampedia.com/inafamaolek> [<https://perma.cc/4FHJ-SJXG>] (last visited Feb. 2, 2026).

44. See generally Pornwiwan Pothasin, Stephen G. Compton & Prasit Wangpakattanawong, *Riparian Ficus Tree Communities: The Distribution and Abundance of Riparian Fig Trees in Northern Thailand*, 9 PLoS ONE 1 (2014) (analyzing *Ficus* trees as keystone species essential for maintaining riparian ecosystem diversity and supporting biodiversity through their ecological roles).

45. Tanya M. Champaco Mendiola, *Animism*, GUAMPEDIA, <https://www.guampedia.com/animism/> [<https://perma.cc/2V3G-4VSR>] (last visited Jan. 19, 2026).

46. Michael Lujan Bevacqua, *Taotaomo'na: Those who are evil and cruel*, GUAMPEDIA, <https://www.guampedia.com/taotaomona-taotaomona/> [<https://perma.cc/8BWD-JJPX>] (last visited Feb. 28, 2026).

47. Gerald McCormack, *Pacific Banyon (Ficus Prolixa)*, COOK ISLANDS BIODIVERSITY DATABASE (2007), <http://cookislands.bishopmuseum.org/species.asp?id=6150> [<https://perma.cc/K42J-TA2L>].

48. Pankaj Oudhia, *Bar or Bargad Ficus benghalensis L.*, PURDUE U.: NEWCROP (July 15, 2020), <https://hort.purdue.edu/newcrop/CropFactSheets/ficus.html> [<https://perma.cc/47MV-LESY>]; Julissa Rojas-Sandoval, *Ficus benghalensis (banyan)*, CABI COMPENDIUM (Apr. 30, 2015), <https://www.cabi.org/isc/datasheet/24066> [<https://perma.cc/754B-KCS6>].

49. *Fig Trees: From the Sacred to the Strangler*, PBS NATURE (July 27, 2008), <https://www.pbs.org/wnet/nature/the-queen-of-trees-fig-trees-from-the-sacred-to-the-strangler/1353/> [<https://perma.cc/K3AE-M4Z8>]; Asko Parpola, *The Sacred Fig Tree and the North Star*, HARAPPA, <https://www.harappa.com/script/parpola11.html> [<https://perma.cc/8AVM-ZTKV>] (last visited Jan. 21, 2026); MIKE SHANAHAN, GODS, WASPS AND STRANGLERS: THE SECRET HISTORY AND REDEMPITIVE FUTURE OF FIG TREES 75, 106, 112, 113, 121–135 (Chelsea Green Publishing ed., 2016).

several active volcanoes.⁵⁰ Designating at least some of the Gani Islands in the CNMI with environmental personhood could create a safe space for an Indigenous renaissance by embracing the ideals of *Inafa'maolek* (i.e., restoring harmony).⁵¹

The beginnings of an Indigenous renaissance in the Marianas of Micronesia have taken root despite 500 years of genocidal colonialism that attempted to wipe out the Chamorro culture.⁵² However, there is no guarantee that those roots will sprout. Cultural loss is perpetuated by incessant acculturation, endangered Indigenous languages, and the desecration of sacred Indigenous lands in the Marianas by the U.S. military.⁵³ As military planners prepare for a possible U.S.-China conflict by 2027,⁵⁴ this could further endanger Chamorro cultural survival.⁵⁵

Instead of increased militarization, the resettlement of the Gani Islands with environmental personhood could institutionalize the rebuilding of cultural identity in the wake of hundreds of years of genocidal colonialism.⁵⁶ Just as the Ojibwe peoples of North America advocate for “Rights of Nature” arguments

50. Ian W.B. Thornton, Stephen G. Compton & Craig N. Wilson, *The Role of Animals in the Colonization of the Krakatau Islands by Fig Trees (Ficus Species)*, 23 J. BIOGEOGRAPHY 577, 585-88 (1996).

51. Hilda Loury, *Pachamama over People and Profit: A Case for Indigenous Ecology and Environmental Personhood*, 47 AM. INDIAN L. REV. 229-59 (2023).

52. Iva Maurin, *Reviving Culture at Chamorro and Carolinian Identity Conference*, SAIPAN TRIB., <https://www.saipantribune.com/index.php/reviving-culture-at-chamorro-and-carolinian-identity-conference/> [https://perma.cc/T86B-BBR7] (last updated Sep. 25, 2019).

53. Kristin Oberiano, *Guåhan and the CHamoru People*, PROCESS: A BLOG FOR AM. HIST. (Mar. 19, 2024), <https://www.oah.org/process/oberiano-guahan-and-the-chamoru-people/> [https://perma.cc/8VN9-GRSD]; CITIZEN-CENTRIC REPORT FOR FY 2019, INDIGENOUS AFFS. OFF. (2019), <https://cnmileg.net/Resources/files/Notices/2019%20Citizen-Centric%20Report.pdf> [https://perma.cc/Y23T-82RQ]; *Guam: Violations of the Rights of the Indigenous Chamorro People*, UNREPRESENTED NATIONS & PEOPLES ORG. (Aug. 7, 2020), <https://unpo.org/guam-violations-of-the-rights-of-the-indigenous-chamorro-people/> [https://perma.cc/YNU4-EFYT]; Tressa P. Diaz, Lana Sue I. Ka'opua & Susan Nakaoka, *Island Nation, US Territory and Contested Space: Territorial Status as a Social Determinant of Indigenous Health in Guam*, 50 BRIT. J. SOC. WORK 1069, 1072 (2019).

54. See Noah Robertson, *How DC became obsessed with a potential 2027 Chinese invasion of Taiwan*, DEF. NEWS (May 7, 2024), <https://www.defensenews.com/pentagon/2024/05/07/how-dc-became-obsessed-with-a-potential-2027-chinese-invasion-of-taiwan/> [https://perma.cc/V3LU-YVQD].

55. Jacqueline Guzman, *Center Official on War Game: Guam and Taiwan 'Frighteningly Entangled'*, MARIANAS VARIETY (Jan. 24, 2023), https://www.mvariety.com/news/center-official-on-war-game-guam-and-taiwan-frighteningly-entangled/article_25342daa-9b85-11ed-8ee4-af065a8b10d2.html [https://perma.cc/P2JN-LJAP].

56. Justine Townsend et al., *Rights for Nature: How Granting a River 'Personhood' Could Help Protect It*, CONVERSATION (June 3, 2021), <https://theconversation.com/rights-for-nature-how-granting-a-river-personhood-could-help-protect-it-157117> [https://perma.cc/P6H7-3JXQ].

in law⁵⁷ and through the courts,⁵⁸ the CNMI could similarly pursue environmental personhood to resist potential environmental destruction. Cultural symbolism is a critical component within Rights of Nature and environmental personhood, whether it is the novel “Rights of Manoomin” for essential wild rice of the Ojibwe—one of the most populous Native American tribes of North America—or the Te Awa Tupua Act for a sacred river to the Māori.⁵⁹ The Rights of Manoomin is a law enacted by the White Earth Band of Ojibwe to recognize the rights of manoomin—a vital and culturally important food source for the Ojibwe Peoples’ way of life—in response to a Canadian company that intended to divert water for a pipeline. These actions by the company would substantially impact the ecosystems necessary for manoomin to grow and flourish, thereby impeding its use by the Ojibwe Peoples as a vital food source and in traditional and culturally significant ceremonies.⁶⁰

In 2025, the U.S. federal government began exploring deep-sea mining in the waters surrounding American Samoa and the Marianas, which would affect the CNMI and Guahan.⁶¹ The race to deep-sea mining for rare earth minerals is also connected to the escalating conflict with China, which dominates control over the global supply chain for these critical minerals, which power critical technology from drones to fighter jets.⁶² U.S. territories, like U.S. states, do not have control over territorial waters more than three nautical miles offshore.⁶³

57. *Chippewa Establish Rights of Manoomin on White Earth Reservation and Throughout 1855 Ceded Territory*, 1855 TREATY AUTH. (Jan. 11, 2019), <https://healingmnstories.wordpress.com/wp-content/uploads/2019/01/right-of-manoomin-media-statement.pdf> [https://perma.cc/CUM6-KUUA].

58. See Ray Levy Uyeda, *‘Rights of Nature’ laws can strengthen Indigenous sovereignty and provide a pathway to environmental justice*, PRISM (Feb. 22, 2022), <https://prismreports.org/2022/02/22/rights-of-nature-laws-can-strengthen-indigenous-sovereignty-and-provide-a-pathway-to-environmental-justice/> [https://perma.cc/8LG8-C7A6].

59. Rights of Manoomin Ordinance, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009 (Dec. 31, 2018); Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 13 (N.Z.).

60. See *Rights of Manoomin (Wild Rice): White Earth Tribal Law: Recognizing the Rights of Manoomin*, CTR. FOR DEM. & ENV’T RTS. (Nov. 23, 2021), <https://www.centerforenvironmentalrights.org/rights-of-manoomin> [https://perma.cc/E7S9-4Z2Y]; *Wild Rice: A Sacred Food*, PLURALISM PROJECT, <https://pluralism.org/wild-rice-a-sacred-food> [https://perma.cc/QGF3-TB38] (last visited Feb. 8, 2026).

61. Jennifer Russo, *BOEM Advances Offshore Minerals Planning Efforts in American Samoa and the Commonwealth of the Northern Mariana Islands*, U.S. DEP’T INTERIOR: BUREAU OCEAN ENERGY MGMT. (Nov. 10, 2025), <https://www.boem.gov/newsroom/press-releases/boem-advances-offshore-minerals-planning-efforts-american-samoa> [https://perma.cc/VKA2-54AL].

62. Mureji Fatunde, *The race to produce rare earth elements*, MIT TECH. REV. (Jan. 5, 2024), https://www.technologyreview.com/2024/01/05/1084791/rare-earth-materials-clean-energy/?gad_source=1&gad_campaignid=20737314952&gbraid=0AAAAADgO_miVRm9Ls7b9ZF4DiE4prdxHJ&gclid=Cj0KCQiA4eHLBhCzARIsAJ2NZoJMhBP8BN0qLYIE7YB421iOeOgrWNLu9mXZfRMJbEH69-WcoJHx1UQaAsWXEALw_wcB [https://perma.cc/7GBL-CN4].

63. *Federal Offshore Lands*, U.S. DEP’T INTERIOR: BUREAU OCEAN ENERGY MGMT., [https://www.boem.gov/oil-gas-energy/leasing/federal-offshorelands#:~:text=The%20Submerged%20Lands%20Act%20\(SLA,into%20the%20Gulf%20of%20Mexico](https://www.boem.gov/oil-gas-energy/leasing/federal-offshorelands#:~:text=The%20Submerged%20Lands%20Act%20(SLA,into%20the%20Gulf%20of%20Mexico) [https://perma.cc/9GGK-93ZH] (last visited Jan. 30, 2026).

Environmental and Indigenous activists in these U.S. territories have petitioned and protested deep-sea mining in their traditional sacred waters that sustain cultural survival, fearing the potential of irreversible environmental destruction.⁶⁴ Environmental personhood legislation at the territorial level would likely fail against judicial challenges from the federal government, as the CNMI has tried and failed in the past to control its own offshore waters.⁶⁵ Not only are these U.S. territories relatively powerless to stop the federal government from exploiting rare earth minerals, there is also apparently no legal requirement to share any potential financial revenues.⁶⁶ For these U.S. territories to gain any kind of seat at the decision-making table to either deny deep-sea mining activities or guarantee potential financial revenue requires federal legislation reform or a change in political status, which is beyond the scope of this paper.

II. RULES OF RESETTLEMENT AND ENVIRONMENTAL PERSONHOOD

The U.S. Constitution, inspired by Western roots of personhood from the Magna Carta, originally prioritized land-owning white men. The evolution of “personhood” has been a double-edged sword. On the one hand, corporate personhood,⁶⁷ often facilitated through “spin-offs” that allow corporations to create new entities to bypass their legal responsibilities, created ecologically destructive outcomes⁶⁸ and is considered an impediment to public health.⁶⁹ Corporations can now spend an unlimited amount of money as a form of free speech in political elections to ensure the election of candidates who support their causes, such as lower air quality standards. On the other hand, legal “personhood” concepts now include women, people of color, and natural

64. See Jayvee Vallejera, *A lawsuit waiting to happen? 60,000 say no to seabed mining in Marianas waters*, PAC. ISLAND TIMES (Jan. 14, 2026), <https://www.pacificislandtimes.com/post/a-lawsuit-waiting-to-happen-60-000-say-no-to-seabed-mining-in-marianas-waters> [https://perma.cc/7CRP-5BYZ].

65. See Stephanie Showalter, *Mariana Islands Lacks Authority Over Its Submerged Lands*, NAT'L SEA GRANT L. CTR., <https://nsglc.olemiss.edu/SandBar/SandBar2/2.3marianna.htm> [https://perma.cc/PRH6-8Y8R] (last visited Jan. 28, 2026).

66. Walter Ulloa, *CNMI lawmakers introduce resolution opposing federal deep-sea mining plan*, GUAM DAILY POST (Jan. 2, 2026), https://www.postguam.com/news/local/cnmi-lawmakers-introduce-resolution-opposing-federal-deep-sea-mining-plan/article_2be4bdc8-d659-4cca-8e15-a0b9943813ee.html [https://perma.cc/5GS8-NYLY].

67. See generally *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 310 (2010) (extending First Amendment free speech protections to corporate political expenditures, thereby solidifying corporate personhood under U.S. constitutional law).

68. David F. Larcker, Brian Tayan & Andrew C. Baker, *Environmental Spinoffs: The Attempt to Dump Liability Through Spin and Bankruptcy*, HARV. L. SCH. F. ON CORP. GOV. (Nov. 27, 2020), <https://corpgov.law.harvard.edu/2020/11/27/environmental-spinoffs-the-attempt-to-dump-liability-through-spin-and-bankruptcy/> [https://perma.cc/YS7R-4SAL].

69. William H. Wiist, *Citizens United, Public Health, and Democracy: The Supreme Court Ruling, Its Implications, and Proposed Action*, 101 AM. J. PUB. HEALTH 1172, 1173 (2011).

entities such as rivers.⁷⁰ Accordingly, the CNMI could implement environmental personhood for the Gani Islands to ensure environmental protection of their northern islands. Since natural entities such as islands cannot represent themselves in court, they require human representatives—similar to a corporation’s board of directors—to act on their behalf, a model successfully implemented with Te Urewera.⁷¹ The Gani Islands have CNMI Constitution-based roles in the local legislature, as well as a Mayor’s Office,⁷² and both could coexist harmoniously with environmental personhood legislation. Gani-based representation in the CNMI legislature and the Mayor’s Office could continue as-is while implementing environmental personhood, which would require establishing a board of directors.⁷³ The mayor’s and legislative representatives’ positions could even hold permanent roles within the environmental personhood board of directors. Constitutional amendments are more desirable than legislation, and perhaps even necessary, but this commentary explores a potential path of least resistance into legal reality via environmental personhood legislation, given that constitutional amendments require a higher procedural bar than enacting legislation.⁷⁴ Constitutional amendments could always happen subsequent to legislative efforts, if desired.

Progress remains elusive regarding CNMI Public Law 21-44,⁷⁵ which was aimed at ameliorating the difficult homesteading requirements for Indigenous resettlement in the Northern Islands (Gani). Amending the law to allow persons who have either resided in or are direct descendants of a person born in the Gani Islands to receive land was intended to facilitate resettlement, but that has yet to materialize. News of federal funding to repair the Pagan airstrip⁷⁶ is promising, and with an Indigenous-based environmental personhood roadmap, resettlement could ensure cultural survival on these pristine volcanic islands with ancient

70. See generally Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 453–57 (1972) (tracing the historical expansion of rights to new entities); see also *Edwards v. Att’y Gen. of Can.*, [1930] A.C. 124 (P.C.) (recognizing women as “persons”); U.S. CONST. amend. XIV, § 1 (granting citizenship to former slaves); Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 14 (N.Z.) (recognizing a river as a legal person).

71. Te Urewera Act 2014, ss 11, 16 (N.Z.) (establishing Te Urewera as a legal entity and creating the Te Urewera Board to act on its behalf).

72. See N. MAR. I. CONST. art. II, § 2(a) (establishing legislative representation for the islands north of Saipan); *id.* art. VI, § 2 (mandating the election of a mayor for the Northern Islands).

73. See Te Urewera Act 2014, ss 16-70 (N.Z.) (establishing a board to act as the “human face” of the legal person).

74. See N. MAR. I. CONST. art. XVIII, § 1 (requiring a constitutional convention, legislative initiative, or popular initiative—all involving high-threshold voter approval—for amendments); compare N. MAR. I. CONST. art. II, § 5 (can pass laws by majority votes).

75. 2021 N. Mar. I. Pub. L. 21-44.

76. *FAA to Award CNMI \$110,000 for Pagan airstrip*, SAIPAN TRIB. (Dec. 12, 2021), <https://www.saipantribune.com/index.php/faa-to-award-cnmi-110000-for-pagan-airstrip/> [<https://perma.cc/KQX5-A4Q9>].

megalithic Latte stones.⁷⁷ Public Law 21-44 could be repealed and replaced with environmental personhood legislation, thereby legalizing oversight not only of resettlement but also of the perpetual “trusteeship” over the Indigenous peoples of the CNMI. This would allow the CNMI to maintain its lands in accordance with its cultural values, rather than depending on difficult homesteading requirements. Environmental personhood would also protect against the potential of future local government demographic changes that might amend Article 12—the CNMI constitutional provision that grants exclusive land rights to the Indigenous Chamorro and Refaluwasch peoples of the CNMI (peoples of “Northern Marianas Descent”).⁷⁸ Doing so would also strengthen the CNMI’s position if an eminent domain conflict erupts with the American federal government over environmentally disastrous military weapons testing on Pagan, thereby reinforcing the Covenant’s recognition of “scarcity and the special importance of land.”⁷⁹ Alternatively, environmental personhood could still be implemented on non-homestead lands if the CNMI desires to keep Public Law 21-44.

*A. Universal Centrality & The Importance of a Name in
Environmental Personhood*

The Indigenous Māori of New Zealand implemented Indigenous rights to protect their sacred spaces through environmental personhood legislation. The Te Awa Tupua Act (also known as the Whanganui River Claims Settlement) bestowed legal personhood upon the Whanganui River. “Te Awa Tupua” is a “spiritual and physical entity.” Naming the CNMI bill specifically after the sacred fig tree, universally known among its people, mirrors the power of “Te Awa Tupua” by synthesizing environmental law and Indigenous rights law. Building on international legal precedent while implementing a customized version of Indigenous and environmental rights legislation, like the Te Awa Tupua Act, could offer the CNMI a legal roadmap for cultural survival and resettlement.

The few independent inhabitants currently residing on the Gani Islands, combined with Indigenous peoples’ desire to return to their ancestral homelands, present a relatively clean slate to revive Indigenous culture. To build upon the growing international environmental personhood precedent, it is critical that the designation embeds the cultural significance of spirituality in nature, recognized by all Indigenous individuals. Fig trees are widely shared across cultures, from the Bible’s Garden of Eden in Christianity, ancient Egypt,

77. See generally Mike T. Carson, *An Overview of Latte Period Archaeology*, 42 MICRONESIA 1 (2012) (surveying the ancient Chamorro Latte stone culture on Marianas volcanic islands like Pagan).

78. N. MAR. I. CONST. art. XII, §§ 1, 4.

79. *Covenant*, COMMONWEALTH. L. REVISION COMM’N, <https://cnmilaw.org/cov.php#gsc.tab=0> [<https://perma.cc/PR39-96Y5>] (last visited June 8, 2023).

the Indus Valley Civilizations, South America, and throughout Asia and the Pacific.⁸⁰ For the CNMI, the most significant aspect of traditional Indigenous Chamorro spirituality embodied within the *Tronkon Nunu* tree would undoubtedly be “*Taotaomo’na*.” The literal meaning of *Taotaomo’na* is the “first people,” “leading people,” or “people in front,” which could also be interpreted as “Indigenous.” However, *Taotaomo’na* contextually means “ancestral spirits”—both good and bad—in the Chamorro language.

Nearly 500 years of genocidal colonialism corrupted the Indigenous Chamorros’ sacred relationship with their revered *Tronkon Nunu*. Once a symbol of ancestral spirit embodied in nature, Christian colonial masters enforced acculturation that now causes some Indigenous Chamorros to literally fear the tree as being inhabited by “evil spirits.”⁸¹ Nevertheless, these *Taotaomo’na* spirits are a very important aspect of the Indigenous Chamorro culture to this day. Just as the Māori considered the sacred river their “ancestor,” the same is true for *Taotaomo’na* and the *Tronkon Nunu* tree.⁸² In a decolonized Marianas, an Indigenous renaissance could reclaim and re-embrace the literal and figurative roots of the *Tronkon Nunu* and *Taotaomo’na* by incorporating these aspects through environmental personhood on the Gani Islands.

B. Historical Significance of Globally Sacred Fig Trees

Historically, ancient Chamorros engaged in animistic⁸³ ancestral worship,⁸⁴ believing their ancestors’ spirits lived in nature—specifically, within the *Tronkon Nunu*.⁸⁵ Although Christianity is the predominant religion in the Marianas, after centuries of forced conversion by the Vatican-backed “Doctrine of Discovery” for the Spanish empire, *Taotaomo’na* and the *Tronkon Nunu* still hold significance for Chamorros today.⁸⁶ There is reverence and respect for the tree, including a taboo against cutting them down without proper spiritual

80. See generally SHANAHAN, *supra* note 49, at 9, 20-26, 29-42, 45-51, 62, 103-04, 112-21, 125, 132, 159 (surveying fig trees’ sacred status across various global cultures).

81. Bevacqua, *supra* note 46.

82. Mendiola, *supra* note 45.

83. *Id.*

84. Raquel Bagnol, *Six feet under: Ancient burial rituals and practices in the Pacific*, PAC. ISLAND TIMES (Oct. 31, 2021), <https://www.pacificislandtimes.com/post/six-feet-under-ancient-burial-rituals-and-practices-in-the-pacific> [<https://perma.cc/3AH7-3RJ8>].

85. Mendiola, *supra* note 45.

86. Fife & Solomon, *supra* note 40; Richelle Ann Agpoon, “Biggest Tree in the Marianas” is on Rota, MARIANAS VARIETY (Apr. 19, 2023), https://www.mvariety.com/lifestyle/biggest-tree-in-the-marianas-is-on-rota/article_5d2c4f6e-ddeb-11ed-aaca-177a8bb10801.html [<https://perma.cc/GX58-MYVS>].

rituals,⁸⁷ a common denominator among cultures that revere sacred fig trees.⁸⁸ The sacredness of the fig tree across multiple cultures is an example of Indigenous knowledge: trees are essential, and fig trees are critical keystone species that need to be protected to ensure healthy biodiversity.⁸⁹

As previously stated, these fig trees are of significant importance not only to the Chamorro people but also to other Asian-Pacific countries, such as the Philippines⁹⁰ and India, where the Banyan is the national tree.⁹¹ The Buddha is reportedly said to have attained enlightenment under a *Ficus Religiosa*, a close relative of the *Tronkon Nunu* tree.⁹² Hindu deities Vishnu and Shiva are also said to reside within the fig tree.⁹³ Therefore, aligning with the spirit of the Māori's natural personhood bill and contributing to precedent and norms for international customary law, utilizing the term *Taotaomo'na* as a designation for a protected zone in the Northern Islands could be impactful.

While other names or titles could certainly be considered, it would be challenging to argue against the fact that the most important natural spirit of Chamorro Indigenous culture would be the spirit of *Taotaomo'na*, embodied in the *Tronkon Nunu*. Consequently, designating the Gani Islands of the CNMI as the "*Taotaomo'na* NMD Protected Zone" could serve as a catalyzing and legitimizing vehicle for legal environmental personhood. "NMD" is included to recognize the CNMI's other "Northern Marianas Descent" populations, which include Refaluwasch (Carolinians)⁹⁴ residents of the Gani Islands. For historical context, following natural disasters in their ancestral lands, now known as the Federated States of Micronesia, the Refaluwasch people were permitted by the Spanish to resettle the ethnically cleansed Chamorro islands of the CNMI during

87. Mendiola, *supra* note 45; Oral Communication with Luella I. Marciano, Resident Executive of CNMI Indigenous Affs. Off., (Saipan, CNMI), from author (June 12, 2025).

88. Daisy Ouya, *Fig Trees Throw Down a Lifeline to a Healthier Planet*, WORLD AGROFORESTRY (Sep. 20, 2016), <https://www.worldagroforestry.org/blog/2016/09/20/fig-trees-throw-down-a-lifeline-to-a-healthier-planet> [<https://perma.cc/KG3X-5UXA>]; H. Eden W. Cottee-Jones & Robert J. Whittaker, *Felling Ficus: The Cultural Status of Fig Trees in a Rural Assamese Community, India*, 6 ETHNOBIOLOGY LETTERS 89 (2015); Else Demeulenaere et al., *Indigenous Spirituality Surrounding Serianthes Trees in Micronesia: Traditional Practice, Conservation, and Resistance*, 68 SOCIAL COMPASS 426 (2021).

89. See SHANAHAN, *supra* note 49, at 75.

90. DENR declares century-old balete as Manila's second heritage tree, REPUBLIC PHIL. DEP'T ENV'T & NAT. RES. (June 6, 2012), <https://denr.gov.ph/news-events/denr-declares-century-old-balete-as-manilas-second-heritage-tree/> [<https://perma.cc/U5D9-UHCJ>].

91. *National Symbols of India*, EIACP PROGRAMME CTR. ON HYGIENE, SANITATION, SEWAGE TREATMENT SYSTEMS & TECH., https://web.archive.org/web/20250713023455/http://www.sulabhenviv.nic.in/KidsCentre/NationalSymbols_226.aspx [<https://perma.cc/VA8M-SSQE>] (last visited May 24, 2022).

92. *Bodhi tree*, BRITANNICA (Mar. 8, 2025), <https://www.britannica.com/plant/Bo-tree> [<https://perma.cc/955H-VSYF>].

93. *Significance of the Banyan*, TIMES INDIA, <https://timesofindia.indiatimes.com/city/nagpur/significance-of-the-banyan/articleshow/8856719.cms> [<https://perma.cc/6J85-63M4>] (last updated June 15, 2011, at 11:18 IST).

94. N. MAR. I. CONST. art. XII, § 4.

the 1800s.⁹⁵ Environmental personhood over natural territory could enable the CNMI to literally rebuild traditional cultural practices of education, resettle the islands, and integrate modern, eco-friendly adaptations (such as contemporary renewable energy sources) with culturally inspired architecture, practices, and infrastructure.

III. APPLICATION OF ENVIRONMENTAL PERSONHOOD IN THE CNMI

If the CNMI were to legislate environmental personhood⁹⁶ as a roadmap for the future of the Gani Islands, the institutionalization potential for Indigenous-based revitalization would be tremendous. New Zealand's environmental personhood legislation requires "Trustees."⁹⁷ This framework could facilitate a partnership-based leadership with a cross-section of "Board Members," reserving the "President of the Board" as a rotating designation between representatives from the Indigenous Chamorro and Refaluwasch peoples. To synchronize with the Constitutionally mandated Northern Islands Mayor's Office and CNMI legislative positions, permanent roles on the Board would align with the *Inafa'maolek* principle of "harmonizing relationships" between legal entities. A hypothetical model of nine Board members could include three elected Chamorro board members and two Refaluwasch board members, recognizing the Chamorro as the original peoples of the islands. This structure could also incorporate aspects of the traditional *Mampolitiku* system, allowing for changes in leadership.⁹⁸

Two additional board members could include a representative of the CNMI government to synchronize common objectives, and perhaps one from the private sector (e.g., the Chamber of Commerce) to coordinate any potential collaborative partnerships related to culturally managed eco-tourism and educational initiatives. Another seat could go to a U.S. federal body, if any mutually agreed-upon initiatives materialize, such as a Coast Guard base or a NASA base of operations.⁹⁹ Both of these hypotheticals align with Indigenous navigation and astronomical cultures, and they also utilize some of the world's clearest skies¹⁰⁰ for scientific or touristic stargazing. In the Federated States of Micronesia's state of Yap, there is an Indigenous governing council that has

95. See Kelly G. Marsh & Tiara R. Na'puti, *Pacific Islanders in the U.S. and their Heritage: Making Visible the Visibly Absent*, in FINDING A PATH FORWARD: ASIAN AMERICAN PACIFIC ISLANDER NATIONAL HISTORIC LANDMARKS THEME STUDY 235 (2019).

96. See Gordon, *supra* note 4.

97. Te Urewera Act 2014, s 2 (N.Z.).

98. Michael Lujan Bevacqua, *Mampolitiku: Politics*, GUAMPEDIA, <https://www.guampedia.com/mampolitiku-politics/> [<https://perma.cc/P34J-ZM2Z>] (last visited Jan. 22, 2026).

99. *US astronomy has ambitious plans – but it needs global partners*, NATURE (Nov. 23, 2021), <https://www.nature.com/articles/d41586-021-03514-2> [<https://perma.cc/Q9F4-CA23>].

100. Pam Eastlick, *Why Guam offers one of the world's best views for stargazers*, PAC. DAILY NEWS (May 14, 2021), https://www.guampdn.com/lifestyle/why-guam-offers-one-of-the-world-s-best-views-for-stargazers/article_b02554f1-e56c-5235-8fad-87220a2940e8.html [<https://perma.cc/K3N2-HHRE>].

legal power-sharing with the elected government, and any protected-zone governing structure in the CNMI could adopt a similar model.¹⁰¹ This would enshrine Indigenous rights and oversight over developments and activities within the Gani Islands of the CNMI to ensure cultural survival into the future.

The ancient Chamorro culture was based on a matrilineal society.¹⁰² While sidestepping the discussion of sex is an easier route, female leadership has cultural compatibility with matrilineal legacies. Mandating alternating sexes for leadership would also ensure equity.¹⁰³ Establishing sex-based roles on the Board that acknowledge these matrilineal cultural practices could draw support from Indigenous rights instruments such as the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”).¹⁰⁴ This approach could help resolve any potentially perceived discrimination concerns. Reconciling U.S. Constitutional law with Indigenous rights is not without its potential for controversy. However, respecting traditional matrilineal and promoting equal sex-based rights is possible. Although this article explores hypothetical futures in the CNMI based on Indigenous rights, it is ultimately up to the Indigenous peoples themselves to make these crucial decisions and determine the best course of action.

A. Environmental Personhood’s Potential Socioeconomic Impacts

Implementing environmental personhood as a governing framework for the Gani Islands could open up significant opportunities. It could create space for Indigenous-based education in collaboration with resettled families and promote tourism in an *Inafa’maolek*-inspired community. This approach could integrate eco-friendly technologies, such as wind and solar power, with culturally influenced architecture, traditional canoe building, and an emphasis on pescatarian diets. These projects could encompass fishing and farming enterprises, as well as activities that both inform educational curricula and sustain Indigenous-managed commercial or tourism-based endeavors. Furthermore, environmental personhood legislation in the CNMI could directly address the Pacific Elders Voice’s (“PEV”) call for academic solutions to the

101. Joyce McClure, *In Yap, traditional councils serve as advisors, mediators, cultural watchdogs and kingmakers*, PAC. IS. TIMES (Nov. 7, 2021), https://www.pacificislandtimes.com/post/the-fourth-branch-in-yap-traditional-councils-serve-as-advisors-mediators-cultural-watchdogs?fbclid=IwAR0MPyrtZdKxM_Mq2pinKOD76Y-f5me9ONhVc0iyaYpZxVilsakRk8r4I [https://perma.cc/6XS6-4DR5].

102. LAWRENCE J. CUNNINGHAM, *ANCIENT CHAMORRO SOCIETY* 182 (Bess Press ed., 1992).

103. Craig Santos Perez, *Wayreading Chamorro Literature From Guam* (2015) (Ph.D. dissertation, UC Berkeley).

104. G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/RES/61/295 (Sep. 13, 2007).

climate crisis in the face of intensifying militarism in the region,¹⁰⁵ in addition to cultural survival.

1. Education

The CNMI government financially supports three main educational groups: the K-12 Public School System (“PSS”), Northern Marianas College (“NMC”), and the Northern Marianas Technical Institute (“NMTech”).¹⁰⁶ All three of these institutions could make ideal partners for Indigenous-based programs within the Gani Islands’ protected zone. PSS could offer summer programs and camps at facilities on Pagan, while NMC could provide semester and year-long educational programs. NMTech could be instrumental in the development and ongoing maintenance of construction and educational projects for their students in the Gani Islands. Collaborations with Indigenous revival organizations, like 500 Sails in the CNMI, could establish a Gani-based campus for culturally relevant, project-based learning in canoe building and sailing through the recently announced Cultural Maritime Training Center (“CMTC”).¹⁰⁷ These types of hands-on projects—integrating culturally relevant curricula—connect students to their ancestral past and their potential future, providing essential relevance for place-based learning. Maritime career training and eco-tourism initiatives could attract people globally, offering a unique and authentic cultural educational experience that could help finance the protected zone’s operations and the resettlement of the Gani islands. Ultimately, these activities could transform the Gani Islands into a legally protected space where endangered Indigenous cultures can sustainably thrive.

2. Health

Cultural survival is an existential issue for the Indigenous peoples of the CNMI and other Pacific Islanders. Hundreds of years of detrimental colonial impacts are evident in numerous health disparities affecting Indigenous populations.¹⁰⁸ Although the CNMI’s Indigenous population accounts for only 29%, suicide data from 2015–2019 indicate they comprised nearly 60% of

105. Mar-Vic Cagurangan, *Pacific Elders nix Indo-Pacific strategy*, PAC. IS. TIMES (Mar. 11, 2022), <https://www.pacificislandtimes.com/post/pacific-elders-nix-indo-pacific-strategy?fbclid=IwAR2seYDkXsDw9Zfw0Kls8quhRDxm-x0UZIYKCEQSpXIMrklbpxnuDhsisZ0> [https://perma.cc/UZ85-W5HL].

106. COMMONWEALTH OF THE N. MAR. I., 20226 FISCAL YEAR GOVERNOR’S BUDGET PROPOSAL, VOLUME I: GENERAL FUND (Apr. 1, 2025), <https://cnmileg.net/resources/files/FY%202026%20BUDGET/FY%202026%20-%20VOLUME%20I%20-%20GENERAL%20FUND.pdf> [https://perma.cc/Y92T-XWQC].

107. NMC, *500 Sails, NMC, IAO, CCVI to Develop Maritime Training Center*, MARIANAS VARIETY, <https://www.mvariety.com/lifestyle/500-sails-nmc-iao-ccvi-to-develop-maritime-training-center> [https://perma.cc/83L3-DHEW] (last updated Oct. 25, 2021).

108. Bram Wispelwey et al., *Because Its Power Remains Naturalized: Introducing the Settler Colonial Determinants of Health*, 11 FRONTIERS PUBLIC HEALTH 1 (2023).

completed suicides.¹⁰⁹ Studies show that strengthening cultural identity for populations decimated by genocidal colonialism helps build resilience and alleviate mental health issues.¹¹⁰ Other significant health disparities include higher rates of obesity, diabetes, and hypertension that are at least 2-3 times higher than the U.S. national average.¹¹¹ Engaging in traditional practices on the Gani islands could be a vital step forward, promoting physical activity while simultaneously strengthening their cultural identity.¹¹²

3. Incarceration

The redevelopment and resettlement of the Gani Islands could also address incarceration rate disparities among the CNMI's Indigenous peoples. Despite comprising only approximately 29% of the CNMI's combined Indigenous population, they disproportionately make up the majority of incarcerated individuals.¹¹³ Criminal justice reform, facilitated by Indigenous rights-based environmental personhood legislation, could offer incarcerated individuals reduced sentences and rehabilitation by working on the redevelopment of the Gani Islands, rather than engaging in penal labor on Saipan.¹¹⁴ Environmental personhood could enable incarcerated individuals to learn traditional methods of sustainably living off the land and ocean. Prisoners could contribute to the redevelopment of the Gani Islands not only to reduce their sentences but also to gain essential skills through an Indigenous-based curriculum, such as farming, fishing, and construction. This initiative could provide the most vulnerable and challenged Indigenous peoples access to what is seen as key to healthy outcomes: a strong cultural identity.¹¹⁵ The added benefits of learning farming and construction trades would enhance incarcerated individuals' skill sets for successful reintegration into civilian society. Reconnecting with the historic islands of their ancestors and learning to live self-sufficiently in a harmonious community would provide one of the most vulnerable populations with a solid

109. Junhan B. Todino, *Community Guidance Center shares data on suicides*, MARIANAS VARIETY, <https://mvariety.com/news/local/community-guidance-center-sharesdata-on-suicides> [https://perma.cc/L5NK-A4DW] (last updated Sep. 8, 2020).

110. Lisa Wexler, *The Importance of Identity, History, and Culture in the Wellbeing of Indigenous Youth*, 2 J. HIST. CHILDHOOD & YOUTH 267, 267-76 (2009).

111. Rica Dela Cruz & Haley Cash, *Commonwealth of the Northern Mariana Islands: Non-Communicable Diseases & Risk Factor Hybrid Surveillance*, PAC. IS. HEALTH OFFICERS ASS'N (2016), <https://microdata.pacificdata.org/index.php/catalog/280/related-materials> [https://perma.cc/23UF-RUBH].

112. Beylul Solomon & William J. Fife III, *Indigenous Rights: A Vehicle to Address Mental Health and Academic Outcomes in the CNMI*, in *LEARNING AND RECONCILIATION THROUGH INDIGENOUS EDUCATION IN OCEANIA* 17 (Perry Jason Camacho Pangelinan & Troy McVey eds., 2021).

113. FY22 CNMI RACIAL ETHNICS DISPARITIES PLAN, N. MAR. I. CRIM. JUST. PLAN. AGENCY (2022), <https://cjpa.cnmi.gov/assets/docs/ojjdp/fy22-cnmi-red-plan.pdf> [https://perma.cc/4PZT-ZZBV].

114. 57 N. MAR. I. ADMIN. CODE §§ 57-20.1-1801, 57-20.1-1805 (2021).

115. Wexler, *supra* note 110.

foundation for rebuilding their lives.

IV. CONCLUSION

Decolonization is a unique process for Indigenous peoples who have experienced varying degrees of genocide and land theft. Although the CNMI technically exercised self-determination through integration into the United States under the federal law known as the Covenant, decolonization, catalyzed by environmental personhood legislation, can continue to drive Indigenous revival. Even independent countries are *still* undergoing decolonization. Islands that were ancestral homelands are fertile grounds for an Indigenous renaissance that would honor limited lands instead of causing potentially irreversible environmental damage from weapons testing or mineral extraction.

Essential to environmental personhood is the spiritual relationship to nature, and none is greater than the sacred fig tree. This tree not only connects Chamorros to their ancient cultural roots in *time* (across millennia), but also geographically in *space* (given its sanctity throughout Asia and Africa). Capitalizing on Indigenous peoples' desire to resettle their homelands in a way that will keep their unique black sand beaches and natural beauty unspoiled, designating Pagan and perhaps other Gani Islands with environmental personhood is an option worth considering for the CNMI government. The universal centrality of *Taotaomo'na* and *the Tronkon Nunu* as the spiritual embodiment in nature is unsurpassed in Chamorro culture and presents a powerful symbol for an Indigenous renaissance in the Marianas. If the Indigenous peoples of the CNMI are interested, environmental personhood could work to protect their cultural survival, just as it has in Aotearoa (N.Z.),¹¹⁶ thereby creating a legally numinous resurrection of *Taotaomo'na*.

116. Tess McClure, *New Zealand Maori party launches petition to change country's name to Aotearoa*, GUARDIAN (Sep. 13, 2021, at 21:46 EDT), <https://www.theguardian.com/world/2021/sep/14/new-zealand-maori-party-launches-petition-to-change-countrys-name-to-aotearoa> [https://perma.cc/6FGX-T6DH].

RETHINKING SUPRACONSTITUTIONALITY: AN EXPLORATION OF THE DOCTRINE OF UNCONSTITUTIONAL AMENDMENTS IN FRANCE, THE US, AND THE UK

NIKOS GKEKAS*

ABSTRACT

Although the doctrine of unamendable constitutional amendments has become a global trend, applied in more than half of the world's constitutions, in the three countries constituting the proponents of modern constitutionalism—the US, France, and the UK—it is almost absent. Specifically, besides the explicit minimal substantive limits on formal amendments in the French and US constitutions, judges have refused to extend this unamendability to additional fundamental principles, whereas the UK's Parliamentary Sovereignty excludes any concept of unamendable principles. The aim of this paper is to demonstrate that even if positive law expressly rejects any idea of implied unamendability, there is a “hidden” unamendability identifiable in the recognition of a hierarchy between constitutional principles. To analyze this doctrinal concept, we will refer to the German and French doctrinal concept of *supraconstitutionality*, which supports that some constitutional rights are placed even above the constitution because they derive from natural law and, for this reason, must be perceived as unbreachable. Hence, in this context, the first part of the study will address the official positive law position of rejection (I), whereas the second part will focus on the existence of concepts of constitutional hierarchy and identity to argue that they can be potentially developed in a real doctrine of unconstitutional constitutional amendments (II).

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INTRODUCTION

Constitutional amendment clauses can be characterized as the “most important part of a Constitution.”¹ In fact, we can affirm this statement if we take into consideration that a constitution and the rules of its amendments are like a “lock and key,” meaning that “one can hardly work without the other.”² But why is a process of “defin[ing] the conditions under which all other constitutional norms may be legally displaced,” as Akhil Amar defines amendment, considered so important?³ The answer can be found in the fundamental constitutional functions served by formal amendment provisions, such as the expression of values defining a Nation, the offering of a roadmap for constitutional alterations, and the recognition of a distinction between ordinary and constitutional law.⁴ For this reason, in the context of constitutional design on a global scale, 96 percent of constitutions provide special procedures for altering their text.⁵

However, despite the importance of amendment procedures in defining a constitution, public law studies have traditionally failed to focus on the analysis of this phenomenon. Constitutional law is primarily concentrated on the study of the relations between public institutions as an application of the separation of powers principle, to the methods of judicial interpretation when Courts review statutes, and on the strengthening of the legislative branch.⁶ Nevertheless, this trend has begun to change in recent years. Specifically, we can observe a paradigm shift in constitutional law studies.⁷

This shift towards detailed research on constitutional amendment was driven primarily by a comparative methodology that does not focus solely on amendment formulas or constitutional rigidity. Rather, it has given attention to a relatively new element of amendments: the substantive limits on constitutional alterations, namely, the unamendable clauses. When we use the adjective “new,” we do not mean to imply that unamendable clauses could not be found in some of the oldest constitutions globally. For instance, Article V of the United States

1. RICHARD ALBERT, *CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS* 1 (2019).

2. *Id.* at 1.

3. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 461 (1994).

4. Richard Albert & Bertil Emrah Oder, *The Forms of Unamendability*, in 68 AN UNAMENDABLE CONSTITUTION? 1, 1 (Richard Albert & Bertil Oder eds., 2018).

5. See ALBERT, *supra* note 1, at 2.

6. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73-104 (1980)

(arguing that constitutional law should focus on the role of the judicial branch); see also Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) (defending the focalization of constitutional law on the legislative branch).

7. Xenophon Contiades & Alkmene Fotiadou, *The Emergence of Comparative Constitutional Amendment as a New Discipline?*, in *THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT* 369, 369 (Richard Albert, Xenophon Contiades & Alkmene Fotiadou eds., 2017).

Constitution contained two amendment prohibitions: the abolition of the slave trade until 1808 and the abolition of the Senate.⁸ The pivotal point here is that there is a strong evolutionary global tendency toward the insertion of formal unamendment clauses in constitutions. Hence, even though formal unamendability was a very rare phenomenon in the modern era of constitutionalism, with only 20 percent of all constitutions from 1789 to 1944 providing a mechanism for formal unamendability, today the rate is 50 percent, and is constantly increasing.⁹

It is important to pinpoint here that there is a huge variety regarding the content of this common feature of codified constitutions. Constitutional designers use this means to protect their system of government, as seen in France¹⁰ or Italy¹¹ where the amendment of the republican form of government is prohibited; the state's political structure, as in the case of the German Basic Law's federalism principal;¹² a fundamental ideology like socialism in Cuba;¹³ fundamental rights and liberties; principles of national integrity; or even the respect of international law norms, as in the case of Switzerland.¹⁴

These examples demonstrate the existence of explicit unamendability principles in some of the world's constitutions. Nevertheless, it is essential to emphasize that this method is not the only one for protecting certain fundamental constitutional principles from amendment entrenchment. In some countries, constitutional judges, by taking the initiative, have declared constitutional amendments unconstitutional by adopting an expansive interpretation of their own powers and of the Constitution as a fundamental norm with a specific spirit that transcends mere textual limitations.¹⁵ This practice is often qualified by the doctrine as *implicit*,¹⁶ *informal*,¹⁷ or *interpretive unamendability*.¹⁸ The most famous example is manifested in India's *basic structure doctrine*.¹⁹ This doctrine has been constructed by the Supreme Court of India in a series of cases dating from the early 60s to 1981.²⁰

8. See U.S. CONST. art. V.

9. YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 22 (2017).

10. 1958 CONST. art. 89 (Fr.).

11. Costituzione Italiana [Constitution of the Italian Republic], Art. 139 (It.).

12. Grundgesetz [GG] [Basic Law], Art. 79, ¶ 3 (Ger.), translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

13. CONSTITUCION DE LA REPUBLICA DE CUBA [CONSTITUTION] Feb. 24, 1976, art. 3.

14. BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 193, ¶ 4 (Switz.).

15. See Saikrishna Bangalore Prakash, *Spirit*, 173 U. PA. L. REV. 937, 996 (2025).

16. ROZNAI, *supra* note 9, at 39.

17. Albert & Oder, *supra* note 4, at 9-10.

18. ALBERT, *supra* note 1, at 149.

19. See SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE 1 (2009).

20. See Manoj Mate, *Two Paths of Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective*, 12 SAN DIEGO INT'L L.J. 175, 179-88 (2010); see also Gary Jeffery Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4(3) INT'L. J. CONST. L. 460, 470-76 (2006).

Specifically, the Constitution provided an unlimited power of formal amendment, with all its limits of a procedural nature, as the default amendment procedure required the consent of each of the two houses of Parliament, expressed by at least two-thirds of the voting members.²¹

The Court resolved the textual ambiguity regarding the existence of substantive limits on the amendment power, especially when the amendment concerns fundamental rights, by recognizing a principle of constitutional unamendability.²² In this context, it reversed its prior holding, which stated that the amendment power was unlimited,²³ by holding that a constitutional amendment could not abolish or violate fundamental rights.²⁴ The main case that places this doctrine within the constitutional order of India is the *Kesavananda Bharati Sripadagalvaru v. Kerala* case, which held that the amending power could be exercised only so long as it did not breach certain principles forming the Constitution's basic structure.²⁵ This basic structure is composed of several principles, including constitutional supremacy, federalism, separation of powers, the republican form of government, and others.²⁶ Several years after this case, the two houses of Parliament tried to amend the constitution's amendment provision to add a clause expressly limiting the power of the Court to review amendments.²⁷ In response to this amendment attempt, the Supreme Court in *Minerva Mills Ltd v. Union of India* rejected any limits on judicial control of formal amendments by invoking the basic structure doctrine.²⁸ Hence, the basic structure doctrine, as well as other countries' principles of implied unamendability,²⁹ recognize a specific premise: the affirmation that in a

21. India Const. art. 368.

22. See S.P. Sathe, *India: From Positivism to Structuralism*, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 215, 242-43 (Jeffrey Goldsworthy ed., 2007).

23. Sri Sankari Prasad Singh Deo v. Union of India, 1951 AIR 458; see also Sajjan Singh v. State of Rajasthan, (1965) 1 SCR 933.

24. Golaknath v. State of Punjab, (1967) 2 SCR 762.

25. Kesavanada Bharati v. State of Kerala, AIR 1973 SC 1461.

26. See Subhash Kashyap, *The "Doctrine" versus the Sovereignty of the People*, in SUPREME COURT VERSUS THE CONSTITUTION: A CHALLENGE TO FEDERALISM 103-05 (Pran Chopra ed., 2006); see also Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657, 690-94 (2013).

27. See India Const. art. 368, amended by The Constitution (Forty-second Amendment) Act, 1976.

28. *Minerva Mills Ltd v. Union of India*, (1981) 1 SCR 206 (holding that "if by constitutional amendment, Parliament were granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it, because it would have power to alter the entire Constitution including its basic structure and even to put an end to it by totally changing its identity").

29. See *Premier of Kwazulu-Natal v. President of the Republic of S. Afr.*, 1996 (1) SA 769 (CC) at 22 ¶ 47 (S. Afr.) ("There is a procedure which is prescribed for amendments to the Constitution and this procedure has to be followed. If that is properly done, the amendment is constitutionally unassailable. It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and reorganizing the fundamental premises of the Constitution, might not qualify as an 'amendment' at all.").

Constitution, all constitutional provisions are not hierarchically the same. There are provisions considered superior to others, constituting a constitutional “basic structure” which are, for this reason, unamendable.

This affirmation can be applied in some constitutions by means other than constitutional judicial review. Strict procedural rigidity can also be used to protect the most fundamental elements of the Constitution. Richard Albert qualifies this type of amendment design as *constructive unamendability* and defines a constitutional rule as constructively unamendable when “the codified thresholds required to amend it are so onerous that reformers cannot satisfy this standard.”³⁰ As an illustration, the Constitution of South Africa codifies three different amendment procedures depending on the constitutional rules constituting the object of amendment.³¹ The most exigent procedure concerns the amendment of the constitution’s declaration of values and its amendment rules, requiring a vote of three-quarters of the members of South Africa’s National Assembly and two-thirds of its National Council of Provinces.³² Another example can be found in the Equal Suffrage Clause of the US Constitution. Although a formal amendment procedure ordinarily requires Congress or the states to propose an amendment rule by a two-thirds vote and to ratify it, respectively, by a three-quarters majority vote, an ordinary amendment diminishing a State’s representation in the Senate requires the State’s consent.³³ This clause is qualified by a very important part of the doctrine as practically unamendable³⁴ and illustrates that the will of the American founding fathers was to make federalism the most fundamental principle of the US constitutional DNA.

In general, all these types of constitutional unamendability constitute a means for illustrating the DNA of the Constitutions and the spirit of the people who adopted them. Nevertheless, the objective of this article does not consist of a general analysis of this phenomenon or the creation of a general doctrine of unconstitutional constitutional amendments, which already exists if we take into consideration the intellectual work of several current scholars like Richard

30. ALBERT, *supra* note 1, at 158.

31. S. AFR. CONST., 1996, ch. 4, § 74.

32. *Id.* (“Section 1 and this subsection may be amended only by a Bill passed by – (a) the National Assembly, with a supporting vote of at least 75 per cent of its members; and (b) the National Council of Provinces, with a supporting vote of at least six provinces”).

33. U.S. CONST. art V (“[N]o State, without its consent, shall be deprived of its equal Suffrage in the Senate”).

34. Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 697 (2011).

Albert³⁵ or Yaniv Roznai.³⁶ The purpose of this study is to examine the issue of unamendable constitutional principles in three specific countries: France, the U.S., and the UK. These countries have been chosen for two specific reasons. Firstly, they constitute the historical and intellectual basis of modern constitutionalism. The most prominent modern political theorists, like Rousseau,³⁷ John Locke,³⁸ Montesquieu,³⁹ and Tocqueville,⁴⁰ were constantly writing about this founding era of constitutionalism, and their contributions significantly influenced the formation and functioning of liberal Constitutions, even today.

However, this is not the only reason for the present study's focus on these Constitutions. The main reason lies in a hidden contradiction regarding constitutional amendments. Although the practical and intellectual origins of the doctrine of constitutional amendments are found in these constitutional orders, especially the French and the American ones, judges nowadays refuse to recognize any substantive limits to the amendment power.⁴¹ In the UK, the absence of a formal constitution, as well as the fundamental principle of Parliamentary sovereignty, attributes an absolute amendment power to Parliament.⁴² Our analysis of this contradiction between the historical creation of these constitutions and their current practice will be made under the European methodology of unconstitutional amendments, which is based on the *doctrine of supra-constitutionality*.⁴³ This doctrine, originating from the French and German constitutional theory, supports the idea that the fundamental character of some constitutional principles makes them unamendable.⁴⁴ Thus, our purpose is to surpass or reinterpret the official positions of Courts to argue for a *hidden*

35. Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1029, 1034-45 (2014); Richard Albert, *The World's Most Difficult Constitution to Amend?*, 110 CAL. L. REV. 2005, 2005-22 (2022); Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT. L. 1, 1-84 (2018).

36. ROZNAI, *supra* note 9, at 1; Yaniv Roznai, *We the Limited People? On the People as a Constitutional Organ in Constitutional Amendments*, 110 SUP. CT. L. REV. 103, 103-31 (2023); Yaniv Roznai, *Unconstitutional Constitutional Change by Courts*, 51 NEW ENG. L. REV. 555, 555-77 (2018); Yaniv Roznai, *The Boundaries of Constituent Authority*, 52 CONN. L. REV. 1381, 1382-408 (2021).

37. See JEAN-JACQUES ROUSSEAU, PROJET DE LA CONSTITUTION DE LA CORSE (1765).

38. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (1690).

39. See CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS (1748) (Thomas Nugent trans., 1752).

40. See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 1 (Henry Reeve, trans., 1835).

41. Jacobsohn, *supra* note 20, at 461; see also Richard Albert, Malkhaz Nakashidze & Tarik Olcay, *The Formalist Resistance to Unconstitutional Constitutional Amendments*, 70 HASTINGS L.J. 639, 661 (2019).

42. John W.F. Allison, *The Westminster Parliament's Formal Sovereignty in Britain and Europe from a Historical Perspective*, 34 J. CONST. HISTORY 57, 60-64 (2018).

43. See Serge Arné, *Existe-t-il des normes supra-constitutionnelles?*, 2 REVUE DU DROIT PUB., 460, 461 (1993).

44. *Id.*

or implied supra-constitutionality in these Constitutions, based on the existence of a clear *hierarchy* among constitutional norms.

Nevertheless, to make this idea of hierarchy clear, it is essential to define the notion of supra-constitutionality. In principle, the term supra-constitutionality includes a set of principles that are placed above the domestic constitutional order either because they derive from natural law or because they are considered as supranational law.⁴⁵ The present article rejects the idea of international standards susceptible to constrain a Constitution, and for this reason, the examination of supra-constitutional limits on amendment powers will be focused only on what Louis Favoreau calls “*internal supra-constitutionality*,” meaning the constitutional principles with which the amendment power must comply.⁴⁶ The superior legal value of these principles can be justified by two elements: moral considerations, as well as a fundamental distinction of nature between constituent power and amendment power.⁴⁷

Regarding the first element, natural law is a fundamental contextual basis for the above-mentioned constitutional hierarchy since it focuses primarily on the content of norms rather than their procedural or formal implications.⁴⁸ In this sense, we can refer to the substantive approaches of morally unconstitutional amendments of several current scholars, like Landau or Murphy. These scholars suggest that amendments that touch on fundamental democratic norms should be declared unconstitutional, as they violate the values of constitutionalism.⁴⁹ However, these ideas are not new. The major modern theorists of sovereignty, like Jean Bodin and Sieyès, used to admit that, regardless of the person holding the sovereign authority, be it the King or the Nation, they are limited by the principles of Natural Law.⁵⁰

The second foundational element concerns the nature of constitutional amendment powers. This question is the consequence of a distinction between constituent and constituted powers, which derives from the French and North American constitutionalism.⁵¹ We can define the constituent power (*pouvoir*

45. See Yaniv Roznai, *The Theory and Practice of “Supra-Constitutional” Limits on Constitutional Amendments*, 62 INT’L COMP. L. Q. 557, 558-59 (2013).

46. Louis Favoreu, *Souveraineté et supraconstitutionnalité* [Sovereignty and supraconstitutionality], 67 POUVOIRS 71, 74-76 (1993) (Fr.).

47. See Aharon Barak, *The Constituent Power and Its Limits*, in REDEFINING COMPARATIVE CONSTITUTIONAL LAW: ESSAYS FOR MARK TUSHNET, 160, 160-73 (2024); Raffael N. Fasel, *Natural Rights, Constituent Power, and the Stain of Constitutionalism*, 87 MOD. L. REV., 864, 866-67 (2024).

48. See ROSCOE POUND, JURISPRUDENCE, 499 (1959); see also Roznai, *The Boundaries of Constituent Authority*, *supra* note 36, at 1392.

49. Walter F. Murphy, *Staggering Toward the New Jerusalem of Constitutional Theory: A Response to Ralph F. Gaebler*, 37 AM. J. JURIS. 337, 350-53 (1992); see also Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT’L J. CONST. L. 606 (2015).

50. JEAN BODIN, ON SOVEREIGNTY 10 (Julian H. Franklin trans., 2004); EMMANUEL SIEYÈS, *What Is The Third Estate?*, in POLITICAL WRITINGS 92, 136 (Michael Sonenscher trans., 2003).

51. See Andreas Kalyvas, ‘*Constituent Power*’, in POLITICAL CONCEPTS: A CRITICAL LEXICON 107 (J.M. Bernstein, Adi Ophir, & Ann Laura Stoler eds., 2018).

constituant) as the power of establishing a new constitutional order in the context of a Nation.⁵² The present concept comes from the intellectual political context of the 18th century, specifically from a pre-Revolution brochure written by Abbé Emmanuel Sieyès called *Qu'est-ce que les Tiers État?* (What is the Third Estate?).⁵³ Regarding the hierarchical relationship between the *pouvoir constituant* and the constituted power (*pouvoir constitué*), the national sovereignty theorist claims that “In each of its parts a constitution is not the work of a constituted power but a constituent power. No type of delegated power can modify the conditions of its delegation.”⁵⁴ That means that the extraordinary power to draft a constitution *ex nihilo* is absolute and unlimited because it is the direct expression of the Nation’s societal and institutional organization.⁵⁵ On the contrary, the power to modify a constitution is a limited power functioning according to the norms of positive law determined by the Nation.⁵⁶

The above-mentioned distinction was generalized into a veritable constitutional theory by Carl Schmitt. In his *Constitutional Theory*, a constitution is valid because it is the product of the will of a constitution-making authority, and this *will* is reflected in the adoption of a concrete decision determining the form of its own political existence.⁵⁷ This assumption constitutes the basis of his distinction between constitution-making power and constituted power.⁵⁸ In fact, the above-mentioned will, derived from the constitution-making power, has to be preserved in any case by constitutional amendments.⁵⁹ For this reason, even if there’s no express unamendable provision in the Constitution, an amendment process cannot change its essence because that would constitute an abrogation of the Constitution.⁶⁰ Constituted powers should always respect a specific constitutional identity and continuity.⁶¹

The most famous illustration of Schmitt’s constitutional theory in positive law is the German Basic Law. The oxymoron here is the fact that post-war Germany’s constitutional approach is based on the constitutional theory of the most prominent Nazi jurist.⁶² In fact, the Basic Law determines the unamendable

52. Fasel, *supra* note 47, at 864-65.

53. SIEYÈS, *supra* note 50.

54. *Id.* at 136.

55. *Id.*

56. See Raffael N. Fasel, *Constraining Constituent Conventions: Emmanuel Joseph Sieyès and the Limits of Pouvoir Constituant*, 20 ICON 1103, 1108 (2022).

57. CARL SCHMITT, CONSTITUTIONAL THEORY 125 (Jeffrey Seitzer trans., 2008); see also Renato Cristi, *Schmitt on Constituent Power and the Monarchical Principle*, 18 CONSTELLATIONS 352 (2011).

58. SCHMITT, *supra* note 57, at 127.

59. See Fasel, *Constraining Constituent Conventions: Emmanuel Joseph Sieyès and the Limits of Pouvoir Constituant*, *supra* note 56, at 1107-08.

60. SCHMITT, *supra* note 57, at 76.

61. *Id.* at 125-30; see also Monica Polzin, *Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power*, INT’L J. CONST. L. 411, 433-38 (2016).

62. Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, *supra* note 26, at 676.

principles within the German constitutional order.⁶³ The eternity clause (*Ewigkeitsklausel*) found in Article 79 paragraph 3 prevents any amendment of two fundamental constitutional canons, aiming to protect the Republic from slipping back into a dictatorship and to avoid the institutional mistakes of the Weimar experience.⁶⁴ Specifically, the above-mentioned provision prohibits “amendments to this Basic Law affecting the division of the Federation into Länder, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20.”⁶⁵

Article 20 of the Basic Law provides some fundamental guarantees of the Rule of Law, such as separation of powers, the principle of legality, and legislation subject to the constitutional order,⁶⁶ whereas the first article of Germany’s foundational text protects the constitutional value of human dignity.⁶⁷ It is important here to underline that the German eternity clause reflects the two foundational elements of the doctrine of *supra-constitutionality*.⁶⁸ Indeed, its existence confirms the supremacy of the constituent power by protecting its will.⁶⁹ For this reason, the last article of the foundational text, although it predicts its own destruction, does not preclude any specific procedures for this.⁷⁰ Concerning the natural law element, it can be found in the protection of the human dignity principle as a higher natural law codified in the Constitution, as explained by Otto Bachof.⁷¹ This natural law approach can be explained not only by the Karlsruhe Court’s extensively constructive interpretation, placing human dignity at the core of Germany’s

63. See Richard Albert, *Does Unamendability Even Matter?*, in *THE VIEW FROM THE OUTSIDE: INTERNATIONAL PERSPECTIVES ON THE GERMAN FEDERAL CONSTITUTIONAL COURT* 8 (Mohr Siebeck, 2026).

64. See Matthias J. Herdegen, *Unjust Laws, Human Rights, and the German Constitution: Germany’s Recent Confrontation with the Past*, 32 COLUM. J. TRANSNAT’L L. 591 (1995).

65. Grundgesetz [GG] [Basic Law], Art. 79, ¶ 3 (Ger.), translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

66. *Id.* Art. 20 (“The Federal Republic of Germany is a democratic and social federal state. All state authority emanates from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies. The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice. All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.”).

67. *Id.* Art. 1 (“Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. The following basic rights shall bind the legislature, the executive and the judiciary as applicable law.”).

68. See Roznai, *The Theory and Practice of “Supra-Constitutional” Limits on Constitutional Amendments*, *supra* note 45, at 563.

69. See Ulrich K. Preuss, *The Implications of “Eternity Clauses”: The German Experience*, 44 ISR. L. REV. 429, 440 (2011); Helmut Goerlich, *Concept of Special Protection for Certain Elements and Principles of the Constitution Against Amendments and Article 79(3), Basic Law of Germany*, 1 NUJS L. REV. 397, 401 (2008).

70. Grundgesetz [GG] [Basic Law], Art. 146; *see also* ROZNAI, *supra* note 9, at 128-29.

71. OTTO BACHOF, *VERFASSUNGSWIDRIGE VERFASSUNGSNORMEN?* 29-57 (1951) (Ger.).

constitutional value system,⁷² but also by several *obiter dicta* of the Federal Constitutional Court referring to general natural law principles that are presupposed as unamendable by every Constitution.⁷³

France and the United States each have their own eternity clauses. Article V of the U.S. Constitution originally forbade the abolition of the African slave trade till 1808 and continues to absolutely prohibit the deprivation of the states' equal representation in the Senate without their consent,⁷⁴ while article 89 of the French Constitution prohibits only an amendment of the Republican form of Government,⁷⁵ a specific provision that exists in numerous Constitutions worldwide, including the Italian Constitution. These clauses, however, cannot be compared to the German eternity clause. They have been interpreted very narrowly and have never been the subject of a political or legal debate. Nevertheless, all issues arising from the doctrine of unconstitutional amendments focus on the existence of an implied unamendability theory derived from the two above-mentioned axes of supra-constitutionality. It is essential, though, to examine their hidden premises of *Supra-constitutionality* as well as the potential for a conceptual upraising of this doctrine in the UK, a place considered almost impossible to recognize any limits on the amendment power. In this context, the first part of this study will examine the official constitutional position of these countries, which rejects any theory of material restrictions on the amendment power, while the second part aims to find the conceptual roots capable of establishing a new model that ensures the constitutional identity of these constitutions.

I. A CONTRADICTIONARY REJECTION OF THE SUPRA-CONSTITUTIONALITY DOCTRINE

Even though most unamendable provisions have entered the *modus operandi* of constitutional design after World War II,⁷⁶ this concept finds its origins in another era: the era of modern constitutionalism,⁷⁷ specifically in the American and French constitutional approaches deriving from the two

72. See, e.g., BVerfGE, 1 BvL 19/63, July 16, 1969; BVerfG, 1 BvL 14/76, June 21, 1977, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1977/06/ls19770621_1bvl001476en.html [<https://perma.cc/T66B-DDC8>]; BVerfG, 1 BvF 6/74, Feb. 25, 1975, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1975/02/fs19750225_1bvf000174en.html [<https://perma.cc/8JE6-TAYM>].

73. See, e.g., 1 BverfGE 14, 32 (1951); see also BVerfG, 1 BvL 106/53, Dec. 18, 1953, <https://openjur.de/u/365619.html> [<https://perma.cc/ZC35-Z2N2>].

74. U.S. CONST. art. V.

75. 1958 CONST. art. 89, ¶ 5 (Fr.) (“The republican form of government shall not be the object of any amendment.”).

76. See Adam Chilton & Mila Versteeg, *Do Constitutional Unamendability Rules Make a Difference?*, PUB. CHOICE (2025).

77. Claude Klein, *A Propos Constituent Power: Some General Views in a Modern Context*, in NATIONAL CONSTITUTIONS IN THE ERA OF INTEGRATION 31, 31 (A Jyräki ed., 1999).

Revolutions.⁷⁸ We can see the oxymoron in our hypothesis here if we compare the conceptual position of this era with the current context of positive law, which clearly does not support any idea of implied unamendability or of hierarchy within the Constitution.

A. The Origins of Substantive Limits on Constitutional Amendments

Ideas of unamendability are as old as the concept of the Constitution broadly conceived. It was in 1669 when John Locke wrote the “Fundamental Constitution of the Colony of Carolina,” which contained a general amendment prohibition applying to the whole document by stipulating that it “shall be and remain the sacred and unalterable form and rule of the government of Carolina forever.”⁷⁹ It is obvious that such “delusions” about “eternal” Constitutions do not exist anymore.⁸⁰ In fact, these mechanisms can frame the amendment power, but they cannot impose limitations on the primary constituent power, which is an absolute and unlimited power in the hands of the people. Nevertheless, eternity clauses allow the constitution-making powers to preserve the Constitution’s essence, the Nation’s identity, or some global human rights that are situated even *above* the Constitution.⁸¹

Thus, since constitutional codification has an American origin, the amendment theory and its facets, procedural or substantive, occupy an important place in modern American political thought. Indeed, America’s first constitution, the Articles of Confederation, approved by the Continental Congress in 1777, just a year after the Declaration of Independence, did not omit to provide for an eternity. Article XIII provided that:

And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.⁸²

The three critical features of this provision were inviolability, unanimity, and perpetuity of a strong union of states.⁸³ Despite the potential contradiction between perpetuity and amendments, we can admit that conciliation is possible as long as the modifications respect the procedural rule of unanimity and that

78. Stephen M. Griffin, *Constituent Power and Constitutional Change in American Constitutionalism*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* 49, 50, 65-66 (Martin Loughlin & Neil Walker eds., 2007).

79. JOHN LOCKE, *THE FUNDAMENTAL CONSTITUTIONS OF CAROLINA* 25 (1670); JOHN LOCKE, *THE WORKS OF JOHN LOCKE* 198 (1823).

80. ROZNAI, *supra* note 9, at 16-17.

81. *Id.*

82. ARTICLES OF CONFEDERATION of 1781, art. XIII, ¶ 1.

83. ALBERT, *supra* note 1, at 13.

the Union is preserved. In addition to the Articles of Confederation, the same tendency could be found in some state constitutions. Specifically, according to the 1776 Constitution of New Jersey, the members of the two Houses could not “annul or repeal” the election provisions, the state’s establishment clause, or the right to a jury in a trial.⁸⁴ Whereas, the 1776 Delaware Constitution prohibited amendments to the declaration of rights, the state’s name, the bicameral legislature, the ban on slave importation, and the establishment of any one religious sect.⁸⁵

Hence, given these precedents, it is not absurd that, in the U.S. Constitutional Convention of 1789 and the 1789-1791 Constitutional Assembly, providing for amendment rules was highly contentious.⁸⁶ Most concerns were raised about the danger that amendments could provoke political instability or jeopardize the document’s acceptance by the people.⁸⁷ Especially in France, there was the conception that amendments could never infringe on the people’s thought, which, according to Madison, is the “only... fountain of power.”⁸⁸ This approach guided constitutional decision-making in these two countries, which, although they accepted amendments as a means to deal with possible future imperfections, provided us with the first traces of unamendability elements.⁸⁹

As an illustration, the above-mentioned Article V of the U.S. Constitution originally forbade the abolition of the African slave trade prior to 1808 and, without time limits, the deprivation of states’ equal representation in the Senate.⁹⁰ It is not wrong if we claim that this Article makes federalism, through the equal representation clause, the most fundamental principle of American constitutional law. It is a compromise that protects the smaller states from being controlled and overruled by larger states. The same practice can be found in France’s first constitution. The 1791 Constitution’s Preamble stated that the National Assembly “abolishes irrevocably the institutions which were injurious to liberty and equality of rights,”⁹¹ whereas Title VII, section 7, stated that the members of the Assembly of Revision take an oath to maintain the perpetuity

84. N.J. CONST. of 1776, art. XXIII.

85. DEL. CONST. of 1776, art. XXX; see also MARC W. KRUMAN, BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA 56 (1999).

86. Mark Tushnet, *Amendment Theory and Constituent Power*, in COMPARATIVE CONSTITUTIONAL THEORY 317 (Gary Jacobsohn & Miguel Schor eds., 2018).

87. Manfred Stelzer, *Constitutional Design Through Amendment*, in ROUTLEDGE HANDBOOK OF COMPARATIVE CONSTITUTIONAL CHANGE 136, 141 (Xenophon Contiades & Alkmene Fotiadou eds., 2020).

88. THE FEDERALIST NO. 49 (James Madison).

89. Roznai, *The Theory and Practice of “Supra-Constitutional” Limits on Constitutional Amendments*, *supra* note 45, at 662-64.

90. U.S. CONST. art. V (“Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”).

91. 1791 CONST. pmbl. (Fr.).

of the Constitution.⁹² This idea of perpetuity gave birth to the first and only French “eternity clause,” which is still alive nowadays. In fact, the genesis of the Third Republic in 1875 marked the complete end of any monarchic comeback, and that fact was reflected in article 8(3) of the constitutional law of 1875, a provision inserted by the amendment of 1884, which stated that “the Republican form of government cannot be made the subject of proposition of revision.”⁹³ Since then, this clause is found in all future French Constitutions, as article 95 of the Fourth Republic’s Constitution of 1946⁹⁴ and article 89 of the Fifth (and current) Republic’s Constitution demonstrate.⁹⁵

It is important to notice here that if we examine the constitutional history of the two above-mentioned countries, we can easily observe that these two eternity clauses have not led to any particular litigation. The entire unamendability debate does not revolve around France’s “republican form” limitation or America’s “equal suffrage” clause. Instead, it is concentrated in several doctrines of implied constitutional unamendability, encompassing a wide variety of provisions, ranging from individual rights to government sovereignty.⁹⁶ This issue is not new, as we will see it dates back to the 19th century. Nevertheless, does advocating for the existence of hidden eternity principles contradict the inclusion of formal unamendability clauses in the constitutions?

The Framers of the French and American Constitutions had expressly determined which principles should be considered unamendable.⁹⁷ Does this violate the maxim *expressio unius est exclusio alterius*, meaning that the explicit intent of the constituent power to limit amendment power by eternity clauses excludes the existence of an implicit unamendability for principles other than those cited in the above-mentioned clauses?⁹⁸ The answer cannot be positive if we take a comparative look. In Italy, for instance, although the Constitution of 1947 has provided the same unamendable clause as France regarding the Republican form of Government (article 139),⁹⁹ the Constitutional Court has

92. *Id.* tit. VII, art. 7.

93. 1875 CONST. art. 8, ¶ 3 (in its version after the amendment made by Article 2 of the constitutional law of 14 august 1884) (Fr.).

94. 1946 CONST. art. 95 (Fr.).

95. 1958 CONST. art. 89 (Fr.); see also Claude Klein, *On the Eternal Constitution: Contrasting Kelsen and Schmitt*, in HANS Kelsen AND CARL SCHMITT: A JUXTAPOSITION 61 (Dan Diner & Michael Stolleis eds., 1999).

96. Claude Klein, *Le contrôle des lois constitutionnelles – Introduction à une problématique moderne* [The control of constitutional laws – Introduction to a modern problem], CONSEIL CONSTITUTIONNEL (Jan. 2010), <https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/le-controle-des-lois-constitutionnelles-introduction-a-une-problematique-moderne> [<https://perma.cc/LPM7-ZMUH>].

97. See David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 2-5 (1990); see also Wim J.M. Voermans, *Constitutional Reserves and Covert Constitutions*, 3 INDIAN J. CONST. L. 84, 92-95 (2009).

98. ROZNAI, *supra* note 9, at 150.

99. Costituzione Italiana [Constitution of the Italian Republic], Art. 139 (It.).

accepted that, besides this formal exception, there are other “supreme principles” that cannot be modified in their essential content.¹⁰⁰ Italian Scholars mention that these principles could include the Rule of Law, Democracy, and the protection of human rights.¹⁰¹ That purpose is not without connection with a supra-constitutionality conception because such an argumentation is based on the assumption that supra-constitutional principles do not require a text to be protected because they are above even the Constitution. In this context, it is essential to examine how scholarship developed the doctrine of supra-constitutionality based on implied material limitations on amendments and what the response was from the principal interpreters of the Constitution, the courts.

*B. A Conflict Between the Doctrine and the Courts About
the Structure of the Constitution*

The modern theory of implicit constitutional limits started in the United States in the 19th century.¹⁰² However, its naissance is based on general constitutional theories regarding the nature of the amendment. Specifically, Sieyès’s aforementioned thesis on constituent power (*pouvoir constituant*) was developed into a general theory that forms the basis of unconstitutional amendments.

It is true that the French founding father distinguished the power to create a constitution from the power exercised by the institutions established by the first one,¹⁰³ but this distinction does not answer the question concerning the nature of the amendment power. Is it a constituent or a constituted power? It is important here to add that in France, the terminology has evolved so that the power to adopt a constitution is doctrinally characterized as an original constituent power (*pouvoir constituant originaire*), and the power of amendment as a derived constituent power (*pouvoir constituant dérivé*).¹⁰⁴ As

100. Corte Cost. [Constitutional Court], Dec. 15, 1988, n. 1146 (It.) (stating that the Constitution contains some supreme principles that cannot be “subverted or modified in their essential content . . . Such are principles that the Constitution itself explicitly contemplates as absolute limits to the power of constitutional revision, such as the republican form . . . as well as principles that, although not expressly mentioned among those not subject to the principle of constitutional revision, are part of the supreme values of which the Italian Constitution is based.”); see also Roznai, *The Theory and Practice of “Supra-Constitutional” Limits on Constitutional Amendments*, *supra* note 45, 686-87.

101. See VÍCTOR FERRERES COMELLA, CONSTITUTIONAL COURTS & DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE 107 (2009).

102. Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, *supra* note 26, at 670-71.

103. SIEYÈS, *supra* note 50, at 136.

104. See RAYMOND CARRÉ DE MALBERG, CONTRIBUTION À LA THÉORIE GÉNÉRALE DE L'ÉTAT [Contribution to the General Theory of the State] 489-500 (CNRS ed., 1962) (distinguishing the original constituent power, meaning the power to establish a Constitution, which is exercised under revolutionary circumstances, from the amendment power, which is exercised in a peaceful and legal context); GEORGES BURDEAU, ESSAI D'UNE THÉORIE DE LA RÉVISION DES LOIS

Olivier Beaud, an adherent of Carl Schmitt's constitutional theory, underlines, the qualification of both an absolute and unlimited power exercised directly by the people and of a power limited by the absolute power as "constituent" is very contradictory because they do not have the same nature.¹⁰⁵ If we consider the existence of this hierarchy, the *pouvoir constituant* can only be original. The consequence of this position is the fact that if the amendment power tries to repeal these unamendable provisions, it would exceed the scope of its authority.

These arguments were present in the first American Congress, in which Roger Sherman argued that "the Constitution is an act of the people, and ought to remain entire," whereas the amendments, because they are acts of the State Governments, have a limited scope and they cannot establish a new Constitution.¹⁰⁶ It was not wrong to admit that the Constitution of the U.S. has a "core" containing the dual sovereignty or the Union principles that cannot be changed by any Article V amendment. In this context, the *Discourse on the Constitution and Government of the United States*, written by John Calhoun, supports an implicit unamendability applied to the "nature of our system" or the "character of our constitution."¹⁰⁷ This argument is almost identical to Thomas Cooley's position, the most prominent defender of unconstitutional amendments in the U.S., who claimed that amendments cannot be "revolutionary" but that they must be harmonious with some principles constituting the "body of the instrument."¹⁰⁸

It is important to add here that although these positions were expressed two centuries ago, they remain alive. Indeed, Yaniv Roznai uses the doctrine of

CONSTITUTIONNELLES EN DROIT FRANÇAIS [Essay on a Theory of the Revision of Constitutional Laws in French Law] 78-83 (1930) (distinguishing the constituent power, as a power to adopt a constitution outside the law, from the revision power, as the power to modify the constitutional rules through the legal system); ROGER BONNARD, LES ACTES CONSTITUTIONNELS DE 1940 [Constitutional Acts of 1940] 46, 49 (1942) (supporting that the original constituent power is exercised outside of any constitutional authority, whereas the amendment power is exercised in the context of a Constitution already in force); see Arnaud Le Pillouer, *Pouvoir constituant originaire et pouvoir constituant dérivé : à propos de l'émergence d'une distinction conceptuelle* [Original Constituent Power and Derived Constituent Power: On the Emergence of a Conceptual Distinction], 25 *Revue d'histoire des facultés de droit et de la culture juridique, du monde des juristes et du livre juridique* [J. Hist. L. Facs. & Legal Culture, World Lawyers & Legal Books] 123 (2006) (Fr.); see Roznai, *The Theory and Practice of "Supra-Constitutional" Limits on Constitutional Amendments*, *supra* note 45, at 664-65.

105. OLIVIER BEAUD, *LA PUISSANCE DE L'ETAT* 315 (1994).

106. 1 *ANNALS OF CONG.* 708 (1789) (Joseph Gales ed., 1834).

107. JOHN CALDWELL CALHOUN, *DISQUISITION ON GOVERNMENT: A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES* 300-01 (1851) ("[I]f it transcends the limits of the amending power,--be inconsistent with the character of the Constitution and the ends for which it was established,--or with the nature of the system . . . the State is not bound to acquiesce . . . that a State, as a party to the constitutional compact, has the right to secede . . . if a power should be inserted by the amending power, which would radically change the character of the Constitution, or the nature of the system . . ."); Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, *supra* note 26, at 672.

108. Thomas M. Cooley, *The Power to Amend the Federal Constitution*, 2 *MICH. L. J.* 109, 118-20 (1893).

delegation to argue that the amendment power is a constitutional power delegated to certain constitutional organs by the people, and for this reason, it should act like a “trustee” of the people and respect its authentic will,¹⁰⁹ while Richard Albert also utilizes an idea of delegation when he makes a distinction between amendment and dismemberment. Albert defines the latter as a “fundamental transformation of one or more of the constitution’s core commitments.”¹¹⁰

Nevertheless, even if these positions sound very logical, they must be supported by positive law to be valid. Over the centuries, the U.S. Supreme Court has adopted different approaches regarding this subject. In *Dodge v. Woolsey* (1885), a dictum in the majority opinion accepts the above-mentioned idea of delegation by characterizing the amendment power as delegated and thus limited.¹¹¹ However, this position was not retained for long. The significant shift regarding the idea of substantive amendment in the U.S. Constitution was evident during the adoption of the 18th Amendment, which prohibited alcohol consumption, triggering several arguments before the courts supporting the view that the amendment was void because it conflicted with the Constitution’s “fundamental principles and spirit.”¹¹²

However, the Court was either constantly refusing to answer that argument, or it was adopting a negative position, accepting the constitutionality of this revision. In the *National Prohibition Case* of 1920, the U.S. Supreme Court, without analyzing this argument in detail, decided that the amendment was placed within the scope of the constitutional amendment powers.¹¹³ This position was applied in another 18th Amendment decision, *Dillon v. Gloss*, in which the court went more thoroughly into the details of the issue by holding that, in the context of an amendment’s ratification, the people who are the “original fountain of power” authorize the modification of the Constitution through representative assemblies and that such ratification “shall be taken as a decisive expression of the people’s will and be binding at all.”¹¹⁴ *As we will see, this formulation anticipates, by nearly seven decades, the French Constitutional Council’s approach to the nature of the amendment and its ratification.* .

The former position regarding the 18th Amendment’s ratification was also taken for the adoption of the 19th Amendment. The Supreme Court of the United States held that it had been constitutionally authorized.¹¹⁵ This *status quo*, though, would not last for long. The Court, after examining but also refusing to declare amendments unconstitutional, clearly rejected any willingness to review them by denying its own jurisdiction. Hence, in *Coleman v. Miller*, the majority

109. ROZNAL, *supra* note 9, at 133-34.

110. ALBERT, *supra* note 1, at 84.

111. 59 U.S. (18 How.) 331, 347-48 (1856).

112. See Roznai, *The Theory and Practice of “Supra-Constitutional” Limits on Constitutional Amendments*, *supra* note 45, at 673.

113. *Rhode Island v. Palmer*, 253 U.S. 350, 385 (1920).

114. 256 U.S. 368, 374 (1921).

115. *Leser v. Garnett*, 258 U.S. 130, 136 (1922).

held that the amendment process is a political question not subject to judicial review.¹¹⁶ It is important to add here that this solution, finding its origins in the case *Luther v. Borden* of 1849 in which the Supreme Court refused to answer the complex question of the content of the republican guarantee clause,¹¹⁷ has been extended even to the procedural aspects of amendments, since the U.S. Supreme Court decided in *Baker v. Carr*, the most famous decision for the definition of the political questions doctrine, that even procedural questions about amendments are unsusceptible to being litigated by the courts.¹¹⁸

Coleman v. Miller is the last case in which the U.S. Supreme Court rendered a decision about the issue of unamendable amendments. It is clear that American positive law rejects any idea of substantive limits on the amendment power.¹¹⁹ The issue of the ratification of the 18th Amendment and the prohibition of alcohol consumption is interesting, though, because it also raised some criticisms of supra-constitutionality on a theoretical level. Everett Abbott was claiming at the time of the provision's ratification that the above-mentioned prohibition was unconstitutional because it constituted a violation of the "natural right to pursue happiness."¹²⁰ Nevertheless, the formal position of U.S. law is an express rejection of any supra-constitutionality concerns, not only because the amendment power is an expression of sovereignty since its ratification is done by assemblies representing the sovereign people, but also because it is considered a political question under the "political questions" doctrine.

In France, though, at that time, the idea of unamendable constitutional principles was also widespread and based mostly on considerations of supra-constitutionality. It is not a coincidence that the most famous constitutional law scholars defended very clearly the idea that the amendment power could not be considered as absolute. In this context, Carré de Malberg, a French scholar who criticized very severely the III Republic's Constitution because of its legislative omnipotence and the lack of any amendment rigidity, admired the fact that in the U.S. there was a double separation between the legislative organ and the *pouvoir constituant* expressed by the fact that a constitutional convention could not pass statutes and a legislative organ could not adopt a Constitution.¹²¹ This phenomenon, establishing a foundational difference between constituent power and amendment power by constituted institutions, as the former is considered as

116. 307 U.S. 433, 459 (1939).

117. 48 U.S. 1 (1849).

118. 369 U.S. 186 (1962).

119. *Downs v. City of Birmingham*, 198 So. 231 (1940) (holding that the State Constitution has to conform to the republican form of government condition imposed by the U.S. Constitution); see also Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J. L. SOC. PROBLEMS 251 (1996); Jacobsohn, *supra* note 20, at 480.

120. Everett Abbott, *Inalienable Rights and the Eighteenth Amendment*, 20 COLUM. L. REV. 183 (1920); see also Dudley O. McGovney, *Is The Eighteenth Amendment Void Because of its Contents?*, 20 COLUM. L. REV. 499 (1920).

121. MALBERG, *supra* note 104, at 489-500.

an extra-legal power, was called according to Carre de Malberg, as the "American Difference."¹²² This approach, though, turns more into positivism since the constituent power is treated as excluded from normative considerations, leaving the amendment function, which has a legal nature, to the constituted institutions.

Nevertheless, the most prominent scholar regarding unconstitutional amendments was Maurice Hauriou. The famous institutionalist based his argument not on the classic constituent power/constituted power scheme of Carré de Malberg, but on the doctrine of supra-constitutionality (*supraconstitutionnalité*). Especially, besides the explicit unamendable provision regarding the republican form of government, he accepted an implied unamendability based on the existence of some principles found even above the Constitution.¹²³ It's a matter of "constitutional legitimacy" which is above the "*superlégimité* itself because it consists of principles that are always above the text."¹²⁴ We can see here how this scholar influenced the constitutional theory of Carl Schmitt, which constitutes the main doctrinal reference on supra-constitutionality.

The only problem with this syllogism is the fact that we cannot define or identify these unamendable principles. Which elements constitute the *supraconstitutionnalité* scope? The answer is very ambiguous and uncertain. For instance, Léon Duguit argued in the 1920s that supra-constitutionality applied to the French Declaration of the Rights of Man and of the Citizen of 1789.¹²⁵ This argument is still alive as several scholars, like Stéphane Rials, claim that even today the content of the declaration, and especially its article 16 concerning the separation of powers principle, is above other constitutional laws and cannot be amended.¹²⁶ Nevertheless, all these examples constitute just a doctrinal interpretation.

It is important to notice here that the question of the potential existence of a supra-constitutionality application could not be treated by positive law during the development of this doctrine in the early twenties for a very simple reason; the Constitution of the Third Republic did not provide the existence of a constitutional court having jurisdiction to interpret the Constitution by

122. Serkan Köybası, *Amending the Unamendable: The Case of Article 20 of the German Basic Law*, in AN UNAMENDABLE CONSTITUTION?, *supra* note 4, at 259, 263.

123. MAURICE HAURIOU, PRÉCIS DE DROIT CONSTITUTIONNEL [Summary of Constitutional Law] 297 (1st ed. 1923).

124. MAURICE HAURIOU, PRÉCIS DE DROIT CONSTITUTIONNEL [Summary of Constitutional Law] 269 (2d ed. 1929); See CARL SCHMITT, LEGALITY AND LEGITIMACY 58-60 (Jeffrey Seitzer ed. & trans., 4th ed. 2004); see also Roznai, *The Theory and Practice of "Supra-Constitutional" Limits on Constitutional Amendments*, *supra* note 45, at 674-75.

125. LEON DUGUIT, TRAITE DE DROIT CONSTITUTIONNEL [Treatise on Constitutional Law] 603-07 (3rd ed., 1930).

126. Stéphane Rials, *Supraconstitutionnalité et systématique du droit* [Supraconstitutionality and Systematicity of Law in the Legal System], 31 ARCHIVES DE PHILOSOPHIE DU DROIT [ARCHIVES LEGAL PHIL.] 57 (1986).

controlling statutes,¹²⁷ whereas there was no such thing like a *Marbury v. Madison* ruling giving the above-mentioned power to ordinary judges.¹²⁸ During the Third and Fourth French Republics, the institutional system was dominated by a legislative sovereignty approach (*légitimité*) and, as a consequence, not only could constitutional amendments not be controlled by courts, but even ordinary statutes were untouchable.¹²⁹

This conception was radically changed by the adoption of the Constitution of the 5th Republic, which tried to rationalize the French parliamentary system by constraining the legislative power.¹³⁰ One aspect of that effort was the creation of the Constitutional Council (*Conseil constitutionnel*), whose primary object was to ensure the conformity of statutes to the Constitution by the exercise of judicial review power.¹³¹ This reference regarding the creation of France's first constitutional court is not without any relation to our subject.¹³² In fact, the answer to our question about the position of French positive law regarding supra-constitutionality can be found in the court's detailed jurisprudence.

It is essential to notice here that, although the dominant Public Law position in the first part of the twentieth century was in favor of "constitutional unamendments," the main rulings of the Constitutional Council chose a different path. The first time the question of substantive limits on constitutional amendments came to the forefront was in 1962 during the major constitutional reform brought by de Gaulle regarding the appointment of the President of the Republic (*Président de la République*).¹³³ Initially, the 1958 Constitution stipulated that the head of state should be elected by a college body of 80,000 delegates.¹³⁴ However, de Gaulle sought to introduce a reform that would allow the President's election by universal suffrage. Due to the opposition in Parliament, he couldn't use the formal amendment procedure in Article 89 of the Constitution, which required approval from both houses.¹³⁵ Instead of following the official procedure, he attempted to get the reform approved by "the people" through a referendum based on Article 11 of the Constitution,¹³⁶

127. Raymond Carré de Malberg, *LA LOI, EXPRESSION DE LA VOLONTÉ GÉNÉRALE* 103-05 (1931).

128. 5 U.S. 137 (1803).

129. See Guillaume Tusseau, *La Fin D'une Exception Française? [The End of a French Exception ?]*, 137 *POUVOIRS [POWERS]* 5, 6-10 (2011).

130. See Jean-Félix de Bujadoux, *Des rationalisations du parlementarisme en France*, 71 *DROITS* 173, 193-98 (2020).

131. 1958 CONST. art. 61 (Fr.).

132. See Arthur Dyevre, *The French Constitutional Council: Argumentation Practices*, in *COMPARATIVE CONSTITUTIONAL REASONING* 323 (ed. Andras Jakab, Arthur Dyevre, Giulio Itzcovich ed. 2017).

133. See FERDINAND MÉLIN-SOUCRAMANIEN, *DROIT CONSTITUTIONNEL* 335-337 (2025).

134. 1958 CONST. art. 6 (original version) (Fr.).

135. See *Id.* art. 89, ¶ 2.

136. See David B. Goldey, *The French Referendum and Election of 1962: The National Campaigns*, 11 *POL. STUD.* 287, 288-90 (1963).

which states that the President of the Republic can submit “any Government Bill which deals with the organization of the public authorities” to a referendum.¹³⁷ This practice faced severed criticism from the opposition because, although article 11 refers to the “organization of public authorities,”¹³⁸ it was argued that the referendum act could have the *status* of an ordinary statute and not a constitutional statute, as only article 89 was included in the constitution’s Title XIV concerning “On Amendments to the Constitution.”¹³⁹

When the bill was deferred, however, to the *Conseil constitutionnel*, the constitutional court had a different opinion. The Court denied any jurisdiction to determine whether the bill was constitutional or not because referenda statutes constitute the “direct expression of the national sovereignty.”¹⁴⁰ In this context, this constitutional modification, which completely transformed the nature of the institutional system¹⁴¹ and, for some scholars such as Olivier Beaud, was considered the “true constituent moment” of the 5th Republic,¹⁴² was not constitutionally challenged. Here, the Constitutional Council relied on the fact that the amendment was made through a referendum.¹⁴³ What if this reform had been carried out through the official amendment procedure of Article 89, which provides for the intervention of the Senate and the National Assembly?¹⁴⁴ Could the outcome have been different?

The answer to that question was given in the nineties through the *Maastricht litigation*.¹⁴⁵ Specifically, in 1992, the Constitutional Council was asked to review the Maastricht Treaty through Article 54 of the Constitution concerning the control of conformity of international treaties to the Constitution.¹⁴⁶ The French constitutional judges found that the treaty could only be ratified if the Constitution was amended. This decision, also called *Maastricht I*,¹⁴⁷ triggered a constitutional amendment for the insertion of article 88-3 into the Constitution, which governs the relations of EU law to French law.¹⁴⁸ After this amendment, the Constitutional Council was again called under Article 54 to oversee the

137. 1958 CONST. art. 11 (Fr.).

138. *Id.*

139. See Tribune extraite du journal L’Aurore des 13 et 14 octobre 1962 [Opinion piece extracted from the newspaper L’Aurore, October 13 and 14, 1962], L’AURORE [DAWN], Oct. 13 & 14, 1962.

140. Conseil constitutionnel [CC] [Constitutional Court] decision No. 92-20DC, Nov. 6, 1962, Rec. 27 (Fr.).

141. Bertrand Mathieu, Philippe ARDANT, *Droit constitutionnel et institutions politiques* 408 (2022).

142. Beaud, *supra* note 105, at 383-84.

143. Conseil constitutionnel [CC] [Constitutional Court] decision No. 92-20DC, Nov. 6, 1962, Rec. 27 (Fr.).

144. 1958 CONST. art. 89, para. 1-3 (Fr.).

145. Denis Baranger, *The Language of Eternity: Constitutional Review of the Amending Power in France (or the Absence Thereof)*, 44 ISR. L. REV. 389, 394-98 (2011).

146. 1958 CONST. art. 54 (Fr.).

147. Conseil constitutionnel [CC] [Constitutional Court] decision No. 92-308DC, Apr. 9, 1992, Rec. 55 (Fr.).

148. Denis Baranger, *supra* note 145, at 394.

Treaty.¹⁴⁹ Plaintiffs argued that, despite the constitutional amendment, the treaty remained unconstitutional and that the insertion of article 88-3 violated the principle of national sovereignty defined in article 3 of the Constitution and the French Declaration of the Rights of Man and Citizen.¹⁵⁰ The *Conseil constitutionnel*, in its decision *Maastricht II* rendered on September 2, 1992,¹⁵¹ rejected that claim in a very famous development. It said that, besides the constitutional provisions governing the periods in which the Constitution cannot be amended¹⁵² and the formal unamendability provision of Article 89, meaning paragraph five regarding the “Republican form of Government,” the constituent power is sovereign; it has the power to repeal, amend, or amplify constitutional provisions in such a manner as it sees fit.”¹⁵³ Hence, there are no implied substantive or material limits on amending the French constitution, because positive law considers the amendment power as a constituent power.¹⁵⁴ A constitutional revision can even insert provisions that derogate from existing constitutional rules or principles.¹⁵⁵

That was not the end of the Maastricht story, though. After that decision, several members of the Parliament tried to contest the constitutionality of the EU Treaty not by contesting it directly through article 54, but by contesting it via an article 61 *a priori* constitutional control of its ratification bill, which was adopted by an article 11 referendum.¹⁵⁶ Nevertheless, in a *Maastricht III* ruling, the Council decided that it had no jurisdiction in such a case by adopting an argumentation saying that its jurisdiction is “strictly defined by the Constitution” and that Article 61 empowers it to control “whether organic laws and ordinary acts of Parliament are compatible with the Constitution,” whereas it is not specified whether this jurisdiction can be extended to constitutional laws, “be they adopted by means of referendum or enacted in parliament . . .”¹⁵⁷ Hence, the end of the *Maastricht cases* demonstrates a willingness to interpret the Constitution’s silence on the control of constitutional amendments restrictively, rather than broadly.¹⁵⁸

149. *Id.*

150. Conseil constitutionnel [CC] [Constitutional Court] decision No. 92-312DC, Sep. 2, 1992, Rec. 76 (Fr.).

151. *Id.*

152. See 1958 CONST. art. 7 (Fr.).

153. Conseil constitutionnel [CC] [Constitutional Court] decision No. 92-312DC, Sep. 2, 1992, Rec. 76, §19 (Fr.).

154. See WANDA MASTOR & LILIANE ICHER, CONSTITUTIONAL AMENDMENT IN FRANCE, IN *ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA, AND THE USA* 115, 118 (Xenophon Contiades ed. 2013)

155. See Conseil constitutionnel [CC] [Constitutional Court] decision No. 92-312DC, Sep. 2, 1992, Rec. 76, §19, §35 (Fr.).

156. Baranger, *supra* note 145, at 395.

157. Conseil constitutionnel [CC] [Constitutional Court] decision No. 92-313DC, Sep. 23, 1992, Rec. 94 (Fr.).

158. See Susan Wright, *The Constitutional Implications in France of the Maastricht Treaty*, 9 TUL. EUR. & CIV. L.F. 35 (1994).

This approach was also confirmed in its last case concerning the supra-constitutionality issue rendered in 2003.¹⁵⁹ The question concerned the adoption of a constitutional bill on March 17, 2003, “regarding the decentralized organization of the Republic.”¹⁶⁰ The difference between that amendment and the Maastricht revision in 1992 was that the adoption of the constitutional bill was not made by referendum but by a “Parliament convened in Congress,” a special chamber provided by article 89 to approve constitutional amendments.¹⁶¹ However, regardless of the absence of popular intervention in the amendment procedure, the constitutional judges declared that there was “no jurisdiction to decide the case” by repeating the *Maastricht III* formulation, saying that article 61 provides jurisdiction only for a constitutional control of organic and ordinary laws and not for constitutional amendments.¹⁶²

The above-mentioned constitutional position creates some further questions. Why did the *Conseil constitutionnel* take such a restrictive approach to its own jurisdiction, while in other cases, such as the recognition of the constitutionality of the Constitution’s Preamble, which contains the Declaration of the Rights of Man and of the Citizen, it demonstrated strong judicial activism, transforming the entire French public law system? Why couldn’t it fill the textual gap of articles 61 or 89 by adopting a similar conception to India’s Supreme Court, which took the power to control amendments based on the basic structure doctrine? The answer can be found in the prevailing current doctrine.¹⁶³ In fact, as Denis Baranger notes, in order to find the answer, we have to focus on a “form v. substance” doctrinal distinction.¹⁶⁴

Although France’s public law doctrinal fathers like Hauriou or Duguit had a substantial approach of constitutional law,¹⁶⁵ that’s not the case in today’s 5th Republic’s context. Nowadays, the current approach to the Constitution’s definition and interpretation is governed by positivism. Hence, as we can easily understand, there is no place for the *supraconstitutionnalité* in a positivist or

159. Xavier Philippe, *France: The Amendment of the French Constitution “On the Decentralized Organization of the Republic”*, 2 INT’L J. CONST’L L. 691 (2004).

160. Loi 2003-276 du 28 mars 2003 relative à l’organisation décentralisée de la République [Law 2003-276 of March 28, 2003 relating to the decentralized organization of the Republic], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Marc. 29, 2003, p. 5568.

161. See Philippe, *supra* note 159, at 691-92.

162. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2003-469DC, Mar. 26, 2003, Rec. 293 (Fr.); for more details about this position, see Otto Pfersmann, *Unconstitutional constitutional amendments: a normativist approach*, 67 ZÖR 81, 107-06 (2012) (translating this position as a judicial policy of denial, meaning the hypothesis in which a Constitution provides implicitly for a “polymorphism” regarding its. Norms, but the competent courts refuse to apply it in concrete cases).

163. See Karlson Preuß, *‘Legal Formalism’ and the Western legal thought*, 14 JURISPRUDENCE 22, 22-54 (2023).

164. See Baranger, *supra* note 145, at 399-400.

165. Hauriou, *supra* note 123, at 245; Duguit, *supra* note 125, at 603-07.

formalist context.¹⁶⁶ The father of legal positivism, Hans Kelsen, adopted a clear thesis against “supra-positive norms” and argued that they should not be considered as real legal norms.¹⁶⁷ In France, the most famous and dominant argumentation regarding the supra-constitutionality concept can be found in Georges Vedel’s writings.¹⁶⁸ His position was a total rejection of any extra-constitutional or supra-constitutional consideration, and he supported it by a formal definition of the concept of Constitution.¹⁶⁹ According to him, a constitution cannot be defined by its content, rather it should be defined by a specific procedure of creation and amendment.¹⁷⁰ The formal element of its definition matters more than the substantive element, and that idea could be confirmed by the fact that in France, the “constitution” is distinguished from an “ordinary statute” of parliament based on their procedure of adoption.

This view of constitutional analysis, which is the dominant one nowadays, leaves no room for supra-constitutionality considerations. Positivist approaches did not allow French and American courts to recognize a constitutional corpus that could never be amended, even though they had demonstrated an important judicial activism on several other occasions.¹⁷¹ Hence, we might wonder whether the above-mentioned positions would differ in a constitutional order lacking a formal constitutional document.¹⁷² The best—and probably sole—example of this order is the UK.

C. The Case of the UK: Searching for the Impossible

It is true that legal scholarship on unamendability focuses on legal systems with a strong judicial review tradition over legislation. The UK definitely does not belong to that category of countries for a very obvious reason: its constitution is not set out in a formal document that can be enforced by judges.¹⁷³ Hence, examining the application of unamendability principles in such a constitutional context is like hitting our heads against a wall.

The English doctrine, however, has not failed to examine the question of constitutional modifications.¹⁷⁴ Albert Dicey wrote in the late 19th century that

166. Baranger, *supra* note 145, at 299-340; Albert, Nakashidze & Okcay, *supra* note 41, at 661.

167. Renaud Baumert, *Hans Kelsen, « La Garantie Jurisdictionnelle de la Constitution »* [*Hans Kelsen, “The Jurisdictional Guarantee of the Constitution”*], 45 *REVUE DU DROIT PUBLIC* [Rev. P.L.] 197, 239 (2024).

168. GEORGES VEDEL, *MANUEL ÉLEMENTAIRE DE DROIT CONSTITUTIONNEL* 78 (1949).

169. *Id.*

170. *Id.*

171. Baumert, *supra* note 167; see Albert, Nakashidze & Okcay, *supra* note 41, at 639.

172. Albert & Oder, *supra* note 4, at 1-2.

173. See Ernest Young, *The Constitution Outside of the Constitution*, 117 *YALE L. J.* 408 (2007).

174. Ian Cram, *Some Thoughts on Constitutional Amendment*, U.K. CONST. L. BLOG (Nov. 12, 2013), <https://ukconstitutionallaw.org/2013/11/12/ian-cram-some-thoughts-on-constitutional-amendment/> [<https://perma.cc/6STJ-KS9M>].

“to know how the constitution of a given State is amended is almost equivalent to knowing who is the person or the body of persons in whom, under the laws of the State, sovereignty is vested.”¹⁷⁵ The UK Constitution which is composed of a certain number of historic documents, specifically the Magna Carta of 1215, the Habeas Corpus of 1679, and the Bill of Rights of 1689, some rights recognized under common law and constitutional conventions, can be amended by the adoption of an ordinary statute adopted by Parliament.¹⁷⁶ This phenomenon is explained by the fundamentality of Parliamentary sovereignty under English law.¹⁷⁷

Parliament can legally be regarded as the “single ultimate source of legal authority.”¹⁷⁸ As Dicey told us in 1885 when he theorized and conceptualized the English constitution in two major principles—the sovereignty of Parliament and the rule of law—“The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament (defined as the Queen, the House of Lords, and the House of Commons, acting together) . . . has, under the English constitution, the right to make or unmake any law whatever; and, further, no person or body is recognized by the law as having a right to override or set aside the legislation of Parliament.”¹⁷⁹ *The above-mentioned definition concretely requires courts to obey any new statute, with no other body able to adopt legal norms that override an Act of Parliament.*¹⁸⁰

Moreover, one of the most important implications of this basic principle is that a sovereign Act of Parliament cannot be bound by its predecessor’s acts.¹⁸¹ This prohibition to “bind its successors” means simply that courts, when faced with two conflicting statutes on the same subject, treat the more recent act as repealing the earlier one.¹⁸² Applying this principle, along with the exclusion of judicial review of statutes, can become quite complex. This is especially true in the transformative context in which the Constitution entered the 20th century, as will be illustrated below.¹⁸³

It is essential to note that several important constitutional moments have strongly contested the *Diceyan* approach to sovereignty, demonstrating that this fundamental principle may not be absolute.¹⁸⁴ Specifically, the Parliament

175. A.V. Dicey, *Constitutional Revision*, 11 L.Q. REV. 387, 388 (1895).

176. See PETER LEYLAND, *THE CONSTITUTION OF THE UNITED KINGDOM: A CONTEXTUAL ANALYSIS*, 25-44 (2016).

177. See A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 291, 315 (Roger E. Michener ed., 1982).

178. Anthony Bradley, *The Sovereignty of Parliament - Form or Substance?*, in *THE CHANGING CONSTITUTION* 35, 37 (Jeffrey Jowell & Dawn Oliver eds., 7th ed. 2011).

179. A.V. Dicey, *supra* note 113, at 3-4.

180. *Id.*

181. See 1 WILLIAM BLACKSTONE, *COMMENTARIES* *90.

182. See Jeffery Goldsworthy, *Challenging parliamentary sovereignty: Past, present and future*, in *PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES* 267-318 (2010).

183. See N.W. Barber, *The afterlife of Parliamentary Sovereignty*, 9 *ICON* 144, 149-52 (2011).

184. *Id.*

itself made this framing, as it can bring changes to constitutional law through ordinary legislation.¹⁸⁵ Indeed, it is not wrong to admit that the most important of these moments was the UK's integration into the European Union, which was the first step toward changing the constitutional status regarding the judicial review of parliamentary acts.¹⁸⁶ Since 1972 and the adoption of the European Communities Act,¹⁸⁷ until the 31st of January 2020 and the application of the European Union (Withdrawal) Act 2018,¹⁸⁸ the House of Lords, and later the Supreme Court, and in general, ordinary judges, could render any law that violated European law inapplicable.¹⁸⁹ Under the European Communities Act 1972 ("ECA"), European law should prevail against all English norms,¹⁹⁰ even against statutes adopted after the enactment of the above-mentioned statute. This principle derives from the ruling of the *Factortame n°2 case* regarding the question of a conflict between an EU norm incorporated in the EC Act and an English statute.¹⁹¹

For the first time, it was admitted that the Parliament itself voluntarily agreed to limit its own Sovereignty by adopting the EC Act 1972.¹⁹² Nevertheless, the appearance of this form of judicial review of statutes was not the only consequence of this constitutional change brought about by European law. In addition to that fundamental mutation, another important change concerns the *constitutionalizing* of certain statutes. Thus, in *Thoburn v. Sunderland City Council*, the case of the "metric martyrs,"¹⁹³ Lord Justice Laws developed the argument that the EC Act 1972 constituted a "constitutional statute" which "(a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights."¹⁹⁴ *Nevertheless, Parliament's recognition of certain statutes as constitutional does not preclude subsequent legislative modification of those enactments.*¹⁹⁵ The

185. See Vernor Bogdanor, *Imprisoned by a Doctrine: The Modern Defense of Parliamentary Sovereignty*, 32 OXFORD J. LEGAL STUD. 179, 183-86 (2012).

186. Natalie Fox, *The Impact of Brexit on the British Constitutional Law*, 1 Przegląd Konstytucyjny 51, 53-55 (2024).

187. European Communities Act 1972, c. 68 (U.K.).

188. European Union (Withdrawal) Act 2018, c. 16 (U.K.).

189. *R v. Sec'y of State for Transp., ex parte Factortame Ltd.* (No. 2) [1991] UKHL 13, [1991] 1 AC 603 (appeal taken from Eng.).

190. European Communities Act 1972, c. 68, § 2 (U.K.).

191. *R v. Sec'y of State for Transp., ex parte Factortame Ltd.* (No. 2) [1991] UKHL 13, [1991] 1 AC 603.

192. *Id.*; see Iris Nguyễn-Duy, *Sovereignty and Europe- The British Perspective*, 2 L'EUROPE EN FORMATION 79, 85-86 (2013).

193. See Barbara Crutchfield George et al., *U.K.'s Metric Martyr Case: A Challenge to the European Union's Authority over Its Member States*, 21 WIS. INT'L L.J. 299 (2003).

194. *Thoburn v. Sunderland City Council* [2002] EWHC (Admin) 195 [62], [2003] QB 151 (U.K.).

195. See *Re Allister* [2023] UKSC 5; see also Kacper Majewski, *Re Alister: The End of 'Constitutional Statutes'?* U.K. CONST. L. BLOG (Feb. 21, 2023), <https://ukconstitutionallaw.org/>

difference between constitutional and ordinary statutes is the fact that Parliament may “impliedly repealed” the former, whereas it may repeal or amend the latter only “by unambiguous words on the face of the later statute.”¹⁹⁶

Hence, this “constitutionalization” does not render these statutes unamendable; it simply places a specific degree of legislative rigidity on their amendment. *We can affirm this thesis by referring to the Miller I decision, in which the UK Supreme Court accepted the result of the Brexit referendum.*¹⁹⁷ *The Court required a more rigid procedure for its realization by deciding that such a process, modifying the whole UK legal order by modifying its sources, cannot be made by a simple exercise of the royal prerogative by the executive power. It requires a clear consent from the sovereign Parliament.*¹⁹⁸

The present discussion of the above-mentioned constitutional statutes may easily allow us to search for additional constitutional laws. Several statutes contain constitutional content concerning the organization of public institutions; among them, the two most significant are the Scotland Act of 1998¹⁹⁹ and the Human Rights Act of 1998,²⁰⁰ because both Acts also place limits on the Parliamentary Sovereignty principle. *Enacted as part of the Labour Party’s devolution program, the first statute grants the Scottish Parliament a defined scope of legislative authority while preserving the principle of Parliamentary sovereignty by reserving ultimate authority over Scottish affairs to Westminster.*²⁰¹ *In contrast, the Human Rights Act, which incorporates the European Convention of Human Rights, constitutes a huge constitutional transformation by introducing a new form of judicial control of statutes grounded in the convention’s rights.*²⁰²

It is essential to add here that, although the UK signed the European Convention on Human Rights in 1951, there was no Bill of Rights incorporating its content. The basic reason for this absence was that it was extremely difficult to enforce statutes that violated these rights. Any mechanism of judicial review based on the ECHR would contradict the Constitution, and specifically Parliamentary Sovereignty. However, in 1998, the UK parliament chose a “middle path” for that.²⁰³ The Human Rights Act (“HRA”) transforms the whole normative system by establishing a mechanism that places human rights in the

2023/02/21/kacper-majewski-re-allister-the-end-of-constitutional-statutes/ [https://perma.cc/8PQX-W895].

196. *Thoburn v. Sunderland City Council* [2002] EWHC (Admin) 195 [63], [2003] QB 151 (U.K.).

197. *R v. Sec’y of State for Exiting the Eur. Union* [2017] UKSC 5 (appeal taken from Eng., Wales, & N. Ir.).

198. *Id.* [124].

199. Scotland Act 1998, c. 46 (U.K.).

200. Human Rights Act 1998, c. 42 (U.K.).

201. Scotland Act 1998, Section 28(7) c. 46 (U.K.).

202. See BRENDA HALE, *THE RISE AND FALL OF THE UK HUMAN RIGHTS ACT* 294, 294-306 (David Capper, Conor McCormick & Norma Dawson eds., 2025).

203. See Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights of Rights-and Democracy-Based Worries*, 38 WAKE FOREST. L. REV. 813, 837 (2003).

first place and creates a new form of *judicial control* of statutes to ensure the protection of these rights by public authorities.

It is clear that such a mutation towards a model of stronger judicial oversight and human rights protection based on declarations of rights creates a new UK constitutional law. Nevertheless, we may easily doubt the connection of this evolution to the doctrine of supra-constitutionality. In fact, supra-constitutionality, based on natural law considerations, places some individual rights above everything—above positive constitutional law. As with the German Basic Law, the Human Rights Act protects fundamental rights, such as the rights to human dignity²⁰⁴ and to life.²⁰⁵ These rights, though, unlike the German eternity clause, are not unamendable. Westminster can adopt a law with a clear and express content, and repeal or even suppress this constitutional human rights statute. In fact, we were in the middle of the process of a total repeal of the Act by Westminster's conservative majority.

However, during the last twenty-five years, this new model based on human rights protection has offered the basic unamendability premises, which are constitutional rigidity and hierarchy; whereas the fundamental moral character of the EHCR rights allows us to thoroughly examine if an implied unamendability doctrine can be established, even when the HR act disappears, and positive law based on parliamentary sovereignty totally rejects it.

II. AN IMPLIED RECOGNITION OF THE CONSTITUTION'S HIERARCHICAL STRUCTURE

In the last chapter, we saw that the positive law of our countries clearly denies any supra-constitutional consideration. From different bases and considerations, there are no implied unamendability principles. France and the US rely heavily on positivist theories, refusing to operate a distinction between constituent power and amendment power, whereas in the UK, Parliamentary Sovereignty, which constitutes the most fundamental constitutional principle and is still alive despite the whole above-mentioned constitutional transformation, prohibits the imposition of any limits to the Parliament's authority to change the Constitution.

However, the express refusal of any unamendability principles does not mean that the conditions for a feature implied recognition are not present. The basic element that supports this position is the presence of a hierarchical structure inside these constitutions. Indeed, even though constitutional judges refuse to accept that, apart from the express eternity clauses, we cannot impose any additional substantive limits to the amendment power, their jurisprudence

204. *R v. Ministry of Just.* [2014] UKSC 38 (recognizing human dignity as a foundational principle of the European Convention system); Although the principle is not explicitly mentioned in the HR Act of 1998, it is applied as a constitutional principle deriving from the other provisions of the statute which incorporates the ECHR.

205. Human Rights Act 1998, sch. 1 (U.K.).

opens a “path” towards the conclusion that some constitutional principles are more fundamental than others. This phenomenon is very evident in France, where the Constitutional Council, relying on the notion of “constitutional identity,” an extremely expanded principle in European constitutional law, decides to set aside the constitutional obligation of conformity to EU law in order to protect some rules that constitute the constitution’s core. In the US, although jurisprudence has not demonstrated such an interpretative technique, considerations of constitutional identity often appear at the doctrinal level. Contrary to the French position, UK constitutional law bases this hierarchy not on any notion of constitutional identity, but on the protection of the Human Rights Act. The adoption of this constitutional statute has radically changed the constitution, allowing the existence of a newly established model that cannot disappear even if the Parliament repeals the HR Act.

A. Constitutional Identity as the Basis of a “New” Supra-Constitutionality

As we saw in the first chapter, all the major doctrines of unconstitutional amendments have two “key concepts”—a hierarchy between constitutional values and constitutional identity.²⁰⁶ However, this concept becomes relatively problematic because it cannot be seen as unique or complete over time. It should be understood as a “composite construction” whose meaning is shaped by the interpretation of several actors.²⁰⁷ Nevertheless, the objective of its concretization is straightforward. It demonstrates that each Constitution has an essence that cannot be modified with one amendment, because even a reform of one element can affect the document’s identity.

In general, despite this conclusion, constitutional identity remains a very enigmatic notion. Indeed, the reason for its ambiguity can be explained by the fact that, unlike notions of national identity, such as Rousseau’s *caractère national*²⁰⁸ or Hegel’s *Volksgeist*,²⁰⁹ which were developed in early modernity, constitutional identity as a theory evolved in the twentieth century and has gained a legal concretization in the last few years in several European countries struggling in a context of rapid and aggressive European integration. Under the doctrines of Carl Schmitt²¹⁰ and Carl Bilfinger²¹¹ during the Weimar Republic, the above-mentioned identity was understood as the “identity of the constitution

206. Sabrina Ragone, *The Limits of Amendment Powers*, 12 VIENNA J. ON INT’L CONST. L. 345, 348 (2018).

207. *Id.* at 348.

208. ROUSSEAU, *supra* note 37, at 9-10.

209. See D. GEORG WILHELM FRIEDRICH HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS, NATURRECHT UND STAATSWISSENSCHAFT IM GRUNDISSE (1821), reprinted in PHILOSOPHISCHE BIBLIOTHEK 124 (Georg Lasson ed., 1911).

210. SCHMITT, *supra* note 57, at 125-30.

211. CARL BILFINGER, DER REICHSSPARKOMMISSAR (1928); Carl Bilfinger, *Verfassungsfrage und Staatsgerichtshof* [*The Constitutional Question and State Court*], 20 ZEITSCHRIFT FÜR POLITIK [POL. MAG.] 81 (1931).

itself and it was a purely normative concept.”²¹² In fact, this term was used to construct implied, material limits to formal amendments. Taking this background into consideration, it is not a coincidence that, regarding continental legal systems in the last decades, the doctrine’s normative concretization was placed in Germany.

Nevertheless, to understand this concretization in Europe, we must also focus on another factor: European Law. Specifically, Article 4, Paragraph 2 of the TEU states that the European Union shall “respect the Member States’ national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.”²¹³ Hence, this provision prompted member states’ courts to interpret constitutional identity as a justification for noncompliance with EU law. *The most famous jurisprudence regarding this notion can be found in the German Constitutional Court. Since the Lisbon judgment,*²¹⁴ *the court has interpreted constitutional identity as the core of the constitution, not susceptible to any constitutional amendment, and capable of limiting European integration by excluding the application of European norms deemed incompatible with its core principles.*

The German constitutional judges, therefore, besides their very expansive jurisprudence concerning the relationships between the EU and national constitutional order based on the protection of human rights,²¹⁵ henceforth have an additional tool to protect the Basic Law’s essence. This allows them to control the conformity of national laws transposing EU norms with constitutional identity principles, such as human dignity, which are included in the above-mentioned “eternity clause” of Article 79, Section 3.²¹⁶ Hence, the constitutional court can expand its jurisprudence regarding the limits of the transfer of state power to European institutions, even beyond human rights, including democratic considerations such as the people’s ability to influence decisions through parliamentary representation at the European level.²¹⁷

This approach can be considered as a “common heritage” of European countries’ constitutional orders, as several courts have used the interpretative

212. Monika Polzin, *Constitutional Identity as a Constructed Reality and a Restless Soul*, 18 GERMAN L.J. 1595, 1597-98 (2017).

213. Consolidated Version of the Treaty on European Union art. 4, ¶ 2, Oct. 26, 2012, 2012 O.J. (C 326/18)13, 17 (EU) [hereinafter TEU].

214. BVerfG, 2 BvE 2/08, June 30, 2009, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html (Ger.); BVerfG, 2 BvR 2735/14 Dec. 15, 2015 (Ger.); KRISZTA KOVÁCS, *THE JURISPRUDENCE OF PARTICULARISM: NATIONAL IDENTITY CLAIMS IN CENTRAL EUROPE* 39 (Kriszta Kovács ed., 2023).

215. BVERFGE, 2 BvL 52/71, May 29, 1974, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1974/ls19740529_2bv1005271en.html; *see also* BVerfG, 2 BvR 197/83, Oct. 22, 1986, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1986/10/rs19861022_2bvr019783en.html (Ger.).

216. Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Dec. 15, 2015, 140 BVerfGE 317 (Identity Control), ¶ 41.

217. BverfG, 2 BvE 2/08, June 30, 2009, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html (Ger.).

approach of constitutional identity.²¹⁸ France, as we will see, has followed this “path,” as the Constitutional Council’s case law demonstrates the development of an interpretation similar to the German one to address the problem of conciliation between EU law and national constitutional principles. In fact, under Article 88-1 of the French Constitution, the transposition of EU secondary legislation, and especially directives, constitutes a constitutional requirement.²¹⁹ Based on this provision, the *Conseil constitutionnel* has, since its decision of 10 June 2004, declined to exercise judicial review of a transposition statute.²²⁰ In the context of its interpretation, this provision establishes a principle of “constitutional immunity” of EU law, as well as a constitutional obligation to transpose secondary European legislation into the French legal order.²²¹

However, as we will see, this immunity is not absolute. In 2006, the French constitutional judges nuanced their above-mentioned position by deciding that this transposition obligation has a specific limit, the “rules and principles of constitutional identity.”²²² Thus, although, in principle, the Council must abstain from controlling the constitutionality of a transposition law, it recognized that “the transposition of a Directive cannot run counter to a rule or principle inherent to the constitutional identity of France, except when the constituting power consents thereto.”²²³ So, plaintiffs, in the context of an *a priori* or an *a posteriori* procedure of judicial review of statutes, can only contest a statute implementing an EU directive by invoking that this norm violates a principle of France’s constitutional identity. This solution was further expanded by the Supreme Administrative Court, the Council of State (*Conseil d’Etat*), in administrative rules (*règlements*) implementing a directive.²²⁴ Specifically, plaintiffs may contest the administrative decision as violating a right of France’s

218. Magyarország Alkotmánybíróság (AK) [Constitutional Court of Hungary] Nov. 30, 2016, Decision No. 22/2016 (XII. 5.), para. 65-66 (Hung.); Trybunał Konstytucyjny [Constitutional Tribunal of Poland] Nov. 24, 2010, Ref. No. K 32/09, at 23 (Pol.); see also Corte Cost., Dec. 18, 1973, No. 183 (Frontini v. Ministero delle Finanze), Giur. Cost. 1973, 2401 (It.). The European Court of Justice decides in the other sense affirming the supremacy of EU law over national law, including constitutional law, in case of conflict. See Case 283/81, CILFIT v. Ministry of Health, 1982 E.C.R. 3415 (requiring national courts of last instance to refer questions of EU law under Article 267, and allowing them to refuse only if the answer is obvious or already settled); Case C-416/17, Commission v. France, ECLI:EU:C:2018:811 (regarding a condemnation of France for not referring to the EU Court of Justice); Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 & C-840/19, Euro Box Promotion, ECLI:EU:C:2021:1034 (providing that national courts should refuse to apply constitutional case law in case it conflicts with EU law).

219. 1958 CONST. art. 11 (“The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December 2007.”); see *Conseil constitutionnel* [CC], decision No. 2004-496DC, June 10, 2004, §7, Rec. 101 (Fr.).

220. *Conseil constitutionnel* [CC], decision No. 2004-496DC, June 10, 2004, Rec. 101 (Fr.).

221. *Id.* §7.

222. *Conseil constitutionnel* [CC], decision No. 2006-540DC, July 26, 2006, Rec. 88 (Fr.).

223. *Id.* ¶ 19.

224. CE Ass., Feb. 8, 2007, 287110, Rec. Lebon 55.

constitutional identity, whereas the judges shall verify if the same right is protected in the EU legal system by an “equivalent principle” by sending an interlocutory question to the European Court of Justice. In the absence of such a provision in the European legal corpus, the Court can hear the case and answer the constitutional identity question.²²⁵ Thus, in principle, as the recent *Conseil d’Etat* case regarding the application of EU data protection standards and considered as a French dialogical response to the famous decision of the German Federal Constitutional Court of 5 May 2020, demonstrates, when the judges have to conciliate a European requirement, like data protection, with a national constitutional principle like national security, the former has to be interpreted in order to assure the major possible protection of the latter.²²⁶

This evolution, though, raises another cardinal question. In fact, the notion of “inherent principle to the French constitutional identity” is significantly vague and general. As with the supra-constitutional concept, which can have multiple meanings, especially influenced by political and moral considerations, the above-mentioned principles can be interpreted in several ways by French lawyers.²²⁷ Nevertheless, the situation here is a little clearer because the French constitutional judges have taken the first steps toward the legal concretization of the notion. Specifically, since 2018, after a period of silence regarding the principles’ meaning, the notion has been placed in a process of content construction.²²⁸

Hence, its latest jurisprudence offers a negative and positive definition of constitutional identity norms.²²⁹ In a decision rendered on July 26, 2018, the Constitutional council started with the negative approach by refusing to qualify the principle of equality before the law as being part of the French constitutional identity.²³⁰ The clearest concretization, though, was made in the famous recent decision *Air France*, in which the Council combines both a positive and negative approach of definition. Regarding the negative aspect, the judges decided that “the right to security, the principle of individual responsibility, and equality before public burdens, which are protected under European Union Law, do not constitute rules or principles that are inherent to French constitutional

225. *Id.*

226. CE Ass., Apr. 21, 2021, 393099.

227. See Édouard Dubut, *Les règles ou principes inhérents à l’identité constitutionnelle de la France : une supra-constitutionnalité?* [The rules or principles inherent in the constitutional identity of France: a supra-constitutionality], 83 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL [French Rev. Const. L.] 451, 461 (2010).

228. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2018-750/751QPC, Dec. 7, 2018 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2018-768DC, July 26, 2018 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2018,2018-745QPC, Nov. 23, 2018; Anne-Charlène Bezzina, *Le Conseil constitutionnel au cœur du “système”*, 130 LES PETITES AFFICHES 24, 24-27 (2020).

229. DENIS BARANGER, *LA CONSTITUTION: SOURCES ET INTERPRÉTATIONS* 221 (2022).

230. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2018-768DC, July 26, 2018, J.O. 0174, para. 38 (Fr.).

identity.”²³¹ As for the positive aspect, it was recognized that the prohibition on delegating administrative police powers to private persons, based on Article 12 of the Declaration of the Rights of Man and of the Citizen of 1789, is, by contrast, part of the constitutional identity.²³² Therefore, the latest position demonstrates a clear step towards the submission of EU law to constitutional law, as well as a positive legal basis for the development and evolution of the constitution’s core.

This evolution, effected through judicial interpretation, can lead us into the field of supra-constitutional law. Do the “rules or principles inherent to the constitutional identity of France” constitute a “new supra-constitutionality”?²³³ The answer to that question will come through the development of constitutional jurisprudence. It is not wrong to admit, though, the identification of the basic premises of an implied supra-constitutionality. We have a clear hierarchy between constitutional requirement: the application of EU law on the one side and some principles constituting the constitution’s essence on the other. Moreover, the fact that the notion of constitutional identity is judicially construed reminds us of the Indian *Basic Structure doctrine*.²³⁴ Nevertheless, it would be wrong to qualify the position of the French *Conseil constitutionnel* as analogous to India’s Supreme Court. In fact, the question of constitutional identity has a very limited scope: the conflicts between EU law and the French Constitution, whereas the characterization of a principle as “inherent to the constitutional identity” depends on an examination of the equivalence between French and EU principles. However, even if constitutional identity is currently a limited-scope concept, it still places a hierarchy on the structure of the constitution, which can be judicially evolved in the future towards the recognition of a real Constitution’s essence, like in the case of Germany.

Nevertheless, taking into consideration that the constitutional identity concept is limited to European countries as a judicial tool to regulate the relations between EU law and state constitutions, we may ask ourselves whether considerations of this concept can be found in non-European constitutional orders, like in the case of the US. Surprisingly, this notion is not strange to the American side of the Atlantic, at least in a doctrinal context.²³⁵ As an illustration, US constitutional lawyer Michel Rosenfeld claims that a functioning constitutional order requires a constitutional identity, whereas “all constitutions depend on the elaboration of a constitutional identity that is distinct from national identity and all other relevant pre-constitutional and extraconstitutional

231. Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2021-940QPC, Oct. 15, 2021, para. 14 (Fr.).

232. *Id.* para. 15.

233. See Dubut, *supra* note 227, at 451-82.

234. See Jürgen Bast, *Don’t Act Beyond your Powers: The Perils and Pitfalls of the German Constitutional Court’s Ultra Vires Review*, 15 GERMAN L. J. 167, 168 (2014).

235. Monica Polzin, *Constitutional Identity as a Constructed Reality and a Restless Soul*, 18 GERMAN L.J. 1595, 1601 (2017).

identities.”²³⁶ According to him, it reflects a reconciliation process between the different identities, conflicts, and tensions within a state or a community. It is important to pinpoint here a very clear influence of Carl Schmitt’s notion of Constitution, in which the fundamental law is a result of “dilatory compromises.”²³⁷ Moreover, he adds that if we look to the Constitution, we can identify the American constitutional identity in the Preamble’s phrase “We the People,” which expresses the fundamental principle that all people are equal.²³⁸

In addition to Rosenfeld, there are other constitutional law scholars who have focused on constitutional identity. Specifically, Gary Jeffrey Jacobsohn uses constitutional identity as a tool for analyzing constitutional development in a context of judicial interpretation.²³⁹ It is a concept placed in a context of constant mutation and development, not only by the judiciary, but also by the political process itself.²⁴⁰ The previous definitions, though, should drive us to a thorough examination of the elements that compose the identity. In fact, some scholars after considering the specificity of the American constitutional order, have concluded that there are some rights considered as unamendable because of their special character that US constitutional law attributes to them.²⁴¹

These considerations can be definitely part of the *supra-constitutionality doctrine* as they present the Constitution as a hierarchical set of values.²⁴² Thus, John Rawls claims that First Amendment protections are “entrenched in the sense of being validated by long historical practice.”²⁴³ John Rawls also says, “[t]hey may be amended but not simply repealed and reversed . . . The successful practice of its ideas and principles over two centuries place restrictions on what can now count as an amendment, whatever was true by the beginning.”²⁴⁴ Influenced by this thesis, Samuel Freedman accepts that the First Amendment freedoms are so fundamental that their suppression would be a “constitutional suicide.”²⁴⁵ Other scholars focus on different rights, like the right to equality. Stephan Macedo, for instance, suggests that an amendment denying African Americans civil and political rights would be unconstitutional. He supports his position by the fact that there are some rights and freedoms that are so

236. MICHEL ROSENFELD, *THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE AND COMMUNITY* 10 (Routledge eds., 2010).

237. SCHMITT, *supra* note 57, at 85.

238. Michel Rosenfeld, *Modern Constitutionalism as Interplay Between Identity and Diversity*, in *CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY* 3, 6 (Michel Rosenfeld ed., 1994).

239. GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY* 7 (Harv. U. Press, 1st ed. 2010).

240. *Id.*

241. See Roznai, *supra* note 89, at 711.

242. Walter Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 756-57 (1980); see also Walter Murphy, *Slaughter-House, Civil Rights, and Limits on Constitutional Change*, 32 AM. J. JURIS. 1, 12-14 (1987).

243. JOHN RAWLS, *POLITICAL LIBERALISM* 238-39 (Colum. U. Press, 1st ed. 1993).

244. *Id.*

245. Samuel Freeman, *Political Liberalism and the Possibility of a Just Democratic Constitution*, 69 CHI. KENT. L. REV. 619, 663 (1994).

fundamental in a process of self-government that modifying them would be considered more as "revolutionize" than "amend."²⁴⁶

All these positions demonstrate that, at least at the doctrinal level, there is a hierarchy of constitutional values that justifies the unamendability of certain principles. However, are these statements reflected in constitutional law as shaped by the Supreme Court? The answer is no. The American constitutional judges have never rendered a decision qualifying the above-mentioned rights as unamendable.²⁴⁷ Nevertheless, we can find another concept in case law, the concept of "fundamentality" that establishes a sort of hierarchy inside the Constitution.²⁴⁸ In fact, fundamentality is an evaluative technique of judicial interpretation that qualifies a norm as "more important" than other norms.²⁴⁹ The "fundamental" norm can be characterized as a "super-source" compared to other norms, even if both norms are formally on the same level.²⁵⁰

This concept, which has been significantly developed and theorized in Anglo-American and German literature, as the theories of Ronald Dworkin²⁵¹ and Radbruch demonstrate,²⁵² is readily identifiable in the Supreme Court's jurisprudence. Specifically, in U.S. constitutional law, we may identify a jurisprudential doctrine of fundamentality if we focus on the transition from a procedural approach of due process to a substantive one concerning the interpretation of the Fourteenth Amendment.²⁵³ This doctrine which focused on providing an extended protection of economic rights from the *Lochner* era till the New Deal,²⁵⁴ also had a second wave focused more on the protection of individual liberties than property rights.²⁵⁵ The most prominent example is *Roe v. Wade*²⁵⁶ in which the Supreme Court recognized the constitutional right of abortion by taking some short of distance from a strict interpretation of the text and connecting it with the constitutional right of privacy.

This technique, which combines a written normative source with a "non-written constitution," captures the essence of fundamentality, since these rights are perceived as inherent to the idea of liberty and expressly recognized in the due process clause. However, as we can notice, the objective of the fundamental

246. STEPHEN MACEDO, *LIBERAL VIRTUE: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* 183 (1990).

247. Jacobsohn, *supra* note 20, at 461.

248. BARANGER, *supra* note 229, at 225.

249. *See id.* at 225-43.

250. *Id.* at 225.

251. RONALD DWORKIN, *LAW'S EMPIRE* 151-75 (Harv. U. Press, 1st ed. 1986).

252. *See* Gustav Radbruch, *Statutory Lawlessness and Supra-Statutory Law*, 26 OXFORD J. LEGAL STUD. 1, 1-11 (1946).

253. BARANGER, *supra* note 229 at 228-29.

254. *Lochner v. New York*, 198 U.S. 45 (1905) (adopting an approach of "fundamentality" of economic rights through the creation of the doctrine of "substantive due process").

255. *See* *Whitney v. California*, 274 U.S. 357 (1927) (accepting the fundamental character of freedom of speech guaranteed by the First Amendment, even though it does not constitute an absolute right).

256. 410 U.S. 113 (1973).

concept does not consist of providing an absolute value for these rights or principles. The right to abortion was not absolute and currently has even been federally eliminated by the Supreme Court.²⁵⁷ Fundamentality is not supra-constitutionality. They have just some similarities in terms of the influence that moral values play on judicial interpretation, especially when judges recognize a particular significance to a constitutional norm. Fundamental rights, though, can be amended.

Nevertheless, the above-mentioned references demonstrate that even if supra-constitutionality has been clearly rejected by positive U.S. law, positions of unamendability based on moral values or natural law considerations can be easily found at a doctrinal level. In addition, the U.S. Supreme Court has already used interpretative techniques, based on similar considerations, in order to qualify some rights as fundamental, attributing to them a particular significance. This background shows us that inside the Constitution there is a hierarchy that has been implicitly recognized by the constitutional judges. However, hierarchy is not synonymous with supra-constitutionality or unamendability in general. It can be, though, the most important condition for the recognition of this implied unamendability. If judges recognize a hierarchy, when the social or institutional situation requires it, they can transform this hierarchy into supra-constitutionality. Hence, concerning the French and the U.S. system, we can only wait to see if these considerations of hierarchy can turn some fundamental constitutional principles into unamendable. Let's see the U.K. system, which renders even more difficult any recognition of supra-constitutional principles.

B. A New Human Rights Model as the Premise of Unamendability in the UK

As we have seen in the first part, the major principle in the UK constitutional system is the principle of parliamentary sovereignty, which forbids any judicial control of Acts of Parliament. This recognition of the Parliament as the "supreme lawmaker" is arguably founded on the idea that law is not a substitute of politics.²⁵⁸ The main idea is the fact that human rights, but also the broader constitutional issues, cannot be protected beyond political process. They have to be deliberated through democratically elected institutions.²⁵⁹ This justifies the position of the Parliament as the holder of the supreme law authority.²⁶⁰ Nevertheless, the above-mentioned constitutional transformation through the adoption of several constitutional statutes can confirm that Parliamentary

257. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

258. J.A.G. Griffith, *The Political Constitution*, 42 MOD. L. REV. 1, 16 (1979).

259. Richard Bellamy, *Political Constitutionalism and the Human Rights Act*, 9 INT'L J. CONST. L. 86, 92 (2011).

260. Geertjes & Uzman, *Conventions of Unamendability: Covert Constitutional Unamendability in (Two) Politically Enforced Constitutions*, in AN UNAMENDABLE CONSTITUTION?, *supra* note 4, at 89, 101.

Sovereignty is no longer absolute, as the courts have obtained an important role, illustrating a judicialization of the U.K. constitutional structure.²⁶¹

This change was even recognized by the Courts themselves. In *R (Jackson) v. Attorney General*, Lord Hope states that “Parliamentary sovereignty is no longer, if it ever was, absolute . . . Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament . . . is being qualified . . . The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.”²⁶² In this case, the House of Lords had even accepted the control of the procedural validity of a statute, the Hunting Act 2004, demonstrating that constitutionality is not just a question of political interpretation.²⁶³ Hence, even if the solution at *Jackson* is an exceptional example, we can affirm that judges have a word to say.

This judicial role, therefore, is a basic condition for the development of a supra-constitutionality doctrine. It is necessary to add that, in order to verify the potential premises for the doctrine’s evolution, we have to focus on the UK human rights protection system, as fundamental rights protection constitutes, most of the time, the basic objective of unamendability principles. Indeed, the UK’s human rights system is largely shaped by the Human Rights Act of 1998. That Act, which incorporated most of the rights found in the European Convention on Human Rights, allowed courts to evaluate both legislative and administrative action against those rights. Before that statute, the protection of these rights depended on Parliament, and it was sometimes perceived as inefficient at protecting individual rights against the security state, leading to several condemnations of the UK by the European Court of Human Rights. That fact led the Labour Government to introduce the HRA.

The HRA brought a radical revolution in the UK’s public law, not only because it empowers judges to control acts of government agencies and statutes against the ECHR’s rights, but also because it placed the protection of these rights at the center of the constitutional context. However, to understand this phenomenon, we have to refer to some important pieces of the Act’s structure.²⁶⁴ Specifically, Article 1 of the HRA defines Convention’s rights as Articles 2 to 12 and 14 of the ECHR,²⁶⁵ excluding Article 13, whereas Article 2 provides that English courts should take into consideration the ECHR’s jurisprudence without being bound by it.²⁶⁶ Section 3(1) provides that “so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights,”²⁶⁷ and section 3(2) adds a nuance to that by specifying that this provision “does not affect the validity,

261. *Id.* at 102.

262. *R (Jackson) v. Att’y Gen.* [2005] UKHL 56 [104], [107] (appeal taken from Eng.).

263. *Id.*

264. See STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM 156 (2013).

265. Human Rights Act 1998, c.42, §1 (U.K.).

266. *Id.* §2.

267. *Id.* § 3(1).

continuing operation or enforcement of any incompatible primary legislation.”²⁶⁸ Another important mechanism is found in section 4, which empowers courts to make a declaration of incompatibility if a statutory provision does not conform to the ECHR principles,²⁶⁹ by also specifying in paragraph 6 that this declaration does not have any effect on the validity or continuing operation of the provision, being considered as “not binding.”²⁷⁰

Furthermore, section 10 gives authority to the relevant minister to amend legislation subject to a declaration of incompatibility by a “fast-track” remedial order as an alternative to the ordinary legislative process.²⁷¹ Section 6, an important provision, especially in administrative law, makes it unlawful for all public authorities, excluding the Parliament, to act incompatibly with the Convention’s right, unless they have express authorization from primary legislation.²⁷² It is essential to outline here that this prohibition applies also to the devolved institutions, like the Scottish Parliament and the Northern Ireland Assembly,²⁷³ which are considered as public authorities under section 6, also empowering the courts to strike down decisions of these Houses judged as violating the Convention’s content.²⁷⁴ Finally, the Act in Section 19 requires the responsible minister in charge of a bill to make a statement before second reading to the effect that, in his own view, the bill is compatible with the Convention rights.²⁷⁵

As we can notice from the above-mentioned description, the HRA introduces a new form of constitutional rights review within a framework that reconciles a mechanism of human rights protection with the fundamental principle of parliamentary sovereignty. The enactment of this act creates a constitutional revolution. Stephan Gardbaum, considering this evolution in the UK as well as in other similar legal systems strongly influenced by UK public law, characterized this new context as the “New Commonwealth model.”²⁷⁶ In fact, the *New Commonwealth model* represents a third path between legal constitutionalism, characterizing systems like the US with a strong judicial review of statutes, and political constitutionalism, characterizing traditional Commonwealth systems marked by the principle of Parliamentary Sovereignty, excluding any potential constitutional control on statutes. Countries falling into this new category include the UK, Australia, New Zealand, and Canada. Despite their potential constitutional differences, their constitutional evolution shares two common characteristics concerning the protection of individual rights: a

268. *Id.* § 3(2)(b).

269. *Id.* § 4(2).

270. *Id.* § 4(6).

271. *Id.* § 10.

272. *Id.* § 6(1)–(3).

273. See *Scotland Act 1998*, c. 46, § 29(1), (2)(d) (U.K.); *Northern Ireland Act 1998*, c. 47, § 6(1), (2)(c).

274. Human Rights Act 1998, c.42, §§ 6 (1)–(3) (U.K.)

275. *Id.* § 19(1).

276. GARDBAUM, *supra* note 264.

mandatory pre-enactment political rights review and a weak-form judicial review.²⁷⁷ For instance, section 33 of the Canadian Charter combines these two aspects by granting the judiciary power to invalidate conflicting statutes, but with a formal legislative final word exercisable by an ordinary majority vote.²⁷⁸

Let's return to England and its human rights judicial control mechanism. We may acknowledge that a reading of sections 3 and 4 of the HRA transforms courts into genuine constitutional judges to ensure the application of the ECHR's content. Based on the "interpretative obligation" under section 3, considered "very strong and far-reaching,"²⁷⁹ courts have at times attempted to develop different techniques to promote a statutory interpretation compliant with the Convention.²⁸⁰ On occasions, the courts have a statute as having implied terms (*read in*) in order to construct it as valid under the Act. One example of that approach can be found in the extensive interpretation of the Crime (Sentences) Act 1997 by the House of Lords.²⁸¹ The other approach is to read the statute in a very restrictive way (*read down*), as the then-supreme court, the House of Lords, did regarding the Road Traffic Act 1988 in 2000.²⁸² These two interpretative techniques were used with the objective of protecting the law from being qualified as violating the Convention.²⁸³

Judges also retain the power to declare a statute incompatible with the HRA and, by extension, the Convention's rights.²⁸⁴ It is important to note here that a declaration of incompatibility is not a "real" judicial review mechanism because Parliament always retains the final word.²⁸⁵ Parliamentary sovereignty requires that the political branch always prevails over the judicial one in terms of constitutional interpretation.²⁸⁶ Thus, we may question the future of cases in which courts have made a declaration of incompatibility. As Stephen Gardbaum points out, most of these declarations of incompatibility have been resolved either by Section 10 remedial orders, legislation enacted at the time of the declaration, or subsequent primary legislation.²⁸⁷ Nevertheless, as the *Belmarsh*

277. *Id.* at 25.

278. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, § 33(3)-(4), 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

279. Ghaidan v. Godin-Mendoza [2004] UKHL 30, [2004] AC (HL) 557 [30] (on appeal from Eng. & Wales) (U.K.).

280. See Alison L. Young, *Judicial Sovereignty and the Human Rights Act 1998*, 61 CAMBRIDGE L.J. 53, 61 (2002); Vanessa Barbé, *L'interprétation neutralisante, substitut de la déclaration d'inconstitutionnalité des lois contraires aux droits et libertés pour les juges britanniques*, 133 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL [R.F.D.C.] 53, 64-66 (2023).

281. R v. Offen [2000] EWCA (Crim) 96.

282. Brown v. Scott [2000] UKPC D3 (appeal taken from Scot.).

283. Barbé, *supra* note 280, at 64-66.

284. Human Rights Act 1998, c.42, §4 (U.K.).

285. *Id.* § 4(6).

286. See Alexander Latham-Gambi, *Political Constitutionalism and Legal Constitutionalism—an Imaginary Opposition?*, 40 OXFORD J. LEGAL STUD. 737, 738 (2020).

287. GARDBAUM, *supra* note 264, at 175.

case illustrates,²⁸⁸ there are instances in which, even though judges have found a very clear violation of ECHR's rights, the political institutions deny correcting the incompatibility.²⁸⁹ Almost all these cases concern the sensible issue of the political rights of prisoners, in which Parliament is entirely reluctant to correct the unconformity as the European Court requires.²⁹⁰

Thus, the previous considerations obviously raise the question of whether this new model is capable of establishing an implied doctrine of supra-constitutionality. The answer will be probably not. There is no unamendability requirement in the HRA. Even if this Act is considered a constitutional statute and the rights incorporated therein have the advantage of special political and judicial protection, we cannot talk about supra-constitutionality. However, we do have a particular constitutional hierarchy since the new model places special rigidity on their modification. Hierarchy is a *sine qua non* condition for an implied supra-constitutionality but, unlike in France or the US, in the UK, it cannot establish it since we have clear examples of non-respect of these rights after judicial declarations of incompatibility.

In addition to that fact, the HRA itself had been placed in a process of repeal by the former conservative government.²⁹¹ Specifically, judicial protection of human rights has been coming under attack for several years due to ongoing political dissatisfaction with European Court of Human Rights case law, especially regarding prisoners' voting rights.²⁹² Moreover, the fight against terrorism and the effects of immigration have created important tensions between several governments and the courts.²⁹³ It was over fifteen years ago, in 2009, when the conservative Prime Minister, David Cameron, first indicated his intent to eliminate the Human Rights Act.²⁹⁴ The same reluctance exists even today since the last conservative Government attempted to pass a new Bill of

288. *A v. Sec'y of State for the Home Dep't* [2004] UKHL 56 (on appeal from Eng. & Wales).

289. *Chester v. Secretary of State for Justice* [2013] UKSC 63; *see also* Gregory Davis & Robert Jones, *Prisoner Rights: Time for a Rethink?*, in *THE HOWARD JOURNAL OF CRIME AND JUSTICE* 1, 1-5 (2025).

290. *Hirst v. United Kingdom (No. 2)*, 2005-IX Eur. Ct. H.R. 187; *Scoppola v. Italy (No. 3)*, App. No. 126/05, Eur. Ct. H.R. 23 (2012); *see* Alison L. Young, *Prisoner Voting: Human or Constitutional Right?*, U.K. CONST. L. ASSOC. (Sep. 27, 2013), <https://ukconstitutionallaw.org/2013/09/27/alison-l-young-prisoner-voting-human-or-constitutional-right/> [<https://perma.cc/9VB7-5X9J>].

291. Bill of Rights Bill 2022-23, HC Bill [117] (UK).

292. *See* Conner Gearty, *The Human Rights Act Comes of Age*, 2 EUR. HUM. RTS. L. REV. 117, 117-26 (2022); Steve Foster, *Should it Go or Should it Stay? The Coming of Age of the Human Rights Act 1998, or Time to Say Goodbye?*, 26 COVENTRY L. J. 23-39 (2021).

293. *See A v. Sec'y of State for the Home Dep't*, [2004] UKHL 56, [2005] 2 A.C. 68 (appeal taken from Eng.).

294. David Cameron, Leader of the Conservative Party, Speech to the Conservative Party Conference (Oct. 8, 2009); *see also* Conservative Party, *Invitation to Join the Government of Britain*, 79 (2010).

Rights that would replace the HRA in order to limit the strong judicial role guaranteed by the previous mechanism.²⁹⁵

This evolution obviously raises questions about the features of human rights in the UK as well as the entire constitutional order. Can the rights derived from the ECHR, like the rights to life or dignity,²⁹⁶ be entirely suppressed, or must they be considered unamendable? As early as 2010, then President of the UK Supreme Court, Lord Philipps, indicated that the Human Rights Act “is here to stay.”²⁹⁷ But how can these rights be protected without a statute guaranteeing their respect? It is important to note at this point that declarations of human rights go against the English constitutional tradition. In this context, Dicey used to claim that declarations of rights are useless because fundamental rights are protected by the Parliament, which can frame governmental action.²⁹⁸ Nevertheless, even the Parliament cannot exercise an absolute power to suppress constitutional rights. Lord Chief Justice Coke stated in 1610 that when an Act of Parliament violates common law or reason, the common law will control the Act and render it void.²⁹⁹ If we take into account the power of the principle of Parliamentary sovereignty and the fact that individual rights are guaranteed by the Parliament, the previous situation has to be judged as very exceptional and applicable only in cases in which the statute violates one of the most fundamental rights.

Hence, even if the HRA is repealed, judges will be able to use the common law in order to protect the most fundamental rights. In the UK legal order, common law is considered a constitutional source.³⁰⁰ It is not incorrect to admit that judges can qualify some fundamental rights as unamendable. In fact, since the 2010s and the tendency of contestation of the HRA mechanism, judges have started to invoke common law as a source of fundamental rights.³⁰¹ In *Kennedy v. Charity Commission*, Lord Mance, writing for a narrow majority, outlined that, even if there is a tendency to analyze areas covered by the Convention solely in terms of the Convention rights, there are some areas in which “common law may go further than the Convention, and in some contexts it may also be inspired by the Convention rights and jurisprudence.”³⁰² We can imagine, therefore, that if the HRA ceases to exist due to repeal by a future government,

295. See Mark Elliot, *Leaving Strasbourg? Understanding the British Human-Rights Debate*, 3 QUADERNI COSTITUZIONALI [CONST. NOTEBOOKS] 804 (2015) (It.).

296. See European Convention on Human Rights arts. 3, 8, Nov. 4, 1950, 213 U.N.T.S. 221.

297. Geertjes & Uzman, *supra* note 260, at 108.

298. See T.R.S. Allan, *Parliamentary Sovereignty: Law, Politics and Revolution*, 113 L.Q. REV. 443 (1997).

299. *Bonham's Case* (1610) 77 Eng. Rep. 64; 8 Co. Rep. 114 (U.K.).

300. DICEY, *supra* note 177.

301. See T.R.S. Allan, *Constitutionalism at Common Law: The Rule of Law and Judicial Review*, 82 CAMBRIDGE L. J. 236 (2023).

302. See *Osborn v. Parole Board* [2013] UKSC 61, [2014] AC 1115 (appeal taken from Eng. & Wales); *Kennedy v. Charity Commission* [2014] UKSC 20, [2014] 2 WLR 808 (appeal taken from Eng. & Wales); *R v. Att'y Gen.* [2015] UKSC 21, [2015] AC 1787 (appeal taken from Eng. & Wales).

“the common-law constitutional landscape that is left behind may be remarkably similar to the situation that has obtained during the era of the HRA.”³⁰³

It is not bizarre that an important part of legal scholarship, especially represented by Sir John Laws and Trevor Robert Seward Allen, supports the idea that fundamental rights are inherently protected by common law. The former argues that every citizen should be granted the rights protected by the European Convention because these rights constitute fundamental principles found in every democratic society.³⁰⁴ The latter asserts that a bill of rights protecting these European rights would be useless, not only because these liberties already exist under common law, but also because the declaration would be interpreted under the same common law principles.³⁰⁵ Therefore, the status brought by the “New Commonwealth model” cannot be reversed. It is important to add here that all these positions bring considerations of implied supra-constitutionality. The hierarchy imposed by the HRA is also found in the “judge made constitution,” and there are some principles, like the right to human dignity, that would be perceived as unamendable by the judges.

Furthermore, Geertjes and Uzman add another conceptual basis for the supra-constitutionality doctrine in the UK. Specifically, given that the UK constitution is a politically enforced one, constitutional conventions can serve as another factor that renders some fundamental principles unamendable.³⁰⁶ These “conventions, understanding, habits or practices” regulating the conduct of several members of the sovereign power and completing the rules of the constitution are determined by the application of the *Jennings test*, examining the precedents of these practices if political actors perceived them as mandatory, and if there is a “reason for the rule.”³⁰⁷ The whole parliamentary system, based on the political responsibility of the Government to the Parliament, was created from these practices. We can understand, hence, their crucial role in the UK constitutional system.

The argument of previous scholars is that, since the political constitution of England derives from the application of several constitutional conventions, these sources include the values of democracy, the rule of law, and the independence of the judiciary.³⁰⁸ These sometimes-conflicting principles can establish a set of unamendable principles. In the context of the English

303. Mark Elliott, *Common-Law constitutionalism and proportionality in the Supreme Court: Kennedy v. the Charity Commission*, PUB. L. FOR EVERYONE (Mar. 31, 2014), <http://publiclawforeveryone.com/2014/03/31/common-law-constitutionalism-and-proportionality-in-the-supreme-court-kennedy-v-the-charity-commission/> [<https://perma.cc/GC7A-DLT4>].

304. John Laws, *Is the High Court the Guardian of Fundamental Constitutional Rights?*, PUB. L. 59 (1993); John Laws, *Law and Democracy*, PUB. L. 72 (1995); John Laws, *The Limitations of Human Rights*, PUB. L. 254 (1998).

305. T.R.S. Allan, *Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism*, 44 CAMBRIDGE L.J. 111 (Mar. 1985); T.R.S. Allan, *supra* note 298, at 443.

306. Geertjes & Uzman, *supra* note 260, at 112-13.

307. IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* 136 (3d ed. 1959).

308. Geertjes & Uzman, *supra* note 260, at 112-13.

institutional functioning, there is no Parliament that can abolish the “Principles of Democracy,” for instance.³⁰⁹ The fact that the UK Constitution cannot be found in a formal document makes it easier for us to assume that there can be an implied supra-constitutionalism in some of its sources, such as common law or constitutional conventions.

In conclusion, even Parliamentary Sovereignty cannot block considerations of unamendability. Indeed, the new model of human rights was a major step toward providing rigidity and hierarchy within the Constitution, demonstrating that some fundamental rights require special protection. Even if the sovereign Parliament is not constrained in abolishing these rights, the citizens will still be protected given the fact that fundamental rights also derive from common law principles and constitutional conventions. Even in our current era, in which the Parliament attempted to repeal, without any success, the Human Rights Act, fundamental principles will be guaranteed by the judicial system and political practices. This hierarchy between constitutional norms will continue to exist and, not only can common law recognize some fundamental human rights, like dignity, as unamendable at any time, but we can already perceive them as implicitly unamendable under the current *status quo*.

CONCLUSION

The doctrine of unconstitutional constitutional amendments, despite becoming a global trend, contains several oxymorons. One of the most important oxymorons is the fact that, although it was created as a concept in France and the US, countries with the first written Constitutions, the official constitutional position nowadays clearly denies recognizing the doctrine’s implied extension in order to overcome the explicit minimal unamendability principles, which have never been a subject of litigation. In the UK, the constitutional tradition based on the fundamental principle of Parliamentary Sovereignty has rendered this question entirely absent from constitutional litigation and scholarship.

Considering these positions, it is evident that we need to ask ourselves if these countries really need doctrines of implicit unamendability. With regards to the US, the difficulty of formally amending the Constitution under the procedures of Article V,³¹⁰ renders the need for the development of an

309. *Id.* at 113.

310. U.S. CONST. art. V (“The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.”).

unamendability doctrine nonexistent.³¹¹ Specifically, the above-mentioned provision, characterized by a particular constitutional rigidity, imposes very strict majority requirements, allowing us to affirm that, in the current era, it has been almost impossible to formally amend the Constitution. Thus, an important part of academic scholarship supports this idea. For instance, Jack Balkin observes that Article V places “almost insurmountable obstacles to constitutional revision,”³¹² while Sanford Levinson characterizes a formal amendment of the US Constitution as “functionally impossible.”³¹³ On the other hand, scholars, like Vicky Jackson, point to the constitutional history and past amendments, supporting that the practice has shown that it is possible to revise the Constitution, depending on the political circumstances.³¹⁴ However, these circumstances are marked by a “political polarization in the American society in general and specifically between the two dominant parties,” making it extremely difficult to form a majority to propose and then ratify any kind of constitutional change.³¹⁵

Hence, it is not wrong to admit that Article V is in decline and disuse.³¹⁶ For this reason, constitutional law scholarship is extremely focused on informal amendments, meaning amendments operated without any formal modification of the constitutional text through judicial or political interpretation.³¹⁷ As an illustration, Bruce Ackerman discusses “constitutional moments” to show that throughout American history, political leaders have transformed constitutional meaning without altering the constitutional text.³¹⁸ The New Deal and the civil rights revolution are both found in this context.

Regarding France, the reasons for this decline differ. Besides the dominance of positivist approaches on constitutional definition and interpretation, the genesis of a “constitutional justice” is a relatively new phenomenon, dating from the adoption of the 5th Republic’s Constitution in 1958. The constitutional

311. KENNETH P. MILLER, *DIRECT DEMOCRACY AND THE COURTS* 157 (2009) (supporting that between 1789 and 2004, there have been 11,000 amendments introduced to Congress, and only thirty-three have been effectively approved); see Jonathan Marshfield, *Amendment Creep*, 115 MICH. L. REV. 215, 242 (2016).

312. Jack M. Balkin, *Sanford Levinson’s Second Thoughts About Our Constitutional Faith*, 48 TULSA L. REV. 169, 171 (2012).

313. Sanford V. Levinson, *Still Complacent After All These Years: Some Ruminations on the Continuing Need for a “New Political Science,”* 89 B.U. L. REV. 409, 422 (2009).

314. Vicki C. Jackson, *The (Myth of Un)amendability of the US Constitution and the Democratic Component of Constitutionalism*, 13 INT’L J. CONST. L. 575 (2015).

315. DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995*, at 246 (1996).

316. Albert, *Constitutional Disuse or Desuetude*, *supra* note 35, at 1046 (describing this phenomenon by pinpointing that from 1968 to 1991 there was only one formal amendment ratified and since 1992 one additional amendment).

317. See *Oregon v. Mitchell*, 400 U.S. 112, 202-03 (1970) (Harlan, J., concurring in part and dissenting in part); see also Marshfield, *supra* note 311, at 244-46.

318. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014).

spirit, marked by the ideas of Rousseau and considerations of national sovereignty, was reticent, even for the judicial control of simple statutes, as they represent the Nation's general will. However, the recent concept of constitutional identity used by constitutional judges since 2006 can be characterized as a "little supra-constitutionality," as it allows them to set aside the constitutional requirement of EU law implementation, to protect some French core principles. It is obvious, though, that constitutional identity does not constitute a general unamendability doctrine, given its very limited scope of application. If we consider the general conception of the *Conseil* regarding the nature of the amendment power, we may affirm that the constitutional judges themselves have refused any existence of a legitimate basis for using the hierarchical superiority of domestic principles to control formal constitutional amendments. The current state of law does not lead to the transformation of constitutional identity into a "basic structure" theory.

The above-mentioned French conceptual reticence for constitutional judicial review is a clear refusal in the UK legal order. In principle, Parliamentary sovereignty excludes any potential judicial review, even regarding simple statutes. Any constitutionalizing of statutes, as in the case of the new human rights model, must operate a conciliation between the Parliament's sovereignty and the fundamentality of the statutory content. Thus, a recognition of unamendable principles in such a system would be a clear alteration of its own structure.

Nevertheless, even in these systems, there is a continuing ongoing academic tendency to support unamendability doctrines. In this context, even Laurence Tribe, who calls for a reserved judiciary role with regard to constitutional amendments,³¹⁹ seems willing to embrace the idea that some "properly adopted formal amendments could themselves be deemed "unconstitutional" because of their radical departure from premises too deeply embedded to be repudiated without a full-blown revolution."³²⁰ We face this thesis because it is conceptually recognized that, even in countries where there is no implied doctrine of unamendability, there exists a core identity—an "essential identity of the constitutional order"³²¹—that cannot be modified without destroying the whole constitution.

It is at this point that we delve into the doctrine of supra-constitutionality, which justifies implied unamendability principles perceived as fundamental because they derive from considerations of moral values and natural law. To accept supra-constitutionality, we must first acknowledge that certain rights, such as the right to human dignity, considered the most fundamental right under the German Basic Law, or the principle that the State is the holder of sovereignty

319. Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433 (1983).

320. LAURANCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 33-34 (2008).

321. Adrienne Stone, *Unconstitutional Constitutional Amendments: Between Contradiction and Necessity*, 12 VIENNA J. ON INT'L CONST. L. 357, 365-66 (2018).

with respect to public powers (*Staatsgewalt*)³²² are beyond elimination. The nature of these rights transcends potential objections against this doctrine, based on its subjectivity, the sovereignty of amendment powers, or the possibility that it may become a tool of political manipulation of the Constitution.

However, let us examine how this *supra-constitutionality* can be established. If we adopt the methodology of Yaniv Roznai, we must take into consideration two elements: a hierarchy of constitutional values, and constitutional identity.³²³ If we look at the constitutional orders examined in this study, these elements are present, and they are recognized by judges. In this context, the French *Conseil constitutionnel* uses the concept of “constitutional identity” to qualify some constitutional principles as superior to others because they have a particular place in the French system. In the U.S. case law, the Supreme Court has, on several occasions, imposed a hierarchy on constitutional principles by requiring that they receive special protection against government regulation, within the context of judicial review. Although such rights, such as free speech, are not considered formally superior to other constitutional provisions, they are *de facto* deemed substantially more important.

Even in the UK, where the constitutional system, in principle, excludes any idea of normative hierarchy, the recent constitutional transformation based on the establishment of a new system of human rights protection demonstrates a hierarchy of constitutional values. Specifically, it emphasizes that human rights are so fundamental that their protection justifies the framing of Parliament’s sovereignty. It is important to add here that this fundamentality will persist even if the Parliament decides to repeal this special human rights protection mechanism because common law is already poised to become the basis of this constitutional hierarchy. This “common law constitutional rights” approach necessitates significantly strong judicial activism. Nevertheless, judicial activism in constitutional interpretation is a constant tendency in UK law. As an illustration, in *Miller II*,³²⁴ a recent case concerning the decision of the Queen, following the advice of the Prime Minister, to prorogue Parliament, the Supreme Court of the United Kingdom—by acknowledging the legal enforcement of a constitutional convention—qualified the royal prerogative of prorogation as justiciable and unlawful under separation of powers considerations.³²⁵ Hence, “common law constitutionalism” as the basis of the English doctrine of unconstitutional amendments is a matter of interpretation. A very activist judiciary may adopt Coke’s approach, according to which common law prevails over statutes, while a less activist judiciary will utilize apply the traditional

322. Olivier Beaud, *Le conseil constitutionnel et ses approximations sur la souveraineté*, in *JUS POLITICUM* 143 (2018).

323. ROZNAI, *supra* note 9, at 144-50.

324. *Cherry v. Advoc. Gen. Scot.*, [2019] UKSC 41, [2020] AC 373 (appeal taken from Eng., Wales & Scot.).

325. See Mark Elliott, *Constitutional Adjudication and Constitutional Politics in the United Kingdom: The Miller II Case in Legal and Political Context*, 16 *EUR. CONST. L. REV.* 625, 625-46 (2020).

constitutional approach under which statutes can always limit or repeal common law rights.

Constitutional hierarchy and identity are elements that compose the doctrine of supra-constitutionality. In these countries, these elements already exist. However, another fundamental element is missing: implied unamendability *per se*. Although constitutional judges recognize the above-mentioned hierarchy and take into consideration the constitution's special identity, they refuse to recognize any implied unamendability principles. In addition to that argument, there are some constitutions that already recognize the superiority of some of their provisions by providing special procedures for their amendment, but they still admit these provisions as susceptible to potential modification. A famous example of the above-mentioned argument is Canada. The Supreme Court of Canada took upon itself the issue regarding a potential separation of Québec. In its *Secession Reference*, the Court developed an interpretation going beyond the formal constitutional text to impose additional procedural limitations on the power of formal amendment, as applied to the subject of provincial secession.³²⁶ In fact, the Canadian constitutional judges supported the idea that provincial secession is possible under the Constitution, but that it has to be governed by particular, rigid procedural requirements. The amendment process must be based on a "duty to negotiate," and the reformers should respect "underlying constitutional principles," including federalism, democracy, constitutionalism, the rule of law, and respect for minority rights.³²⁷ These principles are not stated in the text of Canada's formal amendment rules, but the Court's constructive interpretation requires their respect for the amendment of such a particularly special matter. Two years after this reference, Parliament adopted the *Clarity Act* to incorporate these principles by adding procedural requirements and guiding any potential future exercise of the amendment power concerning the secession of a Province.³²⁸

We see, hence, that constitutional orders recognize a hierarchy between constitutional principles but without recognizing their unamendable character. Do we have *supra-constitutionality* here? The answer is probably not, because there is no recognition of unamendability. Supra-constitutionality entails and requires unamendability. Nevertheless, we can adopt a broader definition of supra-constitutionality, one not limited to unamendability but based on constitutional hierarchy and identity. Indeed, if these latter elements are recognized, we have the potential for the judicial establishment of implied unamendability principles. Constitutional judges already have the tools, and all they need are the most pertinent circumstances to exercise them. As Richard Albert claims, it is at this moment when a court becomes truly

326. Reference re Secession of Québec, [1998] 2 S.C.R. 217 (Can.).

327. *Id.*

328. An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference, S.C. 2000, c. 26 (Can.).

“constitutional.”³²⁹ This moment prompts us to examine more closely what exactly supra-constitutionality means in these countries. Is it just a theoretical concept of unconstitutional amendments, or can it have a practical significance through notions like hierarchy, identity, and rigidity that already exist in their constitutions?

If we evaluate the current political and constitutional circumstances in the study’s three countries, we can conclude that there is no actual need for the Courts to push forward this hierarchy into implied unamendability. In the U.S., the rigidity of Article V combined with the present political situation, makes a formal constitutional amendment almost impossible, whereas in France, the need for constitutional judges to exercise special interpretative techniques influenced by supra-constitutionality is found primarily in cases of conflict between EU law and French constitutional principles. Nevertheless, in the event of a radical change in political circumstances threatening the existence of these principles, it is highly probable that judges will use the above-mentioned tools to protect them. It would be a barrier against “illiberal constitutionalism.”³³⁰ In such a context, the concretization in positive law of unamendability doctrines will be completely justified, as there is no democratic legitimacy issue that could overcome the fundamental need of protection of the constitution’s structural elements and the rule of law. This possibility may become a reality in the UK, where the HRA had unsuccessfully been placed in a process of repeal during the last period, as judges and scholars claim that ECHR’s fundamental rights are also reflected in common law, and potential dangers regarding their protection can lead to unamendability principles through common law methods. Therefore, the transformation of a hierarchy to a real supra-constitutionality, including unamendability, is only a matter of pertinent occurrences.

329. Richard Albert, *How a Court Becomes Supreme: Defending the Constitution from Unconstitutional Amendments*, 77 MD. L. REV. 181, 183-86 (2017) (regarding the role of judges of defending constitutional democracy by controlling the amendment power).

330. We can define the concept of “illiberal constitutionalism” as a constitutional context in which pluralism and fundamental rights protection are menaced. See Michel Rosenfeld, *Illiberal constitutionalism: Viable Alternative or Nemesis of The Modern Constitutional Ideal?*, in COMPARATIVE CONSTITUTIONAL THEORY 23 (Gary Jakobson & Miguel Schor eds., 2d. ed. 2024).

NOTES

HEALTH CARE ON THE SCALE: A COMPARATIVE ANALYSIS OF OZEMPIC AND GLP-1 WEIGHT LOSS DRUG COST AND ACCESS IN UNITED STATES AND CANADIAN HEALTH CARE SYSTEMS

GRACE CURRY*

INTRODUCTION

By 2030, it is estimated that one in two adults will be obese.¹ This rising prevalence of obesity throughout the world has catalyzed a scientific revolution for weight management solutions. Among these, Glucagon-like Peptide-1 (“GLP-1”) agonists, such as Ozempic, have emerged in the pharmaceutical market, offering effective weight-loss solutions for patients struggling with obesity and the health risks associated with the disease. However, the overwhelming demand and excitement for these drugs are tempered by various challenges, particularly high prices and limited access to the medication.

In North America, these challenges are specifically pronounced due to the vast differences between the United States and Canadian healthcare systems. The United States, with its privatized, insurance-driven system, faces major criticism of high out-of-pocket costs and inequitable access to GLP-1 medications. In contrast, Canada’s single-payer healthcare system aims to provide more equitable access, but grapples with its own limitations. The disparities between these two countries’ healthcare systems raise important questions about how healthcare structure influences the affordability and availability of cutting-edge drugs, such as GLP-1 receptor agonist medications.

This Note examines cost and access issues surrounding GLP-1 weight loss

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1. Asuka Koda, *As Ozempic usage expands, accessibility dwindles*, YALE NEWS (Oct. 31, 2024), <https://yaledailynews.com/articles/as-ozempic-usage-expands-accessibility-dwindles> [https://perma.cc/37Z2-ERRM].

drugs, focusing on Ozempic and Wegovy, two brand-name GLP-1 medications, and provides a comparative analysis of the United States and Canadian healthcare systems and their methods for providing weight loss drugs to their citizens. It explores the implications of the differing insurance frameworks, pricing structures, supply chain issues, and policy proposals on cost and access to these drugs. Ultimately, the discussion aims to shed light on systemic inequities and propose strategies for the United States to bolster access and lower cost to these life-changing drugs.

As the demand for GLP-1 prescription drugs grows, so does the urgency to address these disparities. How can healthcare systems balance the promise of pharmaceutical innovation with the principles of affordability and equity? And what lessons can policymakers draw from these contrasting models in the United States and Canada? This Note seeks to answer these pressing questions while contributing to the broader conversation about the future of healthcare access in the era of costly innovation.

I. BACKGROUND

A. *The Global Obesity Epidemic*

According to the Center for Disease Control and Prevention (“CDC”), 42% of Americans are currently obese.² Since 1990, the rate of adult obesity has doubled, and adolescent obesity has nearly quadrupled, underscoring the urgency of this public health crisis.³ Obesity is associated with numerous serious and potentially life-threatening health conditions, such as high blood pressure, high cholesterol, heart disease, type 2 diabetes, sleep apnea, and gallbladder disease.⁴

The World Health Organization (“WHO”) has announced that approximately 1 billion people globally, or one in eight persons, were living with obesity in 2022.⁵ However in Canada, the prevalence of obesity among adults is lower than in the United States.⁶ Recent data from 2022 suggests that 30% of adult Canadians are obese, rising 9% since 2003.⁷ This is almost 12%

2. *Ozempic for weight loss: Does it work, and what do experts recommend?*, UC DAVIS HEALTH (June 3, 2025), <https://health.ucdavis.edu/blog/cultivating-health/ozempic-for-weight-loss-does-it-work-and-what-do-experts-recommend/2023/07> [<https://perma.cc/6BCB-R7LB>].

3. *Obesity and overweight*, WORLD HEALTH ORG. (Dec. 8, 2025), <https://www.who.int/news-room/fact-sheets/detail/obesity-and-overweight> [<https://perma.cc/EH8X-A6WK>].

4. *Consequences of Obesity*, U.S. CTR. FOR DISEASE CONTROL & PREVENTION (July 15, 2022), <https://www.cdc.gov/obesity/basics/consequences.html> [<https://perma.cc/3LMW-CLQ4>].

5. *Obesity and overweight*, *supra* note 3.

6. MARGOT SHIELDS, MARGARET D. CARROLL & CYNTHIA L. OGDEN, ADULT OBESITY PREVALENCE IN CANADA AND THE UNITED STATES (CTR. FOR DISEASE CONTROL & PREVENTION, 2011), <https://www.cdc.gov/nchs/products/databriefs/db56.htm> [<https://perma.cc/7TBV-548Q>].

7. *An overview of weight and height measurements on World Obesity Day*, STATS. CAN. (Mar. 4, 2024), <https://www.statcan.gc.ca/o1/en/plus/5742-overview-weight-and-height-measurements-world-obesity-day> [<https://perma.cc/6F3T-NLUN>].

lower than the United States obesity rate. As a result, obesity has become a significant public health challenge, contributing substantially to increased mortality rates and increased healthcare expenditures.⁸

B. GLP-1 and Its Role in Weight Management

GLP-1 is a naturally occurring hormone that is “released when food is eaten to slow down gastric emptying, the process by which food leaves the stomach, so that the body can absorb nutrients from the food.”⁹ GLP-1 also increases the release of insulin, a hormone that regulates the amount of glucose in the blood, from the pancreas.¹⁰ When food is eaten, blood sugar increases, signaling the body to release insulin.¹¹ In certain diseases, such as type 2 diabetes and obesity, the body does not respond properly to nutrients, leading to elevated blood sugar levels.¹²

GLP-1 receptor agonists mimic the GLP-1 hormone by binding to and activating GLP-1 receptors in the hypothalamus, the part of the brain which regulates food intake.¹³ This activation reduces hunger and increases satiety in patients.¹⁴ Additionally, GLP-1 has been shown to delay gastric emptying, resulting in feeling fuller faster when eating.¹⁵

There are four major kinds of GLP-1 receptor agonists approved and on the market, including: Semaglutide (commonly known as Ozempic®, Wegovy®, Rybelsus®); Liraglutide (Victoza®, Saxenda®); Dulaglutide (Trulicity®); and Tirzepatide (Mounjaro®, Zepbound®).¹⁶

8. See *Obesity and overweight*, *supra* note 3 (3.7 million deaths in 2021 from obesity related diseases).

9. Catherine Rivera, *How Do GLP-1 Receptor Agonists, Like Ozempic or Mounjaro, Work?*, ENDOCRINOLOGY ADVISOR (June 14, 2024), <https://www.endocrinologyadvisor.com/features/mechanism-of-action-glp-1-agonist/> [<https://perma.cc/G4BH-2PN2>].

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. Lauren Garfield, *Wegovy, Trulicity, Ozempic... Oh My!*, RGA (Sep. 2023), <https://www.rgare.com/knowledge-center/article/wegovy-trulicity-ozempic-oh-my> [<https://perma.cc/M6YJ-B83H>].

Table 1. Summary of GLP-1 receptor agonists available in the United States¹⁷

Generic Name	Brand Name(s)	Formulation	FDA Approval	Highlights
semaglutide	Wegovy	2.4 mg weekly injection	Approved 6/2021 for weight management in adults and children age 12+	Approved for weight loss. Approved for teens.
	Ozempic	0.5, 1.0, 2.0 weekly injection	Approved 12/2017 to improve blood glucose in adults with Type 2 diabetes and to reduce major CVD events in people with Type 2 and CVD	Approved for both Type 2 and to reduce major CVD events in Type 2.
	Rybelsus	7.0, 14.0 daily tablet	Approved 9/2019 for blood glucose control in adults with Type 2 diabetes	First oral GLP-1 drug available in the US.
tirzepatide	Mounjaro	2.5, 5, 7.5, 10, 12.5, 15 mg weekly injection	Approved 5/2022 to improve blood glucose control in adults with Type 2 diabetes	Approved 5/2022 to improve blood glucose control in adults with Type 2 diabetes.
liraglutide	Victoza	1.2, 1.8 daily injection	Approved 1/2010 (original approval) for Type 2 in adults. Additional approval 8/2017 to reduce CVD events in type 2; Approved 6/2019 to treat patients 10+ with Type 2 diabetes.	Approved to treat Type 2 in kids ages 10 and up. Also approved to reduce CVD events in adults with Type 2 diabetes.
	Saxenda	3 mg daily injection	Approved 12/2014 for chronic weight management in adults. Approved 12/2020 for kids age ≥ 12 .	Approved for weight loss in kids ages 12-17.
dulaglutide	Trulicity	.75, 1.5, 3.0, 4.5 mg weekly injection	Approved 9/2014 to improve glycemic control in adults with type 2 diabetes and to reduce risk of CVD events in adults with Type 2. The 11/2022 approval was extended to kids age 10+ for Type 2 diabetes.	Approved for both Type 2 diabetes and to reduce major CVD events in Type 2 diabetes. Approved for use in kids ages 10 and up for Type 2 diabetes.

¹⁷. *Id.*

Ozempic, a semaglutide GLP-1 receptor agonist, was originally approved in 2017 for diabetes management.¹⁸ Doctors often prescribe these medications to people with type 2 diabetes because they help control their blood sugar levels.¹⁹ However, more recently, in 2021, the Food and Drug Administration (“FDA”) approved these drugs for weight loss in people with obesity, even if they do not have diabetes.²⁰ Wegovy, a higher-dose brand-name version of Ozempic, is prescribed for chronic weight loss management in adults with a body mass index (“BMI”) of 27 or above, with weight-related health conditions.²¹

This drug causes patients to experience reduced appetite and hunger, lower preference for high-calorie foods, a decrease in food cravings, and better overall control of their eating habits.²² Additionally, patients can expect an average weight loss of 15-20% of their body weight.²³ This is significantly higher than previous non-surgical weight loss solutions on the market, which yielded 5-10% loss in body weight.²⁴ However, even with the significant benefits in weight loss, there are various side effects to this medication, including nausea and vomiting, diarrhea or constipation, headaches, and injection site reactions.²⁵

C. Popularity, Media Coverage, and Benefits of Ozempic

After FDA approval in 2017, Ozempic and similar GLP-1s have experienced a rapid rise in both use and visibility, accompanied by an unprecedented level of media attention that has transformed these drugs from a clinical treatment to a cultural movement.²⁶ While originally approved as a type 2 diabetes treatment, the drug quickly gained attention for its weight loss potential.²⁷

18. *Id.*

19. *Id.*

20. Press release, U.S. Food & Drug Admin., FDA Approves New Drug Treatment for Chronic Weight Management, First Since 2014 (June 4, 2021), <https://www.prnewswire.com/news-releases/fda-approves-new-drug-treatment-for-chronic-weight-management-first-since-2014-301306223.html> [<https://perma.cc/75B5-YS3T>].

21. Emma Bartlett, *Is Ozempic a weight-loss miracle drug or too good to be true?*, BRYANT U. (Mar. 18, 2024), <https://news.bryant.edu/ozempic-weight-loss-miracle-drug-or-too-good-be-true> [<https://perma.cc/76S9-HYKL>].

22. *Weight Loss Medication*, UNIV. OF UTAH HEALTH, <https://healthcare.utah.edu/weight-management/weight-loss-medication> [<https://perma.cc/99U5-34L6>] (last visited Apr. 22, 2026).

23. *The Ozempic Effect: Everything You Need to Know About Medical Weight Loss*, COLUM.: SURGERY, <https://columbiasurgery.org/news/ozempic-effect-everything-you-need-know-about-medical-weight-loss> [<https://perma.cc/Z73B-62Q4>] (last visited Nov. 23, 2024).

24. *Id.*

25. *See id.*

26. Deidre McPhillips, *CNN Exclusive: Prescriptions for popular diabetes and weight-loss drugs soared, but access is limited for some patients*, CNN HEALTH (Sep. 27, 2023), <https://www.cnn.com/2023/09/27/health/semaglutide-equitable-access> [<https://perma.cc/5CN5-U74Z>].

27. Barlett, *supra* note 21.

This surge in attention is reflected among usage rates and public awareness.²⁸ Recent polling indicates that one in eight adults (12%) have taken some form of GLP-1 medication.²⁹ Furthermore, the number of semaglutide prescription refills has increased 442% from January 2021 to December 2023, highlighting the remarkable speed at which these drugs have entered mainstream use.³⁰ Public awareness of the drug has also increased, with about one-third (32%) of adults now reporting they have heard “a lot” about these drugs,³¹ and eight in ten (82%) adults reporting they have heard “a little” about these drugs.³² In addition, a Google trend analysis from 2018 to 2023 demonstrates exponentially growing public interest in weight-loss medications, particularly semaglutides such as Ozempic and Wegovy.³³ Together, this data illustrates not only the widespread adoption of the drug but also a significant shift in awareness, as GLP-1s have become widely discussed weight loss treatments.³⁴

Media coverage has played a significant role in shaping this narrative.³⁵ News outlets, television advertisements, and social media platforms have amplified the clinical promise of weight loss, contributing to the normalization of the drug.³⁶ Ozempic first made headlines as a “blockbuster” weight loss drug in 2021, when the drug was featured on a showing of the Dr. Oz Show.³⁷ By 2023, there were more than 4,000 ads on Instagram and Facebook alone mentioning semaglutide.³⁸ As a result, awareness of GLP-1 drugs has expanded rapidly in a relatively short time period following approval.³⁹

This growing visibility carries important public health implications. In 2021, obesity and related obesity conditions led to an estimated 3.7 trillion

28. Alex Montero et al., *KFF Health Tracking Poll May 2024: The Public's Use and Views of GLP-1 Drugs*, KFF (May 10, 2024), <https://www.kff.org/health-costs/kff-health-tracking-poll-may-2024-the-publics-use-and-views-of-glp-1-drugs/> [https://perma.cc/XYK9-E2ZL].

29. *Id.*

30. Christopher Scannell et al., *Prescription Refills for Semaglutide Products by Payment Method*, 5 JAMA HEALTH F. 1, 1 (2024) <https://doi.org/10.1001/jamahealthforum.2024.2026> [https://perma.cc/ZPM7-E93B].

31. Montero et al., *supra* note 28 (up from 19% in July 2023).

32. *Id.*

33. Sabrina H. Han et al., *Public Interest in the Off-Label Use of Glucagon-like Peptide 1 Agonists (Ozempic) for Cosmetic Weight Loss: A Google Trends Analysis*, 44 AESTHETIC SURGERY J. 60, 61 (2024).

34. Montero et al., *supra* note 28; *id.*

35. See David Ingram, *More than 4,000 ads for Ozempic-style drugs found running on Instagram and Facebook*, NBC (June 15, 2023), <https://www.nbcnews.com/tech/internet/ozempic-weight-loss-drug-ads-instagram-wegovy-semaglutide-rcna88602> [https://perma.cc/H8Y8-AY54].

36. *Id.*

37. Arvind Sommi, *How Ozempic Became a Celebrity Weight Loss Sensation*, DIATRIBE (Nov. 7, 2022), <https://diatribe.org/diabetes-medications/how-ozempic-became-celebrity-weight-loss-sensation> [https://perma.cc/M4AD-BKYD].

38. Ingram, *supra* note 35.

39. Montero et al., *supra* note 28.

deaths.⁴⁰ However, a new study led by researchers at Yale School of Public Health and the University of Florida found that broadening access to these highly effective drugs could prevent “up to 42,027 deaths a year in the United States.”⁴¹ The study was done with integrated data, combining different BMIs, obesity prevalence rates, and current limitations to access, specifically due to high cost and insurance structures.⁴² Under the access and cost limitations in place at the time of the study, an estimated 8,592 lives are saved annually with GLP-1s, with the majority of these individuals having private insurance.⁴³ These findings highlight the significant potential increased access to these drugs could have on reducing mortality rates on a national scale, reinforcing the importance of lowering costs and expanding access to this drug.⁴⁴

In addition, obesity mounts an immense economic burden throughout the country, with medical costs projected to exceed \$170 billion yearly.⁴⁵ Obese individuals, especially those from lower socioeconomic backgrounds, face additional healthcare costs and spend, on average, \$1,800 more annually than those without obesity.⁴⁶ These studies underscore the importance of addressing obesity with these new and highly effective GLP-1 medications as well as implementing policies that will remove barriers to access and high prices.

D. Compounded GLP-1s

Compounded drugs are custom formulations prepared by compounding pharmacies to address specialized patient needs that cannot be met by traditional pharmaceuticals.⁴⁷ Traditionally, the compounding process begins when a prescriber responds to a specific patient need by writing a prescription.⁴⁸ The prescriber chooses the active ingredient, dosage, dosage form, etc.⁴⁹ However, the inactive ingredients may be tailored to the patient, such as in cases when a patient has a documented allergy.⁵⁰ The compounding pharmacist will then

40. Obesity and overweight, *supra* note 3.

41. See Colin Poitras, *Expanding Access to Weight-Loss Drugs Could Save Thousands of Lives A Year, Study Finds*, YALE SCH. PUB. HEALTH (Oct. 16, 2024), <https://medicine.yale.edu/news-article/expanding-access-to-weight-loss-drugs-could-save-thousands-of-lives-annually-study-finds/> [https://perma.cc/5NRK-GXCE].

42. *Id.*

43. *Id.*

44. *See id.*

45. Abhishek Pandey et al., *Estimating the lives that could be saved by expanded access to weight-loss drugs*, 121 PROC. NAT’L ACAD. SCI. 1, 1 (2024).

46. *Id.*

47. *Human Drug Compounding*, U.S. FOOD & DRUG ADMIN. (Feb. 18, 2026), <https://www.fda.gov/drugs/guidance-compliance-regulatory-information/human-drug-compounding> [https://perma.cc/D4CN-QMH6].

48. *The Clinical Utility of Compounded Bioidentical Hormone Therapy: A Review of Safety, Effectiveness, and Use: An Overview of Compounding*, at 29, in NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE (2020).

49. *Id.*

50. *Id.*

formulate and dispense the medication to the patient.⁵¹ Historically, compounding has played an important role in personalized medicine by allowing providers to create formulations that are otherwise unavailable on the market.⁵²

Compounded drugs have become increasingly popular in the boom of GLP-1 medications; however, they are not FDA-approved.⁵³ The FDA's authority to regulate prescription drugs stems from the Food, Drug, and Cosmetic Act ("FDCA"); this does not give the FDA similar authority for compounded pharmaceuticals.⁵⁴ This lack of oversight increases the risk of potential adverse effects, leaving patients vulnerable to potentially ineffective or unsafe treatment.⁵⁵ However, there is some oversight to protect consumers. Under federal law, compounding pharmacies are required to source the active pharmaceutical ingredient ("API") of their formulations from an FDA-approved supplier.⁵⁶ While this provides some oversight, the regulatory framework may still be inadequate to adequately protect consumers.

II. THE CURRENT UNITED STATES HEALTHCARE SYSTEM

The United States healthcare system is one of the most expensive and complex in the world, yet it ranks poorly in performance when compared to other nations.⁵⁷ The U.S. spends more on healthcare than any other high-income nation, over 16% of its GDP in 2022, with projections to exceed 20% by 2035.⁵⁸ Despite the nation's high spending, the U.S. ranks last in overall healthcare performance in a study with nine other high-income nations.⁵⁹

Unlike most developed countries that provide universal healthcare, the U.S. relies on a mix of private and public insurance: publicly financed Medicare and

51. *Id.*

52. *See id.*

53. Nikhil Sood & Rohini Gard, *Global Rise of Compounded Weight-Loss Medicines A Worrisome Trend*, 9 *ENDOCRINE SOCIETY* 1,1 (2025).

54. *The Clinical Utility of Compounded Bioidentical Hormone Therapy*, *supra* note 48; Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-399(f) (2024).

55. *Compounding and the FDA*, U.S. FOOD & DRUG ADMIN. (Sep. 16, 2025), <https://www.fda.gov/drugs/human-drug-compounding/compounding-and-fda-questions-and-answers> [<https://perma.cc/BK2L-HQUV>].

56. *Bulk Drug Substances Used in Compounding Under Section 503A of the FD&C Act*, U.S. FOOD & DRUG ADMIN. (Sep. 26, 2024), <https://www.fda.gov/drugs/human-drug-compounding/bulk-drug-substances-used-compounding-under-section-503a-fdc-act> [<https://perma.cc/3SLM-CLY5>]; 21 U.S.C. § 353(a) (2024).

57. David Blumenthal et al., *Mirror, Mirror 2024: A Portrait of the Failing U.S. Health System*, COMMONWEALTH FUND (Sep. 19, 2024), <https://www.commonwealthfund.org/publications/fund-reports/2024/sep/mirror-mirror-2024> [<https://perma.cc/9PFL-7967>].

58. *Id.*

59. *Id.*

Medicaid coexist with privately funded market plans.⁶⁰ Regarding health insurance, as of 2022, around 48.7% of citizens had private insurance through their employers, 6.3% had private insurance through health insurance marketplaces, 21.2% had Medicaid, 14.6% had Medicare, 1.3% were on other public insurance, and 8% were uninsured.⁶¹ Insurance in the U.S. is administratively complex, and this fragmentation imposes a substantial bureaucratic burden.⁶²

Medicaid and Medicare, which together account for 34% of the U.S. health insurance market, provide government-funded coverage to specific populations.⁶³ Medicaid is a network of statewide programs administered by state governments following broad national guidelines established by federal statutes, regulations, and policies.⁶⁴ Low-income adults, pregnant individuals, children, elderly individuals, and individuals with disabilities are eligible for Medicaid.⁶⁵ Medicaid coverage varies by state, but certain services must be covered, including doctor visits, inpatient and outpatient hospital services, mental health services, necessary medications, prenatal and maternity care, and preventive care, such as immunizations, mammograms, and colonoscopies.⁶⁶

In contrast, Medicare provides health care coverage for people aged 65 or older, individuals of any age with certain disabilities, and people of any age with end-stage renal disease (“ESRD”).⁶⁷ This program, administered by the federal government, has four parts: Part A, B, C, and D.⁶⁸ Part A covers hospital insurance, including inpatient hospital, inpatient skilled nursing facilities, hospice, and some home health services.⁶⁹ Part B covers medical insurance, including services from doctors and other health care providers, outpatient care, durable medical equipment, home health services, and many preventative services.⁷⁰ Part C, also known as Medicare Advantage (“MA”), offers an alternative to Original Medicare through a private insurance plan that is

60. Rossa Tikkanen et al., *International Health Care System Profiles: The United States*, COMMONWEALTH FUND, <https://www.commonwealthfund.org/international-health-policy-center/countries/united-states> [https://perma.cc/4CK4-GDUD] (last visited Nov 23, 2024).

61. *US Healthcare System Overview: Background*, ISPOR, <https://www.ispor.org/heor-resources/us-healthcare-system-overview/background> [https://perma.cc/3PML-JK22] (last visited Nov 23, 2024).

62. Cyril F. Chang, David M. Mirvis & Asos Mahmood, *The High Cost of American Health Care: Understanding the Deeper Roots of the Crisis*, 34 HEALTH CARE ANALYSIS 1 (2025).

63. *US Healthcare System Overview: Background*, *supra* note 61.

64. MEDICARE AND MEDICAID BASICS, CTRS. FOR MEDICAID & MEDICARE SERV. 3 (2024).

65. *Id.*

66. *Id.* at 6.

67. *Id.* at 3.

68. *Id.* at 2.

69. *Id.*

70. *Id.*

Medicare-approved.⁷¹ These MA plans include Part A and B, usually Part D.⁷² Lastly, Part D is the Prescription Drug Benefit, where private insurance companies approved by Medicaid provide prescription drug coverage.⁷³

In March 2010, the Patient Protection and Affordable Care Act, also referred to as the Affordable Care Act (“ACA”), was signed into law.⁷⁴ This comprehensive health care reform expanded health care coverage across the United States by expanding access to Medicaid for individuals with income up to 138% of the federal poverty level, creating new health insurance exchange markets where individuals can purchase insurance, and requiring employers that do not provide such insurance to pay penalties.⁷⁵

The ACA has been regarded as the most comprehensive piece of health care reform legislation in recent history. Most notably, the law transformed health care by expanding health insurance for 20 million Americans.⁷⁶ Prior to 2010, the uninsured rate was 16%; by 2016, it was at an all-time low of 9%.⁷⁷ Additionally, the ACA protects people with preexisting conditions from discrimination. This is called “guaranteed issue,” which means that “insurers must issue policies to anyone and can no longer turn away people based on health status.”⁷⁸ Yet even as the ACA has transformed healthcare in the U.S., there are still major drawbacks for Americans, including cost and access to prescription drugs.

A. Cost

A notable consequence of the United States’ mixed healthcare system is the comparatively high cost of prescription drugs.⁷⁹ Cross-analyses of drug pricing across countries found that U.S. prescription prices were 278% higher than those in other countries.⁸⁰ Public perception reflects this, with nearly 79% of

71. *Id.*

72. CTRS. FOR MEDICARE & MEDICAID SERVS., *Parts of Medicare*, Medicare.gov, <https://www.medicare.gov/basics/get-started-with-medicare/medicare-basics/parts-of-medicare> [<https://perma.cc/9RSA-W9J5>] (last visited May 5, 2026).

73. MEDICARE AND MEDICAID BASICS, *supra* note 64, at 2.

74. *See* 42 U.S.C. §§18001-18122.

75. Jared Ortaliza, Matt McGough & Cynthia Cox, *The Affordable Care Act 101*, KFF (Oct. 8, 2025), <https://www.kff.org/health-policy/101-the-affordable-care-act/?entry=table-of-contents-what-did-the-aca-change-about-health-coverage-in-the-u-s> [<https://perma.cc/8XF8-RAKD>].

76. Nicole Rapfogel, Emily Gee & Maura Calsyn, *10 Ways the ACA Has Improved Health Care in the Past Decade*, CTR. FOR AM. PROGRESS (Mar. 23, 2020), <https://www.americanprogress.org/article/10-ways-aca-improved-health-care-past-decade/#:~:text=The%20ACA%20generated%20one%20of,races%20and%20ethnicities%20have%20narrowed> [<https://perma.cc/8TQH-6YE3>].

77. *Id.*

78. *Id.*

79. Andrew W. Mulcahy, Daniel Schwam & Susan L. Lovejoy, *International Prescription Drug Price Comparisons: Estimates Using 2022 Data*, RAND (Feb. 1, 2024), https://www.rand.org/pubs/research_reports/RRA788-3.html [<https://perma.cc/LGH7-8LSV>].

80. *Id.*

Americans believing that the cost of prescription drugs is unreasonable.⁸¹ These elevated prices stem from a combination of factors, including market exclusivity, patent periods, limited government price regulation, and reduced generic competition.⁸² As a result, this has led to affordability challenges for many patients, forcing some to ration their GLP-1 medications or forgo weight-loss treatment altogether, further amplifying health disparities in the United States.⁸³

An important factor contributing to the high prices of prescription medications is FDA market exclusivity, which allows drug manufacturers to hold monopolies over their medications for a set period.⁸⁴ During this time, competitors are restricted from producing generic alternatives, leading to inflated prices for consumers as the original manufacturer corners the market.⁸⁵ The time period differs for different kinds of drugs; most new drugs get an exclusivity period of five years.⁸⁶ For many new drugs, there are no cheaper generic alternatives due to these monopolies, in addition to drug patents.⁸⁷

Patents, which legally exclude others from making, selling, distributing, or importing a drug, differ from market exclusivity.⁸⁸ Patents are granted by the U.S. Patent and Trademark Office (“USPTO”), while market exclusivity is within the purview of the FDA.⁸⁹ Additionally, patents protect the intellectual property, while market exclusivity guarantees no generics are made during that period.⁹⁰ If a patent is granted, a drug manufacturer may have up to 20 years of intellectual property protection.⁹¹

Drug manufacturers may adopt “patent strategies” in order to maintain their

81. Rachel Dolan & Marina Tian, *Pricing and Payment for Medicaid Prescription Drugs*, KFF (Jan. 23, 2020), <https://www.kff.org/medicaid/5-key-facts-about-medicaid-prescription-drugs/> [https://perma.cc/UWT4-L82D].

82. See S. Vincent Rajkumar, *The High Cost of Prescription Drugs: Causes and Solutions*, 10 BLOOD CANCER J. 1, 1 (2020).

83. Alissa S. Chen et al., *Cost-Related Prescription Drug Rationing by Adults with Obesity*, 7 JAMA NETWORK OPEN 1, 1 (2024); see Ameet Sarpatwari et al., *Glucagon-Like Peptide-1 Receptor Agonist Order Fills and Out-of-Pocket Costs by Race, Ethnicity, and Indication*, 6 JAMA HEALTH FORUM 1, 2 (2025).

84. Aaron S. Kesselheim, Jerry Avorn & Ameet Sarpatwari, *The High Cost of Prescription Drugs in the United States: Origins and Prospects for Reform*, 316 JAMA 858, 860 (2016).

85. *Id.*

86. Aaron S. Kesselheim, *Determinants of Market Exclusivity for Prescription Drugs in the United States*, COMMONWEALTH FUND (Sep. 13, 2017), <https://www.commonwealthfund.org/publications/journal-article/2017/sep/determinants-market-exclusivity-prescription-drugs-united> [https://perma.cc/USP5-B2GD].

87. Rajkumar, *supra* note 82.

88. Kristi Martin, *How Drugmakers Use the Patent Process to Keep Prices High*, COMMONWEALTH FUND (Nov. 13, 2025), <https://www.commonwealthfund.org/publications/explainer/2025/nov/how-drugmakers-use-patent-process-keep-prices-high> [https://perma.cc/Y2QM-QVFM].

89. *Id.*

90. *Id.*

91. *Id.*

monopoly, which can further increase drug prices.⁹² One such strategy is a “patent thicket,” in which a pharmaceutical company builds an overlapping system of patents on a single drug by obtaining multiple patents on the drug’s composition, manufacturing, and formulation.⁹³ While each individual patent may differ, collectively they create a dense web of legal protections that can significantly delay generic competition.⁹⁴ As a result, even after the original patent on a drug’s active ingredient expires, competitors may face substantial legal barriers to entry into the market.⁹⁵ Generic drugs may become available after the original patent expires, allowing competition within the market.⁹⁶

The United States pharmaceutical industry has historically operated under a comparatively “hands-off” regulatory approach with respect to drug pricing. Unlike many countries that directly regulate prescription drug prices, the United States has relied on the market and stakeholders to set prices.⁹⁷ In 2003, Medicare was prohibited from negotiating lower drug prices with the industry.⁹⁸ This restriction was partially scaled back in 2022 for high-cost drugs.⁹⁹ However, there is still a lack of government intervention that gives pharmaceutical manufacturers the power to set high drug prices.

Additionally, with government-funded insurance, such as Medicaid and Medicare, prescription drug prices are determined by a complex set of policies that draw on price benchmarks.¹⁰⁰ Price benchmarking is the “practice whereby market analysis, cost estimating tools, affordable cost targeting, and design/manufacturing analysis are used to establish the fair market price.”¹⁰¹ However, determining the price of a drug in the United States is not a simple process, as many actors play a role in pricing and reimbursements, and each may rely on different pricing benchmarks at various stages of the drug supply chain.¹⁰² In addition, there is a lack of transparency about the actual sticker prices paid for medications, as rebates, discounts, and negotiations are often not made public.¹⁰³ Together, these factors complicate efforts to identify a single, consistent price for any drug, often at the expense of consumers who require

92. *Id.*

93. *Id.*

94. *See id.*

95. *See id.*

96. *See* Kesselheim, Avorn & Sarpatwari, *supra* note 84.

97. *See* Paul Ginsburg & Steven Lieberman, *Government Regulated or Negotiated Drug Prices: Key Design Considerations*, BROOKINGS (Aug. 30, 2021), <https://www.brookings.edu/articles/government-regulated-or-negotiated-drug-prices-key-design-considerations/> [https://perma.cc/XJ6N-3DXR].

98. H.R.1, 108th Cong. (2003) (enacted).

99. H.R. 5376, 117th Cong. (2022) (enacted).

100. Anna Hung & Sean Dickson, *A Primer on Prescription Drug Pricing Benchmarks in the United States*, 31 J. MANAG. CARE SPEC PHARM. 1326, 1326 (2025).

101. WORLD BANK, *Price Benchmarking: Works, Goods and Non-Consulting Services in World Bank-Financed Projects* 1 (2023).

102. *See id.*

103. *See Id.*

these drugs.

Additionally, several other factors may affect prescription drug prices, such as competition, Medicare Part D, pharmaceutical rebates, and pharmacy benefit managers.¹⁰⁴ Market exclusivity and patents allow brand-name drug manufacturers to set high prices, especially when there is little competition.¹⁰⁵ Rebates negotiated between manufacturers and insurers reduce overall spending but do not lower consumers' out-of-pocket costs.¹⁰⁶

Another contributor to high drug costs is pharmacy benefit managers ("PBMs"), which serve as "middlemen" in the pharmaceutical industry.¹⁰⁷ PBMs negotiate drug pricing for consumers on behalf of insurers, employers, and government health plans.¹⁰⁸ By negotiating, PBMs wield a large amount of power and are often a major influence in drug pricing.¹⁰⁹ However, PBMs often operate with limited transparency to consumers and the public, making reform difficult.¹¹⁰

These pricing dynamics are particularly evident in the market for GLP-1s. Ozempic, Wegovy, and other GLP-1s are highly effective but come at a high price. Without insurance, the monthly cost of these medications has ranged from \$1,000 to \$1,350 per month in the United States.¹¹¹ Bariatric surgery, despite being a major medical procedure, resulted in lower out-of-pocket costs for weight-loss patients compared to 12 to 18 months of GLP-1 therapy.¹¹² For many Americans, these medications remain financially out of reach, and many who qualify for GLP-1s forgo treatment altogether due to the high cost, with roughly 40% of GLP-1 prescriptions going unfilled.¹¹³ The high cost of GLP-1s stems from a variety of factors, which complicate lowering the cost of the drug.

First, Novo Nordisk and Eli Lilly maintain substantial control over the GLP-

104. *Prescription Drug Spending*, U.S. GOV'T ACCOUNTABILITY OFF., <https://www.gao.gov/prescription-drug-spending> [<https://perma.cc/V4WV-2D4W>] (last visited Feb. 16, 2025).

105. Rajkumar, *supra* note 82.

106. Steven Lieberman, Paul Ginsburg & Erin Trish, *Sharing Drug Rebates with Medicare Part D Patients: Why and How*, BROOKINGS INSTITUTION (Sep. 14, 2020), <https://www.brookings.edu/articles/sharing-drug-rebates-with-medicare-part-d-patients-why-and-how/> [<https://perma.cc/WC5T-R8QQ>].

107. FED. TRADE COMN'N, *Pharmacy Benefit Managers: The Powerful Middlemen Inflating Drug Costs and Squeezing Main Street Pharmacies*, U.S. FED. TRADE COMN'N OFF. OF POL'Y PLANNING 1 (July 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/pharmacy-benefit-managers-staff-report.pdf [<https://perma.cc/5NNK-E4H90>].

108. *Id.*

109. *Id.*

110. *See id.*

111. NOVOCARE, *Explaining Ozempic List Price*, <https://www.novocare.com/diabetes/products/ozempic/explaining-list-price.html> [<https://perma.cc/QSR8-WH6P>] (last visited May 8, 2026); NOVO PRICING, *Wegovy*, <https://www.novopricing.com/wegovy.html> [<https://perma.cc/6ZLE-3FBP>] (last visited May 8, 2026) (pricing for a one-month supply of Wegovy is \$1,349.02 and Ozempic is \$1027.51, for those uninsured).

112. Salvatore Docimo Jr. et al., *A Cost Comparison of GLP-1 Receptor Agonists and Bariatric Surgery: What is the Break Even Point?*, 38 SURGICAL ENDOSCOPY 6560, 6564 (2024).

113. Kesselheim, Avorn & Sarpatwari, *supra* note 84.

1 market through a combination of FDA market exclusivity and USPTO patent protections. In a study of ten GLP-1s, the average protection period was an average of 18.3 years after FDA approval.¹¹⁴ Although some of Novo Nordisk's primary patents for semaglutide expire in 2026, secondary patents may extend the company's market control until at least 2033.¹¹⁵ This means that no drugmaker can produce a true generic version of Ozempic that is approved by the Food and Drug Administration ("FDA") until 2033.¹¹⁶ In the absence of a generic version, medication prices remain high because competition is restricted, allowing Novo Nordisk to set premium pricing for its medications in the United States.

The pricing of GLP-1s is also influenced by insurance coverage limitations. Although some GLP-1 drugs are covered for diabetes treatment, insurance coverage for obesity treatment remains inconsistent.¹¹⁷ Under the terms of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Part D plans are currently prohibited from covering anti-obesity medications.¹¹⁸ Despite this, there have been recent strides in securing obesity coverage under government-funded insurance programs, however employer insurance plans remain reluctant to broadly cover these medications.¹¹⁹ As approximately half of Americans receive health insurance through their employers, these coverage decisions have a large impact nationwide.¹²⁰ Additionally, GLP-1 prices may be affected by other factors, such as price benchmarking, PBMs, and pharmaceutical rebates; however, they are usually not public knowledge.¹²¹ Overall, the pricing of GLP-1s remains convoluted, though several reforms could help reduce costs.

114. Rasha Alhiary et al., *Patents and Regulatory Exclusivities on GLP-1 Receptor Agonists*, 330 JAMA 650, 652 (2023).

115. *The year of Ozempic: an IP take*, HEALTH TECH WORLD (July 21, 2025), <https://www.htworld.co.uk/insight/features/the-year-of-ozempic-an-ip-take-red23/> [<https://perma.cc/4EKP-UP4H>].

116. Gerardo Sison, *When will Ozempic go generic?*, SIGNLECARE: CHECKUP (Mar. 3, 2025), <https://www.singlecare.com/blog/when-will-ozempic-go-generic/> [<https://perma.cc/J2PR-58ZU>].

117. See Elizabeth Williams, *Medicaid Coverage of and Spending on GLP-1s*, KFF (Jan. 16, 2026), <https://www.kff.org/medicaid/medicaid-coverage-of-and-spending-on-glp-1s/> [<https://perma.cc/R3UV-3X8T>].

118. *Part D / Prescription Drug Benefits*, CTR. FOR MEDICARE ADVOC., <https://medicareadvocacy.org/medicare-info/medicare-part-d/#:~:text=medically%20appropriate%20diagnoses.,Excluded%20Drugs,yet%20have%20Part%20B> [<https://perma.cc/VTQ8-BBUQ>] (last visited Mar. 25, 2026); H.R.1, 108th Cong. (2003) (enacted).

119. *Fact Sheet: President Donald J. Trump Announces Major Developments in Bringing Most-Favored-Nation Pricing to American Patients*, WHITE HOUSE (Nov. 6, 2025), <https://www.whitehouse.gov/fact-sheets/2025/11/fact-sheet-president-donald-j-trump-announces-major-developments-in-bringing-most-favored-nation-pricing-to-american-patients/> [<https://perma.cc/MCT8-DF85>]; *GLP-1 Drugs: 2025 Pulse Survey (United States)*, INT'L FOUND. EMP. BENEFIT PLANS (2025), [https://www.ifebp.org/detail-pages/resource/survey/glp-1-drugs-\(u.s.\)--2025-pulse-survey](https://www.ifebp.org/detail-pages/resource/survey/glp-1-drugs-(u.s.)--2025-pulse-survey) [<https://perma.cc/LN5L-5AWC>].

120. *US Healthcare System Overview: Background*, *supra* note 61.

121. WORLD BANK, *supra* note 101 at 1; FED. TRADE COMN'N, *supra* note 107, at 1.

B. Access

While drug shortages are less prominent than high drug costs, they have been a persistent challenge in the United States. Within just the first quarter of 2024, the American Society of Health-System Pharmacists (“ASHP”) reported 323 active drug shortages, surpassing the previous record of 320 in 2014.¹²² From 2022 to 2025, the FDA’s drug shortage list included GLP-1s used for weight loss, specifically Ozempic and Wegovy, further illustrating that drugs in high demand are especially susceptible to shortages.¹²³

Drug shortages of GLP-1 receptor agonists such as dulaglutide, semaglutide, and tirzepatide began in late 2022 and continued into early 2023.¹²⁴ Novo Nordisk, a major supplier of GLP-1s, has noted that shortages are due to the increased demand for the drug as well as supply chain issues.¹²⁵ The shortages have unevenly affected product doses for patients and created significant access barriers for patients using these drugs for glycemic management, weight loss, and cardiovascular risk reduction.¹²⁶ All GLP-1 shortages were resolved in early 2025, except for liraglutide injections.¹²⁷

Additionally, strategies to manage these shortages were significantly lacking due to the lack of generic alternatives and the monopoly on the newly FDA-approved brand-name drugs.¹²⁸ The exclusivity granted through these patents and market protections limits competition, preventing cheaper options

122. ASHP reports record high number of drug shortages, AM. HOSP. ASS’N (Apr. 12, 2024), <https://www.aha.org/news/headline/2024-04-12-ashp-reports-record-high-number-drug-shortages#:~:text=ASHP%20tracked%20a%20record%20323,of%20320%20shortages%20in%202014> [https://perma.cc/Z7VG-EGPF].

123. Jacqueline A. Corrigan-Curay, *Declaratory Order: Resolution of Shortages of Semaglutide Injection Products (Ozempic and Wegovy)*, U.S. FOOD & DRUG ADMIN. (Feb. 21, 2025), <https://www.fda.gov/media/185526/download> [https://perma.cc/NG45-45HL]; Judi Abbott Curry, Marina Plotkin & Megan Pollastro, *GLP-1 Weight-Loss Drugs Off Shortage List: Deadlines to Stop Compounding*, HARRIS BEACH MURTHA CULLINA PLLC (Mar. 24, 2025), <https://www.harrisbeachmurtha.com/insights/glp-1-weight-loss-drugs-off-shortage-list-deadlines-to-stop-compounding/> [https://perma.cc/4J2M-FSJN].

124. Heather P. Whitley, Jennifer M. Trijillo & Joshua J. Neumiller, *Special Report: Potential Strategies for Addressing GLP-1 and Dual GLP-1/GIP Receptor Agonist Shortages*, 41 CLINICAL DIABETES 467, 467 (2023).

125. NOVO NORISK A/S, *Company Announcement No. 80/2021: Novo Nordisk Announces Supply Chain Challenges for Wegovy in the U.S.*, NOVO NORISK (Dec. 17, 2021), <https://ml-eu.globenewswire.com/Resource/Download/cf92a50b-0b7a-4fe2-9e42-1113ad5840c2> [https://perma.cc/DF2M-PZB8].

126. *Id.*

127. Corrigan-Curay, *supra* note 123; U.S. FOOD & DRUG ADMIN., *Drug Shortage Detail: Liraglutide Injection*, https://www.accessdata.fda.gov/scripts/drugshortages/dsp_ActiveIngredientDetails.cfm?AI=Liraglutide%20Injection&st=c&tab=tabs-1 [https://perma.cc/PRN6-NBR3] (last visited May 9, 2026).

128. Whitley, Trijillo & Neumiller, *supra* note 124.

for weight loss from entering the market.¹²⁹ This monopoly further exacerbates supply chain issues, as no alternative producers can step in to meet the growing demand for these drugs.¹³⁰ Without policy intervention to allow generic production or regulations to ensure equitable supply distribution of these medications, shortages are likely to occur again, creating additional barriers for patients who rely on these life-changing medications for diabetes or weight management.¹³¹

As of February 2025, Medicare did not cover GLP-1 medications for weight loss, only for diabetes.¹³² This impacted a large portion of elderly individuals who could potentially benefit from these medications.¹³³ Furthermore, for those on Medicaid, coverage varies across states, often imposing strict criteria for patients to meet.¹³⁴ Weight-loss drugs are included in a small group of drugs that can be excluded from coverage by states.¹³⁵ As of January 2026, 13 state Medicaid programs have announced coverage for obesity treatment under fee-for-service (“FFS”) programs.¹³⁶ For those on private insurance, coverage may be inconsistent and inadequate, with high deductibles and copays they cannot afford.¹³⁷

Limited access to GLP-1 medications has contributed to the emergence of compounded alternatives.¹³⁸ While the FDA normally restricts compounded drugs, this restriction is lifted for drugs in shortage, essentially a regulatory loophole.¹³⁹ During the drug shortages, many people turned to compounded versions of GLP-1s.¹⁴⁰ This can be dangerous for consumers, as compounded

129. INITIATIVES FOR MEDICINES, ACCESS, AND KNOWLEDGE (I-MAK), *The Heavy Price of GLP-1 Drugs: How Financialization Drives Pharmaceutical Patent Abuse and Health Inequities for GLP-1 Therapies* 1, 3 (2025).

130. *See id.*

131. *See* U.S. DEP’T OF HEALTH & HUM. SERVS., *Policy Considerations to Prevent Drug Shortages and Mitigate Supply Chain Vulnerabilities in the United States* 2 (Apr. 2, 2024).

132. Tony Pugh & Kimberly Lankford, *When Will Medicare Cover Ozempic, Other Weight-Loss Drugs?*, AARP (Feb. 7, 2026), <https://www.aarp.org/medicare/faq/does-medicare-cover-ozempic-weight-loss-drugs/#federal-ban> [<https://perma.cc/E5PT-V3U6>]; Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173; Social Security Act § 1927(d)(2), 42 U.S.C. § 1396r—8.

133. Lou Portero, *Older Adults Face Disproportionate Barriers to Sustained GLP-1 Medication Access*, URB. HEALTH TODAY (Jan. 1, 2026), <https://www.urbanhealthtoday.com/post/older-adults-face-disproportionate-barriers-to-sustained-glp-1-medication-access> [<https://perma.cc/58R8-FBKA>].

134. Williams, *supra* note 117.

135. *Id.*; 42 U.S.C. § 1396r-8(d)(2) (1990).

136. Williams, *supra* note 117.

137. Pandey et al., *supra* note 45, at 1-2.

138. *Id.* at 4.

139. *See* FOOD AND DRUG ADMIN., *Compounding When Drugs Are On FDA’s Drug Shortage List*, U.S. FOOD AND DRUG ADMIN. (Aug. 8, 2025), <https://www.fda.gov/drugs/human-drug-compounding/compounding-when-drugs-are-fdas-drug-shortages-list> [<https://perma.cc/E6GX-J7TA>]; Jared Dudding, *Navigating Access: The Future of Compounded GLP-1 Receptor Agonists for Weight Loss*, 122 MO. MED. 252, 252 (2025).

140. *See* Dudding, *supra* note 139.

drugs do not undergo the same FDA approval process and scrutiny that other drugs on the market do.¹⁴¹ As of 2025, over 1,000 adverse events involving compounded GLP-1s have been reported by public health agencies.¹⁴² These reports are usually related to dosing errors, as compounded GLP-1s often require consumers to draw their own dosage in an insulin needle, rather than pre-set doses that brand-name GLP-1s offer.¹⁴³ During a shortage, compounding is allowed in certain circumstances: for 503A pharmacies, for formulations created after a patient is prescribed, and for 503B pharmacies in bulk drug compounding.¹⁴⁴ However, as the shortage has ended, the FDA has begun phasing out compounded GLP-1s, with a grace period that ended in April 2025.¹⁴⁵ Additionally, the FDA has moved forward with a proposed rule to exclude GLP-1s from 503B compounding pharmacies if a shortage occurs again.¹⁴⁶ This further limits access to GLP-1s, especially for those who cannot afford the brand-name GLP-1s.

III. THE CURRENT CANADIAN HEALTHCARE SYSTEM

Canada has a decentralized, universal, publicly funded health system called Canadian Medicare.¹⁴⁷ In this system, health care is funded and administered primarily by the country's 13 provinces and territories.¹⁴⁸ Each individual province and territory has its own insurance plan, and each receives cash assistance from the federal government on a per-capita basis.¹⁴⁹ Additionally,

141. *Id.* at 253.

142. *Id.*

143. FOOD AND DRUG ADMIN., *FDA Alerts Health Care Providers, Compounders, and Patients of Dosing Errors Associated with Compounded Injectable Semaglutide Products*, U.S. FOOD AND DRUG ADMIN. (July 26, 2024), <https://www.fda.gov/drugs/human-drug-compounding/200Bfda-alerts-health-care-providers-compounders-and-patients-dosing-errors-associated-compounded> [https://perma.cc/SD9L-EGXE].

144. *503A v. 503B Pharmacies*, OLYMPIA, <https://www.olympiapharmacy.com/blog/compounding-503a-vs-503b/> [https://perma.cc/C72T-XFYC] (last visited May 9, 2026).

145. FOOD & DRUG ADMIN., *FDA Clarifies Policies for Compounders as National GLP-1 Supply Begins to Stabilize*, U.S. FOOD & DRUG ADMIN. (Apr. 1, 2026), [https://www.fda.gov/drugs/drug-alerts-and-statements/fda-clarifies-policies-compounders-national-glp-1-supply-begins-stabilize#:~:text=%5B2/21/2025%5D%20FDA%20has%20determined%20the%20shortage%20of,glucagon%2Dlike%20peptide%201%20\(GLP%2D1\)%20medication%2C%20is%20resolved](https://www.fda.gov/drugs/drug-alerts-and-statements/fda-clarifies-policies-compounders-national-glp-1-supply-begins-stabilize#:~:text=%5B2/21/2025%5D%20FDA%20has%20determined%20the%20shortage%20of,glucagon%2Dlike%20peptide%201%20(GLP%2D1)%20medication%2C%20is%20resolved) [https://perma.cc/P6VW-LCST].

146. FOOD & DRUG ADMIN., *FDA Proposes to Exclude Semaglutide, Tirzepatide, and Liraglutide From 503B Bulks List*, U.S. FOOD & DRUG ADMIN. (Apr. 30, 2026), <https://www.fda.gov/news-events/press-announcements/fda-proposes-exclude-semaglutide-tirzepatide-and-liraglutide-503b-bulks-list> [https://perma.cc/P283-K4JG].

147. Sara Allin, Greg Marchildon & Alice Peckham, *International Health Care System Profiles: Canada*, COMMONWEALTH FUND, <https://www.commonwealthfund.org/international-health-policy-center/countries/canada> [https://perma.cc/D9K6-YGVP] (last visited Mar. 25, 2026).

148. *Id.*

149. *Id.*

about two-thirds of Canadians have private insurance.¹⁵⁰

Benefits differ according to individual insurance plans; however, each plan provides medically necessary hospital and physician services free at the point of use. For any excluded services, including outpatient prescription drugs and dental care, provinces and territories provide some coverage for targeted groups.¹⁵¹ A founding principle of the Canadian health system is access to healthcare based on need rather than ability to pay.¹⁵²

The Canadian Health Act, adopted in 1984, lays out various criteria and conditions that must be met for provinces and territories to receive federal funding.¹⁵³ This includes plans being administered and operated as non-profit, plans covering all health services covered by hospitals, physicians, and dentists, and plans for insured residents receiving uniform health services.¹⁵⁴ The federal government then provides funding to the decentralized system through the Canada Health Transfer, but each individual province and territory is ultimately responsible for managing and delivering services.¹⁵⁵

A. Cost

While Canada has a universal publicly funded system that covers hospital and physician services, prescription drugs are not covered by every province.¹⁵⁶ Despite this, it is well known that Canada has more affordable prescription drug prices than the United States.¹⁵⁷

The primary reason for these lower costs is Canada's use of government price controls. In 1987, the Canadian government set up the Canadian Patented Medicine Prices Review Board ("PMPRB"), which regulates medication prices in Canada and limits the maximum price that can be charged.¹⁵⁸ The PMPRB helps ensure that pharmaceutical manufacturers do not charge "excessive"

150. *Id.*

151. *Id.*

152. Danielle Martin et al., *Canada's universal health-care system: achieving its potential*, 391 LANCET 1718, 1718 (2018).

153. Allin, Marchildon & Peckham, *supra* note 147.

154. *Id.*

155. DEP'T OF FIN. CAN., *Canada Health Transfer*, GOV'T CAN., <https://www.canada.ca/en/department-finance/programs/federal-transfers/canada-health-transfer.html> [<https://perma.cc/7PTE-CSR8>] (last visited Feb. 16, 2025).

156. Allin, Marchildon & Peckham, *supra* note 147.

157. Julie Ingram, *Why Are Drugs Cheaper in Canada?*, VERYWELL HEALTH (Feb. 12, 2024), <https://www.verywellhealth.com/america-versus-canada-drug-prices-8567551> [<https://perma.cc/6BHQ-2BGV>]; see *Canadian Insulin is Cheaper than American Insulin: Why?*, INSULIN OUTLET (Jan. 24, 2022), <https://insulinoutlet.com/why-is-canadian-insulin-cheaper-than-american-insulin/> [<https://perma.cc/7B3Z-F4EU>].

158. Kiran Altaf, *Why is medication so much cheaper from Canada?*, RXCONNECTED (Mar. 17, 2026), <https://www.rxconnected.com/blog/canadian-pharmacy/why-is-medication-so-much-cheaper-from-canada> [<https://perma.cc/U7TN-XNHF>]; GOV'T CAN., *PMPRB Guidelines*, GOV'T CAN., <https://www.canada.ca/en/patented-medicine-prices-review/services/legislation/about-guidelines/guidelines.html> [<https://perma.cc/DQ4U-KKBD>] (last visited Apr. 10, 2026).

prices for patented drugs by reviewing and limiting the maximum prices that may be charged within the Canadian market.¹⁵⁹

Additionally, in Canada, prescription drugs are given a market exclusivity period of eight years that prevents generics from being produced.¹⁶⁰ Different from exclusivity protection, prescription drug patents guarantee protection for up to 20 years, beginning once the patent application is filed.¹⁶¹ Market exclusivity begins once a product hits the market, therefore warranting a shorter time length.¹⁶² Together, exclusivity and patents create layered protections for a newly approved drug.

As of 2023, in Canada, the uninsured price for one month of Ozempic averages at 250-300 USD and Wegovy is listed at \$400-570 USD.¹⁶³ However, this is impacted by the provincial government structure, as pricing may differ between parts of the country.¹⁶⁴ For example, one healthcare platform only offers GLP-1s to five of the ten provinces, and of the five, prices can range anywhere from 200 to 450 USD.¹⁶⁵

Even with the moderate pricing, Canada continues to make great strides in further lowering the cost of this weight loss treatment. In April 2026, Canada became the first G7 country to approve a generic semaglutide injection, specifically a generic Ozempic.¹⁶⁶ The generic was possible because Novo Nordisk did not renew its patent in Canada, which is the only country it has not renewed.¹⁶⁷ A result of this generic will likely be a lower cost of the brand-name, as the generic will drive up competition and change the market.¹⁶⁸ A second generic was also approved for use in early May.¹⁶⁹ It is predicted that with two

159. *See id.*

160. Alirod, *Prescription Drug Patents and Generic Drugs in Canada*, IP LAW ALLARD UBC (Apr. 1, 2024), <https://iplaw.allard.ubc.ca/2024/04/01/prescription-drug-patents-canada/> [<https://perma.cc/CRP9-A9XD>].

161. *Id.*

162. *Id.*

163. *Ozempic for Weight-Loss in Canada: Your Ultimate Guide*, WALK IN (Dec. 18, 2025), <https://walkin.ca/blog/ozempic-canada/> [<https://perma.cc/33N2-FG8S>].

164. Felix Team, *How Much Do Ozempic Treatments Cost in Canada?*, FELIX (Apr. 22, 2026), <https://www.felixforyou.ca/blog-posts/how-much-does-ozempic-cost-in-canada/> [<https://perma.cc/8CVE-8K88>].

165. *Id.*

166. HEALTH CAN., *Canada Becomes the First G7 Country to Approve a Generic Version of Semaglutide*, GOV'T CAN. (Apr. 28, 2026), <https://www.canada.ca/en/health-canada/news/2026/04/canada-becomes-the-first-g7-country-to-approve-a-generic-version-of-semaglutide.html> [<https://perma.cc/B356-TM59>]; HEALTH CAN., *Regulatory Decision Summary for Semaglutide Injection*, GOV'T CAN. (Apr. 28, 2026), <https://dhpp.hpfb-dgpsa.ca/review-documents/resource/RDS1776954365092> [<https://perma.cc/NF6Q-6VUL>].

167. Jules Adam, *Did Novo Open the Canadian Market to GLP-1 Generics?*, LABIOTECH (June 16, 2025), <https://www.labiotech.eu/in-depth/novo-nordisk-semaglutide-patent-expiration-canada/> [<https://perma.cc/4HY4-NP3W>].

168. *See Ozempic for Weight-Loss in Canada: Your Ultimate Guide*, *supra* note 163.

169. *Regulatory Decision Summary for Apo-Semaglutide Injection*, HEALTH CAN. (May 1, 2026), <https://dhpp.hpfb-dgpsa.ca/review-documents/resource/RDS1777640768488> [<https://perma.cc/RC3Q-38YQ>].

generics in the market, they will lower GLP-1 costs by about 50% of the current pricing.¹⁷⁰

B. Access

Access to GLP-1 receptor agonists in Canada depends on various factors, such as supply chain issues and the country's patchwork-style framework for health insurance.¹⁷¹ A recent study found that prescription drug shortages were less frequent in Canada, even with the vast supply chain issues occurring globally.¹⁷² In regard to GLP-1 receptor agonists, Canada faced a supply chain shortage of semaglutide, tirzepatide, and dulaglutide from October 2023 to January 2025.¹⁷³ This drug shortage was due to the high worldwide demand for the drug, specifically for weight loss purposes, which posed a threat to those who rely on the drug for type 2 diabetes and were unable to access it.¹⁷⁴ Canada's government took various steps to resolve the supply chain issues including "mobiliz[ing] and shar[ing] information regularly with a broad range of stakeholders on supply, work[ing] with manufacturers to monitor supply levels, and facilitated issuance of recommendations to health care professionals to mitigate the shortage of Ozempic and other GLP-1 receptor agonists by collaborating with clinical experts from different specialties."¹⁷⁵

In response to the Canadian government's actions, companies such as Novo Nordisk Canada and Eli Lilly Canada, the two largest suppliers of Ozempic, asked pharmacists to limit refill prescriptions for patients to a 30-day supply.¹⁷⁶ One province, British Columbia, amended its own regulations to limit the sale or dispensing of Ozempic to non-Canadian residents in situations where there

170. See *Ozempic for Weight-Loss in Canada: Your Ultimate Guide*, *supra* note 163.

171. See CANADIAN MED. ASS'N, *Can You Get GLP-1 Drugs in Canada?* (last visited Apr. 28, 2026), <https://www.cma.ca/healthcare-for-real/can-you-get-glp-1-drugs-canada> [https://perma.cc/5VTU-AA26]; Josh Recamara, *GLP-1 Cost Surge Puts Pressure on Canadian Drug Plans: Report*, INS. BUS. (Apr. 8, 2026), <https://www.insurancebusinessmag.com/ca/news/breaking-news/glp1-cost-surge-puts-pressure-on-canadian-drug-plans-report-571024.aspx> [https://perma.cc/467L-AGF4].

172. See Mina Tadrous et al., *Differences in Drug Shortages in the US and Canada*, 332(22) JAMA 1912 (2024).

173. HEALTH CAN., *Drug shortages in Canada: Fiscal year 2023 to 2024 in review*, GOV'T CAN. (Nov. 20, 2024), <https://www.canada.ca/en/health-canada/services/drugs-health-products/drug-products/drug-shortages/2023-2024-review.html> [https://perma.cc/ET2M-8F49]; HEALTH CAN., *Supply of Ozempic and other GLP-1 Receptor Agonists: Notice*, GOV'T CAN. (Jan. 27, 2025), <https://www.canada.ca/en/health-canada/services/drugs-health-products/drug-products/drug-shortages/information-consumers/supply-notice/ozempic.html> [https://perma.cc/58XH-3BCT].

174. HEALTH CAN., *Drug shortages in Canada*, *supra* note 173.

175. *Id.*

176. *Response to the intermittent shortages of Ozempic, Mounjaro and Trulicity*, DIABETES CAN. (Dec. 6, 2023), <https://www.diabetes.ca/media-room/news/response-to-the-anticipated-ozempic-supply-disrupt> [https://perma.cc/4KX6-PPT7].

are supply chain issues.¹⁷⁷ These actions have significantly reduced supply chain issues in Canada, and as of January 27, 2025, the Canadian government has issued an update that the supply of Ozempic and GLP-1 receptor agonists has stabilized and is available across the country.¹⁷⁸

Public health insurance coverage of GLP-1s varies among provinces because prescription drug coverage is administered at the provincial level.¹⁷⁹ Most provincial plans provide coverage for type 2 diabetes treatment, but coverage for weight loss is less common.¹⁸⁰ If covered for weight-loss, many provinces may list the drug as “limited use,” meaning a doctor has to “confirm it meets special medical rules.”¹⁸¹ Other provinces may require step therapy or prior authorization before covering the drug under public insurance.¹⁸²

For patients with employer-based insurance, access to GLP-1 receptor agonists may be less likely. A survey conducted by the International Foundation of Employee Benefit Plans Canada in 2025 found that 56% of employers cover GLP-1 drugs, but only for diabetes.¹⁸³ Of the employers surveyed in the study, only 31% of them cover GLP-1 drugs for diabetes and weight loss.¹⁸⁴ For those employers who do not offer GLP-1 drugs for weight loss, 35% stated that they were not considering offering coverage for these drugs (with 30% unsure).¹⁸⁵

As GLP-1 drugs become increasingly accessible for weight loss management, insurance plan sponsors face consequential decisions about whether to cover these drugs.¹⁸⁶ These drugs have raised cost concerns for benefit providers as the benefit of weight-management and chronic disease prevention may not be realized during the period employees are covered under their employer’s health plan.¹⁸⁷ As employees frequently switch jobs or retire, employers may bear the immediate cost of covering GLP-1 treatments without

177. Press Release, Gov’t B.C., Province takes actions to prevent shortage of diabetes drug (Mar. 28, 2023), <https://news.gov.bc.ca/releases/2023HLTH0031-000398> [https://perma.cc/9GG9-UPBN].

178. HEALTH CAN., *Supply of Ozempic*, *supra* note 173.

179. CANADIAN MED. ASS’N, *supra* note 171.

180. *See id.*

181. *See id.*; Questions and Answers: Executive Officer Notice to Pharmacies, Ont. Ministry of Health (Jan. 26, 2024), <https://www.ontario.ca/files/2024-01/moh-questions-answers-executive-officer-notice-pharmacies-en-2024-01-26.pdf> [https://perma.cc/E945-C9XJ].

182. *Alberta Drug Benefit List*, ALBERTA BLUE CROSS, https://idbl.ab.bluecross.ca/idbl/drugsList?sessionId=9LhOeo0SEoQjJoLddZSeM-Tl5_feN97SQ64IDD9P9leYSRtQgpeT!91776283?ptc=682006 [https://perma.cc/K42U-GKUQ].

183. *GLP-1 Drugs: 2025 Pulse Survey (Canada)*, INT’L FOUND. EMP. BENEFIT PLANS (2025), [https://www.ifebp.org/detail-pages/resource/survey/glp-1-drugs-\(canada\)--2025-pulse-survey](https://www.ifebp.org/detail-pages/resource/survey/glp-1-drugs-(canada)--2025-pulse-survey) [https://perma.cc/8SUU-QP2M].

184. *Id.* (increasing 14% since 2024).

185. *Id.*

186. David Kitai, *Plan sponsors may only have a few months to decide how they’ll cover obesity drugs*, BPM (Feb. 20, 2024), <https://www.benefitsandpensionsmonitor.com/benefits/group-health/plan-sponsors-may-only-have-a-few-months-to-decide-how-theyll-cover-obesity-drugs/383791> [https://perma.cc/PBQ8-GXKP].

187. *Id.*

ultimately benefiting from the long-term reduction in healthcare expenditures.¹⁸⁸

IV. COMPARISON

A. Cost

Weight loss drugs are significantly more expensive in the United States compared to Canada. In the United States, an uninsured, one-month supply of GLP-1 drugs is approximately \$1,000 for Ozempic and \$1,300 for Wegovy, while in Canada the average price is \$250 for Ozempic and \$450 for Wegovy.¹⁸⁹ As a result, GLP-1s are generally three to four times more expensive in the United States than in Canada. These elevated prices in the United States likely stem from a combination of factors, such as minimal government price regulation, market exclusivity/patent protection, and lack of insurance coverage.¹⁹⁰

Rather than directly regulating the prices of medications, the United States allows pharmaceutical manufacturers to set their own prices with limited government interference.¹⁹¹ As a result, drug manufacturers retain substantial pricing power, leading to higher costs for prescription drugs.¹⁹² By contrast, Canada utilizes a more “hands-on” approach to the pharmaceutical industry. The Canadian government manages and lowers drug pricing through the PMPRB, a federal quasi-judicial agency, which prevents high costs for medications by giving legal authority to regulate patented drug prices.¹⁹³ This form of government oversight limits the ability of pharmaceutical companies to maintain an unchecked monopoly on the drug market.

Additionally, the United States provides longer periods of market exclusivity than Canada. In the U.S., prescription drugs receive an average market exclusivity period of twelve and a half years, whereas Canada provides an eight-year exclusivity period.¹⁹⁴ While both countries have patent protections that may last roughly 20 years from the filing date, Canada has approved semaglutide generics to enter the market earlier than the U.S.¹⁹⁵ While the generic may have resulted from Novo Nordisk’s lack of a patent extension, this

188. *See id.*

189. NOVOCARE, *supra* note 111; NOVO PRICING, *supra* note 111; *Ozempic for Weight-Loss in Canada: Your Ultimate Guide*, *supra* note 163.

190. Rajkumar, *supra* note 82.

191. Ginsburg & Lieberman, *supra* note 97.

192. *Id.*

193. Altaf, *supra* note 158; HEALTH CAN., PROTECTING CANADIANS FROM EXCESSIVE DRUG PRICES: CONSULTING ON PROPOSED AMENDMENTS TO THE PATENTED MEDICINES REGULATIONS 3 (May 16, 2017), <https://www.canada.ca/content/dam/hc-sc/documents/programs/consultation-regulations-patented-medicine-document/con1-eng.pdf> [<https://perma.cc/M683-D8K5>].

194. Kesselheim, *supra* note 86; Alirod, *supra* note 160.

195. Martin, *supra* note 88; Alirod, *supra* note 160.

has allowed Canada to approve not one but two generic GLP-1s.¹⁹⁶

As a result of Canada's lower cost of prescription drugs, more Americans are trying to get GLP-1s across the border. In 2023, 15% of Ozempic prescriptions filled in Canada went to United States residents, which leaves Canadians with Type 2 diabetes without access to the drug.¹⁹⁷ Overall, the stark pricing differences between GLP-1s in the U.S. and Canada demonstrate the impact that government regulation, market exclusivity policies, and pharmaceutical pricing structures can have on the pharmaceutical industry.

B. Access

In addition to cost, Canada has generally provided more stable and equitable access to GLP-1s than in the U.S. Access to GLP-1s is not only dependent on cost, but also the supply chain stability and insurance coverage. While both countries experienced GLP-1 shortages following the rapid rise in demand for the drug, the two countries approached the shortage differently. The United States has experienced persistent shortages of GLP-1 medications from 2022 to 2025.¹⁹⁸ Despite the shortages, the U.S. has relied primarily on market forces and manufacturer-led production increases to address supply issues, with relatively limited government intervention. In contrast, Canada experienced these GLP-1 drug shortages from 2023 to 2024, and government officials took more direct steps to resolve the supply and preserve access. The Canadian government limited prescriptions to a 30-day supply¹⁹⁹ and one province restricted sales to non-Canadians, which helped stabilize availability to the drug.²⁰⁰

Insurance coverage also plays a large role in determining cost as well as access to GLP-1s. In the U.S., many insurers do not cover GLP-1s for obesity, only for diabetes treatment.²⁰¹ As a result, consumers are forced to pay out-of-pocket prices or forgo the drug altogether.²⁰² However, recent progress has been made to give coverage to Medicare beneficiaries.²⁰³ In Canada, public health insurance coverage varies by province; many provinces cover the drug only for

196. Reg. Decision, *supra* note 166; Adam, *supra* note 167; Reg. Decision, *supra* note 169.

197. A. Pawlowski et al., *Canada cracks down on U.S. patients buying Ozempic in British Columbia*, TODAY (Mar. 31, 2023), <https://www.today.com/health/news/ozempic-weight-loss-canada-rcna77601> [<https://perma.cc/777C-VLXG>].

198. *Companies find ways around end of GLP-1 shortages*, ADVISORY BOARD (May 27, 2025), <https://www.advisory.com/daily-briefing/2025/05/27/glp-1-compounders> [<https://perma.cc/E25V-PZRA>].

199. *Response to the intermittent shortages of Ozempic, Mounjaro and Trulicity*, *supra* note 176.

200. HEALTH CAN., *Drug shortages in Canada*, *supra* note 173.

201. Pandey et al., *supra* note 45, at 1.

202. Chen et al., *supra* note 83, at 1.

203. *Fact Sheet: President Donald J. Trump Announces Major Developments*, *supra* note 119.

type 2 diabetes.²⁰⁴ Additionally, many employer-based plans cover GLP-1 drugs for diabetes but not weight loss.²⁰⁵

V. POLICY PROPOSALS AND RECOMMENDATIONS

The comparative analysis between the U.S. and Canada reveals that cost and access disparities are not inevitable, but rather the result of deliberate policy choices. While recent expansions in Medicaid and Medicare coverage for GLP-1 medications mark a significant step towards affordability and accessibility, substantial barriers remain in the U.S. Accordingly, meaningful reform requires a multi-sided approach that addresses government intervention, insurance coverage, and patent exclusivity.

One key takeaway from the comparison of how the American and Canadian healthcare systems shape access and cost of GLP-1s is the amount of government intervention in each country. The Canadian government has significantly more control over prescription drug pricing and supply chain solutions than the United States does. The U.S. lack of control has led to significant consequences for pricing and access to GLP-1s for U.S. citizens.²⁰⁶ However, the United States may be taking a page from the Canadian playbook by allowing government-funded health insurance to cover GLP-1s for weight loss.

Given the market dynamics and patent exclusivity, the best chance of lowering the cost of GLP-1 drugs and thereby increasing access for weight loss may be modeling Canada's approach and increasing government intervention within the healthcare market. In the absence of significant policy reform, market forces alone will likely keep GLP-1 drugs expensive and out of price range for most until Novo Nordisk's patents expire in 2033. Without generic competition, prices will remain high, limiting access for patients who cannot manage their weight without them.

However, if the U.S. follows Canada's approach of drug price regulation, the financial burden on consumers could be significantly reduced. These policy changes could fundamentally make weight-loss medications more affordable and thereby more accessible to the millions of Americans struggling with obesity and related health conditions.

204. Nicolas Valencia, *GLP-1 in Canada: What It Is, How It Works, and What Canadians Should Know*, IFINANCE (Jan. 6, 2026), <https://ifinancecanada.com/glp-1-in-canada-what-it-is-how-it-works-and-what-canadians-should-know/> [https://perma.cc/JFN7-8FVK]; CANADIAN MED. ASS'N, *supra* note 171.

205. *GLP-1 Drugs: 2025 Pulse Survey (Canada)*, *supra* note 183 (increasing weight loss coverage under employer-based insurance from 17% in 2024 to 31% in 2025).

206. See HEALTH CAN., *Drug shortages in Canada*, *supra* note 173.; Laurie Flynn, *What is behind the legal drug crisis in the US?*, STAN. MED. (Oct. 6, 2023), <https://med.stanford.edu/news/insights/2023/10/pharmaceuticals-pricing-generics-medicare.html> [https://perma.cc/C2RR-EH4Y].

A. Expand Federal Coverage Through Legislative Reform

While as of February 2025, Medicare was statutorily prohibited from covering weight loss drugs, the federal Treat and Reduce Obesity Act (“TROA”) aimed to change this.²⁰⁷ This bill would have expanded Medicare coverage for obesity treatments, specifically covering treatment from healthcare providers other than an individual’s primary care provider.²⁰⁸ The TROA has been introduced in every year since 2013 but has yet to advance.²⁰⁹ The lack of progress for the TROA may reflect a stigma that frames obesity as a lifestyle choice rather than recognizing it as a chronic disease.²¹⁰

However, in the 118th Congress for the 2023-2024 session, the original proposed bill expanded on previous versions by allowing Medicare’s Part D prescription drug benefit program to cover drugs that treat both obese and overweight individuals.²¹¹ This expansion would significantly broaden coverage for Medicare beneficiaries, as “two-thirds of beneficiaries are considered either obese or overweight, with 34% falling within the obesity category (BMI $\geq$ 30),”²¹² and an additional 29% classified as overweight (BMI 25-29.9) with a weight-related condition.²¹³ By expanding coverage to both groups, this legislation marks a more comprehensive and preventative approach, increasing early intervention among overweight individuals to prevent progression to obesity and consequential chronic diseases.

During the 2023-2024 session, the Ways and Means Committee voted the bill out of the committee and into the full House of Representatives.²¹⁴ However, the version voted on was amended and scaled back to limit coverage to individuals who had been taking a weight loss drug for a year prior to enrolling in Medicare. The amendments further limited coverage to individuals with obesity only, excluding the 29% of overweight Medicare beneficiaries with at

207. Pugh & Lankford, *supra* note 132; *Part D / Prescription Drug Benefits*, *supra* note 118; Treat and Reduce Obesity Act of 2023, H.R. 4818, 118th Cong. (2023).

208. *Id.*

209. *Treat and Reduce Obesity Act (TROA)*, NATIONAL MEDICAL ASSOCIATION (June 27, 2024), <https://nmanet.org/news/treat-and-reduce-obesity-act-troa/> [<https://perma.cc/4H7X-4UYQ>].

210. Simar S Bajaj et al., *Overcoming Congressional Inertia on Obesity Requires Better Literacy in Obesity Science*, 30 OBESITY (SILVER SPRING) 799, 800 (2022).

211. Treat and Reduce Obesity Act of 2023, *supra* note 207.

212. CONG. BUDGET OFF., *How Would Authorizing Medicare to Cover Anti-Obesity Medications Affect Spending and Health?*, U.S. CONG. 2 (2024), <https://www.cbo.gov/publication/60816#footnote-045> [<https://perma.cc/7GJU-NE7C>] (data recent as of 2021, from the 2021 Medicare Current Beneficiary Survey).

213. *See id.* (83% of the 35% of overweight Medicare beneficiaries have a weight-related condition).

214. Berkeley Jr., *House committee passes bill that would allow Medicare to cover weight loss drugs*, NBC NEWS (June 27, 2024), <https://www.nbcnews.com/health/health-news/house-committee-passes-bill-allow-medicare-cover-weight-loss-drugs-rcna159248> [<https://perma.cc/4GZK-82WN>].

least one weight-related condition,²¹⁵ despite FDA guidance permitting these medications for both groups.²¹⁶ The bill died after not making it out of the House during the 2023-2024 session.²¹⁷

Even with the failed, scaled-back version of the bill, this proposed legislation was the first major step towards Medicare coverage for weight-loss medications. As discussions around weight-loss medications grow, advocates remain hopeful that legislative efforts will codify expanded coverage in upcoming sessions.²¹⁸ While the proposed bill did not pass in the 2023-2024 session, its introduction and committee approval lay the groundwork for renewed efforts in upcoming congressional sessions.

The passing of this bill would have far-reaching implications for healthcare, the pharmaceutical industry, and public health in the United States. By expanding Medicare coverage to include weight loss drugs, this bill would significantly expand access for older adults who could benefit from these treatments.²¹⁹ Notably, for obese individuals, this bill would increase access for 34% of Medicare beneficiaries.²²⁰ By extending coverage to this large and high-risk population, this bill could facilitate improved health outcomes across Medicare beneficiaries.

Additionally, although weight loss drugs are currently expensive, expanding Medicare coverage could reduce long-term healthcare costs by preventing obesity-related chronic conditions. Diseases such as diabetes, cardiovascular disease, and musculoskeletal disorders impose a substantial financial strain on the healthcare system, with approximately 86% of healthcare expenditures being attributable to chronic disease.²²¹ Furthermore, obesity alone costs the U.S. healthcare system nearly \$173 billion annually.²²² By promoting earlier and more effective intervention, this legislation has the potential to generate significant cost savings by reducing hospitalizations, surgical procedures, and long-term chronic disease management.

Expanding Medicare coverage for weight loss drugs may also set a precedent for broader insurance coverage, influencing both private insurers and Medicaid policies. Many private insurance plans currently exclude GLP-1

215. CONG. BUDGET OFF., *supra* note 212.

216. *Id.*; U.S. HOUSE COMM'N ON WAYS & MEANS, EXPLANATION OF CHANGES REFLECTED IN THE CHAIRMAN'S AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 4818, TREAT AND REDUCE OBESITY ACT (June 27, 2024), <https://waysandmeans.house.gov/wp-content/uploads/2024/06/Ways-and-Means-Description-of-the-AINS-to-H.R.-4818-Green-Sheet.pdf> [<https://perma.cc/5U9F-QT7V>].

217. Treat and Reduce Obesity Act of 2023, *supra* note 207.

218. *Id.*

219. CONG. BUDGET OFF., *supra* note 212.

220. *Id.*

221. Halsted R. Holman, *The Relation of the Chronic Disease Epidemic to the Health Care Crisis*, 2 ACR OPEN RHEUMATOLOGY 167, 167 (2020).

222. *About Obesity*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 23, 2024), <https://www.cdc.gov/obesity/php/about/index.html> [<https://perma.cc/PP22-TXQQ>].

medications for weight loss or impose restrictive authorization requirements.²²³ If this bill is passed, private insurers may follow suit to stay competitive in the health insurance market, thereby increasing access for millions of Americans who rely on private insurance and employer-sponsored plans.

Despite the potential benefits of this bill, challenges and criticisms remain. Some policymakers argue that expanding Medicare coverage for weight-loss drugs could increase government spending, thereby increasing the financial burden on the Medicare program.²²⁴ Additionally, the 119th Congress had an agenda to reduce government spending,²²⁵ so it is unlikely there would be any movement on this bill until a shift in the politicization of Congress. To address these concerns, policymakers could implement cost-control measures such as price caps, reimbursement limits, and stricter eligibility requirements to prevent unnecessary spending. Measures to reduce unnecessary spending can already be seen in the amended version of the bill, restricting coverage to those who are obese and not just overweight.²²⁶

B. Implement and Expand Drug Pricing Reforms

Despite policymakers' failure to pass legislation expanding Medicare coverage for GLP-1s, the executive branch took matters into its own hands and made progress in lowering costs for Medicare beneficiaries. In November 2025, President Donald Trump announced an agreement between Eli Lilly and Novo Nordisk, called the "GENERating cost Reductions for U.S. Medicaid" ("GENEROUS").²²⁷ This agreement is two-fold, offering lower prices for uninsured Americans as well as Medicare and Medicaid beneficiaries.

In early 2026, TrumpRX, a prescription drug discount website for those uninsured, was launched.²²⁸ In the agreement with Eli Lilly and Novo Nordisk, the companies agreed to offer their GLP-1 medications (ZepBound and

223. Matthew McGough et al., *How many adults with private health insurance could use GLP-1 drugs*, PETERSON-KFF (Sep. 5, 2024), <https://www.healthsystemtracker.org/brief/how-many-adults-with-private-health-insurance-could-use-glp-1-drugs/> [https://perma.cc/56ZC-XBPV].

224. See Phill Swagel, *A Call for New Research in the Area of Obesity*, CONG. BUDGET OFF. (Oct. 5, 2023), <https://www.cbo.gov/publication/59590> [https://perma.cc/RD5S-G7KR].

225. Eliminating Leftover Expenses for Campaigns from Taxpayers (ELECT) Act of 2025, S.538, 119th Cong. (2025).

226. U.S. HOUSE COMM'N ON WAYS & MEANS, EXPLANATION OF CHANGES, *supra* note 216.

227. *Fact Sheet: President Donald J. Trump Announces Major Developments in Bringing Most-Favored-Nation Pricing to American Patient*, *supra* note 119; Emilee Ryon, *Medicare and Medicaid to Start Covering GLP-1 Drugs for Beneficiaries*, RITTER INS. MKTG. (Nov. 12, 2025), <https://ritterim.com/blog/medicare-and-medicare-to-start-covering-glp1-drugs-for-beneficiaries/#kit-thrive> [https://perma.cc/7229-QPRF].

228. *Fact Sheet: President Donald J. Trump Launches TrumpRX.gov to Bring Lower Drug Prices to American Patients*, WHITE HOUSE (Feb. 5, 2026), <https://www.whitehouse.gov/fact-sheets/2026/02/fact-sheet-president-donald-j-trump-launches-trump-rx-gov-to-bring-lower-drug-prices-to-american-patients/> [https://perma.cc/MDG4-ND93].

Wegovy/Ozempic, respectively) for a discounted price on TrumpRX.²²⁹ These low prices are currently available on the TrumpRX website, with an average price of \$346 per month for ZepBound injectables and \$350 per month for Ozempic and Wegovy injectables.²³⁰ Additionally, the new FDA-approved GLP-1 tablets have been added to TrumpRX.²³¹ However, individuals must certify that they are a U.S. resident who is not enrolled in any insurance plan, including Medicaid and Medicare, in order to receive the discounted price on TrumpRX.²³²

The agreement also addressed those on public insurance, however, not through TrumpRX. Both Eli Lilly and Novo Nordisk pledged to offer their GLP-1 medications for \$245 per month, with copays for Medicare beneficiaries set at \$50 per month.²³³ However, there are restrictions to receive the drug for obesity, including requiring patients to either have: “a BMI over 27 and established prediabetes or a cardiovascular disease, a BMI over 30 and uncontrolled hypertension, kidney disease, or heart failure, or a BMI over 35.”²³⁴ Additionally, Medicare beneficiaries must be opted in to the Medicare Part D Prescription Drug Benefit to obtain these discounted prices.²³⁵ A senior official in the current administration stated that with these restrictions, this agreement will “only expand coverage to 10% of Medicare beneficiaries.”²³⁶

For Medicaid, States will have to opt into this program to receive the discounted price from the GENEROUS deal.²³⁷ To opt in, states must issue a letter of intent to join the GENEROUS program, and then they may be invited to participate in the pricing negotiation later on. Because the GENEROUS program for Medicaid is opt-in, it is not possible to predict how many Medicaid beneficiaries may now be covered for GLP-1 medications.²³⁸ While this reform

229. *Id.*

230. *Id.* (falling from an average price of \$1,028 per month for Ozempic and \$1,349 for Wegovy).

231. *Wegovy Pill*, TRUMPRX, <https://trumprx.gov/p/wegovy-pill> [<https://perma.cc/NWR4-S6WA>] (last visited Apr. 22, 2026).

232. *See id.* (stating in fine print, “You confirm that you are NOT enrolled in insurance from any government, state, or federally funded medical or prescription benefit programs (Examples include Medicare, Medigap, VA, DOD, TRICARE, Medicaid, or any other state or federal medical/pharmaceutical benefit or assistance). Individuals with both commercial and government funded plans ARE considered a patient with government insurance. If you should begin to receive prescription benefits under any government insurance plan, you understand that you can no longer participate in this program.”).

233. Sydney Lupkin, *White House Strikes Deals for Lower Prices on Obesity Drugs*, NPR (Nov. 6, 2025), <https://www.npr.org/sections/shots-health-news/2025/11/06/nx-s1-5599122/wegovy-zepbound-price-deal> [<https://perma.cc/S3ZL-2U5N>].

234. *Id.*

235. Ryon, *supra* note 227.

236. Annika Kim Constantino, *Trump Announces Deal With Eli Lilly, Novo Nordisk to Slash Weight Loss Drug Prices, Offer Some Medicare Coverage*, CNBC (Nov. 6, 2025), <https://www.cnbc.com/2025/11/06/trump-eli-lilly-novo-nordisk-deal-obesity-drug-prices.html> [<https://perma.cc/JWK7-GXYJ>].

237. Lupkin, *supra* note 234.

238. Ryon, *supra* note 227.

represents a meaningful step toward addressing affordability of GLP-1s, there are still many barriers to access, including BMI restrictions in Medicare and opt-in policies in Medicaid.

Furthermore, while executive action can address issues in the short term, it is significantly less stable than legislative reform. Executive action can be modified, delayed, or entirely reversed by subsequent administrations.²³⁹ Without legislative reform codifying these insurance coverage expansions, these cost-reduction efforts are not guaranteed in the future.

C. Address and Prevent Supply Chain and Shortage Issues

While efforts such as the TROA and insurance coverage are critical steps to reduce cost, these actions alone will not ensure meaningful access if supply constraints repeat. The recent surge in GLP-1s has exposed significant vulnerabilities within the pharmaceutical supply chain, resulting in shortages for those in critical need of the drug for diabetes as well as obesity. As a result, any policy effort aimed at reducing costs must also be accompanied by reforms that address the underlying supply chain issues.

One potential strategy to stay ahead of drug shortages could be to authorize an agency to lead drug supply chain efforts. While the FDA is notified and reports when drugs are in a shortage, they are not accountable for preventing or notifying of a future shortage.²⁴⁰ An agency, or a designated part of the FDA, could focus on the drug supply in order to prevent future shortages. In addition, the FDA or a designated entity should be granted authority to access supply chain data from drug manufacturers to carry out this preventive effort.

D. Reform the Patent Process and Generic GLP-1s

Another significant barrier to the affordability of GLP-1 drugs is the absence of generic alternatives. Because no generic GLP-1s exist, many individuals turn to compounded versions for a cheaper option. However, these compounded GLP-1s may raise safety and regulatory concerns. Unlike generics, which must undergo rigorous testing and approval by the FDA, compounded medications do not always meet the same standards.²⁴¹ As a result, compounded GLP-1s may vary in potency, quality, and consistency.

The absence of generic alternatives allows manufacturers to gain significant

239. See Tristan Manalac, *Trump Scraps Biden's Proposed Medicare Coverage for Obesity Drugs*, BIOSPACE (Apr. 7, 2025), <https://www.biospace.com/policy/trump-scraps-bidens-proposed-medicare-coverage-for-obesity-drugs> [https://perma.cc/A4R7-G3GA].

240. *4 Ways the U.S. Can Strengthen Its Pharmaceutical Supply Chain*, JOHNS HOPKINS UNI. (Nov. 10, 2025), <https://washingtondc.jhu.edu/news/4-ways-to-strengthen-the-drug-supply-chain/> [https://perma.cc/DTF3-5D6F]; *Drug Shortages*, U.S. FOOD & DRUG ADMIN. (Oct. 23, 2025), <https://www.fda.gov/drugs/drug-safety-and-availability/drug-shortages> [https://perma.cc/34HL-8FDS].

241. *Human Drug Compounding*, *supra* note 47.

market control and maintain high prices, as seen in the comparison with Canada. The U.S. should consider reforms to prevent the abuse of strategic patenting practices that delay competition. Potential reforms could include higher scrutiny of multiple patents on the same drug and streamlining FDA approval processes for generics once allowed.

CONCLUSION

The rapid rise of GLP-1 receptor agonists such as Ozempic and Wegovy emphasizes the promise of pharmaceutical innovation but also the persistent inequalities embedded within modern healthcare systems. While these medications offer transformative benefits to long-term health, such as weight loss and chronic disease prevention, access to them is deeply shaped by the structural differences between the United States and Canadian healthcare system models.

In the U.S., high medication prices driven by market exclusivity, limited price regulation, and fragmented insurance coverage significantly restrict access, leaving many patients unable to afford or sustain treatment. Even with Medicaid and Medicare coverage, gaps in coverage for employer-based insurance continue to exclude large portions of the U.S. population from these weight-loss treatments. Compounding these challenges is the fear of future supply shortages and the emergence of unregulated compounded alternatives, further exacerbating health risks around this “blockbuster” medication.

By contrast, Canada’s healthcare system, while not without its own limitations, demonstrates how government intervention through price controls, coordinated responses to supply chain disruptions, and patent exclusivity periods can improve affordability and stabilize access. However, Canada’s provincial patchwork insurance structure reveals that lower prices alone do not guarantee universal access to the medication. This comparative analysis highlights a central issue in modern healthcare: the balance between pharmaceutical innovation and health equity.

THE ANTITRUST ANTIDOTE: A SOLUTION TO INDIANAPOLIS' SOCCER DILEMMA AND HOPE FOR U.S. PROFESSIONAL SOCCER

LAUREN LATHAM*

I. INTRODUCTION: INDY'S SOCCER DILEMMA AND THE ANTITRUST ANTIDOTE

A. Explanation of Current Events: Indy Eleven, MLS, and Indianapolis

Indianapolis's only professional soccer team, Indy Eleven, competes in the United Soccer League ("USL") Championship, which is classified as a second division professional soccer league by the United States Soccer Federation ("USSF").¹ Indy Eleven previously planned to build a new stadium, "Eleven Park,"² in the city pursuant to a deal with developer Keystone Group.³ However, in May 2024, the mayor of Indianapolis, Joe Hogsett, decided to withdraw his and the city's support from the Eleven Park project and pursue a new project: the construction of a Major League Soccer ("MLS") stadium to bring an MLS team to Indianapolis.⁴ Because MLS is the top division of professional soccer in the U.S., bringing an MLS team to the city would generate a greater economic return on such a large, expensive project.⁵ However, many supporters of Indy Eleven oppose bringing an MLS team to Indianapolis because the city already has an established professional soccer team with a loyal fanbase, and because some supporters viewed the Eleven Park project as a step towards realizing Indy Eleven's long-standing ambition to compete at the highest level of professional soccer in the U.S.

To those unfamiliar with the professional soccer system in the United States, a logical solution to the conflict created by the city's withdrawal of support

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1. *USL Championship*, UNITED SOCCER LEAGUE, <https://www.uslsoccer.com/usl-championship> [https://perma.cc/69D3-ZEUA] (last visited Nov. 7, 2024); *About Indy Eleven*, INDY ELEVEN, <https://www.indyeleven.com/about-indy-eleven/> [https://perma.cc/4LYD-MW4U] (last visited Oct. 20, 2024).

2. Jill Sheridan, *As Indy Eleven fans hope to join Major League Soccer discussion, Brickyard Battalion president weighs in*, WFYI INDIANAPOLIS (May 10, 2024), <https://www.wfyi.org/news/articles/indy-eleven-fans-hope-to-be-part-of-major-league-soccer-discussion-brickyard-battalion-president-weighs-in> [https://perma.cc/P5KW-ZBM5].

3. Alex Almanza, *Waiting for Kickoff: What's next for Indy's MLS stadium plans and Eleven Park?*, WTHR (May 30, 2025), <https://www.wthr.com/article/news/local/indianapolis-major-league-soccer-mls-plans-indy-eleven-park-stadium/531-8cc31c7a-c1e7-4fbc-aeca-92279d2e1acf> [https://perma.cc/7S74-M4FG].

4. Brian Haenchen, *MLS says Indy 'doing everything right,' but 'very much in the beginning of the process'*, INDIANAPOLIS STAR (July 24, 2024), <https://www.indystar.com/story/sports/2024/07/24/mls-expansion-commissioner-don-garber-says-league-content-at-30-teams-for-now-indianapolis-bid/74407621007/> [https://perma.cc/4HRU-QQJE].

5. *About Major League Soccer*, MLS SOCCER, <https://www.mlssoccer.com/about/> [https://perma.cc/3CAT-72KP] (last visited Feb. 15, 2026).

would be for Indy Eleven to perform well enough to earn promotion to MLS.⁶ Historically, this solution has not been possible in the United States because MLS operates as a closed league, and no system of promotion and relegation exists between MLS (Division I) and the lower professional leagues: USL Championship (Division II) and USL League One (Division III). Instead, professional soccer teams have been confined to these closed leagues, with no opportunity to move to the top tier, MLS, based on sporting merit.⁷ As a result, USL teams have remained USL teams, and MLS teams have remained MLS teams, regardless of the teams' on-field performance or fan support.⁸

Although promotion and relegation have historically not existed within the U.S. professional soccer system, and no mechanism currently allows clubs to earn entry into MLS through on-field performance, USL recently announced plans to launch a new Division I league, USL Premier, and implement promotion and relegation within its own league structure,⁹ creating an interconnected three-tier professional soccer system.¹⁰ If sanctioned by the U.S. Soccer Federation, this new USL Division I league could begin play as early as 2028¹¹ and stand alongside MLS in the top tier of the U.S. professional soccer pyramid.¹² While this development represents a historic shift in the American soccer landscape, it does not create a pathway for clubs like Indy Eleven to reach MLS, nor does it alter the league's closed, franchise-based control over access to the sport's top tier. Instead, it merely creates an alternative league that could potentially compete with MLS—but only if USL successfully launches the new league and obtains Division I sanctioning from USSF. Thus, despite these reforms, Indy Eleven remains categorically excluded from MLS competition—and, by extension, from the top level of professional soccer in the United States.

6. Sheridan, *supra* note 2.

7. Barnaby Lane, *MLS Promotion/Relegation: The Arguments For & Against*, SPORTS ILLUSTRATED (Jan. 29, 2025), <https://www.si.com/soccer/arguments-for-against-mls-promotion-and-relegation> [<https://perma.cc/GZ6J-4BFW>].

8. Haenchen, *supra* note 4.

9. Jeff Carlisle, *Will USL's move to pro-rel change U.S. soccer, threaten MLS?*, ESPN (June 8, 2025), https://www.espn.com/soccer/story/_/id/45464543/will-usl-move-promotion-relegation-change-us-soccer-threaten-mls [<https://perma.cc/KN57-FZ52>].

10. USLSoccer.com Staff, *United Soccer League Adopts Promotion and Relegation System, Ushering in a New Era for American Soccer*, UNITED SOCCER LEAGUE (Mar. 19, 2025), https://www.uslsoccer.com/news_article/show/1334700 [<https://perma.cc/C2MT-HL4N>]; *see also* *USL Premier Set to Reshape American Soccer Pyramid*, GRAND PINNACLE TRIB. (Jan. 27, 2026), <https://evrimagaci.org/gpt/usl-premier-set-to-reshape-american-soccer-pyramid-525739> [<https://perma.cc/74SM-RKHX>].

11. *USL Premier Set to Reshape American Soccer Pyramid*, *supra* note 10.

12. Carlisle, *supra* note 9; Paul Tenorio, *USL Premier announced as new professional league, pro-rel era to launch in 2028*, N.Y. TIMES (Jan. 27, 2026), <https://www.nytimes.com/athletic/7000491/2026/01/27/usl-premier-mls-pro-rel-pyramid/> [<https://perma.cc/TF24-TA9U>].

B. Antitrust Law and Promotion and Relegation Must Apply (to U.S. Soccer)

In the United States, soccer has been developing rapidly and gaining popularity among Americans.¹³ However, the structure of the United States professional soccer system impedes teams and leagues seeking to elevate American soccer to a world-renowned pyramid of high talent and competition. Drawing on the success of the English soccer pyramid, many sports commentators, fans, and officials believe that the key to creating a reputable, well-known, and stable system in the United States is to implement promotion and relegation.¹⁴ Although several leagues, players, and independent actors have challenged the current frontrunners of soccer in the United States—the United States Soccer Federation and Major League Soccer—alleging violations of antitrust law to promote integrity and bolster competition among professional clubs and leagues, none have succeeded.¹⁵ Some, such as the North American Soccer League, have seen their futures effectively eliminated by the alleged actions of MLS and USSF.¹⁶ Now, a local club, Indy Eleven, is facing an uncertain future due to the closed U.S. soccer system.¹⁷

This note compares the U.S. soccer pyramid to the famed English pyramid, analyzes potential MLS or USSF violations of the Sherman Antitrust Act of 1890, reviews European antitrust law, and explores past and pending soccer and sports antitrust cases to ascertain how the present issue in Indianapolis may be resolved. Because MLS and USSF have likely engaged in illegal anticompetitive behavior, both entities must reconfigure the professional soccer system. To avoid future anticompetitive challenges, MLS and USSF must adopt a system of promotion and relegation, adopt new standards for admitting teams to higher tiers based on merit rather than money, or actively enforce the existing standards for professional leagues. Only then can Indy Eleven and other similarly situated teams stand a chance at making it to the major league.

Section II provides an overview of soccer governance and domestic league systems across the world, with greater detail given to the European, English,

13. *Soccer reportedly overtakes baseball in the U.S. as America's third favorite sport*, FOX SPORTS (Jan. 7, 2026), <https://www.foxsports.com/articles/soccer/soccer-reportedly-overtakes-baseball-in-the-u-s-as-americas-third-favorite-sport> [<https://perma.cc/H8Y5-W9RU>].

14. E.g., Tom Hindle, Ryan Tolmich & Alex Labidou, *The Rondo: What are the implications of USL's landmark move to promotion-relegation, will it have any reverberations for MLS, and does it alter U.S. soccer landscape?*, GOAL (Mar. 20, 2025), <https://www.goal.com/en-us/lists/the-rondo-what-are-the-implications-of-usl-s-landmark-move-to-promotion-relegation-would-mls-ever-follow-suit-and-does-it-alter-u-s-soccer-landscape/blt46818c811ef9cd1a> [<https://perma.cc/2386-U655>]; Derek Reese, *Why soccer fans prefer promotion and relegation*, WORLD SOCCER TALK (Apr. 29, 2023), <https://worldsoccertalk.com/news/why-soccer-fans-prefer-promotion-and-relegation-20230206-WST-417655.html>. [<https://perma.cc/Y6FV-EBK7>].

15. Melanie Anzidei, *NASL failed to prove USSF and MLS conspired against it, jury decides*, ATHLETIC (Feb. 3, 2025), <https://www.nytimes.com/athletic/6110245/2025/02/03/nasl-ussf-mls-lawsuit-verdict/> [<https://perma.cc/U8GE-ANMT>].

16. *Id.*

17. Almanza, *supra* note 3.

and American soccer systems. It compares the English pyramid and its “open” system to the U.S. soccer pyramid and the “closed” model that it follows. Following this comparative analysis of soccer systems, Section III aims to further elaborate on the problems with MLS and USSF (and the U.S. professional soccer system as a whole). It serves as a bridge to the next portion of this note, Section IV, which focuses on the relevant antitrust law in the U.S. and competition law in the United Kingdom. Throughout Section IV, the laws and principles of both countries are compared. Finally, Section V connects the soccer systems, laws, and ideas discussed in the previous sections to provide a solution to Indy Eleven’s soccer dilemma and to the current state of the U.S. soccer pyramid.

II. BACKGROUND

Colloquially known as “the Beautiful Game,” soccer is widely regarded as the most popular sport in the world.¹⁸ According to the Fédération Internationale de Football Association (“FIFA”), the sport has over five billion fans worldwide,¹⁹ with around 250 million people playing²⁰ in 200 countries.²¹ However, while soccer dominates in popularity in most of Europe, South America, Africa, and Asia, it is not the most popular sport in the United States.²² European soccer, in particular, is globally renowned for its prestigious leagues and surplus of talented players, and such fame has generated a financially lucrative sport with no shortage of fans across the world.²³ Soccer in the United States, however, does not share the same reputation; according to data published by *The Economist* in November 2025, soccer ranked number three in popularity, behind basketball and (American) football.²⁴ To understand this disparity in prestige and popularity, an examination of two factors—the relationships between national soccer associations and professional leagues and the structures

18. *Explained: Why is football called the beautiful game?*, GOAL (Apr. 13, 2020), <https://www.goal.com/en-us/news/explained-why-is-football-called-the-beautiful-game/16ayjoi69lor168ku0gwsd9vd> [https://perma.cc/UY7R-PKA4].

19. *The Football Landscape*, FIFA PUBL’NS, <https://publications.fifa.com/en/vision-report-2021/the-football-landscape/> [https://perma.cc/V6B9-3YJ8] (last visited Jan. 18, 2026).

20. Peter Christopher Alegi et al., *football*, BRITANNICA (Feb. 2, 2026), <https://www.britannica.com/sports/football-soccer> [https://perma.cc/T9WM-7WDH].

21. Michael Levy, *FIFA*, BRITANNICA (Mar. 9, 2026), <https://www.britannica.com/topic/Federation-Internationale-de-Football-Association> [https://perma.cc/5C6H-A9V7].

22. *Soccer reportedly overtakes baseball in the U.S. as America’s third favorite sport*, *supra* note 13.

23. See MD Motasim Billa, *Inside European Football: How Is It Structured?*, TVISTA (Feb. 5, 2024), <https://tvista.org/sports/65/inside-european-football-how-is-it-structured> [https://perma.cc/KZQ5-M82J].

24. Ben Steiner, *Soccer Passes Baseball in Race to Be America’s Favorite Sport—Report*, SPORTS ILLUSTRATED (Jan. 20, 2026), <https://www.si.com/soccer/soccer-passes-baseball-race-america-> [https://perma.cc/7EX3-K4EB].

of domestic professional soccer competitions—is paramount.²⁵ Ultimately, these factors “heavily impact football development throughout the world.”²⁶

A. Professional Soccer Systems and Governance Across the Globe

Founded in 1904, the Fédération Internationale de Football Association (“FIFA”) acts as the ultimate governing authority of association football (soccer) across the world.²⁷ FIFA oversees all aspects of the sport, including universal rules and officiating standards, the administration of international competitions (like the World Cup), and the global development of soccer at all levels.²⁸ The organization’s members include more than 200 national associations, which belong to one of FIFA’s six regional confederations: CAF (Africa), AFC (Asia), UEFA (Europe), CONMEBOL (South America), OFC (Oceania), and CONCACAF (North America).²⁹ Each national association serves as a representative of FIFA by promoting and regulating soccer within its respective country; for instance, the United States Soccer Federation (“USSF”) is the national association governing soccer in the United States, and the Football Association (“FA”) is the national association that governs the sport in England.³⁰ Thus, while the regional confederations oversee continental competitions between different national association teams, individual countries are responsible for operating their domestic leagues and competitions.³¹ As a result, the relationships between national associations and the leagues “organised at [the] national level and taking place within its jurisdiction” differ across the world.³²

1. Governance: Relationships Between National Associations and Leagues

Generally, domestic leagues follow one of two governance models: association or separate entity. Leagues that follow the association model have the same legal form as their national association and are typically managed

25. CAMILLE BOILLAT & RAFFAELE POLI, GOVERNANCE MODELS ACROSS FOOTBALL ASSOCIATIONS AND LEAGUES (David Rodrigues & Kevin T. Marston eds., vol. 4 2014).

26. *Id.* at 1.

27. Levy, *supra* note 21.

28. *Id.*; see, e.g., *FIFA – Soccer’s World Governing Body*, U.S. SOCCER FED’N, <https://www.ussoccer.com/history/organizational-structure/fifa> [<https://perma.cc/5WS4-UL53>] (last visited Nov. 14, 2024); *About FIFA: Professional Football*, INSIDE FIFA, <https://inside.fifa.com/about-fifa/stakeholders> [<https://perma.cc/BN7E-UDLU>] (last visited Nov. 14, 2024).

29. Levy, *supra* note 21.

30. See, e.g., *About FIFA: Member Associations*, INSIDE FIFA, <https://inside.fifa.com/about-fifa/associations> [<https://perma.cc/P9CU-74LX>] (last visited Nov. 14, 2024).

31. *How is European soccer structured with leagues and cup competitions?*, BUNDESLIGA, <https://www.bundesliga.com/en/faq/what-are-the-rules-and-regulations-of-soccer/how-is-european-soccer-structured-with-leagues-and-cup-competitions-10568> [<https://perma.cc/L848-UKVS>] (last visited Nov. 14, 2024).

32. BOILLAT & POLI, *supra* note 25, at 5.

entirely by, financially dependent on, or fully subject to the rules and decisions of the national association.³³ In contrast, leagues structured as separate entities operate as “a company with an independent ownership structure,” in which “decision-making power belongs to the shareholders” rather than to the national association.³⁴ However, leagues following the separate entity model retain strong relationships with their respective national associations, since such associations are the supreme soccer authority in a country and are responsible for the development of soccer at a national level. As such, despite the league’s model, most national associations organize their country’s national cup competitions and manage basic competencies of the sport, such as “the appointment of referees, disciplinary processes, and the rules of the game.”³⁵

2. Domestic Competition Structures

In most countries, domestic leagues and competitions are organized into professional soccer league systems known as “pyramids” due to their structural shape; each system is arranged as a hierarchical pyramid with tiers and divisions, which denote various levels of competition.³⁶ At each tier or division, professional soccer clubs compete against each other within designated leagues.³⁷ Because this system is structured so that the prestige and ranking of a club or league correspond to tier placement, a country’s best teams usually compete in the league at the top tier of the pyramid, and the least skilled teams compete in lower leagues at the bottom of the pyramid.³⁸ To reinforce this structure and facilitate competition, professional soccer pyramids typically operate as “open” league systems with promotion and relegation.³⁹ In these open league systems, teams move up or down to different leagues on the pyramid based on how the team performs competitively within its league each season.⁴⁰ Thus, at the end of the professional soccer season, the teams that performed best in a league are promoted and therefore move up to a higher tier or division on

33. *Id.* at 8-12.

34. *Id.*

35. *Id.* at 9-16, 60.

36. *Id.* at 2; see also Luka Cajic, *Unveiling the US Soccer Pyramid: An Ultimate Guide to the National League Structure*, STUDBUD, <https://studbud.org/unveiling-the-us-soccer-pyramid-an-ultimate-guide-to-the-national-league-structure/> [<https://perma.cc/CSB5-QNMF>] (last visited Feb. 15, 2026).

37. Draculer, *Football 101: How to get started?*, MEDIUM (Jan. 4, 2024), <https://thefootballhq.medium.com/football-101-how-to-get-started-7d82f307cf36> [<https://perma.cc/XNQ9-7QSK>]; see also BOILLAT & POLI, *supra* note 25, at 5-7 (demonstrating that some leagues consist of a single division, while others contain multiple divisions which are individually ranked in accordance with the entire hierarchical scheme).

38. Reese, *supra* note 14.

39. Derek Reese, *What is promotion and relegation?*, WORLD SOCCER TALK (Apr. 29, 2023), <https://worldsoccertalk.com/news/what-is-promotion-and-relegation-20230205-WST-417286.html> [<https://perma.cc/7VYU-MUWR>].

40. Billa, *supra* note 23.

the pyramid. The teams that performed the worst at the end of a league's season are relegated to a lower-division league or competition.⁴¹ While the details of promotion and relegation (such as the number of teams and the ways in which league standings are determined) vary depending on the country, most of the world utilizes this open league system for professional soccer; according to FIFA's 2023 Professional Football Report, approximately 84% of FIFA's member associations' league systems utilize promotion and relegation mechanisms.⁴²

B. The English and American League Systems

1. Introduction: Europe and North America

In Europe, professional soccer is governed by the Union of European Football Associations ("UEFA"), one of FIFA's six regional confederations.⁴³ Of UEFA's 55 national associations,⁴⁴ only two countries, Gibraltar and San Marino, do not use promotion and relegation mechanisms in their domestic league systems.⁴⁵ Thus, most European soccer leagues, including the top leagues in the world—the English Premier League, Italian Serie A, German Bundesliga, Spanish La Liga, and French Ligue 1 (collectively known as the "Big Five")—operate with promotion and relegation.⁴⁶ Similarly, most national associations belonging to the Confederation of North, Central America, and Caribbean Association Football ("CONCACAF") utilize open league systems in their countries. However, the largest countries in CONCACAF—the United States, Canada, and Mexico—operate their domestic soccer competitions without promotion and relegation.⁴⁷

41. Grey Whitebloom, *How Promotion and Relegation Works in Football*, GIVEMESPORT (Mar. 24, 2024), <https://www.givemesport.com/how-promotion-relegation-works-football/> [https://perma.cc/S5YZ-2QFX].

42. PROFESSIONAL FOOTBALL REPORT 2023 (2023), <https://digitalhub.fifa.com/m/2a5dc95026d9cf8a/original/FIFA-Professional-Football-Report-2023.pdf> [https://perma.cc/FRL4-MXHZ].

43. Billa, *supra* note 23.

44. PROFESSIONAL FOOTBALL REPORT 2023, *supra* note 42, at 198.

45. Barnaby Lane, *What Is Relegation in Soccer? Understanding the System & Its Impact*, SPORTS ILLUSTRATED (Mar. 19, 2025), <https://www.si.com/soccer/what-is-relegation-in-soccer> [https://perma.cc/CND5-MKBP].

46. Reese, *supra* note 39.

47. Derek Reese, *Leagues Cup doesn't fit CONCACAF ecosystem: How to fix it*, WORLD SOCCER TALK (Aug. 25, 2023), <https://worldsoccertalk.com/news/leagues-cup-doesnt-fit-concacaf-ecosystem-how-to-fix-it-20230825-WST-451641.html> [https://perma.cc/FHJ9-CN66].

2. Professional Soccer in England⁴⁸

The English football (soccer) pyramid, home to the world's most popular and highest-ranked domestic soccer competition—the Premier League—has achieved global recognition for its extensive hierarchy and rich history.⁴⁹ As the oldest soccer league competition, the English league system is credited with many of the sport's innovations, including the introduction of promotion and relegation mechanisms, which were implemented into the English Football League in 1898.⁵⁰ Today, the FIFA national association that governs English soccer is the Football Association (“FA”).⁵¹ Although the FA does not directly manage professional football league competitions, it supervises the organization of professional leagues; for instance, the FA ensures that such leagues comply with the directives of FIFA, UEFA, and the FA, and that the “sanctity of promotion and relegation between domestic league competitions” is preserved in England.⁵² The two leagues that operate professional soccer competitions in England, the English Premier League and the English Football League (“EFL”), are both structured as separate entities from the FA. However, the FA holds a minority stake, the “Special Share,” in the Premier League, which grants the FA oversight authority over certain matters; for example, the Premier League must obtain the FA's written consent before altering its rules governing promotion and relegation.⁵³ In contrast, the FA does not hold any shares in the EFL, whose shareholders are the league's 72 Member Clubs.⁵⁴ However, since the FA is responsible for domestic soccer at the national level, the EFL divisions, such as the Premier League, are still subject to FA regulations, including rules on player contracts.⁵⁵

The English pyramid itself consists of 11 tiers, but only the top four are considered professional and compete at the national level: the Premier League (tier 1), EFL Championship (tier 2), EFL League 1 (tier 3), and EFL League 2

48. Although the United Kingdom is the sovereign political entity which governs England, Scotland, Wales, and Northern Ireland, each country has its own FIFA member association which oversees the development of domestic soccer. As such, each country has its own domestic league system. See *Football Association*, BRITANNICA (Mar. 20, 2023), <https://www.britannica.com/topic/Football-Association> [https://perma.cc/BW7M-M6BM].

49. Alex Mitton, *English Football Pyramid Explained: How Promotion, Relegation and Cup Competitions Work*, GIVEMESPORT (May 16, 2024), <https://www.givemesport.com/english-football-pyramid-explained/> [https://perma.cc/9V39-V5DV].

50. *Innovation*, EFL, <https://www.efl.com/about-the-efl/history/innovation/#> [https://perma.cc/AK87-TE9N] (last visited Nov. 14, 2024).

51. BOILLAT & POLI, *supra* note 25.

52. *Rules of the Association*, in THE FA HANDBOOK 2024-2025, at 107 (2024).

53. *Articles of Association*, in PREMIER LEAGUE HANDBOOK 2025-2026, at 701-702, 705-706 (2025).

54. *Articles of Association*, in ENGLISH PREMIER LEAGUE HANDBOOK 2024-2025 at 198, 200 (2024).

55. *Rules of the Association*, in THE FA HANDBOOK 2025-2026, at 123 (2025).

(tier 4).⁵⁶ Currently, the Premier League consists of 20 teams, and each division within the English Football League contains 24 teams.⁵⁷ Until 1992, the English Football League managed all levels of English professional football, including tier 1.⁵⁸ However, “[f]ollowing the ratification and final approval by the Football Association in February 1992,” the top teams from the English Football League first division tier seceded from the EFL and formed the present-day tier one competition, the Premier League.⁵⁹ Although the Premier League operates as a distinct entity from the English Football League—which governs the other three professional English divisions directly below the Premier League—promotion and relegation between all four professional levels of the pyramid occur each season.⁶⁰ For instance, the Premier League teams with the lowest points at the end of a season are relegated to the second-level EFL Championship, and the highest-scoring teams from the Championship are promoted to the English Premier League (“EPL”).⁶¹ Points are allocated to teams based on game performance: teams earn three points for each win, one point for each tie game, and zero points for a loss.⁶² As a result, clubs earn their positions in top-tier or lower-tier leagues by merit.

3. Comparison: Professional Soccer in the United States

In the United States, the United States Soccer Federation (“USSF”) is the FIFA national association that acts as the governing body of all levels and aspects of soccer in the country, overseeing youth, club, amateur, and professional leagues, coach and referee organizations, and state associations.⁶³ Like the English professional leagues, the American professional leagues are structured as separate entities, but unlike the relationship between the FA and the Premier League, USSF does not hold any shares in the top professional

56. *English Football League Pyramid System Guide*, WILLIAM HILL NEWS, <https://news.williamhill.com/football/english-football-league-pyramid-system/> [https://perma.cc/S7BL-C2ME] (last visited Nov. 7, 2024).

57. *Id.*

58. Oliver Roeder, *Beneath The Premier League Stands The Great Football Pyramid Of England*, FIVETHIRTYEIGHT (Sep. 19, 2014), <https://fivethirtyeight.com/features/beneath-the-premier-league-stands-the-great-football-pyramid-of-england/> [https://perma.cc/8FMK-29H5].

59. Jason Rodrigues, *Premier League football at 20: 1992, the start of a whole new ball game*, GUARDIAN (Feb. 2, 2012), <https://www.theguardian.com/football/from-the-archive-blog/2012/feb/02/20-years-premier-league-football-1992> [https://perma.cc/J5G3-VUMU].

60. Mitton, *supra* note 49.

61. *Id.*; see also James Reade, *Why Is There Promotion And Relegation In European Soccer?*, FORBES (Oct. 9, 2020), <https://www.forbes.com/sites/jamesreade/2020/10/08/why-is-there-promotion-and-relegation-in-european-soccer/> [https://perma.cc/76DR-63SK] (discussing the economic and entertainment justifications for the promotion and relegation system).

62. Mitton, *supra* note 49.

63. *Membership Categories*, U.S. SOCCER FED’N, <https://www.ussoccer.com/organization-members-directory> [https://perma.cc/XY39-LLUW] (last visited Nov. 7, 2024).

league it sanctions.⁶⁴ However, since USSF is the supreme authority for domestic soccer in the United States—similar to the FA in England—it oversees the structure of and guidelines for its professional leagues.⁶⁵ For instance, USSF creates the American soccer pyramid by sanctioning qualifying leagues into one of three competitive divisions—or tiers—for men's outdoor professional soccer: Division I, Division II, and Division III.⁶⁶ These divisions create a hierarchical pyramid, with Division I being considered the top level of professional soccer in the United States.⁶⁷ While USSF has sanctioned three leagues to compete at the Division III tier, it has sanctioned only one league for Division II and one for Division I.⁶⁸

The American pyramid itself consists of five levels, but only the top three tiers—Divisions I, II, and III—are sanctioned by USSF for professional competitions.⁶⁹ MLS consists of 30 teams and is sanctioned as the sole Division I league; thus, MLS is considered the top level of professional soccer in the United States.⁷⁰ Below MLS is the United Soccer League (“USL”) Championship, which features 24 teams and is the only league sanctioned as Division II.⁷¹ Currently, three leagues—USL League One, MLS Next Pro, and the National Independent Soccer Association (“NISA”)—are sanctioned as Division III and therefore compete in the tier below the USL Championship.⁷² Unlike European professional soccer, which utilizes a system of relegation and promotion to allow teams to move up or down competition levels based on performance (winning or losing games), the United States professional soccer scheme operates as a closed system with no such movement between its leagues.⁷³ Because of this system, current MLS teams remain “top” teams competing in Division I, while lower division professional soccer teams, such

64. See *Fraser v. Major League Soccer, LLC*, 284 F.3d 47 (1st Cir. 2002) (describing the ownership structure of MLS as distinct from the United States Soccer Federation).

65. See *BYLAWS OF THE UNITED STATES SOCCER FEDERATION, INC.* (2025), <https://ussoccer.app.box.com/s/ummpm6cykezn0qcl1zolp32j5yj6qole> [<https://perma.cc/5S2G-UFSY>].

66. *THE UNITED STATES SOCCER FEDERATION, INC. POLICY MANUAL 16* (2025), <https://ussoccer.app.box.com/s/d17mtf22sltr4k8r7513970c13almooo> [<https://perma.cc/6AGW-3VYU>].

67. Cajic, *supra* note 36.

68. Gerald Barnhart, *US Soccer's Club Structure – The Breakdown*, INW SOCCER NEWS (Feb. 11, 2024), <https://www.inwsoccernews.com/2024/02/11/us-soccers-club-structure-the-breakdown/> [<https://perma.cc/4SVC-YC5B>].

69. Spencer Collins & Meghan Bragg, *Breaking down the soccer pyramids in the US*, WCNC CHARLOTTE (Oct. 14, 2024), <https://www.wcnc.com/article/news/verify/breaking-down-soccer-pyramids-united-states/275-abb9077c-2a14-47fb-888f-ec83f4db54a7> [<https://perma.cc/HRH5-M6UK>].

70. Barnaby Lane, *How Many MLS Teams Are There for the 2025 Season?*, SPORTS ILLUSTRATED (Feb. 19, 2025), <https://www.si.com/soccer/how-many-mls-teams-are-there-for-the-2025-season> [<https://perma.cc/3V6J-HNXQ>].

71. Barnhart, *supra* note 68.

72. *From Grassroots to Pro: Understanding the U.S. Soccer System*, BROOKLYN FC (Sept. 16, 2025), <https://www.brooklynfootballclub.com/2025/09/16/from-grassroots-to-pro-understanding-the-u-s-soccer-system/> [<https://perma.cc/NQC2-QLAT>].

73. Reade, *supra* note 61.

as teams playing in the second-highest league, the USL Championship, are unable to move up to the MLS based on merit, regardless of their popularity or success on the field. Consequently, MLS teams that perform poorly remain in the top division of professional soccer.⁷⁴

III. IMPLICATIONS: MLS, ANTITRUST LAW, AND THE HOPE OF PROMOTION AND RELEGATION

Prior to the birth of the MLS, the United States had seen a few Division I soccer leagues come and go, merge and succeed, and ultimately fail.⁷⁵ After the predecessor league to the MLS folded in 1984, the United States was left without a major professional soccer league for a decade.⁷⁶ In 1993, as a condition to granting the United States' bid to host the 1994 World Cup, FIFA urged the country's national association to form a top-tier professional soccer league.⁷⁷ Thus, Major League Soccer was created, and ten teams played their first MLS season in 1996.⁷⁸ Although the early years of the MLS were plagued with various financial challenges and fan shortages, after a series of stabilization efforts in the early 2000s, the league's popularity and size have consistently grown in correspondence to Americans' increasing interest and involvement in the sport.⁷⁹ Since the inception of the MLS, new leagues and divisions of professional soccer, such as the Division II USL Championship, have likewise developed and continue to expand as soccer's popularity in the United States flourishes.⁸⁰

In general, all the American "major league" sports operate closed leagues. Other professional sports leagues, such as the National Football League ("NFL"), the National Basketball Association ("NBA"), and the Major League Baseball ("MLB"), all consist of independently owned and managed teams that compete against each other within single leagues.⁸¹ While the USL follows this

74. Anna Claire Mercer, *Not Just Kickin' It: How the Current United States Soccer System Will Not Yield Success in MLS*, 10 MISS. SPORTS L. REV. 281, 300 (2021).

75. Aimée Lister, *The history of Major League Soccer*, RED BULL (Nov. 9, 2022), <https://www.redbull.com/us-en/history-of-major-league-soccer> [https://perma.cc/CXR3-A6EK].

76. Michael Lewis, *How the birth and death of the NASL changed soccer in America forever*, GUARDIAN (Oct. 20, 2018), <https://www.theguardian.com/football/2018/oct/20/nasl-history-soccer-america> [https://perma.cc/KZ8B-Q4X5].

77. Lister, *supra* note 75.

78. *Id.*

79. Chris Beaumont, *A Brief History of Major League Soccer*, TOTAL FOOTBALL ANALYSIS (Feb. 2, 2023), <https://totalfootballanalysis.com/opinion/a-brief-history-of-major-league-soccer> [https://perma.cc/X5VM-EU3G].

80. *About USL Championship*, UNITED SOCCER LEAGUE, <https://www.uslsoccer.com/usl-championship> [https://perma.cc/72BZ-35AM] (last visited Nov. 25, 2024).

81. Leah Farzin, *On the Antitrust Exemption for Professional Sports in the United States and Europe*, 22 JEFFREY S. MOORAD SPORTS L.J. 75, 80 (2015).

franchise model for club ownership, the MLS does not.⁸² Instead, soccer clubs that compete in the MLS do not have independent owners; the teams are run by “investor-operators.”⁸³ These investor-operators invest financially into the MLS entity, which owns the teams, in exchange for the right to operate a team.⁸⁴ Essentially, MLS “is owned by the same people running the teams.”⁸⁵ Thus, because the operators of MLS teams also have equity interests in the league itself, the MLS structure acts as a disincentive for the league to entertain the idea of implementing a promotion and relegation system.⁸⁶ Furthermore, because teams have recently paid between \$200 million and \$500 million in expansion fees to join MLS, investor-operators are unlikely to risk their large investments in MLS by supporting a system in which their teams’ poor performance could result in relegation to a lower competition league.⁸⁷ However, supporters of implementing promotion and relegation into U.S. professional soccer cite this financial risk as one of the benefits of such a system because it incentivizes club and league stakeholders to invest in their teams’ performance on the field.⁸⁸ As a result, the development and quality of professional soccer in the United States will continue to improve. For instance, the former Miami Football Club (an MLS team) CEO, Sean Flynn, explained that by adopting promotion and relegation, “America will be open, resulting in better teams through all divisions, compelling storylines to increase fan excitement and greater financial success for everyone involved in this beautiful game.”⁸⁹

Beyond potential economic success and increased team quality, an open system ensures integrity in professional soccer and promotes inclusivity. Instead of allowing only large cities and wealthy teams to compete at the top level, a promotion and relegation system gives any city or team, regardless of size or capital, the opportunity to achieve success, fame, and financial rewards.⁹⁰

82. Derek Reese, *What is the difference between MLS and USL?*, WORLD SOCCER TALK (Nov. 17, 2023), <https://worldsoccertalk.com/news/what-is-the-difference-between-mls-and-usl-20231116-WST-470478.html> [<https://perma.cc/B528-VEGZ>].

83. Isaac Krasny, *Unpacking the Major League Soccer Business Model*, MEDIUM (June 7, 2017), https://medium.com/@isaac_krasny/unpacking-the-major-league-soccer-business-model-827f4b784bcd [<https://perma.cc/4PED-YYN9>].

84. *Id.*

85. *Id.*

86. *Explained: Why U.S. soccer doesn't have relegation and promotion – and will MLS ever change?*, GOAL (Feb. 20, 2023), <https://www.goal.com/en-us/news/explained-why-us-soccer-doesnt-have-relegation-and-promotion---and-will-mls-ever-change/7a2v9a1dga8v116cbjr5lsp11> [<https://perma.cc/6XV3-79PD>].

87. Evan Frank & Brian Haenchen, *Indianapolis will bid for an MLS team. What to know about possible stadium location, fee*, INDIANAPOLIS STAR (Apr. 25, 2024), <https://www.indystar.com/story/sports/2024/04/25/mls-in-indianapolis-what-to-know-major-league-soccer-bid-stadium-expansion-fee-indy-eleven/73458963007/#> [<https://perma.cc/RFE4-RBX7>].

88. Reese, *supra* note 39.

89. *Miami FC taking promotion-relegation fight to Court of Arbitration for Sport*, ESPN (Aug. 3, 2017), <http://www.espnfc.com/miami-fc/story/3171424/miami-fc-taking-promotion-relegation-fight-to-court-of-arbitration-for-sport> [<https://perma.cc/VX5Z-3DUA>].

90. Reese, *supra* note 39.

Furthermore, it encourages a system built on merit rather than financial connections and assets. For teams to reach entry into the top-tier league, they must earn it by winning games, which safeguards the integrity of the sport. The American system, as it is currently structured, fails to do this. For instance, in 2012, after finishing the previous second-tier league season in second-to-last place, the Montreal Impact was awarded admittance to the MLS.⁹¹ Instead of sporting criteria, the MLS commissioner at the time explained that the club was admitted to the MLS based on factors such as “[c]ommitted and engaged ownership, [a] comprehensive stadium plan, [demonstration of] fan support for professional soccer in the market, [s]upport from sponsors, television partners and other constituents, [g]eographic location, [and a] strategic business plan for the launch and successful operation of the club.”⁹² Although these criteria are logical considerations for granting a team entry into a league, the absence of factors related to the team’s competitive ability or quality of play results in a less honorable system that disfavors sporting merit.

Lastly, by instituting automatic promotion and relegation, teams are incentivized to perform well during a season because it gives them a goal to work towards—promotion to a more advanced league. Likewise, it creates a pyramid in which teams compete at the appropriate level with other teams of similar competitive status.⁹³ For instance, each year, during the U.S. Open Cup—a yearly tournament between teams from all U.S. professional leagues, regardless of tier level—USL Championship teams regularly defeat MLS teams, despite the fact that teams in the USL Championship are competing in their regular seasons in a lower tier than the MLS teams.⁹⁴ Most recently, in July 2024, Indy Eleven (USL Championship) beat Atlanta United (MLS) in the U.S. Open Cup Quarterfinals, therefore eliminating the MLS team from the competition and sending Indy Eleven to the Semifinals.⁹⁵ Despite this accomplishment, or any other victories from the regular season, the closed U.S. soccer system provides no pathways for the Indy Eleven to earn membership to the MLS. And since the MLS has already denied Indy Eleven’s bids to join through an expansion package, the financial route to the MLS is also unavailable to the team.⁹⁶ However, the last pathway to the MLS—the legal route—may be

91. BOILLAT & POLI, *supra* note 25, at 98-99.

92. *Id.*

93. Reese, *supra* note 39.

94. James Nalton, *A relegation push and CBS: USL’s quest to become America’s go-to league*, GUARDIAN (Apr. 9, 2024), <https://www.theguardian.com/football/2024/apr/09/promotion-relegation-cbsmessiuslsoccermls#:~:text=“USL%20teams%20beat%20MLS%20teams,keen%20on%20owning%20the%20sport> [https://perma.cc/KM5G-YR9W].

95. *Indy Eleven Delivers Dramatic Upset on First Matchday of 2024 U.S. Open Cup Quarterfinals*, U.S. SOCCER (July 9, 2024), <https://www.ussoccer.com/stories/2024/07/2024-us-open-cup-atlanta-united-indy-eleven-sacramento-republic-seattle-sounders-score-result-stats-goals-recap> [https://perma.cc/VF8Z-GC3V].

96. Mickey Shuey & Taylor Wooten, *With Indy’s soccer future in balance, city to go all-in on MLS*, IBJ (May 3, 2024), <https://www.ibj.com/articles/with-indys-soccer-future-in-balance->

available if the actions of MLS, USSF, or both have violated federal antitrust laws.

IV. ANTITRUST LAW COMPARATIVE ANALYSIS

A. Relevant Antitrust Laws and Principles: the U.S.

In the United States, antitrust law serves to prevent powerful private entities from engaging in anti-competitive behavior. The theory behind U.S. antitrust statutes is that by outlawing certain agreements and actions that prevent competition in the market, the viability of businesses and the flow of commerce will depend on the economy's natural expansions and recessions. Thus, antitrust law seeks to ensure that the “volume of commerce, sales, or market opportunities” will not be impeded by restrictions, agreements, or other interventions used by competitors to intentionally control or manipulate the market.⁹⁷ The Sherman Antitrust Act of 1890 and the Clayton Antitrust Act of 1914 form the foundation of and legal framework for enforcing antitrust law in the United States. For purposes of this note, the most relevant federal antitrust statute, the Sherman Antitrust Act of 1890 (the “Sherman Act”), explicitly prohibits two types of “actions” that it deems to be anti-competitive: concerted action and unilateral action.⁹⁸ The Sherman Act specifies that violators of its provisions are subject to hefty fines,⁹⁹ and Section 4 of the Clayton Act provides a private right of action for parties harmed by any anticompetitive practices forbidden in the federal antitrust laws, including those prohibited by the Sherman Act.¹⁰⁰

1. Sherman Act Section 1: Concerted Action

Under Section 1 of the Sherman Act, “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”¹⁰¹ This section of the Act deals with “concerted action” between multiple parties as opposed to a single party acting unilaterally.¹⁰² In regard to the type of concerted action prohibited, the courts have broadly interpreted the scope of the

city-to-go-all-in-on-mls [<https://perma.cc/9NQA-3W4V>]; Katie Cox & Matt McKinney, *Indy Eleven enters bid to become Major League Soccer member in 2020*, WRTV (Jan. 31, 2017), <https://www.wrtv.com/sports/indy-eleven-seeks-to-become-member-of-major-league-soccer> [<https://perma.cc/Q2GZ-XXJ3>].

97. Herbert J. Hovenkamp, *The Antitrust Text*, 99 IND. L.J. 1063, 1069 (2024).

98. 15 U.S.C. §§ 1-2 (2004).

99. *Id.*

100. 15 U.S.C. § 15 (1982).

101. 15 U.S.C. § 1 (2004).

102. WILLIAM C. HOLMES & MELISSA H. MANGIARACINA, ANTITRUST LAW HANDBOOK § 2:4 (2024).

statute to include behavior which is “unreasonably restrictive of competitive conditions.”¹⁰³ Overall, for there to be a violation of Section 1 of the Sherman Act, the evidence must show the existence of an agreement between multiple parties to engage in anticompetitive behavior, and that such competitive restraints are unreasonable. Thus, numerous practices, including price-fixing, territorial or customer restraints, group boycotts and refusals to deal, exclusive dealing arrangements, and conditional tying agreements, have been struck down by the courts as unreasonably anticompetitive and therefore illegal under Section 1.¹⁰⁴

In analyzing whether the conduct engaged in by defendants was violative of antitrust law, courts have developed two distinct frameworks. The first framework recognizes that some practices—such as horizontal price-fixing and market restraints—are so fundamentally anticompetitive that they are considered “per se” or conclusively illegal under Section 1.¹⁰⁵ Other restrictive practices, however, may withstand antitrust scrutiny depending on whether the restraint “merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”¹⁰⁶ This framework, known as the “rule of reason” analysis, was further developed by the Supreme Court in *N.W. Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, where the Court addressed whether the defendant’s alleged anticompetitive conduct constituted a per se violation of Section 1.¹⁰⁷ The Court explained that the allegation of a certain practice that might be anticompetitive, such as a concerted refusal to deal, is not alone sufficient for the application of the per se test because “not all concerted refusals to deal are predominantly anticompetitive.”¹⁰⁸ Thus, to obtain an analysis under the per se rule, a plaintiff must show that the challenged practice had anticompetitive effects.¹⁰⁹

If the reviewing court determines the alleged conduct was not inherently anticompetitive, it then engages in a rule of reason analysis, in which “the factfinder weighs all of the circumstances of a case in deciding whether a

103. *Standard Oil Co. of N.J. v. U.S.*, 221 U.S. 1, 58 (1911); *see, e.g., Nat’l Soc. of Pro. Eng’rs v. U.S.*, 435 U.S. 679, 690 (1978) (explaining the test for unreasonableness).

104. *HOLMES & MANGIARACINA*, *supra* note 102, § 2:2.

105. *E.g., N. Pac. Ry. Co. v. U.S.*, 356 U.S. 1, 5 (1958) (“[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”); *see, e.g., Ethyl Gasoline Corp. v. U.S.*, 309 U.S. 436, 458 (1940) (holding that horizontal price-fixing agreements are per se illegal under the Sherman Act); *see also U.S. v. Topco Assocs., Inc.*, 405 U.S. 596, 596-97 (1972) (horizontal restraints, such as the allocation of territories to reduce competition, are per se violations of Section 1).

106. *Bd. of Trade of Chi. v. U.S.*, 246 U.S. 231, 238 (1918).

107. 472 U.S. 284, 288 (1985) (arising from Northwestern’s expulsion of Pacific from its cooperative without notice or a hearing, which resulted in Pacific filing suit against Northwestern. Pacific alleged that Northwestern’s conduct constituted a concerted refusal or group boycott, which Pacific argued was per se illegal under Section 1 of the Sherman Act. The Court disagreed).

108. *Id.* at 298.

109. *Id.*

restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”¹¹⁰ Such circumstances may include the actors’ intent, the structure of competitive conditions in the affected market, the market power of the defendants, and any relevant justifications for engaging in the challenged practices.¹¹¹ Typically, courts start with identifying the “relevant market” affected by such concerted practices, because “[w]ithout a definition of [the] market there is no way to measure [the defendant’s] ability to lessen or destroy competition.”¹¹² The delineation of the relevant market is then followed by an examination of the relative market power¹¹³ of the defendants and an assessment of the “actual or threatened impact[s]” of the anticompetitive practices on competitors, consumers, and the market as a whole.¹¹⁴ However, the Court has held that an “elaborate market analysis” is not always required under a rule of reason analysis, because the goal of market delineation is to show “genuine adverse effects on competition.”¹¹⁵ Thus, where proof of “actual, sustained adverse effects on competition” has been demonstrated in specific geographic or product areas, the absence of a “detailed market analysis is not fatal” to a rule of reason case.¹¹⁶

Even if a plaintiff can successfully show that the defendant engaged in concerted conduct which had tangible, anticompetitive effects on the market, the defendant may escape potential Section 1 liability if the court views the concerted action to have occurred within a single entity, rather than two or more legally distinct actors.¹¹⁷ This “single entity” exception was first established in *Copperweld Corporation v. Independence Tube Corporation*, when the Supreme Court explained that “[n]othing in the literal meaning of those terms [the Section 1 provisions prohibiting concerted agreements] excludes coordinated conduct among officers or employees of the same company.”¹¹⁸ As

110. *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

111. *See, e.g., FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 461 (1986). For a discussion of courts’ applications of the rule of reason and examples of factors used to determine whether the challenged conduct unreasonably restricts competition, *see* HOLMES & MANGIARACINA, *supra* note 102, § 2:10.

112. *Ohio v. Am. Express Co.*, 585 U.S. 529, 543 (2018) (quoting *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965)).

113. HOLMES & MANGIARACINA, *supra* note 102, § 2:10 (explaining that the term “market power” has various definitions, but it often refers to the “ability to control price or exclude competition” (citing *Black v. Occidental Petroleum Corporation*, 69 F.4th 1161, 1176 (10th Cir. 2023))); *see, e.g., Am. Express Co.*, 585 U.S. at 549 (“‘Market power is the ability to raise price profitably by *restricting output*.’” (emphasis added) (quoting PHILLIP E. AREEDA & HERBERT HOVENKAMP, *FUNDAMENTALS OF ANTITRUST LAW* §5.01 (2011))).

114. *Am. Express Co.*, 585 U.S. at 544–51; *see, HOLMES & MANGIARACINA, supra* note 102, § 2:10.

115. *Indiana Fed’n of Dentists*, 476 U.S. at 460–61.

116. *Id.*

117. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984) (“[I]t is perfectly plain that an internal ‘agreement’ to implement a single, unitary firm’s policies does not raise the antitrust dangers that § 1 was designed to police.”).

118. *Id.*

the Court further explained, this is because “[t]he officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals.”¹¹⁹ Applying this reasoning to the facts of the case, the Court in *Copperweld* held that “the coordinated activity of a parent and its wholly owned subsidiary” must likewise be viewed as conduct “of a single enterprise for purposes of § 1 of the Sherman Act” because the two have “a complete unity of interest.”¹²⁰ Although a single firm’s conduct may still face scrutiny under Section 2 of the Sherman Act (actual or threatened monopolization), the Court held that concerted practices between actors within a single entity are exempt from Section 1 liability.¹²¹ As will be examined later, since *Copperweld*, sports leagues have frequently—and successfully—asserted this single entity defense to combat allegations of anticompetitive conduct in violation of Section 1.

2. U.S. Antitrust Law: Sherman Act Section 2

As opposed to concerted actions and agreements between multiple parties, Section 2 of the Sherman Act deals with the unilateral action of a single actor in the marketplace. Under Section 2 of the Act, it is illegal for a person to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations.”¹²² Thus, an entity violates Section 2 when it retains actual monopoly power or attempts to acquire monopoly power “through competitively unreasonable practices.”¹²³ The scope of Section 2 is not limited to the actions of single firms.¹²⁴ Attempts by multiple parties to monopolize, or actual conspiracies between two parties to monopolize by attaining market power, are also deemed to be illegal practices under Section 2.¹²⁵

Although Section 2 seems straightforward, successful claims against monopolizing behavior contain multiple elements.¹²⁶ First, the plaintiff must identify the relevant market¹²⁷ of competition and then prove the defendant has “possession of monopoly power in the relevant market.”¹²⁸ The “relevant

119. *Id.*

120. *Id.* at 771.

121. *Id.* at 775.

122. 15 U.S.C. § 2 (2004).

123. HOLMES & MANGIARACINA, *supra* note 102, § 3:2.

124. *Id.*

125. *Id.*

126. HOLMES & MANGIARACINA, *supra* note 102, § 3:4.

127. *See* 15 U.S.C. § 2 (2004) (the term “relevant market” comes from the statutory language that refers to the monopolization of “any part of the trade or commerce” in the U.S. or with foreign countries); *see also* *Standard Oil Co. of N.J. v. U.S.*, 221 U.S. 1, 61 (1911).

128. *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

market” includes both the relevant product (or service) market and the geographic (physical area or location) market in which the defendant competes.¹²⁹ While the standard test for defining the relevant product market is one that “is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use, and qualities considered,”¹³⁰ the court has explained that some markets may be defined more broadly as to include a combination of multiple “different products or services where that combination reflects commercial realities.”¹³¹ The other dimension of the relevant market analysis—the identification of the geographic market—is considerably less complex than the product market delineation, as it typically involves the geographic area where the defendant competes and where its customers can shop for alternatives.¹³² Once both dimensions of the relevant market have been defined, an assessment of the defendant’s monopoly power is conducted.¹³³ Although monopoly power is often defined as the power to “control prices or exclude competition”¹³⁴ within the relevant market, other identifiers, such as percentage of market share, may be used to demonstrate the defendant’s monopoly power.¹³⁵

Finally, if the claimant successfully shows that the defendant actually achieved monopoly power in the relevant market, the plaintiff must show that the defendant engaged in “the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”¹³⁶ Alternatively, if the offense claimed is attempted monopolization—as opposed to actual monopolization—the plaintiff must prove multiple elements, including the relevant markets targeted, specific anticompetitive conduct “likely to result in monopolization of the market,” intent to monopolize, and that the actions and power of the defendant are so egregious that there is a high probability of an impending monopolization.¹³⁷ Overall, in addressing this element, the Court often addresses whether the monopoly power has been acquired or maintained through competitively unreasonable means.¹³⁸

For instance, in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, the Court considered the effects of the defendant’s conduct on the plaintiff and other rivals, its impact on consumers, and whether the conduct “impaired competition

129. *Standard Oil Co. of N.J. v. U.S.*, 221 U.S. 1, 61 (referencing 15 U.S.C. § 2 (2004)) (“The commerce referred to by the words ‘in part,’ . . . has both a geographical and a distributive significance.”).

130. *U.S. v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956).

131. *Grinnell Corp.*, 384 U.S. at 572.

132. *U.S. v. Philadelphia Nat’l Bank*, 374 U.S. 321, 357-60 (1963).

133. HOLMES & MANGIARACINA, *supra* note 102, § 3:4.

134. *E.I. du Pont de Nemours & Co.*, 351 U.S. at 391.

135. *See Eastman Kodak Co. v. Image Tech. Services, Inc.*, 504 U.S. 451 (1992).

136. *Grinnell Corp.*, 384 U.S. at 570-71.

137. HOLMES & MANGIARACINA, *supra* note 102, § 3:6.

138. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

in an unnecessarily restrictive way.”¹³⁹ In the Court’s view, “[i]f a firm has been ‘attempting to exclude rivals on some basis other than efficiency,’ it is fair to characterize its behavior as predatory.”¹⁴⁰ After assessing these factors, the Court determined that “the monopolist made a deliberate effort to discourage its customers from doing business with” its rivals, and that its exclusionary conduct was not motivated by any legitimate business purposes (such as efficiency concerns).¹⁴¹ While subsequent cases have provided various formulations of the *Aspen* test, as Holmes and Mangiaracina explain, courts have tended to “distinguish between acts that reflect competition on the merits, versus exclusionary acts that have no apparent rational business purpose other than eliminating competition in the market and seizing or maintaining monopoly power.”¹⁴² Thus, for a plaintiff to successfully challenge the exclusionary, monopolizing practices of a monopoly, the alleged conduct must have been done for anticompetitive purposes—like inhibiting competition—rather than for commercially meritorious purposes which reflect “a superior product, a well-run business, or luck.”¹⁴³

B. U. K. and European Antitrust Law

Unlike the United States, which passed its first federal antitrust law in the late nineteenth century, the United Kingdom did not begin developing a statutory framework for competition law until the mid-twentieth century, with the enactment of the 1948 Monopolies and Restrictive Practices Act.¹⁴⁴ Until 1948, antitrust law in the United Kingdom was based on common law principles, such as the doctrine of restraint of trade.¹⁴⁵ Despite the existence of these principles, the United Kingdom’s judicial system of antitrust law remained underdeveloped and underenforced compared to other major jurisdictions, due in part to the “persistent Victorian commitment to the politics of laissez-faire when British enterprises enjoyed an international pre-eminence.”¹⁴⁶ From the passage of the first antitrust statute in 1948 until the UK’s accession to the European Economic Community (“EEC”) in 1973,¹⁴⁷ the United Kingdom experimented with several statutory and regulatory schemes for the governance of anti-competitive practices, yet most ultimately proved unsuccessful for

139. *Id.* at 605.

140. *Id.*

141. *Id.* at 610.

142. HOLMES & MANGIARACINA, *supra* note 102, § 3:5.

143. *Aspen Skiing Co.*, 472 U.S. at 596.

144. Andrew Scott, *The Evolution of Competition Law and Policy in the United Kingdom* 6 (London Sch. Econ. & Pol. Science L., Soc’y & Econ. Working Papers, Working Paper No. 9/2009, 2009), https://researchonline.lse.ac.uk/id/eprint/24564/1/WPS2009-09_Scott.pdf [<https://dx.doi.org/10.2139/ssrn.1344807>].

145. *Id.* at 4.

146. *Id.* at 3.

147. The EEC is now the European Union (EU). *See id.* at 9-11.

various reasons.¹⁴⁸ Upon its entry into the EEC, the United Kingdom became subject to the EEC Articles on competition law, including those covering restraint of trade and anti-competitive agreements.¹⁴⁹ In effect, UK businesses became subject to “two bodies of law [which] imposed different and potentially dichotomous regulatory burdens [. . .] in respects of the same practices,” which ultimately became impracticable.¹⁵⁰ Thus, to “align national competition law as closely as possible with EC law,” the United Kingdom passed the Competition Act 1998, which contained two principal prohibitive provisions.¹⁵¹ These provisions proscribe two types of practices: anti-competitive agreements (Chapter I) and abuse of a dominant position (Chapter II).¹⁵² Although the circumstances surrounding the creation of the Competition Act 1998 have changed—the EC officially became the EU in 2009¹⁵³ and the United Kingdom formally withdrew from the EU in 2020—the United Kingdom’s national statutory framework remains in place and continues to coincide with European antitrust law;¹⁵⁴ indeed, the Chapter I and Chapter II prohibitions of the Competition Act 1998 have been referred to as the UK equivalents of Article 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”).¹⁵⁵ Currently, the Competition Act 1998, along with the Enterprise Act 2002, provides the framework for and is paramount to antitrust law in the United Kingdom.¹⁵⁶ For the purposes of comparison with the U.S. Sherman Antitrust Act, however, the Competition Act 1998 is the most relevant.

Before leaving the EU, the EU Commission and court systems had jurisdiction over antitrust matters in the UK. Now, however, UK courts and regulatory authorities—such as the Competition and Markets Authority (“CMA”)—have sole jurisdictional authority over domestic antitrust actions, with a few caveats.¹⁵⁷ For instance, the EU authorities may continue to exercise jurisdiction over proceedings initiated before the transition period ended, and UK companies remain subject to EU competition law to the extent that a breach affects trade with any EU member state.¹⁵⁸ Further, because UK competition law “developed in tandem” with EU competition law, and therefore “UK

148. *Id.*

149. *Id.* at 15.

150. *Id.*

151. *Id.* at 17.

152. *Id.*

153. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1.

154. AIRLIE GOODMAN ET AL., PRIVATE ANTITRUST LITIGATION IN THE UK AND THE US: COMPARISON AND STRATEGIC CONSIDERATIONS (2024), Thomson Reuters w-036-4382.

155. PRAC. L. COMPETITION, OVERVIEW: UK COMPETITION LAW (2025), Thomson Reuters 3-107-3683.

156. ADRIAN MAGNUS ET AL., COMPETITION AND MARKETS AUTHORITY: OVERVIEW (UNITED KINGDOM) (2024), Thomson Reuters w-037-1413.

157. PRAC. L. COMPETITION, BREXIT: IMPLICATIONS FOR UK COMPETITION LAW ENFORCEMENT (2025), Thomson Reuters w-019-5177.

158. *Id.*

competition authorities [such as the courts and the CMA] developed competition law practices in line with EU law and precedent,” the EU case law and Commission decisions were foundational to the UK’s competition law system.¹⁵⁹ Thus, the UK added section 60A to the Competition Act 1998, which “requires UK courts and competition authorities to interpret UK competition law in a manner consistent with Retained EU law,” which includes EU Commission and European Court of Justice decisions.¹⁶⁰ Although section 60A allows UK authorities to deviate from EU competition law under specified circumstances, the retained case law carries the same weight as decisions of the UK Supreme Court and the High Court.¹⁶¹ Thus, for comparative purposes, early competition case law and enforcement actions from the EU will be referenced, in addition to those from the UK.

1. Chapter I: Agreements

Similar to Section 1 of the U.S. Sherman Act, Chapter I of the Competition Act 1998 deals with the anti-competitive actions of multiple parties, rather than a single party acting independently. Chapter I prohibits agreements or concerted practices “which have as their object or effect the prevention, restriction, or distortion of competition within the United Kingdom” and which may otherwise “affect trade” within the country.¹⁶² Unlike the Sherman Act, however, Chapter I specifically lists certain concerted practices which are prohibited, such as: price-fixing, production controls or limitations, supply or market sharing, applying “dissimilar conditions to equivalent transactions with other trading parties,” and subjecting contracting parties to additional obligations outside the scope of the contractual subject matter.¹⁶³ While many of these practices have been deemed as violative of the Sherman Act, these determinations have resulted from U.S. judicial decisions, rather than statutory language. Additionally, the Competition Act provides exemptions for some agreements that would otherwise be prohibited by Chapter I if they meet the requirements of one of the block, retained, or individual exemptions outlined in Chapter 43, section 9 of the Act.¹⁶⁴ In contrast, the various exemptions to the Sherman Antitrust Act in the U.S. have been created over time by Congress and the federal courts.¹⁶⁵

159. *Id.*

160. *Id.*

161. *Id.*

162. Competition Act 1998, c. 1, § 2 (U.K.).

163. *Id.*

164. UK COMPETITION: CHAPTER I PROHIBITION (Prac. L. Competition ed., 2025), Thomson Reuters 6-107-3691.

165. *See, e.g.,* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769 (1984) (defining the single entity exemption from Section 1 liability); *see also* Richard Cordero, *Exemption or Immunity from Federal Antitrust Liability Under McCarran-Ferguson (15 U.S.C. 1011-1013) and*

Generally, agreements that violate Chapter I consist of horizontal restrictions (such as price-fixing agreements between competitors) or vertical restrictions (for instance, exclusive supply agreements).¹⁶⁶ To determine whether an agreement violates Chapter I, first, an assessment of the agreement's effect or object must be conducted. If an agreement is alleged to have anti-competitive effects, the relevant competition landscape and market structure must be examined.¹⁶⁷ On the other hand, if an agreement's object is allegedly anti-competitive, the agreement's contents, goals, and the context of its operation must be considered before examining potential effects.¹⁶⁸ Additionally, an analysis of the relevant product and geographic markets is conducted to gain further insight into the agreement's effects.¹⁶⁹ Finally, an agreement must have an appreciable effect on both competition and trade in the UK; in other words, there must be "a close nexus between the effect on competition and trade" for an agreement to be deemed unlawful under Chapter I.¹⁷⁰

2. Chapter II: Abuse of Dominant Position

Like the U.S. Sherman Act, the UK Competition Act 1998 also contains a section dedicated to anti-competitive, unilateral conduct in the marketplace.¹⁷¹ However, while Chapter II of the Competition Act prohibits conduct which "amounts to the abuse of a dominant position in a market" if it affects trade within the UK,¹⁷² the unilateral conduct prohibited by Section 2 of the Sherman Act is defined as the retention of monopoly power and other "attempts to monopolize."¹⁷³ Similarly, unlike the U.S. law, Chapter II lists examples of conduct which may constitute an abuse of a dominant position, such as imposing unfair prices, applying dissimilar conditions to equal transactions, and limiting markets, technical development, or production.¹⁷⁴ However, this list is not exhaustive. Further, Chapter II, like Chapter I, includes a list of block exemptions and exclusions, while the Sherman Act does not.¹⁷⁵ Overall, however, Chapter II is similar to Section 2 of the Sherman Act in that both focus on entities that engage in monopolistic behavior or otherwise abuse their market

State Action and Noer-Pennington Doctrines for Business of Insurance and Persons Engaged in It, 116 A.L.R. FED. 163 (1993) (providing a detailed overview of the statutory and caselaw framework for Sherman Act exemptions).

166. UK COMPETITION: CHAPTER I PROHIBITION, *supra* note 164.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. Competition Act 1998, c. 2, §§ 18-19 (UK).

172. *Id.* at § 18.

173. 15 U.S.C. § 2 (2004).

174. *Id.*

175. Competition Act 1998, c. 2, § 19 (UK).

power, and the prohibitions apply regardless of whether an entity acts alone or in conjunction with others.¹⁷⁶

To determine whether a violation of Chapter II has occurred, a three-step inquiry is required.¹⁷⁷ First, the relevant product and geographic markets must be defined.¹⁷⁸ Next, an entity's dominance in the market is assessed by looking at whether the entity possesses the "power to behave independently of competitive pressures."¹⁷⁹ A company may be dominant, for instance, if there are low constraints on its market power, it holds a large share of the market, and the market has high entry barriers (for new competitors).¹⁸⁰ However, merely holding a dominant position in a market is not enough for a company to violate Chapter II. The dominant entity must abuse its powerful market position, which may be done by excluding competitors or by imposing unfair prices on consumers or conditions on contracting parties.¹⁸¹

V. APPLICATION AND SOLUTIONS

Given the state of professional men's soccer in the United States—which is currently structured as a three-tier pyramid, with only one league, MLS, sanctioned by USSF for the top tier competition (Division I), and no system of promotion or relegation to allow teams to gain entry to the top league based on sporting merit—it seems logical to subject the top league, MLS, and the domestic governing body, USSF, to antitrust scrutiny. Specifically, there are three possible antitrust claims against MLS, USSF, or both entities.

The first possible antitrust claim is that MLS and USSF are engaging in collusive conduct to restrict competition in the U.S. marketplace for top-tier professional soccer, in violation of Section 1 of the Sherman Act. As stated previously, USSF is the FIFA national association that acts as the official governing body of soccer in the U.S. and holds the authority to sanction professional leagues at various levels of domestic competition.¹⁸² Indeed, USSF has created the American soccer pyramid, which consists of three tiers: Division I, II, and III, respectively.¹⁸³ While USSF has sanctioned multiple leagues for the lower divisions, since 1996, the organization has only sanctioned one league for its Division I competition: MLS.¹⁸⁴ Additionally, the closed-league structure of MLS, with no promotion or relegation mechanisms, deprives lower-level

176. ALEX NOURRY & DAN HARRISON, *UK COMPETITION: CHAPTER II PROHIBITION (ABUSE OF DOMINANCE)* (Prac. L. Competition ed., 2025), Thomson Reuters 4-107-3692.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. See *BYLAWS OF THE UNITED STATES SOCCER FEDERATION, INC.*, *supra* note 65.

183. See *THE UNITED STATES SOCCER FEDERATION, INC. POLICY MANUAL 16*, *supra* note 66.

184. *Timeline*, U.S. SOCCER FED'N, <https://www.ussoccer.com/history/timeline> [<https://perma.cc/EC82-WPRV>] (last visited Mar. 7, 2025).

teams of the opportunity to gain entry into the Division I competition.¹⁸⁵ Thus, the restrictions imposed by MLS, coupled with the fact that USSF has only sanctioned MLS for Division I, open the door to the possibility that MLS and USSF have an illegal concerted agreement to restrict competition in violation of Section 1.

However, this argument likely lacks merit for two reasons. First, in antitrust cases naming USSF as a defendant, courts have focused their discussion and analysis on MLS, absent any evidence of an agreement between USSF and MLS.¹⁸⁶ Second, the United Soccer League (“USL”), which currently maintains both Division II and Division III leagues, announced in February 2025 that it plans to “launch a Division One men’s professional league in 2027-28,”¹⁸⁷ USL Premier.¹⁸⁸ Given USL’s recent success in attaining USSF Division I sanctioning for its women’s league, and the existence of its other USSF-sanctioned leagues, it is unlikely that USSF will deny USL’s new league Division I sanctioning.¹⁸⁹ Thus, because USSF will soon grant another professional men’s league Division I status, any potential claims regarding USSF’s alleged collusion with MLS to restrict competition in the Division I market are without merit and will not be addressed in the following analysis.

Although no viable allegations of anticompetitive behavior may be made against USSF, the conduct of MLS is still subject to antitrust scrutiny. Specifically, either: (1) MLS and its clubs have a collusive agreement to restrict top-tier professional men’s soccer in the U.S., in violation of Section 1 of the Sherman Act, or (2) MLS has monopolized the top-tier professional men’s soccer market in the U.S., in violation of Section 2 of the Sherman Act. The next section will focus on insights from European competition law and the United Kingdom soccer models, recent cases that have shaped antitrust law in the context of the U.S. sports industry, and the circumstances in Indianapolis, which indicate that a successful antitrust case against MLS may be on the horizon.

A. Insights from the United Kingdom and Europe

As discussed earlier, the United Kingdom is home to the world’s most popular and profitable professional soccer league.¹⁹⁰ Although the domestic

185. Lower division teams may submit bids to MLS, but the league must first approve the bid. If MLS accepts a bid, the team must pay a hefty expansion fee to join the league. *See* Frank & Haenchen, *supra* note 87.

186. *See infra* notes 211–226, 239–244 and accompanying text.

187. *United Soccer League Takes Bold Step Forward with Launch of Division One Professional Men’s League*, UNITED SOCCER LEAGUE (Feb. 13, 2025), https://www.uslsoccer.com/news_article/show/1331372#:~:text=TAMPA%2C%20Fla.,sport%20is%20experiencing%20unprecedented%20momentum [https://perma.cc/UUJ4-Y88U].

188. *See USL Premier Set to Reshape American Soccer Pyramid*, *supra* note 11.

189. *USL plans to launch Division I men’s league, take on MLS*, SPORTS BUS. J. (Feb. 13, 2025), <https://www.sportsbusinessjournal.com/Articles/2025/02/13/usl-plans-to-launch-division-i-mens-league-take-on-mls/> [https://perma.cc/BZ68-ML9W].

190. Mitton, *supra* note 49.

leagues in the United Kingdom and across Europe all operate as open systems,¹⁹¹ in 2021, this harmonization was challenged when a group of “elite” European soccer teams proposed creating a new “European Super League” (“ESL”) for seasonal competitions.¹⁹² This proposal was ultimately abandoned for many reasons, probably in part due to UEFA’s proposed sanctions and the widespread controversy and backlash the ESL faced.¹⁹³ However, when the Super League plan was first introduced, many legal scholars considered whether the league would violate European competition law—specifically 101(1) of the TFEU, which prohibits “all agreements between undertakings . . . and concerted practices which . . . have as their object or effect the prevention, restriction or distortion of competition within the internal market” (the equivalent to Chapter I of the UK Competition Act 1998).¹⁹⁴ Essentially, it was believed that the ESL (if established) would not survive competition law challenges in Europe because the league would be “based on agreements between big clubs or at least on concerted practices of big clubs.”¹⁹⁵ As other scholars have framed the antitrust issues associated with the proposed ESL, forming a breakaway league is not inherently anti-competitive, but a closed model would be more likely to run afoul of the law.¹⁹⁶

In the U.S., however, closed leagues are the norm in professional sports competitions. These systems are generally not challenged (except in the context of professional American soccer), and if they are, they do not face strict antitrust scrutiny (as illustrated previously). In Europe, however, a closed soccer league would almost certainly face competition law challenges.¹⁹⁷ One reason for this discrepancy could be attributed to the specific language in the relevant competition (and antitrust) statutes. For instance, European (and UK) competition law generally covers sports leagues because Article 101 TFEU explicitly covers decisions by both undertakings and associations of undertakings.¹⁹⁸ And, even though such sports leagues “may be viewed as single economic entities for some purposes, the decisions of the sporting leagues are therefore nevertheless subject to antitrust scrutiny.”¹⁹⁹

Overall, the European Courts’ treatment of sports leagues, competitions, organizations, and governing bodies in relation to the relevant competition law

191. Hanno Beck, Aloys Prinz & Tsjalle ven der Burg, *The League System, Competitive Balance, and the Future of European Football*, 30 *MANAGING SPORT AND LEISURE* 21, 36 (2025).

192. *Id.* at 38-39.

193. *Id.*

194. *Id.*

195. *Id.*

196. Robby Houben, Jan Blockx & Steve Nuyts, *UEFA & Super League: who is calling who a cartel?*, 22 *INT’L SPORTS L.J.* 205, 214-15 (2022).

197. *See id.*; *see also* Katarina Pijetlovic, *European Model of Sport: Alternative Structures*, in *RSCH. HANDBOOK ON EU SPORTS L. AND POL’Y* 326, 339 (Jack Anderson, Richard Parrish & Borja Garcia eds., 2018) (arguing that closed leagues would be difficult to defend if challenged under EU competition law).

198. *Id.* at 210.

199. *Id.*

is at odds with the approach of U.S. courts. While the antitrust analyses used by U.S. courts focus more on economics and on whether allegedly anti-competitive behaviors or restrictions unreasonably affect relevant markets, European courts take a different approach that is arguably less lenient. For example, the Court of Justice has ruled that restrictions imposed by professional sports governing bodies (such as UEFA) are subject to Articles 101 and 102 of the TFEU. Such organizations may only escape the competition prohibitions if the restrictions “are inherent in the pursuit of legitimate objectives of general interest and are proportionate to them.”²⁰⁰ Examples of objectives which may be considered “legitimate” include “the integrity of sport, the protection of health and safety, the organization and proper conduct of competitive sport [. . .], [and] solidarity between participants and the protection of the volunteer model of a sport.”²⁰¹ Yet the open-league structure of sports, like professional soccer, in European countries may contribute to the different approach taken by European competition authorities and courts.

Additionally, although sports leagues may be subject to antitrust scrutiny under the EU and UK competition laws, such scrutiny is seldom applied. Unlike in the U.S., where the main entities subject to antitrust challenges are sports leagues, in Europe, the entities facing the most antitrust scrutiny are sports governing bodies, such as UEFA (in the U.S., this would be USSF).²⁰² Thus, because sports governing bodies are generally responsible for the development of a sport in a country (including youth, amateur, and professional levels), the goals and objectives of such organizations are fundamentally different than those of sports leagues, which are primarily focused on the economic benefits they can receive from selling their product (whether it is selling tickets to games, broadcasting rights, or merchandise).²⁰³ Due to the inherent differences between the regulation of and application of antitrust laws to professional sports entities in Europe and the U.S., and the lack of evidence or other basis to support an antitrust action against the U.S. sports governing body (USSF), it seems unlikely that European or United Kingdom competition law can provide any solutions to the U.S. professional soccer dilemma.

B. U.S. Antitrust Law and the Sports Industry: The Single Entity Defense

Although professional sports leagues, in general, fall under the purview of the Sherman Act “because they affect interstate commerce and are therefore capable of affecting competition by behaving like a cartel or a monopoly,” many actors are able to circumvent antitrust challenges due to the unique nature of the

200. *Id.*

201. *Id.*

202. Farzin, *supra* note 81, at 75-76.

203. *Id.* at 77-78; BOILLAT & POLI, *supra* note 25, at 9-16 (discussing the structures of and relationships between domestic football (soccer) competitions, leagues, and national governing bodies).

professional sports industry.²⁰⁴ For instance, professional sports leagues often argue that at least some degree of economic cooperation between teams within the league is necessary to maintain “athletically balanced competition,” which is a main component of the product (sports entertainment) sold to their consumers (sports fans).²⁰⁵ A prevalent and successful defense used by U.S. sports organizations to ward off antitrust allegations is the single entity argument, which arises from a non-sports case, *Copperweld Corporation v. Independence Tube Corporation*.²⁰⁶ Prior to *Copperweld*, however, sports entities that attempted to claim exemptions from antitrust violations by arguing the single entity defense were not always released from liability.²⁰⁷

For instance, in 1982, the North American Soccer League (“NASL”) brought a suit against the National Football League (“NFL”) for alleged violations of antitrust laws. The NFL’s member football clubs had agreed to prohibit “making or retaining any capital investment” in other professional sports leagues’ members, including the NASL.²⁰⁸ Although the Court of Appeals for the Second Circuit acknowledged that the teams in the NFL needed to cooperate with one another because their economic success, strength, stability, and “quality of sports competition” were interdependent, the court refused to accept the NFL’s contention that its status as a “single economic entity” insulated it from the Sherman Act’s prohibitions on anticompetitive agreements.²⁰⁹ Thus, after conducting a rule of reason analysis, the court determined that the agreement between the NFL’s members violated Section 1 of the Sherman Act and directed the district court to impose a permanent injunction prohibiting the ban.²¹⁰

However, two years later, the Supreme Court decided *Copperweld* and essentially endorsed the single entity argument as a viable defense against antitrust claims. In *Copperweld*, the Court concluded that the conduct of a parent and wholly owned subsidiary was exempt from the Sherman Act’s Section 1 prohibitions on concerted actions in restraint of trade because it characterized a parent and its subsidiary as a “single firm” rather than “two independent firms acting in concert.”²¹¹ Since *Copperweld*, the single entity defense has become a prominent mechanism for entities like sports leagues to shield themselves from

204. Farzin, *supra* note 81, at 81-83.

205. *Id.* at 78.

206. *Id.* at 82-83.

207. See Brendan Ewing, *MLS Promotion! Can MLS’s Single Entity Status Protect it from “Pro/Rel”?*, 25 JEFFREY S. MOORAD SPORTS L.J. 359, 360-61, 376-78, 389-91 (2018) (explaining that *Copperweld* “opened the door to a ‘single entity’ defense to antitrust litigation” for sports leagues); see, e.g., Farzin, *supra* note 81, at 82-83.

208. *N. Am. Soccer League v. Nat’l Football League*, 670 F.2d 1249, 1250 (2d Cir. 1982).

209. *Id.* at 1253-57; see 15 U.S.C. § 1 (2004) (Sherman Act section which prohibits concerted actions and agreements in restraint of trade); see also HOLMES & MANGIARACINA, *supra* note 102, § 2:16 (discussing competitively motivated group boycotts and concerted refusals to deal, which are practices generally characterized as violative of Sec. 1 of the Sherman Act).

210. *N. Am. Soccer League*, 670 F.2d at 1261-62.

211. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771-72, 775 (1984).

anti-competitive conspiracy allegations.²¹² This defense is especially relevant in assessing potential antitrust claims against MLS because, according to some, the league was “designed to conform to the single entity exception to Section 1 of the Sherman Act.”²¹³ As explained previously, MLS is structured so that the league itself owns all member soccer clubs, which are then operated by investor-operators who invest in the league.²¹⁴ If, in fact, the league’s investor-operator structure was chosen specifically to circumvent antitrust scrutiny, it has succeeded. Indeed, the first antitrust lawsuit against MLS, *Fraser v. Major League Soccer, LLC.*, was brought in the U.S. District Court for the District of Massachusetts in 2000.²¹⁵

In *Fraser I*, the plaintiffs—representatives of a certified class of professional soccer players who competed on MLS teams—sued MLS, USSF, and several MLS investor-operators for alleged violations of Sections 1 and 2 of the Sherman Act.²¹⁶ The plaintiffs claimed that the defendants had violated antitrust law by limiting competition for player services by “contracting for player services centrally through MLS” rather than through individual MLS teams and imposing player transfer fees, which restricted players’ relocation opportunities.²¹⁷ Additionally, the plaintiffs claimed that MLS, USSF, and the named investor-operators were jointly exercising monopoly power in violation of Section 2 of the Sherman Act.²¹⁸ However, the District Court rejected these arguments because it determined that MLS’s corporate structure was akin to the single economic entity described in *Copperweld*; therefore, as a single entity, MLS’s policies could not, “as a matter of law,” violate Section 1 of the Sherman Act.²¹⁹

Two years later, in *Fraser II*, the plaintiffs appealed the District Court’s decision to the Court of Appeals for the First Circuit, which rejected the District Court’s oversimplified characterization of MLS as a pure single entity business arrangement like the one at issue in *Copperweld*.²²⁰ Instead, the First Circuit described MLS as “a hybrid arrangement, somewhere between a single company (with or without wholly owned subsidiaries) and a cooperative

212. See Ewing, *supra* note 207.

213. Farzin, *supra* note 81, at 88; see also Bryan A. Green, *Can Major League Soccer Survive Another Antitrust Challenge? Emerging Threats to its Single Entity Treatment*, 4 INT’L SPORTS L. REV. 79, 81-83 (2009) (discussing the history of Major League Soccer and league structure).

214. Krasny, *supra* note 83.

215. *Fraser v. Major League Soccer, L.L.C.*, 97 F.Supp.2d 130 (D. Mass. 2000) [hereinafter “*Fraser I*”].

216. *Id.* at 131.

217. *Id.*

218. However, the District Court did not address the alleged Section 2 violation because it was not at issue on plaintiffs’ motion for summary judgment. The plaintiffs also alleged violations of § 7 of the Clayton Antitrust Act, 15 U.S.C. § 18, but for the purposes of this note, these claims and the court’s ruling on these issues were omitted from this discussion. See *id.*

219. *Id.* at 134.

220. *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 57 (1st Cir. 2002) [hereinafter “*Fraser II*”].

arrangement between existing competitors.”²²¹ Ultimately, the court declined to definitively resolve the single entity question, refusing to extend *Copperweld* to grant categorical single entity protection to sports organizations or to characterize MLS itself as a single entity.²²² Further, the court stated that even if Section 1 of the Sherman Act applied to the case at hand, MLS could not “be condemned by per se rules” and the venture presented “at best a debatable case under the rule of reason,” especially because the jury rejected “plaintiffs’ own market definition” (which was either the United States or Division I).²²³ Consequently, according to the court, the jury’s rejection of the relevant market “doom[ed]” the monopolization claims under Section 2 of the Sherman Act because this is one of the requisite elements in establishing a Section 2 violation.²²⁴ Thus, the First Circuit affirmed the District Court’s judgment in favor of MLS, USSF, and the investor-operators.²²⁵ Although the First Circuit did not directly endorse MLS’s status as a single entity, it did not reject that characterization either; thus, MLS has continued to operate under the protection of the single entity defense, which may help explain why its “‘cartel-like’ structure” has rarely been challenged in court since *Fraser II*.²²⁶ However, there may be hope for those who still wish to subject MLS and USSF to the competition protections afforded by the Sherman Act. In the last fifteen years, the sports industry has continued to face antitrust litigation. And while not every plaintiff who challenges a sports conglomerate succeeds, each antitrust case provides an opportunity to strategize.

C. Building an Antitrust Strategy

1. Challenging the Single Entity Exemption for MLS

In 2010, the Supreme Court decided *Am. Needle, Inc. v. National Football League*, a case that weakened the single entity defense for sports organizations hoping to avoid antitrust liability.²²⁷ The suit arose from a decision by the NFL and its 32 professional football teams to form an entity known as the National Football League Properties (“NFLP”), which would be responsible for the NFL and its teams’ intellectual property and for the development and licensing of that property. The NFLP had granted nonexclusive licenses to several vendors, including American Needle, to create and sell NFL team apparel.²²⁸ However,

221. *Id.* at 58.

222. *Id.* at 59.

223. *Id.*

224. *Id.* at 62.

225. *Id.* at 71.

226. Daniel S. MacMillan, *Is MLS Inherently Anticompetitive? The Strange Single-Entity Structure of Major League Soccer in Order to Legitimize American Professional Soccer*, 28 MARQ. SPORTS L. REV. 503, 507 (2018).

227. 560 U.S. 183 (2010).

228. *Id.* at 186-88.

shortly thereafter, NFLP gave Reebok International an exclusive license to create and sell certain trademarked apparel, and the NFLP did not renew its license to American Needle. As a result, American Needle sued for violations of Section 1 of the Sherman Act, but the NFL claimed it was exempt from the statute's provisions because it was a single entity.²²⁹

The Court, however, reaffirmed the principle articulated in *Copperweld*, emphasizing that “‘substance, not form, should determine whether a[n] entity is capable of conspiring under § 1.’”²³⁰ Therefore, “[t]he key [to evaluating Section 1 claims] is whether the alleged ‘contract, combination . . . , or conspiracy’ is concerted action—that is, whether it joins together separate decisionmakers” or instead involves “‘separate economic actors pursuing separate economic interests.’”²³¹ Thus, the Court explained that the structure of multiple legally distinct entities—whether organized separately or as a joint venture, as a single entity, or under a unified body—is not determinative in deciding whether parties are capable of or have in fact violated Section 1 of the Sherman Act.²³² As a result, the Court rejected the NFLP’s single entity defense, reasoning that “[t]he NFL teams do not possess either the unitary decision making quality or the single aggregation of economic power characteristic of independent action.”²³³ Thus, the NFLP’s alleged concerted action remained subject to antitrust scrutiny under Section 1 because a single entity structure does not shield an organization from such analysis.²³⁴

Because the Supreme Court has refused to recognize the single entity defense as a blanket exemption from potential antitrust liability under Section 1, and because the economic structure of MLS clubs has changed since *Fraser I* and *Fraser II* were decided, new challenges to the anticompetitive conduct of MLS should, at a minimum, proceed past the single entity exemption and subject the league’s conduct to a rule of reason analysis. First, the single entity defense is premised on the notion that a parent and its wholly owned subsidiaries share a “complete unity of [economic] interest.”²³⁵ In *American Needle*, the Court reasoned that the teams within the NFL did not share the same economic interests, because the teams “compete with one another, not only on the playing field, but to attract fans, for gate receipts, and for contracts with managerial and playing personnel.”²³⁶ Similarly, although the soccer clubs within MLS contribute some of their individually-acquired revenue to the league itself, 70% of the revenue earned by individual teams—from ticket sales, parking and stadium fees, local broadcasts and sponsors, and stadium merchandise sales, for

229. *Id.*

230. *Id.* at 195 (citing *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 773 (1984)).

231. *Id.*

232. *Id.* at 196.

233. *Id.*

234. *Id.* at 203.

235. *Copperweld*, 467 U.S. at 771.

236. *Am. Needle*, 560 U.S. at 196.

instance—is retained by the clubs themselves.²³⁷ Further, after *Fraser II* was decided, the league implemented the “Designated Player Rule,” which allows individual clubs to acquire (up to) three players on their teams “whose total compensation and acquisition costs exceed the Maximum Salary Budget Charge, with the clubs bearing financial responsibility.”²³⁸ Thus, these changes show that individual MLS clubs have been given greater economic latitude in spending and earning, allowing for greater competition between clubs.

As a result, individual MLS clubs have greater incentives to compete for better players and more fan engagement to achieve greater economic success, which ultimately deconstructs the economic unity and interests of the teams within the league itself. Therefore, in light of *American Needle* and these increasingly divergent economic interests between teams, the single entity defense should not shield MLS from Section 1 liability.

2. NASL’s Antitrust Lawsuit Against MLS and USSF

However, more than twenty years after *Fraser II*, it appears that parties attempting to assert antitrust claims against MLS and USSF are still struggling to define the relevant market or provide direct evidence of a conspiracy, and therefore are failing to prove violations of Section 1 or 2 of the Sherman Antitrust Act.²³⁹ Indeed, in the most recently decided antitrust action against MLS and USSF, the North American Soccer League (“NASL”)—a former USSF-sanctioned, Division II professional men’s league—alleged that the entities conspired to grant and maintain for USL a monopoly in the relevant market (Division II professional soccer) and that MLS possessed monopoly power in the relevant market (Division I professional soccer) in the U.S. and Canada.²⁴⁰ In addition to the Section 2 claims, the NASL alleged that MLS and USSF violated Section 1 of the Sherman Act by conspiring “to exclude NASL and others from competing against MLS in the market for top-tier men’s professional soccer leagues in the U.S. and Canada.”²⁴¹

Unfortunately, in February 2025, the jury returned a verdict in favor of MLS and USSF, “ultimately finding that NASL was unable to prove substantial harm in the relevant markets that would be foundational to its claims of

237. Jameson Scarsella, *Sporting Econ 101: MLS Finances Explained*, BUS. DOWNLOAD (Sep. 5, 2023), <https://thebusinessdownload.com/sporting-econ-101-mls-finances-explained/> [https://perma.cc/6G6R-FDQR].

238. *2026 MLS Roster Composition*, MLS SOCCER (Feb. 3, 2026), <https://www.mlssoccer.com/about/roster-rules-and-regulations> [https://perma.cc/6PLB-VEG7].

239. *Fraser II*, 284 F.3d at 59-61.

240. *N. Am. Soccer League, LLC v. U.S. Soccer Fed’n., Inc.*, No. 17-CV-5495 (BMC), 2024 WL 2959967, at *4 (E.D.N.Y. June 12, 2024).

241. *Id.* at *1.

conspiracy.”²⁴² According to the jury verdict form, it appears that NASL failed to prove the existence of the relevant antitrust markets, which NASL had defined as Division I and Division II sanctions for men’s professional soccer leagues in the U.S. and Canada.²⁴³ NASL plans to appeal the decision, but until then, the jury’s verdict regarding NASL’s failure to define the relevant markets must be highly regarded, especially because a jury twenty years earlier—in *Fraser I*—also indicated that the plaintiffs failed to prove the existence of the proposed relevant market.²⁴⁴ Additional inquiry into these failed attempts to convince juries of the relevant markets affected by the alleged anti-competitive conduct is imperative if future plaintiffs hope to bring a successful antitrust action against MLS or USSF.

D. Challenging the Cartel (The Solution)

Although European and United Kingdom competition law offers little to no solutions to the antitrust problems associated with the U.S. professional soccer system, the popularity, prestige, and economic success of the European and English soccer pyramids should serve as role models for MLS and USSF. An open-league format, with promotion and relegation mechanisms, is ideal for professional soccer pyramids for several reasons. Because the threat of relegation and the potential benefits associated with promotion serve as strong incentives for clubs to invest in the development of player talent and the competitive strength of their teams, “the overall quality of play will be higher in an open league than in a closed league resulting in more competitive games and higher fan utility.”²⁴⁵ The integrity of the sport is increased by a system that rewards teams and players based on sporting merit rather than a system that rewards entry to the top-tier based on maximizing profit.

Expenditures on players and team development are higher in open leagues than in closed leagues because this spending serves as an investment in the quality of the sport and is likely to yield greater economic benefits in the long run, as higher-quality competitions will attract more fans and engagement in the U.S. soccer market. Indeed, teams in the MLS “will always be weaker than teams from the top leagues in Europe because the MLS is a closed league.”²⁴⁶ Furthermore, MLS and its investor-operators currently lack any incentive to invest in competitive quality and on-field performances, because teams do not

242. Melanie Anzidei, *NASL failed to prove USSF and MLS conspired against it, jury decides*, N.Y. TIMES (Feb. 3, 2025), <https://www.nytimes.com/athletic/6110245/2025/02/03/nasl-ussf-mls-lawsuit-verdict/> [https://perma.cc/U8GE-ANMT].

243. Verdict Form at 7, *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, No. 17-CV-5495-HG (E.D.N.Y. Feb. 3, 2025).

244. *Fraser I*, 97 F.Supp.2d at 135-39 (D. Mass. 2000); *Fraser II*, 284 F.3d at 62 (1st Cir. 2002).

245. John Jasina & Kurt Rotthoff, *A Model of Promotion and Relegation in League Sports*, 36 J. ECON. & FIN. 303, 313 (2012).

246. *Id.* at 305.

fear relegation; in a closed system like MLS, once a team is granted entry to the league, it is (essentially) guaranteed to retain its position and status as a Division I team.²⁴⁷ Thus, if MLS or USSF hope to compete at the same high level of play as European leagues, these entities need to ensure that teams are incentivized to develop their players' skills and enhance their prestige. Further, open systems may benefit small market teams because they provide an opportunity for free entry into the top leagues based on talent, skill, and success on the field, rather than on which market or investor is willing to pay the highest expansion fee to gain entry to MLS. For small market teams that earn entry into a top-tier league through promotion, attendance to their games is likely to increase, which would generate more revenue for communities at a financial disadvantage. This has been illustrated in the English pyramid system; on average, "promotion into the Premier League is accompanied by an increase in attendance of 6,000 people per game."²⁴⁸ Overall, an open system in the United States would create higher-quality soccer teams, leading to greater fan engagement and contributing to the sport's development in the country.

Given the benefits of implementing an open system with promotion and relegation mechanisms, it would be advantageous for USSF and MLS to abandon the closed model. Furthermore, if USSF or MLS were to voluntarily implement promotion and relegation between the professional soccer divisions, it could avoid future antitrust challenges. Because MLS has historically been the only league sanctioned by the USSF to operate in the top-tier of the U.S. professional soccer pyramid, and because it continues to control access to its Division I competition through expansion fees and discretionary selection, it essentially holds a monopoly over the top level of professional men's soccer in the country. Additionally, because MLS requires teams hoping to gain entry into the league to pay millions of dollars to "earn" an expansion deal, and the MLS ultimately decides which teams (who pay the expansion fee) it wants to join MLS based on factors unrelated to sporting merit, such arbitrary and expensive barriers to entry make the league susceptible to further antitrust liability.²⁴⁹

Furthermore, because the USSF has either been complicit in MLS's exclusive endeavors or has actively facilitated and maintained MLS's monopoly over the top-tier professional soccer market in the U.S., it, too, may be vulnerable to future antitrust challenges from competitors it has restricted or excluded. However, due to MLS's and USSF's past ability to ward off the antitrust claims brought against them in lawsuits, and the economic advantages that the MLS investor-operators receive from dominating the professional soccer market, it seems unlikely that either entity will voluntarily amend the closed system and face competition from potentially higher-quality teams and

247. Ali Harb, *Lionel Messi makes MLS debut: how does the league work?*, ALJAZEERA (Aug. 28, 2023), <https://www.aljazeera.com/sports/2023/8/28/lionel-messi-makes-mls-debut-but-how-does-the-league-work> [https://perma.cc/BW6D-NBGT]; see Reese, *supra* note 14.

248. *Id.* at 316.

249. See BOILLAT & POLI, *supra* note 25, at 98.

leagues. Moreover, if USSF ultimately sanctions USL's proposed Division I league, USL Premier, a successful antitrust challenge to USSF's conduct may become even less likely.²⁵⁰ Antitrust claims against MLS, however, retain merit regardless of USL's plans to launch USL Premier. Even if USL successfully launches a USSF-sanctioned Division I league within an open pyramid structure, MLS will still operate as an exclusionary, closed system, and its longstanding dominance of the Division I tier would continue to create significant barriers for qualified teams seeking entry into the top level of professional soccer. Thus, it may ultimately be necessary for such teams to bring antitrust claims against MLS because its entrenched dominance in the U.S. top-tier professional soccer market may prevent USL from meaningfully competing in the Division I market.

Arguably, Indy Eleven is the best-suited plaintiff for a successful challenge against the anticompetitive behavior of MLS and USSF. As a club that competes in the division directly below MLS, has repeatedly sought entry to MLS but been denied, and recently defeated an MLS team while placing fourth in the 2024 U.S. Open Cup,²⁵¹ Indy Eleven is an ideal plaintiff to raise claims against MLS and USSF for violations of Sections 1 and 2 of the Sherman Antitrust Act. First, *American Needle* opened the door for self-proclaimed single entities, such as MLS, to face antitrust scrutiny (such as a rule-of-reason analysis or at least a market analysis) rather than immediately avoid it by claiming a structural defense. Thus, Indy Eleven could conceivably argue that the investor-operators of MLS have agreed to "consolidate their economic interests into one body, despite actually holding separate economic interests," which has resulted in "a deprivation of independent centers of decision-making in the relevant marketplace" and therefore, contend that the court is compelled to engage in, at a minimum, a rule of reason analysis under Section 1.²⁵²

Further, because MLS repeatedly denied Indy Eleven access to the Division I market (via an expansion package to join the MLS), and now MLS has engaged in agreements or has otherwise conspired with Indianapolis officials to implement its own team in Indianapolis, Indy Eleven may have another option for a legal claim; the team may be able to show that MLS has attempted to, or is in the process of, monopolizing the professional soccer market in Indianapolis. By bringing a suit against MLS and USSF for violations of the Sherman Act, Indy Eleven could receive various types of relief or remedies. The preferred form of relief would be an injunction preventing MLS from monopolizing the Indianapolis professional soccer market. This would provide the most direct relief to Indy Eleven and may be the most realistic remedy the

250. See *supra* notes 187-90 and accompanying text.

251. See *Indy Eleven Delivers Dramatic Upset on First Matchday of 2024 U.S. Open Cup Quarterfinals*, *supra* note 95.

252. Ewing, *supra* note 207, at 403.

club could receive. On the other hand, a court may issue an injunction requiring MLS, USSF, or both to amend their procedures, rules, and standards for clubs seeking to advance to higher divisions. While it is unclear whether a court could force MLS or USSF to implement promotion or relegation as a remedy, the closed model of professional soccer in the U.S. is impeding the sport's development, harming lower-level teams and leagues—including Indy Eleven—and overlooking fan welfare. By bringing a legal challenge against MLS and USSF, Indy Eleven will not only solve its own dilemma but also work to improve the integrity of soccer in the U.S.

VI. CONCLUSION

Indianapolis's soccer dilemma is not an anomaly. It is a symptom of a deeper structural failure in the governance of professional soccer (and professional sports generally) in the United States. By organizing soccer around a closed, franchise-based model that conditions entry to the top tier on wealth rather than merit, MLS has insulated itself from competitive pressures, distorted the incentives of clubs and investors, and foreclosed the very pathways that make soccer the world's most dynamic and credible sporting system elsewhere. The result is a pyramid in name only—one that preserves hierarchy without permitting movement, and stability without accountability.

This Note has argued that the current structure of U.S. professional soccer is not merely undesirable but also legally vulnerable. Although past antitrust challenges against MLS and USSF have failed, largely because of difficulties defining relevant markets and the historical shelter provided by the single entity legal defense, doctrinal developments since *Fraser I* and *II*, especially the Supreme Court's decision in *American Needle*, have substantially weakened MLS's ability to avoid meaningful scrutiny under the Sherman Act. At the same time, MLS's evolving economic structure—one in which clubs retain substantial independent revenue streams and compete aggressively for talent, fans, and local market dominance—undercuts the premise that the league and its teams still share a complete unity of economic interests. Indy Eleven stands at the center of this conflict. It is a club with proven competitive success, demonstrated fan support, and a tangible record of outperforming MLS teams on the field, yet it remains permanently locked out of the top tier because it cannot, or will not, purchase its way in. If MLS is permitted to deny access to the Division I market while simultaneously inserting its own team into Indianapolis, the league's conduct begins to resemble not merely a closed system, but an exclusionary one that risks crossing the line from business model to unlawful monopolization.

To be sure, antitrust law does not guarantee promotion and relegation, nor does it mandate any particular league structure. But it does prohibit the use of market power to exclude competitors, entrench dominance, and foreclose competition without legitimate justification. At a minimum, it demands that

MLS's practices be subjected to serious rule-of-reason scrutiny rather than to structural immunity under the single entity defense. More broadly, the case for reform extends beyond litigation. An open system that rewards sporting merit, incentivizes investment in quality teams and players, and preserves the integrity of competition would better serve fans, players, clubs, and the long-term development of the sport in the United States. It would also align American soccer with the global norms that have made the game the world's most popular sport.

If MLS and USSF will not move voluntarily toward a more open and competitive system, pressure will come from elsewhere—from courts, from competitors, like USL, and from markets that increasingly recognize the costs of artificial closure. Therefore, the crux of Indy Eleven's fight extends beyond just one city or one club. Ultimately, it is about whether American soccer will continue to be governed as a protected cartel or finally be allowed to become what the sport has long been elsewhere: a competition where success is earned on the field rather than purchased in an executive suite.

FORCE MAJEURE IN THE AGE OF DIGITAL ASSETS: A NEW FRAMEWORK FOR INTERNATIONAL CRYPTOCURRENCY MARKETS

BRIAN LEON*

“The life of the law has not been logic; it has been experience.”
— Justice Oliver Wendell Holmes, Jr.¹

INTRODUCTION

In an era in which teenagers can become crypto millionaires overnight, sports arenas rebrand for digital currencies, and Elon Musk’s tweets about Dogecoin move markets, cryptocurrency has become impossible to ignore—but its underlying smart contracts pose an even more revolutionary challenge to contract law.² These self-executing digital agreements, which automatically enforce obligations through code rather than courts, have begun to reshape international commerce in ways that traditional legal frameworks never anticipated.³ When a smart contract, managing millions in cross-border transactions, fails, it raises a pressing question: How does the centuries-old force majeure doctrine apply when “force” can be a bug in the code and the “majeure” can happen at the speed of light, or whether force majeure should even play a role at all?⁴

The United Nations Convention on International Sale of Goods (“CISG”)

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1. OLIVER WENDELL HOLMES, *THE COMMON LAW* (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881).

2. See Amy Francombe, *Billion dollar babies: meet the teenagers making a fortune off cryptocurrency*, STANDARD (Apr. 7, 2022), <https://www.standard.co.uk/lifestyle/cryptocurrency-money-teenagers-tiktok-social-media-influencers-b993101.html> [<https://perma.cc/H63U-BP8F>]; Jordan Greer, *Why did Staples Center become Crypto.com Arena? Home venue for Lakers, Clippers undergoes name change*, SPORTING NEWS (Dec. 25, 2021, at 07:45 EST), <https://www.sportingnews.com/us/nba/news/staples-center-crypto-com-arena-name-change-lakers-clippers/28kzrkjlkxyx1rzo7rj18r64j> [<https://perma.cc/V7Q8-WG82>]; Catherine McGrath, *Dogecoin soars 15% as Elon Musk replies ‘D.O.G.E’ to question about proposed Department of Government Efficiency*, FORTUNE CRYPTO (Oct. 18, 2024, at 16:36 EDT), <https://fortune.com/crypto/2024/10/18/dogecoin-soars-15-as-elon-musk-replies-d-o-g-e-to-question-about-proposed-department-of-government-efficiency/> [<https://perma.cc/4TLW-RW3U>].

3. Jerome Desbonnet & Oded Vanunu, *The rise of smart contracts and strategies for mitigating cyber and legal risks*, WORLD ECON. F. (July 16, 2024), <https://www.weforum.org/stories/2024/07/smart-contracts-technology-cybersecurity-legal-risks/> [<https://perma.cc/LBE5-GVZ7>].

4. *Id.*

has been the backbone of international commercial contracts since the 1980s.⁵ The CISG was drafted when contracts were written on paper, and examples of force majeure were natural disasters, wars, or government action.⁶ Today, smart contracts have the capability to facilitate billions of dollars in international business transactions through decentralized finance (“DeFi”) platforms, while the CISG’s traditional approach to force majeure appears increasingly antiquated.⁷ For example, WazirX’s loss of approximately \$230 million occurred after attackers exploited a vulnerability in a smart contract-controlled multi-signature wallet, which automatically governed access to customer funds.⁸ These types of events are largely un contemplated by Article 79 of the CISG.

From ancient Mesopotamian clay tablets to today’s distributive ledger technology, commercial contracts have evolved to meet the needs of their time. Smart contracts represent more than mere technological progress—they fundamentally alter contractual relationships. While a traditional international sale of goods contract might excuse performance due to a port closure or trade embargo, the question arises: what happens when a smart contract’s oracle fails, triggering an unstoppable cascade of automated transactions across multiple jurisdictions?⁹ The emergence of distributive ledger technology and cryptocurrency markets necessitates a fundamental reconceptualization of what constitutes an act beyond human control in digital commerce.

This Note argues that the CISG’s force majeure provision is inadequately equipped to address the unique vulnerabilities inherent in distributive ledger technology, e.g., smart contract malfunctions, consensus attacks, and protocol

5. Evaldas Cerkesas, *The Aspects of International Sale of Goods Contracts*, ESAS CONSULTING (Nov. 9, 2020), <https://esasconsulting.eu/en/insights/international-sale-of-goods-contract/> [https://perma.cc/9SK5-C39M].

6. Larry A. DiMatteo, *Contractual Excuse Under the CISG: Impediment, Hardship, and the Excuse Doctrines*, 27 PACE INT’L L. REV. 258, 300 (2015).

7. Roomy Khan, *DeFi—Financial Alchemy in a Trillion-Dollar Market*, FORBES (Aug. 7, 2024), <https://www.forbes.com/sites/roomykhan/2024/08/07/defi--financial-alchemy-in-a-trillion-dollar-market/> [https://perma.cc/XKC2-TJ8C]; Yogesh Shinde, *Smart Contracts in Trade Finance Market to hit USD 37.95 billion by 2034*, SCOOP (Dec. 31, 2025), <https://scoop.market.us/smart-contracts-in-trade-finance-market-news-2/> [https://perma.cc/UUJ3-C7U6].

8. E.g., *Crypto absurdity: WazirX plan to socialise losses deeply flawed*, FIN. EXPRESS (July 30, 2024), <https://www.financialexpress.com/opinion/crypto-absurdity-wazirx-plan-to-socialise-losses-deeply-flawed/3568360/> [https://perma.cc/YQZ2-KG3F].

9. An oracle is a third-party service that allows smart contract to access real-world data from external sources, essentially acting as a bridge between the blockchain and the outside world. Further explanation of oracles is found later in the Note. See Malanii Oleh & Lavrenenko Viktor, *Blockchain Oracles: Their Importance, Types, and Vulnerabilities*, HACKEN (Nov. 22, 2023), <https://hacken.io/discover/blockchain-oracles/> [https://perma.cc/9S6S-YWSK]; see Philipp Tamussino et al., *Impact of Sanctions on Contracts*, COVINGTON (May 23, 2022), <https://www.cov.com/-/media/files/corporate/publications/2022/05/impact-of-sanctions-on-contracts.pdf> [https://perma.cc/BJV8-YV8T]; Noam Elstein, *What Is the Blockchain Oracle Problem, And Why Does it Matter?*, SILENT DATA (Nov. 14, 2024), <https://www.silentdata.com/blog/what-is-the-blockchain-oracle-problem-and-why-does-it-matter> [https://perma.cc/2TH3-85PL].

failures.¹⁰ Drawing parallels from traditional financial institutions' force majeure triggers during cybersecurity breaches, this Note proposes that force majeure provisions must evolve to encompass both conventional catastrophic events and novel digital disruptions in international business transactions. This Note proceeds as follows. Part I of this Note will explain the background and framework of smart contracts. Part II examines the force majeure clause of the CISG, Article 79(1). Part III briefly explains force majeure under the Uniform Commercial Code ("UCC"). Part IV of this Note will examine several approaches to fix the inadequacies of the CISG and different interpretations of Article 79(1) of the CISG. Part V of this Note will provide a recommendation to businesses entering into smart contract transactions and proposes a force majeure clause to protect vulnerable parties. Lastly, part VI will provide a brief conclusion and final thoughts on smart contracts and Article 79.

I. BACKGROUND OF SMART CONTRACTS

A. Definitions and Existing Framework

The concept of smart contracts was attributed to Nick Szabo, an American computer scientist and researcher of digital currencies in 1994.¹¹ Although, back in the late 1600's, German Mathematician Gottfried Wilhelm Leibniz had a similar idea of turning all legal arguments into matters of pure logic that could potentially be resolved by a machine.¹² But Mr. Szabo's turned his idea into reality; his early conception of a smart contract was a "computerized transaction protocol that executes the terms of a contract."¹³ Simply put, a smart contract is a digital version of a normal paper contract, that automatically verifies

10. Consensus attacks are malicious attempts to take control of a blockchain network by manipulating its agreement mechanism, typically to reverse transactions or halt operations. See Oleh Malanii, *Consensus Mechanisms In Blockchain: A Deep Dive Into The Different Types*, HACKEN (June 30, 2025), <https://hacken.io/discover/consensus-mechanisms/> [https://perma.cc/63ND-PGQB]. Protocol failures refer to the breakdown, malfunction, or violation of established rules, procedures, or technical standards that govern communication, security, or operational processes. See *id.*

11. *Smart Contract*, CFI, <https://corporatefinanceinstitute.com/resources/valuation/smart-contract/#:~:text=Essentially%2C%20a%20smart%20contract%20is,of%20digital%20currencie s%2C%20in%201994/> [https://perma.cc/2BSP-SPHN] (last visited Feb. 2, 2025).

12. Gottfried Wilhelm Leibniz was a German polymath active as a mathematician, philosopher, scientist, and diplomat who is credited, alongside Sir Isaac Newton, with the creation of calculus, binary arithmetic, and statistics. See BUSINESS INSIDER, *Stephen Wolfram Explains How Smart Contracts Will Work* (YouTube, Sep. 27, 2018), <https://www.youtube.com/watch?v=IddTrcE5Qwo> [https://perma.cc/MPY2-QLXY]; see Oscar Schwartz, *In the 17th Century, Leibniz Dreamed of a Machine That Could Calculate Ideas*, SPECTRUM (Nov. 4, 2019), <https://spectrum.ieee.org/in-the-17th-century-leibniz-dreamed-of-a-machine-that-could-calculate-ideas> [https://perma.cc/XN3J-8BDA].

13. Nick Szabo, *Smart Contracts*, SATOSHI NAKAMOTO INST. (1994), <https://nakamoto.institute.org/library/smart-contracts/> [https://perma.cc/5XHA-LZEY].

fulfillment and enforces and performs the terms of the contract.¹⁴ The most famous real-world example is a vending machine.¹⁵ The owner of the vending machine stocks it, which is accepted when a buyer inserts payment and selects an item; the code running the vending machine takes over to perfect performance.¹⁶ The vending machine verifies input, dispenses the buyer's selection, and returns any required change.¹⁷ In even simpler terms, when X happens, Y automatically happens without any further action from the two parties.¹⁸

Smart contracts provide several advantages over traditional paper contracts: they minimize the risk of transactions failing, cut down on administrative overhead and service expenses, streamline business operations through automated execution, and use digital ledger technology ("DLT") security.¹⁹ Many industries such as logistics, trade, manufacturing, the public sector, and real estate stand to benefit from the evolution of smart contracts.²⁰ Smart contracts enable these industries to handle certain types of contracts, insurance, orders, supply chain management, and licensing more securely and accurately than ever before.²¹ However, not all smart contracts are created equal.

Professor Max Raskin's distinction hinges on their revocability: strong smart contracts are virtually impossible to modify or revoke once executed, while weak smart contracts remain subject to external intervention like courts.²² This creates a problem in contract law, as courts and lawmakers must balance the immutable, self-executing benefits of strong smart contracts with the need for legal oversight and consumer protection because the strength of smart contracts lies partly within their security and inflexibility.²³ Therefore, the underlying principle society must remember is that a contract is still a contract, whether smart or traditional—it's a documented agreement between two

14. *Smart Contract*, *supra* note 11.

15. Laura E. Jehl & Brian Bartish, *Blockchain 'Smart Contracts' – A New Transactional Framework*, BLOOMBERG L. (May 2018), <https://www.bloomberglaw.com/external/document/X4SGO17O000000/tech-telecom-professional-perspective-blockchain-smart-contracts/> [https://perma.cc/XZD8-XDBX].

16. *Id.*

17. *Id.*

18. DEAN ARMSTRONG KC, DAN HYDE & SAM THOMAS, *BLOCKCHAIN AND CRYPTOCURRENCY: INTERNATIONAL LEGAL AND REGULATORY CHALLENGES* 47 (2nd ed. 2022).

19. Hamed Taherdoost, *Smart Contracts in Blockchain Technology: A Critical Review*, 14 INFORMATION 117 (2023).

20. Renato Fazzone & Jessica de Brignac, *Understanding the Functionality and Benefits of Smart Contracts for Corporations*, FTI CONSULTING, <https://www.ftitechnology.com/resources/blog/understanding-the-functionality-and-benefits-of-smart-contracts-for-corporations> [https://perma.cc/H4UC-VX7V] (last visited Feb. 17, 2026).

21. *Id.*

22. Professor Max Raskin is an Adjunct Professor of Law at New York University. Professor Raskin teaches a course titled *Digital Currency, Blockchains and the Future of Financial Services*. See ARMSTRONG KC, HYDE & THOMAS, *supra* note 18; see Max Raskin, *The Law and Legality of Smart Contracts*, 1 GEO. L. TECH. REV. 305, 310 (2017).

23. Raskin, *supra* note 22.

parties.²⁴

A real-world example of how smart contracts are used today is in agricultural supply-chain tracking, particularly in the Australian wine industry.²⁵ In September 2020, Australian agricultural technology firm Entrust announced that it would use Hedera's hashgraph public distributed ledger to help prevent wine fraud by allowing consumers to verify a bottle's authenticity.²⁶ More than a dozen wineries in South Australia's Clare Valley are participating in the project, which is tracking over 250,000 liters of wine.²⁷ Entrust's system records location and time data on an immutable ledger, allowing producers to track products from grapes through bottling and distribution.²⁸ This use of distributed ledger technology shows how smart contract systems can increase transparency and trust in real-world commercial supply chains.²⁹

That same immutability and automation that make smart contracts attractive in commerce have also placed them squarely in the crosshairs of federal regulators and courts. In *Van Loon v. Department of the Treasury*, the United States Court of Appeals for the Fifth Circuit confronted a critical distinction between mutable and immutable smart contracts in reviewing the federal government's sanctions against Tornado Cash, a decentralized protocol that relies on immutable smart contracts to facilitate private cryptocurrency transactions.³⁰ The Fifth Circuit framed the question as whether immutable smart contracts—those not owned, operated, or alterable by any person or entity—could constitute “property” subject to sanctions under federal law.³¹ Drawing a sharp distinction from mutable contracts, which remain subject to human control or modification, the Fifth Circuit held that Tornado Cash's immutable smart contracts were not sanctionable property because they were incapable of being owned or controlled by an identifiable legal actor.³² Notably, the Fifth Circuit engaged in a detailed, highly technical explanation of DLT and cryptocurrency mechanics, signaling both the judiciary's increasing technological literacy and the likely trajectory of future smart contract litigation.³³

24. *The Emergence of Smart Contracts on a Blockchain*, ORACLE (Aug. 23, 2022), <https://www.oracle.com/blockchain/what-is-blockchain/smart-contracts-blockchain/> [https://perma.cc/6CJP-QGA6].

25. *Australian fine wines tracked by Entrust on Hedera Hashgraph's DLT*, LEDGER INSIGHTS (Sep. 21, 2020), <https://www.ledgerinsights.com/australia-fine-wine-traceability-entrust-hedera-hashgraphs-dlt/> [https://perma.cc/CER9-9ZER].

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. 122 F.4th 549, 550-55 (5th Cir. 2024).

31. *Id.* at 554.

32. *Id.* at 555, 565-66.

33. *Id.* at 554-60.

B. Digital Ledger Technology

Smart contracts operate on a decentralized digital ledger; the most popular form is blockchain technology.³⁴ Some other types of DLT include Directed Acyclic Graphs (“DAG”), hashgraph, and Holochain.³⁵ A blockchain is a decentralized digital ledger that records data in linked, tamper-resistant blocks, allowing participants in the network to collectively verify and trust the accuracy of the information without relying on a central authority.³⁶ Dr. Thibault Schrepel has identified four main characteristics that differentiate the blockchain from ordinary computers: (1) the blockchain is decentralized; (2) the blockchain relies on unstoppable code; (3) blockchains are pseudonymous; (4) blockchains are immutable.³⁷ The first characteristic, decentralization, means no singular user controls the information on the blockchain and that no one oversees maintaining its proper functioning.³⁸ All information exchanged on the blockchain is transmitted between each node (a computer connected to the network).³⁹

Second, the blockchain relies on consensus mechanisms, the most common of which are Proof of Work, Proof of Stake, and Proof of Burn.⁴⁰ Proof of Work was the first of its kind, originally introduced by Bitcoin.⁴¹ Proof of Work blockchains use a huge amount of computing power because miners all over the world are racing to solve a math puzzle.⁴² Whoever wins gets to add the latest transactions to the blockchain and earns a fixed amount of cryptocurrency as a prize.⁴³ After the block is proposed, the other nodes in the network independently verify it and update their own copies of the blockchain to reflect the same transaction history.⁴⁴ The benefits of Proof of Work include a secure,

34. *What is Decentralization in Blockchain?*, PLASMA (Dec. 13, 2025), <https://www.plasma.to/learn/decentralization-in-blockchain> [<https://perma.cc/7FAY-9GTH>].

35. This Note will discuss digital ledger technology through the lens of blockchain only.

36. *See generally* Zach Church, *Blockchain, explained*, MIT SLOAN SCH. MGMT. (May 25, 2017), <https://mitsloan.mit.edu/ideas-made-to-matter/blockchain-explained> [<https://perma.cc/VHM3-FTLV>] (providing an overview of blockchain technology as a decentralized, consensus-based system for recording tamper-resistant transaction data).

37. Dr. Thibault Schrepel is an Associate Professor of Law at Vrije Universiteit Amsterdam and Faculty Affiliate at Stanford University (CodeX Center) who has focused most of his research on blockchain antitrust, computational antitrust, and complexity theory. *See* Thibault Schrepel, *Collusion by Blockchain and Smart Contracts*, 33 HARV. J.L. & TECH. 117, 119-121 (2019).

38. *Id.* at 119.

39. *Id.* at 120.

40. Consensus mechanisms are protocols that bring all nodes of a distributed blockchain network into agreement on a single data set. They act as the verification standards through which each blockchain transaction gets approved. *See id.*

41. *What is “proof of work” or “proof of stake”?*, COINBASE, <https://www.coinbase.com/learn/crypto-basics/what-is-proof-of-work-or-proof-of-stake> [<https://perma.cc/V9XN-JNZF>] (last visited Feb. 16, 2025).

42. *Id.*

43. *Id.*

44. *Id.*

decentralized blockchain, but its downsides include an energy-intensive process and difficulty scaling to accommodate a vast number of transactions.⁴⁵

Ethereum developers recognized the inefficiencies of Proof of Work and developed Ethereum 2.0, which employs a faster, less resource-intensive consensus mechanism called Proof of Stake.⁴⁶ In this system, staking serves a similar function to mining in Proof of Work; network validators stake their own cryptocurrency for the chance to validate new transactions, update the blockchain, and earn rewards.⁴⁷

Blockchain technology relies on a distributed ledger in which transactions are grouped into sequential “blocks” that are cryptographically linked to one another.⁴⁸ Because each block contains a hash of the prior block, altering a past transaction would require rewriting the entire chain, making retroactive manipulation computationally impractical.⁴⁹ The transactions are validated through a consensus mechanism—proof of work or proof of stake—by which independent nodes on the network agree on the legitimacy and ordering of transactions.⁵⁰ Once validated, transactions are broadcast to the network and recorded on the ledger, where they become publicly visible and resistant to later modification.⁵¹

Blockchain systems distinguish between users and nodes through cryptographic key pairs.⁵² Nodes possess network addresses that allow them to participate in validation, while users control wallets identified by public keys or derived public addresses.⁵³ A public key functions much like a bank account number: it can be shared with others to receive funds.⁵⁴ By contrast, a private key operates as a form of authorization credential; only the holder of the private key can cryptographically sign and execute transactions transferring assets from the associated wallet.⁵⁵ The private key, therefore, does not primarily protect a user’s identity, but rather ensures exclusive control over the asset’s stores in the wallet.⁵⁶

Although blockchain transactions are publicly recorded, they are best

45. *Id.*

46. *Id.*

47. See *What is “proof of work” or “proof of stake”?*, *supra* note 41 (explaining validator responsibilities, the 32-ETH staking requirement, and the potential loss of stake through slashing).

48. Schrepel, *supra* note 37, at 119-21.

49. Esthon Medeiros, Jr., *Blocks, Chains, and Hashes*, MEDIUM (Nov. 30, 2023), <https://medium.com/@esthon/blocks-chains-and-hashes-b3bc323b978e> [<https://perma.cc/DZ77-Q567>].

50. *Id.*

51. *Id.*

52. *Blockchain payments in 2026: A step by step guide for businesses*, BVNK (Jan. 5, 2026), <https://bvnk.com/blog/blockchain-payments> [<https://perma.cc/2FBG-M36H>].

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

described as pseudonymous, not anonymous.⁵⁷ Wallets are identified by alphanumeric strings rather than by real-world names, which makes it difficult—but not impossible—to link transactions to specific individuals.⁵⁸ When users publicly associate their identities with a wallet address, or when transaction patterns are analyzed across platforms, attribution may become feasible.⁵⁹ When the blockchain records the transfer of digital assets between wallets, it does not typically record the underlying legal or commercial rationale for those transfers.⁶⁰ This feature is not unique to blockchain-based transactions, however, as traditional financial systems likewise do not publicly disclose the contractual or commercial reasons underlying most payments.⁶¹ Accordingly, smart contracts are not inherently designed to obscure transactional purpose, but instead automate performance by conditioning asset transfers on the satisfaction of predefined, verifiable criteria—such as the submission of a bill of lading in an international sale.⁶² This Note will consider smart contracts in their most popular form—the blockchain.

C. Challenges in Smart Contracts

Although blockchain networks themselves are designed to be highly resistant to tampering, smart contracts built on top of those networks present distinct and unresolved risks. The cryptographic integrity of the blockchain does not guarantee that the code governing a smart contract accurately reflects the intentions of the contracting parties.⁶³ Instead, most vulnerabilities arise not from failures of the blockchain infrastructure, but from errors in contract design, implementation, and use.⁶⁴

These risks were famously illustrated by the 2016 attack on The DAO, a decentralized investment vehicle implemented through smart contracts on the Ethereum blockchain.⁶⁵ Exploiting a flaw in the contract's code rather than any weakness in the blockchain itself, an attacker was able to drain approximately

57. Richard Peters, *Unraveling crypto crimes through blockchain tracing*, HKA (Sep. 3, 2025), <https://www.hka.com/article/crypto-crimes-blockchain-tracing/> [<https://perma.cc/52CS-DXFR>].

58. Anna Buczak, *Is Bitcoin Anonymous? The Myth of Anonymity Debunked*, ULAM LABS (Dec. 30, 2024), <https://www.ulam.io/blog/is-cryptocurrency-anonymous#> [<https://perma.cc/J5XF-D77V>].

59. *Id.*

60. Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, BITCOIN (Aug. 21, 2008), <https://bitcoin.org/bitcoin.pdf> [<https://perma.cc/AHV7-SETE>].

61. ANDREAS PARK, *DEFI VS. TRADFI: INSTITUTIONS AND INDUSTRIAL ORGANIZATION* 6-7 (Oct. 5, 2025), <https://wifpr.wharton.upenn.edu/wp-content/uploads/2025/10/WIFPR-DeFi-Vs-TradFi-Park.pdf> [<https://perma.cc/6JVB-B5FW>].

62. Raskin, *supra* note 22, at 306-07.

63. Fabio Bassan & Maddalena Rabitti, *From Smart Legal Contracts to Contracts on Blockchain: An Empirical Investigation*, 55 *COMPUT. L. & SEC. REV.* 1, 15-16 (Nov. 2024).

64. *Id.*

65. *Smart Contract Challenges*, HEDERA, <https://hedera.com/learning/smart-contracts/smart-contract-challenges> [<https://perma.cc/3Q5A-2M76>] (last visited Feb. 8, 2025).

\$60 million worth of Ether by repeatedly triggering an automated withdrawal mechanism.⁶⁶ The incident demonstrated that even when transactions are immutably recorded and cryptographically validated, errors in contract logic can produce outcomes that are economically devastating and legally unintended.⁶⁷

More broadly, smart contracts remain vulnerable to coding mistakes that cause contractual performance to diverge from the parties' shared commercial expectations.⁶⁸ The risk is particularly acute when contracts depend on complex conditions—such as the submission of shipping documents, confirmation of delivery, or the satisfaction of multiple approval requirements—before payment is released.⁶⁹ Because many smart contract applications are still relatively novel and lack standardized drafting models, these contracts often operate in an experimental space where legal intent must be translated into precise computational instructions, with little tolerance for ambiguity or later correction.⁷⁰

A further category of risk arises not from the blockchain or the contract code, but from user behavior and surrounding technical infrastructure.⁷¹ Smart contracts rely on users to securely manage private cryptographic keys that authorize transactions.⁷² If those keys are compromised through weak passwords, phishing attacks, malware, or other forms of social engineering, unauthorized parties may gain control over contract execution.⁷³ In such cases, the resulting loss reflects neither a failure of blockchain security nor a contractual breach in the traditional sense, but rather a breakdown in the mechanisms by which parties access and control their digital assets.⁷⁴ Accordingly, smart contracts' automatic and irreversible execution raises unresolved questions under Article 79 of the CISG about whether coding failures are excusable impediments or risks assumed by the parties.

II. FORCE MAJEURE UNDER THE CISG

A. Background of the CISG

The United Nations Commission on International Trade Law (“UNCITRAL”) stands as the primary body responsible for developing and

66. *Id.*

67. *Id.*

68. See Bassan & Rabitti, *supra* note 63.

69. *Id.*

70. *Id.*

71. Jerome Desbonnet & Oded Vanunu, *The rise of smart contracts and strategies for mitigating cyber and legal risks*, WORLD ECON. F. (July 16, 2024), <https://www.weforum.org/stories/2024/07/smart-contracts-technology-cybersecurity-legal-risks/> [https://perma.cc/YSQ9-BVTV].

72. Sarwar Sayeed, Hector Marco-Gisbert & Tom Caira, *Smart Contract: Attacks and Protections*, 8 IEEE ACCESS 24416, 24417 (2020).

73. *Id.* at 24420.

74. *Id.*

maintaining the legal frameworks that govern international trade and investments.⁷⁵ In cross-border commercial transactions, parties frequently operate against the backdrop of fundamentally different legal systems, creating uncertainty at the moment of contracting. Consider a transaction in which Seller A, located in Country X, contracts with Buyer B in Country Y. Each party is familiar with its own domestic commercial law, but they have little knowledge of the other party's legal regime. Insisting on the application of one party's national law risks strategic advantage, increased transaction costs, and perceived unfairness. The UNCITRAL was established to precisely address this problem by promoting harmony among contracting states and modernizing international commercial law through widely accepted legal standards.⁷⁶ Its flagship achievement in this area, the CISG, provides a neutral, internationally recognized framework that reflects a balanced approach of civil law and common law traditions.

The UNCITRAL developed the text of the Convention on Contracts for the International Sale of Goods ("CISG") in Vienna in 1980.⁷⁷ As of March 2025, 97 countries across the globe have adopted the CISG.⁷⁸ The motive behind the promulgation of the CISG is to provide "a modern, uniform, and fair regime for contracts for the international sale of goods."⁷⁹ To that end, courts in all contracting states are obligated to apply the CISG when the parties have chosen it or when Article 1(1)(a) or (b) governs the transaction.⁸⁰ As courts across different jurisdictions apply the CISG to recurring commercial disputes, a growing body of interpretive case law emerges that clarifies the meaning and operation of its provisions in practice.⁸¹ Although the CISG is a legislative instrument rather than a common-law code, this transnational jurisprudence functions as an informal supranational body of law.⁸² As Professor Larry A.

75. UNITED NATIONS COMM'N ON INT'L TRADE LAW, <https://uncitral.un.org/en> [<https://perma.cc/73PR-YHXP>] (last visited Dec. 13, 2024).

76. *Id.*

77. *United Nations Convention on Contracts for the International Sale of Goods* (Vienna, 1980) (CISG), U.N. COMM'N ON INT'L TRADE L., https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg [<https://perma.cc/79BV-K5QW>] (last visited Feb. 17, 2025).

78. *CISG: Table of Contracting States*, INST. INT'L COM. L. (Dec. 9, 2024), <https://iicl.law.pace.edu/cisg/page/cisg-table-contracting-states> [<https://perma.cc/5CQC-AJM4>].

79. *United Nations Convention on Contracts for the International Sale of Goods* (Vienna, 1980) (CISG), *supra* note 77.

80. Boris Praštalo, *CISG as the (Rules of) Law Applicable to the Arbitration Agreement: Exploration from an English Perspective*, KLUWER ARB. BLOG (June 3, 2024), <https://legalblogs.wolterskluwer.com/arbitration-blog/cisg-as-the-rules-of-law-applicable-to-the-arbitration-agreement-exploration-from-an-english-perspective/> [<https://perma.cc/GHT8-X56B>].

81. See Larry A. DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen years of CISG Jurisprudence*, 24 NW. J. INT'L L. & BUS. 299 (2004).

82. See CAMILLA B. ANDERSEN, *UNIFORM APPLICATION OF THE INTERNATIONAL SALES LAW: UNDERSTANDING UNIFORMITY, THE GLOBAL JURISCONSULTORIUM AND EXAMINATION AND NOTIFICATION PROVISIONS OF THE CISG* 23 (2007); Larry A. DiMatteo, *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*, 22 YALE INT'L L. J. 111 (1997).

DiMatteo observes, the CISG contemplates that “national stare decisis is to be supplanted by an informal supranational stare decisis,” under which courts are expected to consider and engage with foreign CISG decisions to promote uniformity, while retaining discretion to depart where differences in fact, law, or context so require.⁸³

B. Article 79(1)

While the term “force majeure” itself does not appear in the CISG, it is well-agreed upon that Article 79 of the CISG is a force majeure provision. To avoid liability for breach under Article 79, the non-performing party must prove: (1) an impediment to performance; (2) that prevented performance; (3) was beyond the party’s control; (4) could not reasonably have been taken into account at the time of the conclusion of the contract; (5) and, along with its consequences, could not have been avoided or overcome.⁸⁴

The standard of force majeure under the CISG is a high one and set against a strong general principle of *pacta sunt servanda*—promises must be kept—and for the most part, been interpreted and applied narrowly.⁸⁵ Specifically, financial difficulties will almost never satisfy this standard.⁸⁶ For example, *Macromex Srl. v. Globex Int’l Inc.*, demonstrates this limitation on Article 79 excuses.⁸⁷ Seller Globex International had a contract to deliver chicken to a buyer in Romania. Because of the outbreak of bird flu, the Romanian government banned imports. When chicken prices rose substantially during the

83. DiMatteo, *supra* note 82.

84. See U.N. Convention on Contracts for the International Sale of Goods art. 79, Apr. 11, 1980, S. Treaty Doc. No. 98-9, 1489 U.N.T.S. 3. Stating that:

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party’s failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

85. JACK GRAVES, *THE ABCS OF THE CISG* 150 (2014).

86. *Id.*

87. *Macromex Srl. v. Globex Int’l Inc.*, Case No. 50181T 0036406, Interim Award, at 9 (Am. Arb. Ass’n, Int’l Ct. for Disp. Resol., Oct. 23, 2007), https://cisg-online.org/files/cases/7564/fullTextFile/1645_53897288.pdf [<https://perma.cc/H3XG-3EF7>].

contract period, seller attempted to claim an Article 79 exemption after failing to deliver the contracted goods.⁸⁸ Despite having alternative means to perform—including shipping to ports outside Romania—seller chose not to pursue these options because they could secure higher profits by selling the chicken elsewhere.⁸⁹ The tribunal emphasized that a party must “do all in his power to carry out his obligation” rather than await events that might justify non-performance.⁹⁰ Therefore, the tribunal rejected the seller’s exemption claim, finding that the seller’s desire to capitalize on market changes for financial gain did not constitute an impediment under Article 79.⁹¹

Force majeure and hardship are frequently invoked in international trade when unforeseen events make performance impossible or impracticable.⁹² While Article 79 of the CISG provides a framework for exemption from liability when performance becomes impossible due to unforeseen circumstances, it does not prevent parties from contracting around it.⁹³ The CISG offers statutory authority for interpreting contract provisions, filling gaps, and governing issues not addressed by the contract.⁹⁴ Parties often incorporate International Chamber of Commerce (“ICC”) clauses to tailor their contracts, effectively supplementing or bypassing Article 79 to better suit specific needs.⁹⁵ The ICC, a membership organization of international businesses, has promulgated model Force Majeure and Hardship Clauses that attempt to provide clear and concise provisions for excusing or modifying contractual obligations in such cases.⁹⁶

C. The Model Law on Electronic Commerce

The UNCITRAL adopted the Model Law on Electronic Commerce (“MLEC”) in 1996.⁹⁷ The purpose of the MLEC is to enable and facilitate commerce conducted using electronic means by providing national legislators with a set of internationally acceptable rules aimed at removing legal obstacles and increasing legal predictability for electronic commerce.⁹⁸ Specifically, the

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *ICC Force Majeure and Hardship Clauses*, INT’L CHAMBER COM., [https://iccwbo.org/business-solutions/model-contracts-clauses/icc-force-majeure-and-hardship-clauses/#:~:text=Force%20majeure%20and%20hardship%20are,the%20contract%20\(hardship\)%20occur](https://iccwbo.org/business-solutions/model-contracts-clauses/icc-force-majeure-and-hardship-clauses/#:~:text=Force%20majeure%20and%20hardship%20are,the%20contract%20(hardship)%20occur) [<https://perma.cc/N2UG-ND4Y>] (last visited Feb. 8, 2026).

93. *Ajax Tool Works, Inc. v. Can-Eng Mfg. Ltd.*, No. 01-C-5938, 2003 WL 223187, at 3 (N.D. Ill. Jan. 30, 2003).

94. *Id.*

95. INT’L CHAMBER OF COM., *supra* note 92.

96. *Id.*

97. *UNCITRAL Model Law on Electronic Commerce (1996) with additional article 5 bis as adopted in 1998*, U.N. COMM’N ON INT’L TRADE L., https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce [<https://perma.cc/7E42-XYVY>] (last visited Feb. 5, 2026).

98. *Id.*

MLEC establishes the principle of treating paper-based and electronic information equally under the law.⁹⁹ The MLEC was the first legislative text to adopt the fundamental principles of non-discrimination, technological neutrality, and functional equivalence that are regarded as the founding elements of modern electronic commerce law.¹⁰⁰ The important principle of non-discrimination ensures that a document would not be denied legal effect, validity or enforceability solely on the grounds that it is in electronic form.¹⁰¹ A similar principle was adopted by the UCC in the 1998 revision of Article 9, defining the term “record” to mean “information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.”¹⁰² Professor Frank Sullivan explains that “[t]he idea was to make the UCC ‘medium neutral’ . . . parties may use virtually any medium for communicating with one another and memorializing their agreements.”¹⁰³

By the 2000s, legislation implementing provisions of the MLEC had been adopted by over 100 countries, most notably, the United States (Electronic Commerce Security Act 1998), the Philippines (Electronic Commerce Act 2000), and the Republic of Korea (Basic Law on Electronic Commerce 1999).¹⁰⁴ Moreover, uniform legislation influenced by the MLEC and the principles on which it is based has been prepared in the United States as the Uniform Electronic Transactions Act, adopted in 1999 by the National Conference of Commissioners on Uniform State Law.¹⁰⁵ Specifically, the MLEC was adopted by all U.S. states except New York.¹⁰⁶

The MLEC provides a set of suggested guidelines for national governments to incorporate into their domestic legal systems.¹⁰⁷ Unlike the CISG, which is a binding international treaty ratified by 97 countries, the MLEC is not mandatory and allows countries the flexibility to adopt, modify, or expand its scope to suit

99. *Id.*

100. *Id.*

101. *Id.*

102. Frank Sullivan, Jr., *New Law Amends the Uniform Commercial Code to Accommodate Emerging Technologies*, 57 IND. L. REV. 775, 778 (2024).

103. *See id.* at 779. Professor Frank Sullivan is the Bicentennial Professor at the Indiana University Robert H. McKinney School of Law. He served as a Justice of the Indiana Supreme Court (1993-2012). He is also a member of the American Law Institute and a Commissioner from Indiana on the Uniform Law Commission.

104. *Electronic Commerce*, U.N. COMM’N ON INT’L TRADE LAW, <https://uncitral.un.org/en/texts/ecommerce> [<https://perma.cc/83DK-DKAA>] (last visited Feb. 5, 2026); *see* Renuad Sorieu, Jennifer R. Clift & Jose Angelo Estrella-Faria, *Establishing a Legal Framework for Electronic Commerce: The Work of the United Nations Commission on International Trade Law (UNCITRAL)*, 35 INT’L LAW. 107, 114-15 (2001).

105. Sorieu, Clift & Estrella-Faria, *supra* note 104, at 115.

106. *Electronic Transactions Act*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034> [<https://perma.cc/7U6S-4RQM>] (last visited Feb. 5, 2026).

107. Henry Deeb Gabriel, *The Advantages of Soft Law in International Commercial Law: The Role of UNIDROIT, UNCITRAL, and the Hague Conference*, 34 BROOK. J. INT’L L. 655, 666 (2009).

their domestic needs.¹⁰⁸ If parties want to avoid the CISG applying to their international sales contract, they must agree and expressly manifest that intention in their contract.¹⁰⁹

III. FORCE MAJEURE UNDER THE UCC

A. Background of the UCC

The Uniform Commercial Code (“UCC”) was first published in 1952, with the goal of harmonizing the laws of sales and commercial transactions in the United States.¹¹⁰ The UCC was written through a collective effort of experts in commercial law, attorneys, federal judges, legislators, and law professors from all around the United States.¹¹¹ Article 2 of the UCC governs the sales of goods, part of the original UCC sections approved in 1951.¹¹² The UCC is not limited to the sales of goods under Article 2, but also governs commercial leases (Article 2A), bank deposits and collections (Article 4), and secured transactions (Article 9).¹¹³ In this respect, the CISG differs from the UCC, as the CISG is limited to sales of goods and, of course, the CISG is on an international scale rather than just operating in the United States.¹¹⁴ But both have similar goals: like the CISG, the UCC aims to make business transactions consistent and efficient across all states.¹¹⁵ The visionary behind the UCC, Karl Llewellyn, envisioned default terms that ultimately reduced contracting costs, mirroring arrangements most commercial parties engage in.¹¹⁶ Unlike the CISG, the UCC has made significant strides in fostering a legal system that accommodates new technologies, such as

108. José Angelo Estrella Faria, *Legal Harmonization Through Model Laws: The Experience of the United Nations Commission on International Trade Law (UNCITRAL)*, https://www.justice.gov.za/alraesa/conferences/2005sa/papers/s5_faria2.pdf [<https://perma.cc/KB2F-V3UN>] (last visited Feb. 5, 2026) (on file with author).

109. *E.g.*, *Travelers Prop. Cas. Co. of Am. v. Saint-Gobain Tech. Fabrics Canada Ltd.*, 474 F.Supp.2d 1075, 1082 (D. Minn. 2007) (“[A]bsent an express statement that the CISG does not apply, merely referring to a particular state’s law does not opt out of the CISG.”).

110. *See* William A. Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1 (1967).

111. *Uniform Commercial Code* (UCC), DUKE L., <https://law.duke.edu/lib/research-guides/ucc> [<https://perma.cc/K9E7-WN5R>] (last visited Feb. 6, 2026).

112. *Uniform Commercial Code*, UNIF. L. COMM’N, <https://www.uniformlaws.org/acts/ucc> [<https://perma.cc/854Y-E69C>] (last visited Feb 6, 2026).

113. *Id.*

114. *See* Kristen David Adams & Candance M. Zierdt, *United Nations Convention on Contracts for the International Sale of Goods*, A.B.A. (June 18, 2015), https://www.americanbar.org/groups/business_law/resources/business-law-today/2015-june/united-nations-convention/ [<https://perma.cc/2LUB-5Z43>].

115. COUNTY OFFICE LAW, *What is the Purpose of the Uniform Commercial Code (UCC)* (YouTube, Feb. 1, 2025), <https://www.youtube.com/watch?v=VsCDdY2DuCY> [<https://perma.cc/YSN2-FT7U>].

116. Sullivan, *supra* note 102, at 776 (citing Robert E. Scott, *The Rise and Fall of Article 2*, 62 LA. L. REV. 1009, 1015 (2002)).

DLT.¹¹⁷

B. UCC § 2-615 Force Majeure Clause

In the United States, UCC § 2-615 (Excuse by Failure of Presupposed Conditions) sets forth the default force majeure framework applicable to contracts for the sale of goods.¹¹⁸ The Official Comments to § 2-615 further illuminate the drafters' intent and provide interpretive guidance. The Official Comments explain that § 2-615 excuses sellers when performance is "commercially impracticable," not merely impracticable.¹¹⁹ A "collapse in the market" or "increased costs," by themselves, are not a justification under § 2-615.¹²⁰

Courts commonly apply a three-part test to determine whether § 2-615 excuses a nonperforming seller: (1) the seller must not have assumed the risk of some unknown contingency; (2) the nonoccurrence of the contingency must have been a basic assumption underlying the contract; and (3) the occurrence of that contingency must have made performance commercially impracticable.¹²¹ If an event was foreseeable, it was not "a contingency the non-occurrence of which was a basic assumption on which the contract was made. . . ."¹²²

A leading case on this issue is *NIPSCO. v. Carbon County Coal*, where the plaintiff agreed to buy a certain amount of coal from the defendant every year for 20 years.¹²³ The price was set at the time that the parties entered into the

117. See generally *id.* at 778 (arguing that the UCC's default rules make it more adaptable to new commercial technologies).

118. See U.C.C. § 2-615 (A.L.I. & UNIF. L. COMM'N 1977) (impracticability in the sale of goods):

(a) delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers, but may this portion include regular customers not then under contracts as well as his own requirements for further manufacture. He may so be allocated in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

119. See U.C.C. § 2-615, Comment 1 & 3.

120. See *id.*, Comment 4.

121. *Exelon Generation Co., LLC v. General Atomics Technologies Corp.*, 559 F. Supp. 2d 892 (N.D. Ill. 2008); *Hancock Paper Co. v. Champion Intern. Corp.*, 424 F. Supp. 285 (E.D. Pa. 1976); *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134 (6th Cir. 1983).

122. UCC § 2-615.

123. 799 F.2d 265, 267-69 (7th Cir. 1986).

contract, but it was subject to escalation.¹²⁴ The parties included a force majeure clause within the contract, providing that the plaintiff could stop buying coal under the contract “for any cause beyond [its] reasonable control . . . including but not limited to . . . orders or acts of civil authority . . . which wholly or partly prevent . . . the utilizing . . . of the coal. . . .”¹²⁵

Later, the price of the coal under the contract escalated to the point the plaintiff requested permission from the Indiana Public Service Commission to increase its fuel charges to its customers.¹²⁶ The commission granted the request but required the plaintiff to make a good-faith effort to decrease its prices by finding an alternative source.¹²⁷ The plaintiff found cheaper coal and stopped purchasing from the defendant.¹²⁸ The Seventh Circuit held that the plaintiff, as a party to a fixed-price contract, could not excuse performance for frustration of purpose or impossibility.¹²⁹ A force majeure clause cannot be interpreted to excuse a buyer from performance due to a change in market price.¹³⁰ This excuse would nullify a central term of the contract.¹³¹ According to the court, a fixed-price contract explicitly assigns the risk of market-price increases to the seller and market-price decreases to the buyer.¹³² Having examined the court’s approach under the UCC and CISG to tangible objects like chickens and coal, we now turn to a more complex scenario: How might courts analyze force majeure clauses in smart contracts, where code execution is instantaneous and cryptocurrency prices fluctuate continuously in a twenty-four hours global market?

IV. COMMERCIAL IMPRACTICABILITY IN A TRUSTLESS ENVIRONMENT

A. Oracle Approach

Smart contracts, like many emerging innovations, face certain limitations. At the same time, excessive regulation risks undermining the very efficiencies that make smart contracts attractive. One recurring challenge concern how smart contract should account for force majeure events, a problem for which some scholars propose the use of oracles. As Professor Eric Tjong Tjin Tai explains, an oracle is “the entity or communication channel by which the smart contract system receives information about the external world.”¹³³ Oracles enable smart

124. *Id.* at 267.

125. *Id.* at 274.

126. *Id.* at 267.

127. *Id.*

128. *Id.*

129. *Id.* at 275-76.

130. *Id.*

131. *Id.*

132. *Id.* at 278.

133. Eric Tjong Tjin Tai, *Force Majeure and Excuses in Smart Contracts*, 26 EUR. REV. PRIV. L. 787, 789 (2018).

contracts to respond to real-world events, such as a hotel room unlocking upon a guest's payment or a storage unit releasing merchandise when payment has been received.¹³⁴

Professor Tjong Tjin Tai categorizes oracles into three types: First, automated oracles; these respond to automated signals, such as a self-driving car that registers when it has been involved in an accident.¹³⁵ Second, trusted third party ("TTP") oracles; these involve human intervention, like a courier confirming delivery to a specified address.¹³⁶ Lastly, expert oracles; these provide evaluative functions, such as assessing damage or the quality of delivered goods.¹³⁷ While TTP and expert oracles are currently being executed by humans, Professor Tjin Tai suggests that artificial intelligence ("AI") will eventually fill this role.¹³⁸

Expanding on these oracle classifications, Ethereum co-founder Vitalik Buterin has highlighted various projects that have developed specialized oracles serving different functions.¹³⁹ According to Mr. Buterin, the Augur oracle is designed specifically for "events," so it prioritizes security over speed.¹⁴⁰ In contrast, the Chainlink oracle emphasizes rapid data delivery.¹⁴¹ For example, if a party chooses an automated oracle over a TTP oracle, the next step would be deciding which project to utilize for their transaction—one that prioritizes speed, security, or some other factor.¹⁴²

In addressing force majeure clauses in smart contracts, Professor Tjong Tjin Tai suggests including a general force majeure exception, invocable by the debtor and operationalized with an expert oracle.¹⁴³ However, this approach may undermine the very benefits that make smart contracts attractive—namely, efficiency and cost-effectiveness. Furthermore, it raises complex questions: Who selects the expert? What happens if the expert provides a poor opinion? How are expert qualifications determined across different jurisdictions? What recourse exists for challenging expert determinations? One of the downsides of solely relying on an oracle to answer these questions is that it may introduce unexpected legal issues due to the novelty of the technology. For instance, instead of having a smart contract interpretation issue, it may spiral into an oracle third-party liability problem.

Professor Tjong Tjin Tai recognizes the complexity of smart contracts,

134. *Id.* at 789.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. LEX CLIPS, *Vitalik Buterin on Chainlink and Hybrid Smart Contracts* (YouTube, Jun. 4, 2021), <https://www.youtube.com/watch?v=IRba55HTK0Q> [<https://perma.cc/EK65-6GR3>].

140. *Id.*

141. *Id.*

142. *Id.*

143. Tjong Tjin Tai, *supra* note 133, at 800 ("Debtor" is a term of art used by Professor Tjong Tjin Tai to connote a party that seeks to be excused from performance of contractual obligations).

explaining that it is practically impossible to code for all foreseeable events and that, given the technology's novelty, defining foreseeability is itself challenging.¹⁴⁴ What may be foreseeable in the real world can be unexplainable in the DLT universe, and vice versa. Professor Tjong Tjin Tai suggests that parties face a choice between: (1) A simple default rule listing circumstances that qualify as force majeure, identified through automated or TTP oracles, with presumed causality within a relevant time frame; or (2) A simple reference to an expert oracle.¹⁴⁵ However, both approaches present significant drawbacks. Most notably, both parties must agree on the type of oracle to be used, and businesses focused on profit and efficiency may simply opt out of the transaction. Although these solutions may be workable for smaller transactions, they risk diminishing the benefits of smart contracts in more complex commercial agreements.

The following example illustrates how an oracle can operate within a smart contract transaction. In a cross-border wine sale between a buyer in the United States and a seller in Russia, the contract governs the sale of five cases of vintage wine to be shipped by cargo vessel on March 25, 2025, subject to a critical environmental condition: the wine must remain below 80 degrees Fahrenheit throughout transit.¹⁴⁶ To enforce this requirement, the seller integrates an IoT-enabled thermometer into the wine cases, creating a real-time data feed to the blockchain-based smart contract through a digital oracle.¹⁴⁷ The oracle continuously monitors the temperature as an automated and impartial verifier of contract compliance. If the temperature reaches 81 degrees at any point during transit, the smart contract automatically cancels the transaction and triggers the applicable insurance payment, thereby protecting both parties and allocating risk without the need for post hoc dispute resolution. This example shows how oracles can facilitate performance and risk management in relatively straightforward two-party contracts involving a single, objectively verifiable condition.

Oracles are essential for the function of smart contracts to interact with information from the outside world.¹⁴⁸ In more complex transactions, oracles face significantly greater challenges, such as data aggregation, conditional

144. *Id.* at 799.

145. *Id.* at 801.

146. See BENEXT, *What are Smart Legal Contracts?* (YouTube, Sep. 14, 2021), <https://www.youtube.com/watch?v=o-6BnatkDRE&t=454s> [<https://perma.cc/V33D-Z9F9>].

147. *Id.*; see David, *The potential of temperature sensor applications in IoT*, DEEPSEA DEVS., <https://www.deepseadev.com/en/blog/temperature-sensor-applications/#:~:text=The%20potential%20of%20using%20temperature%20sensors%20in%20IoT&text=To%20use%20temperature%20sensors%2C%20they,for%20processing%20and%20appropriate%20actions/> [<https://perma.cc/Z6SP-2S8L>] (last visited Nov. 23, 2024) (explaining how IoT thermometers work).

148. See Siddhant Kejriwal, *Understanding The Role Of Oracles In Decentralized Finance*, COIN BUREAU (Nov. 19, 2024), <https://coinbureau.com/analysis/the-role-of-oracles-in-defi/> [<https://perma.cc/L62J-CVBQ>].

interdependency, and multiple jurisdiction compliance.¹⁴⁹ When disputes over oracle-enabled smart contracts reach courts, existing international frameworks such as the CISG provide limited guidance. While Professor Tjong Tjin Tai's proposed solutions may address force majeure in simple two-party contracts and serve as fail-safes in more complex transactions, they largely ignore or attempt to bypass the role of the judge.

Although oracles can enable smart contracts to self-execute and, in theory, reduce the need for judicial intervention, current technology has not yet realized this ideal. Rather than attempting to eliminate judicial oversight altogether, a more productive approach is to develop a legal environment that supports smart contracts when oracles fail or produce contested outcomes. As discussed in earlier sections, international courts and tribunals already struggle to apply Article 79(1) of the CISG consistently in the context of traditional paper contracts; it is therefore doubtful that the provision can govern smart contracts effectively without further doctrinal development. In the absence of a clear framework for their interpretation and dispute resolution, parties may be incentivized to retreat to traditional contracting methods rather than adopt smart contract technology.

One of the primary motivations for businesses, governments, and individuals to adopt smart contracts is the elimination of intermediaries. At the same time, commercial relationships are embedded in complex real-world conditions that cannot always be reduced to code *ex ante*. Oracles offer a mechanism for bridging this gap by allowing smart contracts to respond to external facts and events while preserving many of the efficiencies that make automated contracting attractive. Much of the debate surrounding oracles focuses on whether they reintroduce the very intermediaries that blockchain technology seeks to eliminate. This Note does not seek to reject the use of oracles in smart contracts; rather, it argues that oracles are essential to integrating smart contracts with the practical realities of commercial life. Nevertheless, the complexity and variability of external events mean that parties cannot yet rely exclusively on oracles to resolve all disputes. An international legal framework that extends beyond Article 79(1) of the CISG and provides consistent standards for invoking force majeure in smart contracts would supply necessary legal stability as the technology continues to evolve toward more autonomous solutions.

B. The Judicial Challenge of Smart Contract Interpretation

As smart contracts become increasingly prevalent through the growth of blockchain and other distributed ledger technologies, a fundamental question remains: how will courts interpret these self-executing agreements, particularly

149. See Mohamed Damak et al., *Utility at a cost: Assessing the risks of blockchain oracles*, S&P GLOBAL (Nov. 17, 2024), <https://www.spglobal.com/en/research-insights/special-reports/utility-at-a-cost-assessing-the-risks-of-blockchain-oracles> [<https://perma.cc/99SE-TBFY>].

in the context of international sales governed by the CISG? Although smart contracts operate through executable code—a series of binary instructions—this does not mean that questions of contractual interpretation will disappear.¹⁵⁰ In practice, smart contracts are unlikely to be bespoke programs drafted through direct interaction between contracting parties and programmers. Rather, their widespread adoption will depend on standardized, pre-coded templates that parties can adopt and complete in much the same way they currently use letters of credit, bills of lading, or insurance contracts. In this setting, interpretive challenges arise not from ambiguity in negotiated language, but from the potential mismatch between the parties' commercial expectations and the legal effects produced by the underlying code. Courts will therefore confront questions not of how to read code itself, but how to reconcile automated contractual performance with established doctrines of intent, risk allocation, and excuse under international sales law.

State and federal judges, who are accustomed to using traditional interpretive tools to resolve ambiguity in contracts, will need to adapt their approaches when dealing with smart contracts. Contract interpretation typically begins with the plain language, with the parties' intention controlling, but gathered from the four corners of the written instrument.¹⁵¹ However, judges will find themselves confronting code rather than ambiguous legal language. The binary nature of programming languages and the execution of smart contract render traditional canons of construction largely inapplicable. When faced with a smart contract dispute, courts cannot simply parse ambiguous terms through *ejusdem generis* or *expressio unius*, nor seek refuge in plain and ordinary meaning. The image below is a very simple example of a sale of goods contract written in Solidity, the primary language of Ethereum smart contracts:

150. Siegfried Fina & Irene Ng (Huang Ying), *Smart Contract 'Drafting' and the Homogenization of Languages*, in SMART LEGAL CONTRACTS: COMPUTABLE LAW IN THEORY AND PRACTICE 339, 350-51 (Jason G. Allen & Peter Hunn eds., 2022).

151. See 11 WILLISTON ON CONTRACTS § 32:5 (4th ed. 2025).

```

1  pragma solidity 0.6.11;
2
3  contract VendingMachine {
4
5      // Declare state variables of the contract
6      address public owner;
7      mapping (address => uint) public cupcakeBalances;
8
9      // When 'VendingMachine' contract is deployed:
10     // 1. set the deploying address as the owner of the contract
11     // 2. set the deployed smart contract's cupcake balance to 100
12     constructor() public {
13         owner = msg.sender;
14         cupcakeBalances[address(this)] = 100;
15     }
16
17     // Allow the owner to increase the smart contract's cupcake balance
18     function refill(uint amount) public {
19         require(msg.sender == owner, "Only the owner can refill.");
20         cupcakeBalances[address(this)] += amount;
21     }
22
23     // Allow anyone to purchase cupcakes
24     function purchase(uint amount) public payable {
25         require(msg.value >= amount * 1 ether, "You must pay at least 1
26         ETH per cupcake");
27         require(cupcakeBalances[address(this)] >= amount, "Not enough
28         cupcakes in stock to complete this purchase");
29         cupcakeBalances[address(this)] -= amount;
30         cupcakeBalances[msg.sender] += amount;
31     }
32 }

```

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Professor James Grimmelmann suggests that all smart contracts can be ambiguous “because technical facts depend on socially determined ones.”¹⁵³ To give meaning to a computer program, a community of programmers and users must agree on the semantics of the programming language in which it is written.¹⁵⁴ Professor Grimmelmann explains that ambiguity in smart contracts does not only come from the written code but also from the function of oracles because “the problem of observing the world is also a problem of ambiguity,” and the world is complex.¹⁵⁵ But there is no simple way to deal with this type of ambiguity.

The lack of effective interpretative tools may give rise to a new framework of construction tailored to smart contracts—perhaps the “digital canons of construction.” These digital canons would need to bridge the gap between computer code and contractual intent, focusing on elements such as protocol standards, code conventions, and digital ledger-specific industry practices. An

152. Benjamin Talin, *What are Smart Contracts? – Understanding contracts on the blockchain*, MORE THAN DIGITAL (Mar. 22, 2021), <https://morethandigital.info/en/what-are-smart-contracts-understanding-contracts-on-the-blockchain/> [https://perma.cc/S8P4-7N6C].

153. James Grimmelmann, *All Smart Contracts are Ambiguous*, 2 J.L. & INNOVATION 1, 1-3 (2019).

154. *Id.* at 1.

155. *Id.* at 15.

example of an industry standard would be the practice of “optimistic rollups” in Ethereum Layer 2 networks.¹⁵⁶ In these systems, transactions are initially considered valid by default and can be executed immediately, but there is a challenge period (typically seven days) where anyone can challenge the transaction’s validity.¹⁵⁷ This “innocent until proven guilty” approach with a built-in-dispute window has become a de facto industry standard. Potentially, this could resemble the hierarchy of implied terms found in UCC § 1-303(e).¹⁵⁸

Traditionally, courts have several tools to determine ambiguities within a paper contract. Some considerations from the CISG and contract law principles include intent, good faith, and other established rules for interpreting written agreements. The Law Commission’s report and statement published by the United Kingdom Jurisdiction Taskforce suggest a “reasonable coder” standard for contractual interpretation in smart contracts.¹⁵⁹ Under this approach, smart contracts would rely heavily on a “reasonable coder” standard, meaning courts would consult expert testimony from programmers to understand the code.¹⁶⁰ The experts would explain “the effect of certain combinations of words, and give their reasoned opinion as to what the code appeared to instruct the computer to do.”¹⁶¹ This approach is unlikely to find favor with the United States Supreme Court’s conservative majority, given their strong commitment to the plain text and ordinary meaning.¹⁶²

Also, the traditional “reasonable person” test is likely inadequate for smart contracts because an ordinary reasonable person would not understand the

156. See Mike Shin, *What is an Optimistic Rollup?*, THIRDWEB (Nov. 4, 2023), <https://blog.thirdweb.com/what-is-an-optimistic-rollup/> [<https://perma.cc/E3JU-CTP6>].

157. *Id.*

158. UCC § 1-303(e) (A.L.I. & UNIF. L. COMM’N 1977): Hierarchy of Implied Terms (e) The express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable:

- (1) express term prevails over course of performance, court of dealing, and usage of trade;
- (2) course of performance prevails over course of dealing and usage of trade; and
- (3) court of dealing prevails over usage of trade.

159. See L. COMM’N, SMART LEGAL CONTRACTS ADVICE TO GOVERNMENT (2021) [hereinafter SMART LEGAL CONTRACTS ADVICE TO GOVERNMENT]; UK JURISDICTION TASKFORCE, LEGAL STATEMENT ON CRYPTO ASSETS AND SMART CONTRACTS 38 (2019); L. COMM’N, DIGITAL ASSETS CONSULTATION PAPER (2022).

160. See Nick Hsu & Jagjit S. Sahota, *Interpreting Smart Contracts: The Reasonable Coder and the need for a Stronger Contextual Approach*, 12 OXFORD U. UNDERGRADUATE L. J. 146, 165 (2023).

161. Harriet Jones-Fenleigh, Adam Sanitt & Jonathan Hawkins, *Smart legal contracts under English Law – Part 2: Formation and interpretation*, NORTON ROSE FULBRIGHT (Feb. 2, 2022), <https://www.nortonrosefulbright.com/en/inside-disputes/blog/202202-smart-legal-contracts-under-english-law-formation-and-interpretation> [<https://perma.cc/2T7D-5DBP>].

162. See generally William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism’s Defining Moment*, 123 COLUM. L. REV. 1611 (2023) (explaining the Court’s turn toward plain-text and ordinary-meaning interpretation).

meaning of the smart contract's code. A significant issue arises with the "reasonable coder" standard: it substantially shifts the role of adjudication away from the judge and toward the expert coders.¹⁶³ Smart contract scholars argue that because of this issue, there must be a "backshift towards a contextual approach to interpretation in the realm of smart contracts."¹⁶⁴ Therefore, the admissibility of "surrounding circumstances" (including pre-contractual negotiations) would restore the judges' role in determining the parties' agreement.¹⁶⁵ Some other scholars take a more extreme position with smart contracts, believing that code only has an effect, leaving no room for interpretation, essentially—"code is the law."¹⁶⁶

While the UNCITRAL has not yet addressed whether a smart contract constitutes a valid contract under the CISG, extensive scholarship supports the view that smart contracts meet all of the requirements of acceptance and offer found under Article 14 of the CISG.¹⁶⁷ Therefore, it is easy to see how smart contracts raise challenges regarding the balance between judicial interpretation and the technical expertise of coders, particularly when disputes arise over the contract's term, execution, and intended functionality.

C. The Lack of International Harmony

Scholars have characterized Article 79 of the CISG as "the Convention's least successful part of the half-century work," while also being one of the most complex and difficult provisions.¹⁶⁸ This provision, which governs force majeure in international sales contracts, presents courts with significant interpretative challenges and has led to inconsistent application across jurisdictions. The elements required for a party to satisfy Article 79(1) are: (1) an impediment to performance; (2) the impediment must have prevented performance; (3) the impediment was beyond the party's control; (4) the impediment could not have been reasonably foreseen when forming the

163. Hsu & Sahota, *supra* note 160, at 147.

164. *Id.*

165. *Id.*

166. SMART LEGAL CONTRACTS ADVICE TO GOVERNMENT, *supra* note 159, paras. 4.8, 4.9, 4.10; see Michel Cannarsa, *Interpretation of Contracts and Smart Contracts: Smart Interpretation or Interpretation of Smart Contracts?*, 26 EUR. REV. PRIV. L. 773, 780 (2018).

167. Anna Duke, *What Does the CISG Have to Say About Smart Contracts? A Legal Analysis*, 20 CHI. J. INT'L L. 141 (2019); André Janssen, *The United Nations Convention on Contracts for the International Sale of Goods (CISG) and the Emergence of Smart Contracts and Cryptocurrencies: Should We Try to Teach an Old Dog Some New Tricks?*, 14 TSINGHUA CHINA L. REV. 1 (2022); Tharika Dishani Lamappulage Donn, *Smart Contract and International Trade: European Legal Strategies for Managing Challenges*, 4 J. DIGIT. TECH. & L. 1042 (2023).

168. Yasutoshi Ishida, *CISG Article 79: Exemption of Performance, and Adaptation of Contract Through Interpretation of Reasonableness – Full of Sound and Fury, but Signifying Something*, 30 PACE INT'L L. REV. 331 (2018); Harry M. Flechtner, *The Exemption Provisions of the Sales Convention, Including Comments on "Hardship" Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court*, 59 BELGRADE L. REV. 84 (2011).

contract; and (5) the impediment could not have been avoided or overcome.¹⁶⁹ This section examines the divergent judicial interpretations of Article 79(1), revealing how international courts' and tribunals' persistent reliance on domestic legal frameworks undermines the CISG's harmonization goals and demonstrates why this provision's inherent inconsistency makes it fundamentally incompatible with governing smart contracts.

In *Scaфом International BV v. Lorraine Tubes S.A.S.*, the Belgian Court of Cassation confronted two parties that had entered into an agreement for the sale of steel tubes.¹⁷⁰ Subsequently, the cost of steel unexpectedly increased by more than 70%.¹⁷¹ As a result, the seller sought to renegotiate a higher contract price, but the buyer refused.¹⁷² The trial court held that the facts did not constitute an "impediment" under Article 79(1) of the CISG.¹⁷³ On appeal, the court held that the CISG did not govern the facts, applied French civil law, and overturned the trial court's decision.¹⁷⁴ The buyer appealed to the Supreme Court of Belgium, which held that the CISG did govern the facts under Article 79(1) and that the price increase did constitute an impediment.¹⁷⁵ However, the Belgian Supreme Court did not stop there; the court ordered the parties to renegotiate the contract price.¹⁷⁶

On the other hand, in *Macromex SRL v. Globex Int'l Inc.*, a seller contracted to deliver chicken to a buyer in Romania, but an outbreak of bird flu led the Romanian government to ban imports.¹⁷⁷ During the contract period, the price of chicken rose substantially, and the seller, seeking to benefit from higher prices elsewhere, failed to deliver the contracts goods, claiming an Article 79(1) exemption.¹⁷⁸ The tribunal rejected the seller's claim, finding that the company's desire to capitalize on market changes for financial gain did not constitute an impediment under Article 79(1), particularly since alternative means of performance, such as shipping ports outside Romania, were available.¹⁷⁹ Similarly, the United States District Court for the Northern District of Illinois in *Raw Materials, Inc. v. Manfred Forberich GmbH & Co., KG* ("RMI") held that

169. Brandon Nagy, *Unreliable Excuses: How Do Differing Persuasive Interpretations of CISG Article 79 Affect Its Goal of Harmony?*, 26 N.Y. INT'L L. REV. 61 (2013).

170. *Scaфом International BV v. Lorraine Tubes S.A.S.* (Neth. v. Fr.), Cass. [Court of Cassation], June 19, 2009, Case No. C.07.0289.N (English trans.), https://ciscg-online.org/files/cases/7880/translationFile/1963_18923774.pdf [hereinafter *Steel Tubes*].

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Macromex Srl. v. Globex Int'l Inc.*, Case No. 50181T 0036406, Interim Award, at 9 (Am. Arb. Ass'n, Int'l Ct. for Disp. Resol., Oct. 23, 2007), https://ciscg-online.org/files/cases/7564/fullTextFile/1645_53897288.pdf [<https://perma.cc/H3XG-3EF7>] (holding the Buyer's favor and award damages, as the weightier facts and more persuasive precedent/scholarly commentary support that result).

178. *Id.*

179. *Id.*

the CISG was the applicable substantive law, but in applying Article 79, the court used case law interpreting a similar provision in § 2-615 of the UCC [Uniform Commercial Code].¹⁸⁰ The court determined that there were two questions of fact unanswered: first, whether the port freezing over made it impossible for Forberich to meet its contractual deadline, and whether the St. Petersburg port freezing in December rather than in January was foreseeable.¹⁸¹ Therefore, summary judgment was deemed inappropriate since there were unresolved questions of fact.¹⁸²

Both *Steel Tubes* and *RMI* highlight the deficiencies in the CISG's harmonization of international transactions. In *Steel Tubes*, the court's decision to renegotiate contractual terms reflects a remedy for hardship commonly found in civil law jurisdictions, where courts have greater flexibility to adjust contracts based on changed circumstances.¹⁸³ In contrast, in common law jurisdictions such as the United States, courts rarely adjust contractual terms due to changed circumstances.¹⁸⁴ In *Macromex*, the tribunal not only denied contract renegotiation but also held that a rise in market price does not constitute an impediment.¹⁸⁵ The U.S. courts have further complicated the matter by applying domestic UCC principles to interpret the CISG, contributing to the fragmented understanding of Article 79.

The unifying thread across these divergent judicial decisions is that they all involve traditional paper contract relationships disrupted by conventional force majeure events—a stark contrast to the code-driven execution of smart contracts. Courts would have even less guidance interpreting smart contracts than they do with paper contracts. More importantly, these fragmented interpretations and applications pose a greater risk to smart contracts, potentially stunting the growth of the industry and forcing parties to rely on the inferior alternative of paper contracts. As Professor Frank Emmert explains, DLT requires a “predictable legal environment” for individuals, businesses, and

180. *Raw Materials, Inc. v. Manfred Forberich GmbH & Co.*, No. 03 C 1154, 2004 U.S. Dist. LEXIS 12510 (N.D. Ill. July 6, 2004) [hereinafter *RMI*].

181. *Id.*

182. *Id.*

183. See Tian Dai, *A Case Analysis of Scafom International BV v. Lorraine Tubes S.A.S: the Application of Article 79 of the United Nations Convention on International Sale of Goods*, 1 *PERTH INT'L L.J.* 131, 132 (2016); see also Fredrick R. Fucci, *Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts: Practical Considerations in International Infrastructure Investment and Finance*, *ARNOLD PORTER* (Apr. 2006), https://www.arnoldporter.com/-/media/files/perspectives/publications/2006/04/hardship-and-changed-circumstances-as-grounds-fo_/files/publication/fileattachment/hardship_excuse_article.pdf?rev=c85b346bcc844d68a7e0eb17072bd719&sc_lang=en&hash=094DDAAAE5D10E7265B0C86EB70EB5EE [https://perma.cc/NJ4W-KH6Y].

184. *Id.*

185. *Macromex Srl. v. Globex Int'l Inc.*, Case No. 50181T 0036406, Interim Award, at 9 (Am. Arb. Ass'n, Int'l Ct. for Disp. Resol., Oct. 23, 2007), https://ciscg-online.org/files/cases/7564/fullTextFile/1645_53897288.pdf [https://perma.cc/H3XG-3EF7].

investors to commit time and money to the industry.¹⁸⁶ Professor Emmert advocates for international treaties and conventions to regulate DLT and blockchain, noting that a treaty specifically designed for smart contracts would be ideal.¹⁸⁷ However, the CISG's lack of uniformity, exacerbated by domestic legal influences of Article 79 interpretations, falls short of these expectations.

Some scholars disagree with the view that Article 79(1) has been inconsistently applied, arguing instead for a concept of "functional uniformity," where courts may apply rules differently but achieve similar outcomes.¹⁸⁸ For instance, in the *Sunflower Seed* case, a seller's attempt to invoke Article 79(1) due to reduced production and escalating costs was rejected because the CISG does not excuse performance merely due to economic hardship.¹⁸⁹ Similarly, in the *Canned Oranges* case, a Chinese arbitral tribunal denied a seller's claim when unforeseen factors increased costs, holding that the seller did not meet the hardship standard under Article 79(1).¹⁹⁰ The divergence among scholars and courts often centers around the meaning of "impediment" in Article 79(1). The term "impediment" was deliberately chosen to bridge the gap between various excuse doctrines, ranging from strict impossibility to mere economic hardship.¹⁹¹ But the flexibility of the term seems to have led courts to rely on national doctrines of excuse, increasing the risk of misapplication.

Sunflower Seed and *Canned Oranges*, while cited as an example of "functional uniformity," in fact underscore the inconsistency in applying Article 79(1). Both cases denied exemptions based on economic hardship, yet courts in other jurisdictions, such as in *Scafom*, have accepted similar economic disruptions as valid impediments. The CISG's reliance on broad terms like "impediment" leaves significant room for subjective judicial interpretation influenced by domestic legal principles. Another twist smart contracts will add to this inconsistency is the varying views of DLT across countries, courts, and tribunals. For example, the federal judiciary's treatment of smart contracts and digital assets may continue to evolve alongside shifting regulatory and policy approaches to DLT. In *Van Loon*, discussed earlier in Part I of this Note, the three-judge panel consisted of Judges Don R. Willett, James C. Ho, and Kurt D.

186. Professor Frank Emmert is the John S. Grimes Professor of Law at the Indiana University Robert H. McKinney School of law. He is a widely known and highly regarded expert in the law of the European Union, international business transactions, international commercial arbitration, the World Trade Organization, international trade, and the Middle East. He co-founded the Council on International Law and Politics and the Blockchain Law Alliance. See Frank Emmert, *Blockchain and Law in Comparative Perspective*, 3 (Mar. 31, 2022), https://mckinneylaw.iu.edu/events/_docs/EmmertBlockchainandNFTs.pdf [<https://perma.cc/X4E9-X8TV>].

187. *Id.* at 6-7.

188. David Kuster & Camilla Baasch Andersen, *Hardly Room for Hardship—A Functional Review of Article 79 of the CISG*, 35 J.L. & COM. 1, 11 (2016).

189. Epheteio Lamia [Ephet.] [Lamias Court of Appeals] 63/2006 (Greece).

190. *Canned Oranges Case II* (Ger. v. China), CISG/2006/06 (China Int'l Econ. & Trade Arb. Comm. (May 2006)).

191. See Kuster & Andersen, *supra* note 188, at 11.

Engelhardt, each appointed by President Trump.

Conversely, China's restrictive approach to DLT could affect its interpretation of Article 79 in similar contexts.¹⁹² The European Union presents yet another approach, with its balanced regulatory framework under the Markets in Crypto-Assets ("MiCA") legislation, which could lead to a more measured interpretation of Article 79 that weighs both innovation and consumer protection.¹⁹³ Meanwhile, countries like El Salvador, which have adopted Bitcoin as legal tender, might develop particularly permissive interpretations of force majeure in blockchain-based transactions to encourage adoption and economic development.¹⁹⁴ Each CISG contracting state has a unique public policy consideration influenced by its cultural, political, and economic landscape, all of which will shape its approach to smart contracts and DLT.

Moreover, the infamous *Milk powder* case illustrates the challenges in applying Article 79 to smart contracts.¹⁹⁵ In this case, a buyer received spoiled powdered milk due to lipase contamination.¹⁹⁶ The seller sought an exemption under Article 79 because the seller proved that no available testing technique could have detected the inactive lipase.¹⁹⁷ However, the Bundesgerichtshof¹⁹⁸ ("BGH") rejected this defense, ruling that merely proving the inadequacy of current testing methods was insufficient for exemption.¹⁹⁹ The CISG AC Opinion No.7 provides further insight through a hypothetical example: "Assume a seller bound to deliver frozen goods which, due to a blackout occurring after the seller shipped them but before risk transferred to the buyer, arrive decomposed at the delivery place."²⁰⁰ The Opinion states that "Article 79 may apply only if the seller proves that he neither knew of the blackout nor could

192. *The Most (and Least) Crypto-Friendly Countries in the World*, NOMAD CAPITALIST (Nov. 11, 2024), <https://nomadcapitalist.com/finance/cryptocurrency/the-most-and-the-least-crypto-friendly-countries-in-the-world/> [<https://perma.cc/J7SY-QZA7>].

193. The Markets in Crypto-Assets Regulation (MiCA) institutes uniform EU market rules for crypto assets.

194. Rebecca Beyer, *El Salvador Adopted Bitcoin as an Official Currency; Salvadorans Mostly Shrugged*, YALE INSIGHTS (Jan. 29, 2024), <https://insights.som.yale.edu/insights/el-salvador-adopted-bitcoin-as-an-official-currency-salvadorans-mostly-shrugged#:~:text=El%20Salvador%20took%20a%20different,Bitcoin%20as%20a%20legal%20tender> [<https://perma.cc/9XHG-HV9K>].

195. See *Milk Powder Case* (Neth. v. Ger.), Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 9, 2002, VIII ZR 304/00, https://cisg-online.org/files/cases/6594/translationFile/651_52762818.pdf [<https://perma.cc/LB2H-5MMH>].

196. *Id.*

197. *Id.*

198. The Federal Court of Justice is the highest court of civil and criminal jurisdiction in Germany. Its primary responsibility is the final appellate review of decision by lower courts for errors of law.

199. *Id.*

200. CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007.

have controlled it,” and therefore, the “seller would not be exempted if he reasonably could have expected to anticipate a possible power failure when concluding the contract.”²⁰¹

These interpretations raise serious concerns for smart contract implementation. The *Milk powder* case demonstrates how Article 79 requires complex and subjective assessments of what constitutes “reasonable foreseeability” and adequate preventive measures—judgments that are incompatible with the deterministic nature of smart contracts. “In smart contracts, the parties write their wills with the codes such as ‘do this if the following condition occurs.’”²⁰² “Therefore, since each input will have an output, it is quite difficult to foresee force majeure and include it to the code.”²⁰³ A programmer can code recognized force majeure events—such as floods, tsunamis, epidemics, and earthquakes—based on historical experience; however, the program’s ability to determine whether a novel future event qualifies as force majeure is far more limited. For example, courts must consider whether the malfunctioning of a smart contract, issues transferring cryptocurrencies, or a party’s access to the blockchain being compromised are events that fall within the sphere of force majeure events under Article 79(1) of the CISG.

In 2017, CryptoKitties, a digital cat game, overwhelmed the Ethereum network, causing congestion, delayed transactions, and increased gas fees.²⁰⁴ Courts and tribunals will face scenarios where smart contract malfunctions or network congestion led to unintended consequences, potentially affecting millions of users and transactions worldwide within minutes. Eventually, the court will be faced with interpreting the smart contract alongside the CISG to determine whether this CryptoKitties event meets Article 79. In the future, artificial intelligence will likely be better equipped to foresee these smart contract force majeure events and provide its own interpretations that are now made by lawyers and judges while balancing the interests of the parties. The technology simply is not at this point yet.

It remains unclear how contracting states of the CISG will approach force majeure in the context of smart contracts. The existing jurisprudence provides little hope that Article 79 can effectively govern smart contracts, as courts have yet to establish a consistent interpretation of Article 79(1) even for traditional paper contracts. The uncertainty is even greater regarding whether courts will view coding errors, blockchain disruption, or technical malfunction as

201. *Id.*

202. Miran Legal, *Legal Assessment On Smart Contracts And Force Majeure*, MIRAN LEGAL (Nov. 14, 2022), [https://miranlegal.com.tr/en/publications/legal-assessment-on-smart-contracts-and-force-majeure?utm_source=mondaq&utm_medium=syndication&utm_content=article original&utm_campaign=article](https://miranlegal.com.tr/en/publications/legal-assessment-on-smart-contracts-and-force-majeure?utm_source=mondaq&utm_medium=syndication&utm_content=article%20original&utm_campaign=article) [<https://perma.cc/RH7Y-FZTF>].

203. *Id.*

204. *The Inside Story of the CryptoKitties Congestion Crisis*, CONSENSYS (Feb. 20, 2018), <https://consensys.io/blog/the-inside-story-of-the-cryptokitties-congestion-crisis> [<https://perma.cc/EU3N-B4EE>].

impediments under the CISG, or simply treat them as inherent risks that parties assume when choosing DLT. Consequently, sellers and buyers entering into smart contracts must take proactive measures to protect themselves against the potential for inconsistent judicial outcomes across different jurisdictions.

V. RECOMMENDATION

A. Suggestions for International Parties Contracting for the Sale of Goods

The CISG's Article 79(1) has failed to fully achieve its fundamental purpose of harmonizing international trade law in matters of contractual excuse. Courts and tribunals, viewing Article 79 through their domestic legal lenses, have created a fragmented landscape of interpretations—ranging from force majeure to impossibility, *eccessiva onerosità* to impracticability, and *Wegfall/Störung der Geschäftsgrundlage* to economic hardship. This interpretive discord becomes even more pronounced in the context of smart contracts, where novel technological challenges strain the CISG's existing framework. Although a specialized international convention addressing smart contracts and distributed ledger technology would be desirable, such an instrument would be difficult to draft and even more difficult to secure ratification from a broad range of countries in the foreseeable future. Given these limitations, parties entering smart contracts for the international sale of goods need practical solutions now. This section provides essential recommendations for contracting parties engaging in smart contract transactions, including a proposed force majeure clause tailored to possible smart contract events.

First, parties should maintain a dual-contract system: the original paper contract and the smart contract. The paper contract serves as the foundation for a computer programmer to convert into code. Parties may want to include a clause within the paper contract stating, “in case of dispute between parties, the paper contract will govern for interpretation purposes.” Maintaining the original paper contract proves advantageous when disputes arise due to coding errors that did not represent the original drafter's intent. Additionally, parties should address programmer liability, as programmers will likely seek protection against any potential claims for their services.

Second, parties should prioritize hiring professionals who understand both contract drafting principles and coding to accurately express the full intent of both parties. Law schools like Stanford University and New York University are now producing graduates with training in both law and computer programming, creating a new class of professionals who can bridge this critical gap.²⁰⁵ As smart contracts are written in programming languages, it is essential

205. See *Law & Computer Science – Joint Degree (JD/MS)*, DEPAUL U., <https://catalog.depaul.edu/programs/law-computer-science-joint-degree-jd/#:~:text=Graduates%20with%20the%20joint%20degree,or%20reusing%20computer%20software%2C%20expressive%2C/>

to rely on skilled programmers well-versed in languages such as Solidity, Vyper, Python, and JavaScript.²⁰⁶

Third, parties must carefully select the appropriate oracle type—automated, trusted third party (“TTP”), or expert—based on their specific transaction needs.²⁰⁷ Each international transaction may require a different oracle depending on the complexity of the transaction and the parties’ priorities regarding speed, security, efficiency, and cost.

Simple transactions can typically utilize automated oracles. Consider a US-based retailer purchasing 1,000 units of standard electronic components from South Korean manufacturer for \$50,000.00. This straightforward transaction involves a single buyer and seller, standard goods with clear specifications, fixed price and quantity, delivery to a single destination, and payment upon delivery verification. A programmer can likely write sufficient code to address potential force majeure events in this scenario.

Complex transactions, however, often require TTP or expert oracles. For instance, a German pharmaceutical company entering into a supply chain agreement with multiple ingredient suppliers across Asia, contract manufacturers in Eastern Europe, and distributors across three continents presents numerous complexities: multiple parties, temperature-sensitive perishable goods, varying regulatory requirements across jurisdictions, complex pricing tiers, and profit-sharing arrangements. Such intricate arrangements exceed a programmer’s ability to predict and code for all contingencies. Additionally, when selecting an oracle provider, parties should evaluate which project aligns with their specific needs, as some providers prioritize security while others focus on transaction speed or data volume. These considerations, along with cost, liability, and the need for human judgment in exceptional circumstances, should guide the selection process.

Fourth, parties may want to have clear dispute resolution mechanism specifically tailored to smart contract issues like designating a specific forum or arbitration body familiar with smart contracts and DLT. For example, Professor Frank Emmert is a member of the Silicon Valley Arbitration and Mediation Center (“SVAMC”) and has industry-specific experience in DeFi and Blockchain contracts.²⁰⁸ Also, JAMS, the world’s largest private alternative dispute resolution (“ADR”) provider, created a Model Dispute Resolution

[<https://perma.cc/9PP8-NPBZ>] (last visited Feb. 17, 2026); *Law and Computer Science: JD MS*, STANFORD L. SCH., <https://law.stanford.edu/education/degrees/joint-degrees-within-stanford-university/law-and-computer-science/> [<https://perma.cc/PAT8-2K6H>] (last visited Feb. 17, 2026); *Exploring the Intersection of Computer Science and Law*, NORTHWESTERN (Sep. 13, 2022), <https://www.mccormick.northwestern.edu/computer-science/news-events/news/articles/2022/exploring-the-intersection-of-computer-science-and-law.html> [<https://perma.cc/9FMS-7535>].

206. *Top 6 Smart Contract Languages in 2024*, CHAINLINK (Jan. 2, 2024), <https://chain.link/education-hub/smart-contract-programming-languages> [<https://perma.cc/ZFN6-XXU4>].

207. Tjong Tjin Tai, *supra* note 133, at 800.

208. See Frank Emmert, *Commercial Law and Arbitration Experience*, FRANK EMMERT, <https://www.frankemmert.com/arbitration> [<https://perma.cc/Z9PT-N22D>] (last visited Feb. 17, 2026).

Clause specifically for smart contracts that parties may utilize.²⁰⁹

Finally, this section proposes a new model for force majeure clauses in smart contract agreements that bridges the divide between conventional contract law and digital asset transactions. The model addresses three fundamental objectives: accounting for the automated and irreversible nature of smart contract execution, addressing international cross-jurisdictional complexity of blockchain transactions, and maintaining flexibility to accommodate evolving technological threats while providing consistency in international sales.²¹⁰ The force majeure clause follows:

A party shall not be liable for failure to perform any of its obligations under this smart contract if it proves that such failure was due to an unforeseen event, hardship, impossibility, or impediment beyond its control and that it could not reasonably have been expected to take such impediment into account at the time of the code's deployment or to have avoided or overcome its consequences. Such impediments shall include, but are not limited to:

- (1) critical blockchain network failures, or consensus mechanism disruptions;
- (2) widespread validator node outages, smart contract vulnerabilities discovered post-deployment, or oracle malfunctions resulting in incorrect data feeds;
- (3) severe network congestion resulting in sustained inability to execute transactions, or cryptographic failures affecting contract security, network attacks, or exploits that compromise contract functionality;
- (4) unforeseen flaws in the smart contract code that materially impact its intended function;
- (5) Acts of God, natural disasters, or extreme weather events;
- (6) War, hostilities, terrorism, or civil unrest; or
- (7) Government actions, laws, or regulations.

The party failing to perform must provide cryptographically signed notice of the impediment and its effect on performance to the other party within a reasonable time after the failing party knew or should have known of the impediment. The exemption provided herein shall have effect only for the period during which the impediment exists. If the

209. See Daniel B. Garrie & Gail A. Andler, *Arbitrating Smart Contract Disputes: A Comprehensive Approach*, DAILY J. (Dec. 20, 2024), <https://www.jamsadr.com/insight/2024/arbitrating-smart-contract-disputes> [https://perma.cc/3SY2-7MZ4]; *JAMS Model Dispute Resolution Clause for Smart Contracts*, JAMS, <https://www.jamsadr.com/rules-clauses/clauses-smart-contracts> [https://perma.cc/GMZ8-XSEK] (last visited Feb. 17, 2026).

210. See Siegfried Fina & Irene Ng, *Smart Contract 'Drafting' and the Homogenization of Languages*, in *SMART LEGAL CONTRACTS: COMPUTABLE LAW THEORY AND PRACTICE* 339 (Jason G. Allen & Peter Hunn eds., 2022).

impediment lasts for more than [X] consecutive blocks, either party may terminate the contract through the designated termination function, with all parties returned to their pre-contractual positions to the extent technically feasible.

The model clause is intended to adapt traditional force majeure principles to the realities of smart contract transactions. It preserves the core idea of Article 79—excusing performance when an unforeseen impediment beyond a party's control occurs—while expressly addressing risks unique to blockchain systems, such as oracle failures, network disruptions, and post-deployment code defects. The notice requirement, time limits, and termination mechanism provide clear procedural safeguards and give courts and arbitral tribunals a workable standard for review. Taken together, the clause offers parties a practical way to allocate risk and manage disruption in smart contract sales, while promoting greater consistency in dispute resolution until broader international agreement on smart contract governance emerges.

VI. CONCLUSION

The emergence of smart contracts represents a pivotal moment in the evolution of international commercial law, challenging traditional legal frameworks in ways that demand both immediate practical solutions and long-term systematic reform. As this Note has demonstrated, the current interpretation and application of Article 79(1) of the CISG—already fraught with inconsistencies across jurisdictions for traditional contracts—proves particularly inadequate when confronting the technological challenges posed by smart contracts and DLT.

The fundamental tension lies in reconciling the deterministic, code-based nature of smart contracts with the inherently flexible and jurisdiction-dependent interpretation of force majeure under Article 79(1). While traditional force majeure provisions effectively address conventional disruptions like natural disasters or government actions, they fail to contemplate the novel impediments inherent in smart contracts—from oracle failures and consensus attacks to code vulnerabilities and network congestion. This gap in coverage, combined with courts' persistent reliance on domestic legal frameworks when interpreting Article 79(1), creates significant uncertainty for parties engaging in international smart contract transactions.

The proposed solutions in this Note operate on two levels. In the immediate term, parties must adopt practical safeguards, including implementing dual-contract systems, carefully selecting appropriate oracles, and incorporating comprehensive force majeure clauses specifically tailored to smart contract vulnerabilities. The recommended force majeure clause provided in this Note serves as a bridge between traditional contract law and the emerging realities of digital commerce, addressing both conventional and technological impediments

while maintaining the flexibility necessary for cross-jurisdictional application.

However, these stopgap measures, while necessary, highlight the broader need for international legal reform. The inconsistent application of Article 79(1) across jurisdictions—evident in cases like *Scaфом International*, *Macromex*, and *Raw Materials*—underscores the CISG’s limitations in providing the predictable legal environment necessary for smart contract adoption and growth. As DLT continues to evolve and smart contracts become more prevalent in international commerce, the development of a specialized convention addressing smart contracts and their challenges becomes increasingly crucial.

Until such comprehensive reform materializes, the success of smart contracts in international commerce will depend largely on careful drafting, expertise, and proactive risk management by contracting parties. The recommendations provided in this Note offer a framework for navigating this complex landscape, balancing the efficiency and automation benefits of smart contracts with the need for legal certainty and protection against both traditional and technological force majeure events.

Ultimately, the integration of smart contracts into international commerce marks not merely a technological leap but a profound reimagining of how human promises transcend borders through code. As we venture deeper into this digital frontier, the law must evolve beyond its earthbound origins—where force majeure once spoke only of storms and wars—to embrace a new realm where impediments travel at the speed of light and contracts execute themselves in the blink of an eye. In this borderless realm of digital commerce, our legal frameworks must learn to dance with both the predictable precision of code and the unpredictable chaos of a world that refuses to be contained within binary bounds.

JUSTICE FOR SALE: THE BUSINESS OF INCARCERATION: CONSTITUTIONALIZED CONVICT LABOR, FOR-PROFIT, PRIVATE PRISONS, AND WHAT THE UNITED STATES CAN LEARN FROM COMMONWEALTH MODELS

SHIBANI S. MODY*

I. INTRODUCTION

The United States stands alone in its embrace of for-profit incarceration. Home to just 4% of the world's population, it holds a staggering quarter of all prisoners globally. Even more troubling, over 8% of these inmates—some 116,000 individuals—suffer in privately operated facilities, their freedom reduced to a line item on corporate balance sheets.¹

This Note examines the troubling legal and ethical problem created by America's partnership with prison privatization. By contrasting the U.S. model with recent reforms in countries like Commonwealth nations, this Note exposes a system that prioritizes shareholder returns over rehabilitation and human dignity. The roots of this crisis run deep in slavery and Jim Crow America. While U.S. courts cling to outdated precedents permitting privatization under the Thirteenth Amendment's punitive clause (a holdover from post-Civil War labor exploitation),² countries abroad are charting a different course and actively learning from their mistakes.

Private prison contracts frequently include occupancy guarantees, which essentially promise a consistent stream of human inventory.³ Industry lobbyists advocate for harsher punishment legislation to maintain a captive market and protect their profit stream. Proponents and critics of private prisons debate whether the Constitution's nondelegation doctrine prohibits governments from outsourcing their core power of incarceration to profit-driven corporations.⁴

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1. Kristen M. Budd, *Private Prisons in the United States*, SENT'G PROJECT (Feb. 21, 2024), <https://www.sentencingproject.org/reports/private-prisons-in-the-united-states/> [<https://perma.cc/6QAT-W5PY>].

2. Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L. J. 437, 450-54 (2005).

3. *Criminal: How Lockup Quotas and "Low-Crime Taxes" Guarantee Profits for Private Prison Corporations*, IN PUB. INT. (Sep. 19, 2013), <https://inthepublicinterest.org/criminal-how-lockup-quotas-and-low-crime-taxes-guarantee-profits-for-private-prison-corporations/> [<https://perma.cc/3DZM-SJDS>].

4. Warren L. Ratliff, *The Due Process Failure of America's Prison Privatization Statutes*, 21 SETON HALL J. LEGIS. & PUB. POL'Y 371, 382-83 (1997).

What is the outcome? A system that disproportionately warehouses Black and Latino Americans, turning underprivileged and vulnerable communities into profit centers. New Zealand's Auckland South Corrections Facility—a public-private partnership (“PPP”) requiring operators to reduce recidivism by 10% compared to state-run prisons—demonstrates that profit motives need not eclipse rehabilitative goals when contracts are tethered to human rights outcomes.⁵

The privatization of prisons in the United States is not merely a matter of operational efficiency; it represents a fundamental shift in how society views punishment and rehabilitation. This commodification of incarceration has far-reaching consequences that extend beyond prison walls, shaping criminal justice policy and perpetuating cycles of poverty and recidivism.⁶

Unlike many of its international counterparts, the U.S. has allowed the profit motive to become deeply entrenched in its correctional system. This creates a troubling conflict of interest: private prison companies have a financial incentive to maintain high incarceration rates, directly opposing the societal goal of reducing crime and recidivism. The result is a system that prioritizes cost-cutting over prisoner welfare and rehabilitation programs. The major global private prison companies today are GEO Group, G4S, and Sodexo.⁷

The United Kingdom's (“UK”) experience with private prisons offers both cautionary lessons and potential guidance for American reform. Despite maintaining a far smaller prison population—roughly 83,000 compared to America's 2.3 million—Britain actually holds a higher percentage of its prisoners in private facilities.⁸ What makes the UK system particularly instructive is how it has attempted to harness private-sector efficiency while maintaining public accountability through structured oversight and performance metrics.⁹ Though these measures have not prevented all the problems inherent to privatization, as evidenced by several high-profile failures, they represent a more balanced approach than America's largely unregulated system. The British

5. *Contract Management*, ARA POUTAMA AOTEAROA [DEP'T CORR.], https://www.corrections.govt.nz/about_us/getting_in_touch/our_locations/auckland_south_corrections_facility/contract_management#:~:text=A%20zero%20tolerance%20approach%20has,programme%20into%20any%20other%20prison [https://perma.cc/5BJQ-NTNR] (last visited Mar. 11, 2026).

6. Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U.L. REV. 149, 176 (2010).

7. James Byrne, Kimberly R. Kras & Lina Maria Marmolejo, *International Perspectives on the Privatization of Corrections*, 18 CRIMINOLOGY & PUB. POL'Y 477, 491 (2019), <https://globccci.org/wp-content/uploads/2021/05/International-perspectives-on-the-privatization-of-corrections-2-1.pdf> [https://perma.cc/9Q93-GGSE].

8. Sydney Young, *Capital and the Carceral State: Prison Privatization in the United States and United Kingdom*, HARV. INT'L REV. (Sep. 23, 2020), <https://hir.harvard.edu/us-uk-prison-privatization/> [https://perma.cc/7A2F-ETRR].

9. *How We Inspect*, HIS MAJESTY'S INSPECTORATE PRISONS, <https://hmiprisons.justice.inspectorates.gov.uk/how-we-inspect/> [https://perma.cc/4UYZ-BRQ3] (last visited Mar. 11, 2026).

model, despite its flaws, demonstrates that while prison privatization carries inherent risks, those risks can be better managed through careful regulation and alignment of profit incentives with the public interest—lessons that could prove valuable in reforming America’s troubled private prison industry.¹⁰

Australia’s experience offers a cautionary tale. After embracing privatization in the 1990s, several Australian states are now grappling with the long-term consequences.¹¹ Victoria’s decision to return its privately-run Port Phillip Prison to public management by 2025 reflects growing concerns about the efficacy and ethics of for-profit incarceration.¹² This shift comes after years of data showing that private facilities failed to deliver on promises of cost savings and improved outcomes.¹³

New Zealand’s approach demonstrates a more nuanced strategy. The Auckland South Corrections Facility, known as Wiri, operates under a public-private partnership model that ties financial incentives to rehabilitation outcomes.¹⁴ This innovative contract structure attempts to align profit motives with public interest, requiring the private operator to outperform state-run facilities in reducing reoffending rates.¹⁵ The prison’s contract demands better outcomes, especially for New Zealand’s indigenous Māori population, and backs these demands with real financial incentives and penalties.¹⁶ Everything about Wiri, from its architecture to its rehabilitation programs, focuses on preparing people for life outside prison walls.¹⁷ While it is too soon to declare victory, New Zealand’s experiment shows what might be possible if we force private prison companies to profit from rehabilitation rather than incarceration. Their approach offers valuable lessons for reforming America’s deeply flawed system.

This Note argues that America’s tolerance of incarceration-for-profit not only decimates the purpose of incarceration and the overall goals of rehabilitation and justice, but it violates basic human rights and increases recidivism rates. The for-profit nature of private prisons directly clashes with

10. See, e.g., *id.*

11. See Richard Harding, *Private Prisons in Australia: The Second Phase*, in 84 TRENDS & ISSUES IN CRIME & CRIM. JUST. (1998).

12. Press release, Enver Erdogan, Vict. St. Gov’t, Creating a Modern and Secure Corrections System (June 26, 2024), <https://www.premier.vic.gov.au/sites/default/files/2024-06/240626-Creating-A-Modern-And-Secure-Corrections-System.pdf> [<https://perma.cc/35B7-NK8E>].

13. *Id.*

14. SONAL SHAH & OLIVIER BROUSSE, DESIGNING A PUBLIC-PRIVATE PARTNERSHIP TO DELIVER SOCIAL OUTCOMES (2019), https://beeckcenter.georgetown.edu/wp-content/uploads/2019/06/innovation_spotlight_pages_bleeds.pdf [<https://perma.cc/95GB-G572>].

15. Lauren-Brooke Eisen, *Down Under, More Humane Private Prisons*, PULITZER CTR. (Nov. 14, 2018), <https://pulitzercenter.org/stories/down-under-more-humane-private-prisons> [<https://perma.cc/TH5Q-ZKF7>].

16. Lauren-Brooke Eisen, *The Private Prison Experiments: Is There Any Positive in For-Profit Imprisonment?*, PULITZER CTR. (Feb. 25, 2019), <https://pulitzercenter.org/stories/private-prison-experiments-there-any-positive-profit-imprisonment> [<https://perma.cc/QMY9-KJX9>].

17. *Id.*

these principles, as the profit motive can incentivize cost-cutting measures that compromise prisoner welfare, rehabilitation programs, and overall safety. Through careful analysis of international models, this Note proposes recommendations for serious reform. Justice should not be privatized, and billionaire companies should not be profiting off the suffering of those who were sent to prison for rehabilitation and reform. If the United States is to continue with private prison contracts, there is a way to ensure government and public oversight and accountability, and incentives to increase rehabilitation rates and decrease recidivism rates. The stakes could not be higher. The world and justice would do better without having billionaire companies run jails and prisons, but realistically, the government will continue to contract with private companies. That does not mean we cannot try to learn from other countries on how to implement private contracts ethically and effectively, and install proper, strict oversight mechanisms to reduce recidivism rates and aid inmates on their paths to freedom and rehabilitation.

When punishment becomes a commodity, the state abandons its fundamental duty to administer justice fairly and humanely. This Note charts a path back towards a system where incarceration serves the public good, not private profit—an initiative that countries abroad have focused on and proven necessary to lower crime rates and increase rehabilitation outcomes.

II. THE RISE OF PRIVATE PRISONS IN THE UNITED STATES

The modern era of private prisons in the United States traces its roots to the early 1980s, but the concept of profiting from incarceration has a much longer and darker history in America.¹⁸ To understand the current landscape, we must first acknowledge the troubling origins of prison labor and privatization.

A. Roots in Convict Leasing and the War on Drugs

In the aftermath of the Civil War, southern states exploited a loophole in the Thirteenth Amendment: “[n]either slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.”¹⁹ This gave rise to convict leasing systems that effectively re-enslaved Black Americans, forcing them to work on plantations, in mines, and on railroads under brutal conditions.²⁰ This system was immensely profitable for both private businesses and state governments, with Alabama deriving 73% of its

18. Gabriella A. Badmus, *Privatization and Flawed Punishment: An Economic Analysis and Critique of Private Prisons in the United States and United Kingdom*, 44 NW. J. INT'L L. & BUS. 129, 133 (2024).

19. Shane Bauer, *The True History of America's Private Prison Industry*, TIME (Sep. 25, 2018), <https://time.com/5405158/the-true-history-of-americas-private-prison-industry/> [https://perma.cc/TT6A-YFBV]; U.S. CONST. amend. XIII (emphasis added).

20. See Bauer, *supra* note 19.

yearly revenue from convict leasing by 1898.²¹

This exploitative legacy continues to shape the modern prison labor system in fundamental ways. From the moment they enter the prison gates, incarcerated people lose the right to refuse to work. Today, more than 76% of incarcerated workers surveyed by the Bureau of Justice Statistics say that they are required to work or face additional punishment such as solitary confinement, denial of opportunities to reduce their sentence, and loss of family visitation.²²

The economic dynamics also echo those of earlier eras. Incarcerated workers produce more than \$2 billion per year in goods and more than \$9 billion per year in services for the maintenance of the prisons, yet in seven states, incarcerated workers are not paid at all for the vast majority of work assignments.²³ Those who are paid earn wages that have remained essentially unchanged for decades—on average, between \$0.13 and \$0.52 per hour nationwide.²⁴

Just as convict leasing stripped incarcerated people of basic protections, U.S. law explicitly excludes incarcerated workers from the most universally recognized workplace protections. Incarcerated workers are not covered by minimum wage laws or overtime protection, are not afforded the right to unionize, and are denied workplace safety guarantees.²⁵

The racial dimensions of this system remain pronounced. The same communities that were targeted by the Black Codes and convict leasing continue to be disproportionately affected by mass incarceration today. The exploitation of incarcerated workers is rooted in the “exception clause” of the 13th Amendment, which bars slavery except for people who have been convicted of crimes.²⁶

While these overtly racist practices eventually faded, the idea of prisons as profit centers and cheap labor never disappeared. The modern private prison industry emerged in the 1980s, coinciding with two significant trends: the War on Drugs and a crisis of confidence in the government’s ability to manage recidivism and fund the resulting demand for prison space.²⁷ President Reagan’s decision to escalate the War on Drugs led to a surge in incarceration rates,

21. Sylvia Mendoza, *From Convict Leasing to Today’s Prison Labor System*, N.J. ST. BAR FOUND. (Apr. 24, 2025), <https://njsbf.org/2025/04/24/from-convict-leasing-to-todays-prison-labor-system/> [https://perma.cc/V8F3-LPPS].

22. AM. C.L. UNION & UNIV. OF CHI. L. SCH. GLOB. HUM. RTS. CLINIC, CAPTIVE LABOR: EXPLOITATION OF INCARCERATED WORKERS 5 (2022), <https://www.aclu.org/publications/captive-labor-exploitation-incarcerated-workers> [https://perma.cc/9ZK7-NEAD].

23. *Id.* at 38.

24. *Id.* at 55.

25. *Id.* at 6.

26. U.S. CONST. amend. XIII.

27. Mitchell Abood, *The Evolution of Private Prison Incarceration in the United States*, U. MIAMI L. REV. (Jan. 31, 2021), <https://lawreview.law.miami.edu/evolution-private-prison-incarceration-united-states/> [https://perma.cc/2E34-MHXT]; JAMES AUSTIN & GARRY COVENTRY, EMERGING ISSUES ON PRIVATIZED PRISONS 1-2 (2001), <https://www.ojp.gov/pdffiles1/bja/181249.pdf> [https://perma.cc/P5F8-7QTP].

creating an increased demand for prison space.²⁸

The numbers are staggering. Incarcerations for nonviolent drug offenses increased from approximately 50,000 in 1980 to 400,000 by 1997.²⁹ Between 1980 and 1998, the number of people in state and federal prisons on drug charges increased twelvefold, from roughly 24,000 to 285,009.³⁰ By 1998, drug offenders constituted 21% of state prison populations and 59% of federal inmates—compared to just 6% and 25% respectively in 1980.³¹ These figures represent over 1.5 million new drug-related prison admissions during this period alone.³²

By prioritizing punishment over prevention and treatment and focusing on drug offenses, the government implemented increasingly punitive policies, including mandatory minimum sentencing and zero-tolerance policies. These policies led to a surge in arrests and convictions for drug-related crimes, particularly impacting minority communities.³³ This explosion in the prison population overwhelmed existing state and federal correctional facilities, creating an unprecedented demand for additional prison beds.³⁴

Private prison corporations, eager to capitalize on this demand, presented themselves as cost-effective and efficient solutions, rapidly expanding their facilities and lobbying for policies that would further increase incarceration rates, thereby solidifying their role in the American correctional system.

B. The Birth of the Modern Industry

In 1983, Corrections Corporation of America (“CCA,” now known as “CoreCivic”) was founded, marking the birth of the contemporary private prison industry.³⁵ In the same year, CCA secured its first contract with the U.S. Department of Justice for the Bureau of Immigration and Customs Enforcement (formerly “INS”), designing, building, financing, and operating a secure

28. *Id.*

29. *War on Drugs*, ENCYC. BRITANNICA (Mar. 2, 2026), <https://www.britannica.com/topic/war-on-drugs> [<https://perma.cc/UW2L-3TM3>].

30. *Punishment and Prejudice: Racial Disparities in the War on Drugs*, HUM. RTS. WATCH (May 2000), <https://www.hrw.org/reports/2000/usa/Rcedrg00-03.htm> [<https://perma.cc/VGG9-N9GR>].

31. *Id.*

32. *Id.*

33. *Drug Arrests Stayed High Even as Imprisonment Fell From 2009 to 2019*, PEW CHARITABLE TRS. (Feb. 15, 2022), <https://www.pew.org/en/research-and-analysis/issue-briefs/2022/02/drug-arrests-stayed-high-even-as-imprisonment-fell-from-2009-to-2019> [<https://perma.cc/8WCT-FM5N>].

34. *In ‘90s, Prison Building by States and U.S. Government Surged*, N.Y. TIMES (Aug. 8, 1997), <https://www.nytimes.com/1997/08/08/us/in-90-s-prison-building-by-states-and-us-government-surged.html> [<https://perma.cc/GR54-A8G4>].

35. Abood, *supra* note 27; Kristian Burt, *The Genesis of Corecivic’s Privatized Prison Labor*, N.Y.U. GALLATIN SCH. INDIVIDUALIZED STUDY: CONFLUENCE (Sep. 23, 2022), <https://confluence.gallatin.nyu.edu/context/interdisciplinary-seminar/the-genesis-of-corecivics-privatized-prison-labor> [<https://perma.cc/NU7H-DHRG>].

correctional facility.³⁶ This contract is considered the beginning of the private prison industry, and CCA quickly repurposed a motel in Houston to house undocumented immigrants, opening the Houston Processing Center in 1984.³⁷

The company's revenue in 2015 exceeded \$1.7 billion, up from \$1.65 billion the previous year, driven by lucrative state contracts.³⁸ In 2024, CoreCivic earned 51% of its revenue from the Federal Bureau of Prisons, ICE, and the U.S. Marshals Service.³⁹ By 2023, CCA manages 43 correctional facilities—39 of them company-owned—capable of housing up to 65,000 inmates.⁴⁰ In October 2016, CCA rebranded itself as CoreCivic amid scrutiny of the private prison industry.⁴¹

Since 2024, CoreCivic has been the second-largest private corrections company in the United States and the nation's largest owner of partnership correctional, detention, and residential reentry facilities, managing more than 65 state and federal correctional and detention facilities with a capacity of more than 76,000 beds in 19 states and the District of Columbia.⁴²

The private prison industry's expansion was staggering. Between 2000 and 2016, the number of people held in private prisons increased five times faster than the total prison population.⁴³ By the end of 2022, 8%, roughly 90,873 people of the 1.2 million inmates in federal and state prisons, were in private facilities.⁴⁴ Moreover, people of color are disproportionately placed in private

36. Burt, *supra* note 35.

37. Harbeer Sandhu, *Houston to Host World's First Museum Dedicated to the Private Prison Industry*, FREE PRESS HOU. (Oct. 15, 2026), https://freepresshouston.com/holiday_inn/ [<https://perma.cc/P88H-HHHC>].

38. Rupert Neate, *Welcome to Jail Inc: how private companies make money off US prisons*, GUARDIAN (June 16, 2016), <https://www.theguardian.com/us-news/2016/jun/16/us-prisons-jail-private-healthcare-companies-profit> [<https://perma.cc/CQA6-LX8H>].

39. *Id.*

40. JUST. POL'Y INST., GAMING THE SYSTEM: HOW THE POLITICAL STRATEGIES OF PRIVATE PRISON COMPANIES PROMOTE INEFFECTIVE INCARCERATION POLICIES 1 (Oct. 2011), https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/gaming_the_system_-_executive_summary.pdf#:~:text=In%202010%2C%20CCA%20saw%20record%20revenue%20of,are%20held%20in%20prisons%20run%20by%20CCA [<https://perma.cc/YP7K-DVMK>]; *CoreCivic Inc.*, AM. FRIENDS SERV. COMM. (Sep. 15, 2024), <https://investigate.afsc.org/company/corecivic> [<https://perma.cc/9J9Q-74NK>].

41. *Corrections Corporation of America Rebrands as CoreCivic*, CORECIVIC (Oct. 28, 2016), <https://www.corecivic.com/news/corrections-corporation-of-america-rebrands-as-corecivic> [<https://perma.cc/BD5E-JE6N>]; Casey Tolan, *The largest private prison company in America is changing its name—but can't escape a troubled record*, HUM. RTS. DEF. CTR. (Oct. 28, 2016, at 18:00 EST), <https://www.humanrightsdefensecenter.org/action/news/2016/cca-changes-its-name-pln-comments/> [<https://perma.cc/7HKP-3HVX>].

42. *CoreCivic, Inc. SEC 10-K Report*, TRADINGVIEW (Feb. 21, 2025), <https://www.tradingview.com/news/tradingview:93d4dcc9bfaba:0-corecivic-inc-sec-10-k-report/> [<https://perma.cc/2VZG-W8QZ>].

43. Kara Gotsch & Vinay Basti, *Capitalizing on Mass Incarceration: U.S. Growth in Private Prisons*, SENT'G PROJECT (Aug. 2, 2018), <https://www.sentencingproject.org/reports/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons/> [<https://perma.cc/7M7S-QGAR>].

44. Budd, *supra* note 1.

prisons when compared to white prisoners.⁴⁵

Supporters of privatization argue that these facilities can operate more efficiently than government-run prisons, saving taxpayer money and providing better services to inmates.⁴⁶ However, decades of research have failed to substantiate these cost-saving claims. Critics argue that the profit motive creates perverse incentives that undermine the goals of rehabilitation.⁴⁷

The for-profit nature of these prisons is problematic as private prison interests are not necessarily in line with society's interests.⁴⁸ Private prisons, unlike their public counterparts, answer not to the people but to boards and shareholders; thus, they have not only an incentive but a duty to their shareholders to maintain a profitable bottom line.⁴⁹ Private prisons also cut educational, rehabilitative, and safety programs and protocols to reduce costs as they have the leeway to run these facilities without governmental oversight.⁵⁰

The two largest private prison companies in the world, GEO Group and CoreCivic, receive payments from the government through contracts that typically specify a per-diem rate for each inmate housed.⁵¹ These contracts often include "occupancy guarantees" or minimum occupancy clauses, which require the government to pay for a certain number of beds regardless of actual occupancy.⁵² These contracts incentivize private prisons to maintain high incarceration rates to maximize profits.

C. Lobbying Efforts of Private Prison Companies

The private prison industry engages in extensive lobbying and political donations to influence policies that affect their bottom line. Since 2000, private prison companies have "contributed over \$7.2 million to state candidates and political parties."⁵³ GEO Group and CoreCivic have also spent hundreds of thousands of dollars annually on federal lobbying efforts, focusing on bills related to incarceration and law enforcement.⁵⁴

The industry's growth has not been without controversy. A 2016 U.S. Department of Justice analysis found higher rates of violence and infractions in

45. Abood, *supra* note 27.

46. Stephen McFarland, Christ McGowan & Tom O'Toole, *Prisons, Privatization, and Public Values*, CORN. U. (Dec. 2002), https://labs.aap.cornell.edu/sites/aap-labs/files/2022-10/McFarland%20et.al_2002.pdf [<https://perma.cc/44KM-YRVF>].

47. Abood, *supra* note 27.

48. *Id.*

49. *Id.*

50. Badmus, *supra* note 18, at 138-40.

51. *Id.* at 137-38.

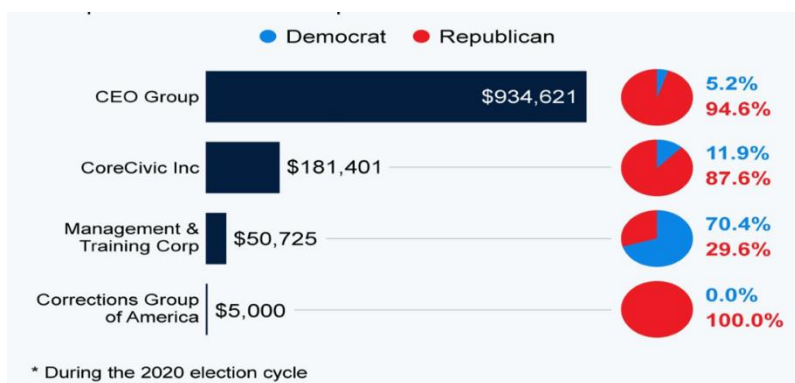
52. *Id.* at 137-38, 144.

53. JUST. POL'Y INST., *supra* note 40, at 2.

54. *Id.*

private prisons compared to their public counterparts.⁵⁵ Moreover, the profit motive has led to troubling practices. For instance, some private prison contracts include “occupancy guarantees,” essentially promising a steady stream of inmates.⁵⁶ This creates an incentive for these companies to lobby for harsher sentencing laws and against reforms that might reduce incarceration rates.

Figure 1. Private Prison Company Donations During the 2020 Election Cycle.⁵⁷



GEO Group has been particularly active in supporting President Trump during his first administration and now. In the 2024 election cycle, GEO Group became the first corporation to max out its Political Action Committee (“PAC”) contribution to Trump’s campaign, giving \$5,000.⁵⁸ Additionally, a GEO Group subsidiary contributed \$500,000 to a pro-Trump super PAC.⁵⁹ This continues a pattern from previous elections; in 2016, GEO Group donated \$225,000 to a pro-Trump super PAC shortly after the Obama administration announced plans to phase out private prisons.⁶⁰ In 2021, President Biden signed an executive

55. U.S. DEP’T JUST.: OFF. INSPECTOR GEN., REVIEW OF THE FEDERAL BUREAU OF PRISONS’ MONITORING OF CONTRACT PRISONS (2016), https://oig.justice.gov/sites/default/files/reports/el606_0.pdf [<https://perma.cc/CD2Q-NJ2N>].

56. *Criminal: How Lockup Quotas and “Low-Crime Taxes” Guarantee Profits for Private Prison Corporations*, *supra* note 3.

57. James Walker, Chantal Da Silva & Jacob Jarvis, *Private Prison Lobby Targets House, Senate Races as Biden Pledges Crackdown*, NEWSWEEK (July 8, 2020), <https://www.newsweek.com/private-prison-lobby-targets-house-senate-races-biden-pledges-crackdown-1515866> [<https://perma.cc/4NU4-DW42>].

58. Robert Maguire & Lauren White, *Private prison behemoth is first corporation to max out to Trump*, CREW (July 3, 2024), <https://www.citizensforethics.org/reports-investigations/crew-investigations/private-prison-behemoth-is-first-corporation-to-max-out-to-trump/> [<https://perma.cc/CV5Y-4DEF>].

59. *Id.*

60. Maya Gold, *Following super PAC support, private prison company wins Trump admin contract*, CREW (Apr. 17, 2017), <https://www.citizensforethics.org/reports-investigations/crew-investigations/following-super-pac-support-private-prison-company-wins-trump-admin-contract/> [<https://perma.cc/2MMB-499K>].

order instructing the Department of Justice not to renew contracts with private prisons.⁶¹ However, on January 20, 2025, Trump rescinded President Biden's ban on his first day back in office. After Trump's election, GEO's stock prices soared.⁶² And shortly after Trump assumed office, Attorney General Jeff Sessions announced that the new administration would continue the use of private prisons.⁶³ A few months later, the Trump administration awarded GEO an \$110 million, 10-year federal contract.⁶⁴

D. Cutting Costs to Prioritize Profits

Private prison companies often cut costs by hiring less-experienced staff, providing less training, and offering lower wages and benefits than public institutions.⁶⁵ This leads to higher turnover rates—40.9% annually in private prisons compared to 15.4% in public facilities—resulting in less experienced guards and potentially more dangerous conditions for both inmates and staff. Incarcerated individuals in privately operated facilities face a significantly higher likelihood of receiving disciplinary infractions—approximately 15% more—than those housed in public institutions.⁶⁶ This disparity carries significant consequences at the parole stage, as incarcerated individuals with disciplinary records face substantially diminished prospects of release, ultimately prolonging their period of incarceration.⁶⁷

Private prisons in the United States have historically provided minimal rehabilitation programming, largely due to their per-diem payment structure that incentivizes cutting costs rather than investing in meaningful rehabilitation.⁶⁸ The contracts, like Arizona's example with GEO Group's Phoenix West prison, typically include only basic requirements for programming.⁶⁹ For instance, they may mandate literacy programs as required by state law, but even these come with problematic provisions—prisoners can be denied parole for failing to meet reading-level requirements, even though they have zero control over the quality

61. Lauren-Brooke Eisen, *Trump Reverses Biden Order that Eliminated DOJ Contracts with Private Prisons*, BRENNAN CTR. FOR JUST., (Jan. 20, 2025), <https://www.brennancenter.org/our-work/analysis-opinion/trump-reverses-biden-order-eliminated-doj-contracts-private-prisons> [<https://perma.cc/PF22-NDTJ>].

62. Gold, *supra* note 60.

63. *Id.*

64. *Exposing Pay-to-Play Scheme Enacted by the GEO Group*, CAMPAIGN LEGAL CTR., <https://campaignlegal.org/cases-actions/exposing-pay-play-scheme-enacted-geo-group> [<https://perma.cc/Y8M6-HV3X>] (last visited Mar. 24, 2026).

65. Noah Glick, *As Private Prisons Push to Keep Costs Down, Workers Can Pay The Price*, PULITZER CTR. (Mar. 10, 2020), <https://pulitzercenter.org/stories/private-prisons-push-keep-costs-down-workers-can-pay-price> [<https://perma.cc/X7WG-TG6P>].

66. Abood, *supra* note 27.

67. *Id.*

68. John F. Pfaff, *The Incentives of Private Prisons*, 52 ARIZ. ST. L.J. 991, 1001-02 (2020).

69. *Id.*

of education provided.⁷⁰

Most U.S. private prisons face structural challenges that limit the effectiveness of rehabilitation.⁷¹ Many prisoners serve such short sentences (parolees serve only one-third of their sentences) that they cannot complete comprehensive programs.⁷² Additionally, private operators often struggle to coordinate with third-party service providers who deliver specialized programming, particularly when it comes to sharing data and measuring outcomes to track progress.⁷³

The federal prison system has historically been the biggest user of private facilities in the United States. However, this trend has shifted significantly in recent years. In 2016, the Obama administration signaled a move away from private prisons, citing concerns about safety and efficacy, but this policy was reversed under President Trump.⁷⁴ Following President Biden's executive order to phase out private prisons, the number of people held in federal private facilities dropped to 13,834 in 2022—an 11% decrease since 2000.⁷⁵ Despite this reduction, a substantial population remains in these for-profit institutions.⁷⁶ The Biden order explicitly excluded facilities used for immigration detention, leaving a significant portion of the private prison industry intact, further increased by Trump's immigration policies and mass deportation goals.⁷⁷

E. Private Detention Centers and Cheap Prison Labor

The picture becomes more complex when considering immigration detention. While federal prisons are moving away from privatization, immigrant detention facilities heavily rely on private operators. Under the Department of Homeland Security's oversight, 90.8% of people detained in Immigration and Customs Enforcement ("ICE") custody each day are held in detention facilities owned or operated by private prison corporations.⁷⁸ This creates a stark contrast: as traditional federal prisons reduce their private prison populations, immigration detention remains firmly in the hands of private operators.

70. *Id.*

71. William Arbour, Guy Lacroix & Steeve Marchand, *Prison Rehabilitation Programs and Recidivism: Evidence from Variations in Availability*, 61 J. HUM. RES. 1 (Mar. 6, 2024), <https://jhr.uwpress.org/content/early/2024/01/30/jhr.1021-11933R2> [<https://perma.cc/SD5M-W2PK>].

72. *Id.* at 3.

73. *Id.*

74. Heather Long, *U.S. Justice Department to end use of private prisons*, CNN BUS. (Aug. 18, 2016), <https://www.cnn.com/2016/08/18/news/doj-to-end-use-of-private-prisons> [<https://perma.cc/R6PU-XBVC>].

75. Budd, *supra* note 1.

76. *Id.*

77. Exec. Order No. 14006, 86 Fed. Reg. 7483 (Jan. 26, 2021).

78. Eunice Hyunhye Cho, *Unchecked Growth: Private Prison Corporations and Immigration Detention, Three Years Into the Biden Administration*, AM. C.L. UNION (Aug. 7, 2023), <https://www.aclu.org/news/immigrants-rights/unchecked-growth-private-prison-corporations-and-immigration-detention-three-years-into-the-biden-administration> [<https://perma.cc/24KS-QP77>].

States have always shown a significant variance in the use of private prisons. States like Montana incarcerate almost half of their prison population in privately run facilities, but in another 23 states, private prisons are not used at all.⁷⁹ A total of 27 states and the federal government use private corporations like GEO Group, Core Civic, LaSalle Corrections, and Management and Training Corporation to run some of their corrections facilities.⁸⁰

Furthermore, U.S. private prisons have a history of using forced prison labor to avoid paying real wages for their labor needs to run the prison, no matter the harm that comes to the inmates. Privatized detention centers have put detainees to work for as little as one dollar per 8-hour workday.⁸¹ Fortunately for prison corporations, federal courts have determined that individuals in immigration detention and custodial institutions are not entitled to protection under labor statutes, such as the Fair Labor Standards Act, as they are not considered “employees.”⁸² This leaves detained individuals with minimal to no recourse for exploitation, allowing private prisons to pay detainees as little as one dollar per day for their duties and claim that it is voluntary.⁸³ These jobs consist of prison maintenance, janitorial duties, food preparation, and other tasks that maintain the very prisons that keep them. Overall, prisons spend less than 1% of their budgets on wages for incarcerated workers. Minimum wage laws and overtime protection do not apply to incarcerated laborers, and they are not granted the right to unionize or receive workplace safety guarantees.⁸⁴ The Thirteenth Amendment’s role in carving out an exception for forced labor in incarceration has led to widespread evasion of proper treatment of human beings confined in these prisons and using these inmates to profit and cut costs.

Seven states—Alabama, Arkansas, Florida, Georgia, Mississippi, South Carolina, and Texas—pay incarcerated workers nothing for the vast majority of work assignments.⁸⁵ Nationwide, incarcerated workers produce at least two billion dollars in goods and over nine billion in prison maintenance services annually.⁸⁶ The average minimum hourly wage paid to incarcerated workers for

79. Budd, *supra* note 1.

80. *Id.*

81. Austin Nielsen-Reagan, *The Profitability of Inhumanity: How Corporate Power Gives Rise to Forced Labor in Privatized Immigration Detention*, SYSTEMIC JUST. J. (2001), https://systemicjustice.org/wp-content/uploads/2021/10/Nielsen-Reagan_FinalPaper.pdf [<https://perma.cc/JT2P-KNQC>].

82. *See* Ndambi v. CoreCivic, Inc., 990 F.3d 369 (4th Cir. 2021) (holding that while incarcerated individuals have a constitutional right to basic necessities such as food, shelter, and medicine, this protection exists solely to ensure humane treatment and does not extend to entitling them to minimum wage protections under the Fair Labor Standards Act).

83. *Id.*

84. *Captive Labor: Exploitation of Incarcerated Workers*, AM. C.L. UNION (June 15, 2022), <https://www.aclu.org/news/human-rights/captive-labor-exploitation-of-incarcerated-workers> [<https://perma.cc/HZE2-RJYV>].

85. AM. C.L. UNION & UNIV. OF CHI. L. SCH. GLOB. HUM. RTS. CLINIC, *supra* note 22, at 10.

86. *Id.* at 6.

non-industry jobs is \$0.13, and the average maximum hourly wage is \$0.52.⁸⁷ Even these meager wages are subject to deductions of up to 80% for taxes, “room and board” expenses, and court costs.⁸⁸

More than 76% of incarcerated workers report being required to work or face punishment such as solitary confinement, denial of opportunities to reduce their sentence, and loss of family visitation.⁸⁹ Incarcerated workers are excluded from the Fair Labor Standards Act’s minimum wage and overtime protections, Title VII of the Civil Rights Act, the National Labor Relations Act’s right to collectively bargain, and the Occupational Safety and Health Act’s workplace safety guarantees.⁹⁰ As one Louisiana sheriff candidly stated while opposing sentencing reform: incarcerated laborers are a “necessary evil to keep the [prison] doors open”—workers who “wash cars, change oil in our cars, cook in the kitchen . . . [is] where we save money.”⁹¹

Almost 70% of inmates received no formal job training before being assigned to their positions.⁹² Workers are routinely assigned hazardous tasks in unsafe conditions without the standard training or protective gear that would be legally mandated in any workplace outside prison walls.⁹³ Injury logs from the California Prison Industry Authority alone documented more than 600 injuries over a four-year period, including body parts strained, crushed, lacerated, or amputated.⁹⁴ Incarcerated workers have been burned with chemicals, maimed by industrial machinery, and killed on the job—injuries that investigations repeatedly conclude could have been prevented with proper training, machine guarding mechanisms, or personal protective equipment.⁹⁵ When workers attempt to access remedies for these injuries, they are met with prison grievance systems that are “cumbersome, opaque, and ineffective,” and the Prison Litigation Reform Act of 1996 has erected “nearly insurmountable barriers” to prisoners seeking to enforce their rights in federal courts.⁹⁶ The system is designed not to protect incarcerated workers, but to ensure their labor remains extractable at minimal cost and maximal control.

The role of private prisons continues to be a contentious issue as we navigate the legacy and the persisting problem of mass incarceration. Supporters claim that competition among private providers drives innovation, reduces operational expenses, and frees up government resources.⁹⁷ Critics, however, contend that

87. *Id.* at 10.

88. *Id.* at 11.

89. *Id.* at 5.

90. *Id.* at 11-12.

91. *Id.* at 18.

92. *Id.* at 12.

93. *Id.* at 13.

94. *Id.* at 12.

95. *Id.*

96. *Id.*

97. See André Douglas Pond Cummings & Adam Lamparello, *Private Prisons and the New Marketplace for Crime*, 6 WAKE FOREST J.L. & POL’Y 407 (2016).

the profit motive inherent in private prisons creates perverse incentives, leading to compromised safety, inadequate staffing, and substandard healthcare for inmates.⁹⁸ Supporters argue that properly and effectively regulated private facilities can generate the necessary innovation and capacity.⁹⁹ Moreover, critics point to evidence suggesting that private prisons are not always cheaper than their public counterparts, as private prisons often engage in extensive lobbying to influence policies that maintain high incarceration rates.¹⁰⁰

It is evident that the private prison industry, which emerged following a dark chapter in American history, continues to influence our criminal justice system in significant and frequently alarming ways, profiting off justice.

III. THE RISE OF PRIVATE PRISONS IN COMMONWEALTH NATIONS

The privatization of prisons, while often associated with the U.S., has taken root in several Commonwealth nations and other countries worldwide. The modern prison privatization phenomenon emerged in the United States in the mid 1980s and quickly spread to Australia and the United Kingdom. This section examines the development and current state of private prisons in the United Kingdom, Australia, and New Zealand, highlighting the unique challenges and debates surrounding prison privatization in these nations.

A. The United Kingdom: The First European Country to Adopt For-Profit Prisons in the Modern Era

The U.K. was the first European country to adopt for-profit prisons in the modern era. Prime Minister Margaret Thatcher's government laid the foundation for prison privatization in Britain as part of her broader mission to privatize public services.¹⁰¹ Under her leadership in the 1980s, the Conservative government framed private prisons as a solution to both fiscal and operational challenges in the prison system.¹⁰² Thatcher's free-market philosophy, which emphasized private-sector efficiency over public-sector management, provided the theoretical basis for introducing market competition into corrections. In 1987, the Parliamentary Home Affairs Select Committee conducted a study that would ultimately endorse private prisons, marking the first serious consideration of prison privatization in modern British history.¹⁰³ The Committee argued that "the present state of our prisons, blighted by age, severe overcrowding, unsanitary conditions, and painfully slow progress in modernization makes it

98. See Dolovich, *supra* note 2.

99. AUSTIN & COVENTRY, *supra* note 27.

100. Amy Pratt, *Private Prison Companies and Sentencing*, 39 OHIO STATE L. STUD. RSCH. DRUG ENF'T & POL'Y CTR. 2 (2022).

101. Badmus, *supra* note 18, at 136.

102. *Id.*

103. Young, *supra* note 8.

necessary to consider urgent new ways of dealing with these problems . . .”¹⁰⁴

This aligned with Thatcher’s larger privatization agenda, which had already transformed British utilities, transportation, and housing. Though the first private prison would not open until 1992 under John Major’s government, it was Thatcher’s ideological groundwork and market-oriented reforms that made private incarceration politically feasible in the U.K.¹⁰⁵ Facing a surge in the prison population during the late 1980s, the Thatcher government turned to privatization as an ideologically driven, cost-effective solution, championed by the Adam Smith Institute.¹⁰⁶ A 1986 Parliamentary committee concluded that contracting out to the private sector would relieve taxpayers of “immediate burden,” accelerate construction, and produce “greatly enhanced architectural efficiency and excellence.”¹⁰⁷ This decision created the policy framework that would eventually lead Britain to privatize prisons at a higher rate than any other European nation. In the early 1990s, the Thatcher government’s recommendations were implemented as Conservative Prime Minister John Major’s sentencing policies were more stringent.¹⁰⁸ Major maintained that “society must condemn a little more and understand a little less.”¹⁰⁹ The legal framework for privatization was established with the Criminal Justice Act of 1991, which empowered the Home Secretary to contract out prison services to the private sector.¹¹⁰ The United Kingdom converted certain public prisons into private facilities, in contrast to the United States, which contracted with private corporations to construct cheap detention facilities.¹¹¹

1. Implementation and Expansion of Private Prisons

In May 1992, Her Majesty’s Prison Wolds (“HMP Wolds”), a male penitentiary operated by a private contractor that later became part of G4S, became the first privately operated prison in the United Kingdom.¹¹² Despite initial opposition from the Labour Party, the privatization trend continued after Tony Blair’s government came to power in 1997.¹¹³ In a surprising policy

104. Badmus, *supra* note 18, at 136.

105. Chris Edwards, *Margaret Thatcher’s Privatization Legacy*, 37 CATO J. 89 (2017).

106. *Private Punishment: Who Profits?*, PRISON REFORM TR. (Jan. 2005), https://prisonreformtrust.org.uk/wp-content/uploads/old_files/Documents/private%20punishment%20who%20profits.pdf [<https://perma.cc/E8RQ-9XH3>].

107. *Id.*

108. Stephen Farrall, *Making Sense of Thatcherism and Crime*, REV. 31, <http://review31.co.uk/essay/view/19/making-sense-of-thatcherism-and-crime> [<https://perma.cc/EHX5-YLRN>] (last visited Mar. 26, 2026).

109. Donald Macintyre, *Major on Crime: Condemn More, Understand Less*, INDEPENDENT (Feb. 21, 1993), <https://www.independent.co.uk/news/major-on-crime-condemn-more-understand-less-1474470.html> [<https://perma.cc/2Z4F-PP5T>].

110. Criminal Justice Act 1991, c. 53 (U.K.).

111. Young, *supra* note 8.

112. Badmus, *supra* note 18, at 137.

113. *Id.*

continuation, Blair's administration opened seven new private prisons between 1997 and 2007, demonstrating the extent to which privatization had become entrenched in UK prison policy across party lines.¹¹⁴

As of 2014, private companies operated 14 prisons across England and Wales, housing roughly 17% of the prison population in those jurisdictions.¹¹⁵ The contracts were shared between three companies: G4S Justice Services, Serco Custodial Services, and Sodexo Justice Services.¹¹⁶ In terms of revenue, G4S brought in £7.7 billion in 2019, Serco generated £3.9 billion the following year, and Sodexo reported €17.43 billion in international revenue in 2021.¹¹⁷ Of the fourteen private prisons in England and Wales, Sodexo runs four, and G4S and Serco run five each.¹¹⁸ The United Kingdom incarcerates more of its population than any other European nation, with roughly 85,000 people held in custody as of 2021.¹¹⁹

The UK's basic private prison contracts operate on a 25-30-year contractual basis with private security companies running public facilities.¹²⁰ The core payment structure involves the government paying set annual amounts to the three private operators, G4S, Serco, and Sodexo.¹²¹ The contracts require private operators to manage all aspects of prison operations, from staffing to daily operations, under government oversight. When the Conservative government introduced this system in the early 1990s through the Private Finance Initiative, it mandated that all newly constructed prisons would be privately contracted.¹²² UK private prison contracts include provisions allowing the government to intervene when a private operator fails to meet required standards. Under the Criminal Justice Act 1991, the Secretary of State retains statutory authority to step in and take control of a privately run prison where the director has lost effective control or safety is at risk.¹²³ This power was exercised in the case of HMP Birmingham, where, after an inspection found conditions had deteriorated into a "state of crisis"—with squalid conditions, freely available drugs and alcohol, and blood, urine, and vomit left in cells—the Ministry of Justice

114. *Id.*

115. Gabrielle Garton Grimwood, *Prisons: The role of the private sector*, HOUSE COMMONS 1 (Jan. 30, 2014), <https://researchbriefings.files.parliament.uk/documents/SN06811/SN06811.pdf> [<https://perma.cc/65QC-NUTS>].

116. *Id.*

117. Hatty Nestor, *Profiting from their misery: Britain's private prisons*, VERSO BOOKS (Sep. 8, 2022), <https://www.versobooks.com/blogs/news/5418-profiting-from-their-misery-britain-s-private-prisons?srsId=AfmBOophVgLuNbEEeD7jjjzEQJ8JahfjIvOV-qLbxhUgxvtRdvhOaKX5> [<https://perma.cc/8RE7-WVY4>].

118. *Id.*

119. *Id.*

120. Grimwood, *supra* note 115, at 11.

121. *Id.* at 1.

122. Badmus, *supra* note 18.

123. THE CRIMINAL JUSTICE ACT 1991, c. 53, § 88 (Eng.).

stepped in to take over operations from G4S.¹²⁴ What began as a temporary six-month intervention in August 2018 ultimately became permanent, with G4S required to pay £9.9 million in penalties for breaching certain contractual obligations and covering the government's "step-in."¹²⁵

2. *Payment Models for Results*

The UK also implemented a Payment by Results ("PBR") program in the early 2010s to encourage rehabilitation efforts and reduce recidivism rates.¹²⁶ Unlike the standard per diem payment model common in the United States, the UK system ties payment to specific performance outcomes, particularly recidivism reduction.¹²⁷ Under this model, the government pays private prison service providers based on the measurable results their services achieve.¹²⁸ At facilities like HMP Peterborough and HMP Doncaster, operators can earn incentive payments if they successfully reduce recidivism rates, with early programs showing promising results of up to 8% reduction in reoffending.¹²⁹

The contracts include detailed performance metrics, with financial penalties for failing to meet standards and bonuses for exceeding them. For example, UKDS (a private operator) faced penalties of 41,167 pounds for failing to meet performance targets at its Blakenhurst prison, demonstrating the financial consequences of poor performance.¹³⁰ This outcome-based payment structure represents an attempt to align private operators' financial incentives with the public interest in rehabilitation, though questions remain about its long-term effectiveness compared to more fundamental criminal justice reforms.

While the incentive program is encouraging, the prisons report significantly higher violence rates, with 156 more assaults per 1,000 prisoners than their public counterparts.¹³¹ The striking failure of privately-run HMP Birmingham, where inspectors discovered deplorable conditions, including pools of blood and vomit, forced the government to retake control despite private operator G4S's claims of substantial investment in improvement initiatives.¹³² When confronted with these failures, the Labour Party spokesperson Richard Burgon crystallized the fundamental problem, declaring the "incarceration of human beings for

124. HM CHIEF INSPECTOR OF PRISONS, REPORT ON AN UNANNOUNCED INSPECTION OF HMP BIRMINGHAM 3 (2023), <https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2023/05/Birmingham-web-2023.pdf> [<https://perma.cc/4PLQ-3DH9>].

125. *Id.*

126. Badmus, *supra* note 18, at 145.

127. *Id.*

128. *Id.*

129. *Id.* at 145-46.

130. *Id.* at 147.

131. *Id.* at 142.

132. Danny Shaw, *Birmingham Prison: Government takes over from G4S*, BBC NEWS (Aug. 20, 2018), <https://www.bbc.com/news/uk-england-birmingham-45240742> [<https://perma.cc/WX25-8YJW>].

profit is immoral.”¹³³ A study of 110 adult prisons found that three of the top ten most violent prisons were privately run—Birmingham, Doncaster, and Peterborough—despite private prisons making up only 12.7% of the facilities surveyed.¹³⁴ These disproportionate violence rates, coupled with high staff turnover and inadequate training due to cost-cutting measures, demonstrate how the drive for profit undermines even well-intentioned performance incentives.

3. Critics and Supporters of U.K. Privatization

Private prisons in the UK have been both praised and criticized for their rehabilitation programs when compared to public prisons. Supporters argue that private prisons often outperform public facilities on key rehabilitation metrics.¹³⁵ A report by the think tank Reform found that 10 out of 12 private prisons had lower reoffending rates among offenders serving 12 months or more compared to similar public prisons, suggesting that private operators may be more effective in reducing recidivism.¹³⁶ Additionally, private prisons tend to offer prisoners more time for purposeful activities, averaging 26.7 hours per week compared to 24 hours in public prisons, which could contribute to better rehabilitation outcomes.¹³⁷ However, critics highlight significant shortcomings. The Prison Reform Trust has argued that private prisons are often overcrowded and less safe than their public counterparts, with staff frequently lacking the experience needed to effectively manage rehabilitation programs.¹³⁸ A study also found that while private prisons excel at “easy-to-measure” outcomes like operational efficiency, they often fall short on qualitative aspects of rehabilitation, such as addressing prisoners’ individual needs.¹³⁹ Furthermore, some prisoners perceive official rehabilitation efforts in private facilities as self-serving and inadequate, raising questions about the sincerity of these programs.¹⁴⁰ Critics contend that private companies may find themselves in an advantageous position, running newer, more profitable facilities, while the state is left to grapple with the challenges of maintaining crumbling, antiquated Victorian prisons.¹⁴¹ The UK government has responded by emphasizing the importance of performance-based contracts in private prisons, as discussed

133. *United Kingdom and United States: capital and the carceral state*, PRISON INSIDER (Sep. 24, 2020), <https://www.prison-insider.com/en/articles/united-kingdom-and-united-states-capital-and-the-carceral-state> [<https://perma.cc/H6P6-TJRC>].

134. Badmus, *supra* note 18, at 142.

135. *Private firms better at running prisons – think tank*, BBC NEWS (Feb. 21, 2013), <https://www.bbc.com/news/uk-21520068> [<https://perma.cc/U6PR-BLHH>].

136. *Id.*

137. *Private Punishment: Who Profits?*, *supra* note 137.

138. *Id.*

139. Byrne, Kras & Marmolejo, *supra* note 7, at 496.

140. Karen Bullock & Annie Bunce, ‘The Prison Don’t Talk to You About Getting Out of Prison’: On Why Prisons in England and Wales Fail to Rehabilitate Prisoners, 20 CRIMINOLOGY & PUB. JUST. 111, 116 (2020).

141. *Private Punishment: Who Profits?*, *supra* note 137.

earlier in this Note. These contracts tie payment to measurable outcomes, like reduced recidivism rates, thereby incentivizing operators to focus on rehabilitation efforts. Despite these efforts, critics argue that systemic issues, such as overcrowding and cost-cutting measures, undermine the long-term effectiveness of rehabilitation programs in both private and public facilities.¹⁴²

4. *The U.K.'s Current Stance on Private Prisons*

As of 2025, the Labour Party in the UK, led by Prime Minister Keir Starmer, has taken a strong stance against the overcrowding in prisons and the normality of punishment over rehabilitation and reducing recidivism.¹⁴³ This aligns with the party's broader mission to reform the criminal justice system and address the ongoing crisis of prison overcrowding.¹⁴⁴ The Party has committed to completing the remaining 14,000 of the 20,000 prisons promised by the previous Conservative government, but due to planning constraints, the extra prisons will not be delivered until 2030.¹⁴⁵ The Labour government introduced the Sentencing Bill, which implements many of the recommendations of an independent sentencing review led by former Conservative justice secretary David Gauke, including proposals to mostly abolish short sentences, reduce time served in prison, and expand community-based alternatives—reforms that, if enacted, could significantly reduce demand for prison places and reshape the role of private prisons.¹⁴⁶ In addition to addressing capacity issues, the Justice Committee, chaired by the Labour Party, aims to improve rehabilitation efforts by ensuring that all prisoners have post-release plans and access to purposeful activities.¹⁴⁷ They also plan to collaborate with local employers and voluntary organizations to enhance employment opportunities for released prisoners.¹⁴⁸ While these commitments signal a shift away from privatization, the Labour

142. Idil Aydinoglu, *Beyond capacity: Europe's prison overcrowding challenge*, PENAL REFORM INT'L (Dec. 11, 2024), <https://www.penalreform.org/blog/beyond-capacity-europes-prison-overcrowding-challenge/> [<https://perma.cc/H5SG-YXB3>].

143. Paul Seddon & Sam Francis, *We have too many prisoners, says new PM Starmer*, BBC (July 7, 2024), <https://www.bbc.com/news/articles/c16jpkzz9g3o> [<https://perma.cc/AU5L-3GLM>].

144. *Id.*

145. Faye Brown, *Labour promises thousands of new prison spaces to ease overcrowding crisis*, SKY NEWS (June 8, 2024), <https://news.sky.com/story/labour-promises-thousands-of-new-prison-spaces-to-ease-overcrowding-crisis-13149903> [<https://perma.cc/282N-8E2W>].

146. *See id.*; Cassia Rowland, *The Government Is Taking the Right Approach to Sentencing Reform*, INST. FOR GOV'T (Sep. 16, 2025), <https://www.instituteforgovernment.org.uk/comment/government-sentencing-bill> [<https://perma.cc/6WTZ-AXUJ>].

147. *Justice Committee launches new inquiry into rehabilitation and resettlement*, UK PARLIAMENT (Nov. 26, 2024), <https://committees.parliament.uk/committee/102/justice-committee/news/204003/justice-committee-launches-new-inquiry-into-rehabilitation-and-resettlement> [<https://perma.cc/L5KD-5B78>].

148. Philippa Rousell, *Understanding Party Positions On Criminal Justice*, CHANGING LIVES (June 25, 2024), <https://www.changing-lives.org.uk/insights/understanding-party-positions-on-criminal-justice> [<https://perma.cc/Q8Z4-DUBL>].

Party may face challenges in implementing these policies due to existing contracts with private operators and the complexities of transitioning certain prison services back into public hands.¹⁴⁹

B. Private Prisons in Australia: A Shifting Landscape

Australia's prison system, both public and private, faces the daunting task of managing rising incarceration rates, addressing systemic inequalities, and ensuring effective rehabilitation. The country's experience with private prisons is particularly noteworthy, with Australia having one of the highest per capita rates of private incarceration globally.¹⁵⁰

1. Origins of the For-Profit Industry

The emergence of private prisons in Australia can be traced back to the late 1980s, influenced by neoliberal economic trends and similar movements in the United States and the United Kingdom.¹⁵¹ The catalyst for this shift came in Queensland, where businessman and roving commissioner Jim Kennedy was prompted by the state government to investigate misconduct in state prisons.¹⁵² Kennedy's investigation revealed alarming evidence of inhumane conditions, especially those endured by indigenous inmates, prompting a search for alternative solutions.¹⁵³ This led to the opening of Australia's first private prison, Borallon Correctional Centre, near Ipswich, Queensland, in January 1990.¹⁵⁴ The facility was initially operated by an international consortium consisting of Wormald International, Corrections Corporation of America, and John Holland Group. Serco Australia then took over operations in 2007.¹⁵⁵ This move towards privatization was seen as a potential solution to alleviate overcrowding and reduce costs in a prison system that had faced decades of neglect.¹⁵⁶

149. Emilio Casalichio, *Labour Reveals Plan to Ban Privatisation in Prisons, Health and Benefits Services*, POLITICSHOME (Feb. 25, 2020), <https://www.politicshome.com/news/article/labour-reveals-plan-to-ban-privatisation-in-prisons-health-and-benefits-services> [https://perma.cc/8FQ4-WA5G].

150. Lenny Roth, *Privatisation of Prisons*, 3 NSW PARLIAMENTARY LIBR. RSCH. SERV. 1, 4 (2004) <https://www.parliament.nsw.gov.au/researchpapers/Documents/privatisation-of-prisons/bg03-04.pdf> [https://perma.cc/5HG9-ER2B].

151. Stephanie Tran, *Profits of punishment: the big business of Australia's private prisons*, MICHAEL W. MEDIA (Nov. 20, 2021), <https://michaelwest.com.au/profits-of-punishment-the-big-business-of-australias-private-prisons/> [https://perma.cc/SJ2T-WJQP].

152. *Id.*

153. *Id.*

154. *Id.*; Dan Butler, *Prisons for profit: The business of incarceration*, NITV (Aug. 27, 2021), <https://www.sbs.com.au/nitv/article/prisons-for-profit-the-business-of-incarceration/wveqa43h5> [https://perma.cc/AXK6-GQCL].

155. Tran, *supra* note 151.

156. *Id.*

Despite initial opposition from the Labour Party during the 1989 election campaign, the newly elected Labour Government reaffirmed the private contract to manage Borallon, marking a significant shift in Australian corrections policy.¹⁵⁷ 20.5% of prisoners in Australia are held in privately operated prisons, with the Australian Government spending \$658 million per year on average on the management of privatized correctional facilities.¹⁵⁸ In 2018, the state's Crime and Corruption Commission ("CCC") made clear what it thought of the experiment: "this marketised approach, where prisons are operated by private, profit driven organisations, disconnects the state from direct responsibility for the delivery of privately operated prisons."¹⁵⁹ In 2019, Queensland's Labor government announced it would return Arthur Gorrie and Southern Queensland Correctional Centres to public hands, with Western Australia announcing that same year that it would do likewise with Melaleuca Prison, a move that would reduce the state's privately operated prisons to a single remaining institution.¹⁶⁰

2. Policy Shifts

Australia's use of private prisons is increasingly limited, with only Victoria, NSW, South Australia and Western Australia currently utilizing private operators.¹⁶¹ The trend appears to be moving away from privatization, with projections suggesting the number of private facilities could decrease to seven by 2026, marking the lowest point in three decades.¹⁶² The shift back to public management has shown promising results. For instance, when NSW decided against extending the Junee facility's private contract, officials cited benefits including better oversight of prison management and enhanced integration with other public services, particularly healthcare and the court system.¹⁶³ Similarly, the transition of Arthur Gorrie and Southern Queensland correctional centers back to public operation in 2020 and 2021 led to immediate operational improvements, particularly in staffing levels and security response capabilities.¹⁶⁴

Australia's prison system faces significant challenges, particularly

157. Paul Moyle, *Privatisation of Prisons in New South Wales and Queensland: A Review of Some Key Developments in Australia*, 32 HOWARD J. CRIM. JUST. 231, 231 (1993).

158. Tran, *supra* note 151.

159. Nino Bucci, *Australian authorities once embraced privately operated prisons. But some governments are taking back control*, GUARDIAN (Dec. 23, 2023), <https://www.theguardian.com/australia-news/2023/dec/24/australian-authorities-once-embraced-privately-operated-prisons-but-some-governments-are-taking-back-control> [<https://perma.cc/SU3T-AF32>] (internal quotations omitted).

160. *Id.*

161. *Id.*

162. *Id.*

163. See Lucas Forbes, *Privately run Junee Corr. Centre set to return to public hands*, ABC (Nov. 2, 2023), <https://www.abc.net.au/news/2023-11-03/nsw-government-junee-corrections-facility-jail-privatisation/103059390> [<https://perma.cc/939B-5VE5>].

164. Bucci, *supra* note 159.

regarding the overrepresentation of indigenous Australians. As of 2022, despite making up only 3.8% of the general population, Indigenous people account for 31.8% of prisoners in Australia.¹⁶⁵ This disparity has worsened over time, with the imprisonment rate for Indigenous Australians increasing by 41% from 2006 to 2016, compared to a 24% increase for non-Indigenous Australians.¹⁶⁶

The privatization of prisons in Australia has been a contentious issue since its inception. While initially seen as a solution to overcrowding and cost reduction, private prisons have faced criticism regarding accountability and effectiveness.¹⁶⁷ The Australian Institute of Criminology noted that the allocation of punishment should remain the responsibility of the state, while day-to-day administration can be devolved to contract managers.¹⁶⁸

Critics argue that the profit motive can lead to cost-cutting measures that compromise inmate care, welfare, and overall safety.¹⁶⁹ Australia has implemented robust oversight mechanisms for its private prisons.¹⁷⁰ The Office of the Commonwealth Ombudsman, part of the Australian National Preventative Mechanism (“NPM”) Network, monitors prisons and other detention facilities across the country.¹⁷¹ Ombudsmen have the right to visit prisoners and regularly inspect prisons, while prisoners have an unrestricted right to communicate with ombudsmen in most states.¹⁷² Additionally, private prisons are subject to media attention and monitored visits.¹⁷³ Monitors are appointed to check contract compliance and adherence to general standards, a mechanism that is not present in public prisons.¹⁷⁴ These measures aim to ensure accountability, the proper treatment of human beings in incarceration, and to maintain standards in privately operated facilities.¹⁷⁵

165. Anna Fleck, *Indigenous Peoples are Overrepresented in Australian Prisons*, STATISTA (Aug. 9, 2023), <https://www.statista.com/chart/30569/share-of-prisoners-in-australia-by-indigenous-status/> [https://perma.cc/4FQ7-TK4B].

166. AUSTRALIAN L. REFORM COMM'N, *PATHWAYS TO JUSTICE—INQUIRY INTO THE INCARCERATION RATE OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES* (ALRC REPORT 133) (2018), <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/3-incidence/over-representation/> [https://perma.cc/DYR5-8Y5C].

167. Harding, *supra* note 11, at 3.

168. *Id.*

169. Roth, *supra* note 150; Harding, *supra* note 11, at 5.

170. STEVEN CARUANA ET AL., *THE IMPLEMENTATION OF OPCAT IN AUSTRALIA* 17 (Jan. 2020), https://www.refugeecouncil.org.au/wp-content/uploads/2020/02/Implementation_of_OPCAT_in_Australia.pdf [https://perma.cc/8H78-JTAD].

171. *Id.*

172. *Id.* at 12.

173. Roth, *supra* note 150, at 27, 34.

174. *Id.*

175. *Id.* at 9-11.

3. *Current Status*

Despite these oversight efforts, Australia's approach to private prisons is evolving. In 2023, New South Wales announced plans not to renew GEO Group's contract with Junee Correctional Center and to revert it to public hands to run.¹⁷⁶ Meanwhile, Victoria took over healthcare operations from a privately operated women's prison.¹⁷⁷ This decision follows similar moves in Queensland and Western Australia, indicating a shift away from the privatization model.¹⁷⁸ The trend reflects growing concerns about the effectiveness of private prisons in achieving rehabilitation goals and addressing systemic inequalities, particularly given Australia's ongoing struggle with Indigenous overrepresentation in the criminal justice system.

4. *Incentive Programs*

With the private prisons still remaining, Australia has implemented a diverse range of rehabilitation programs aimed at reducing recidivism and facilitating offenders' successful reintegration into society. These programs encompass cognitive skill development, substance abuse treatment, anger management, violence prevention, and domestic violence intervention.¹⁷⁹ Specialized programs for sex offenders are also available. Educational services focus on improving literacy and numeracy skills, while vocational training programs aim to enhance employment prospects.¹⁸⁰ The Corrections Victoria Reintegration Pathway ("CVRP") provides pre- and post-release services and support to ease the transition back into the community.¹⁸¹ Recognizing the unique needs of Aboriginal and Torres Strait Islander offenders, the Koori Courts have implemented culturally specific programs often involving Indigenous elders and liaison officers.¹⁸²

Australia has experimented with incentive programs for private prisons to encourage rehabilitation and reduce recidivism, but the implementation has been limited, and results are mixed. In recent years, Australia has piloted performance-based contracts for private prisons that tie financial incentives to rehabilitation outcomes. For example, one prison in Australia, Ravenhall, adopted a contract that rewards the operator for achieving reductions in

176. See Forbes, *supra* note 163.

177. Bucci, *supra* note 159.

178. *Id.*

179. Andrew Day, *At a crossroads? Offender rehabilitation in Australian prisons*, 27 PSYCHIATRY, PSYCH. & L. 939 (2020).

180. DEBORAH GLASS, INVESTIGATION INTO THE REHABILITATION AND REINTEGRATION OF PRISONERS IN VICTORIA 64-66 (Sep. 2015), <https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/1-PDF-Report-Files/Investigation-into-the-rehabilitation-and-reintegration-of-prisoners-in-Victoria.pdf> [<https://perma.cc/8E2W-CUJ8>].

181. *Id.* at 124.

182. *Id.* at 133-34.

recidivism rates or for meeting intermediate goals, such as improving prisoners' education, employment, or housing outcomes upon release.¹⁸³

However, these incentive-based contracts are not yet widespread across Australia's private prison system.¹⁸⁴ Critics argue that many existing contracts still primarily incentivize private operators to cut costs rather than focus on rehabilitation.¹⁸⁵ The effectiveness of the pilot programs has also been questioned, with some experts suggesting the incentives need to be more substantial to drive meaningful change in prison operations and outcomes.¹⁸⁶

IV. CRITICISMS AND SUPPORT OF PRIVATE PRISONS

There are calls from some policymakers and researchers to expand and strengthen incentive programs for private prisons in Australia. Proposed models include tying a larger share of payments to reductions in recidivism, offering bonuses for successful rehabilitation programs, or allowing prisons to "replace" rehabilitated prisoners to maintain capacity.¹⁸⁷

The privatization of prisons in Australia sparks ongoing debate. Supporters argue that private prisons offer solutions to overcrowding and potential cost savings while introducing innovation and setting new benchmarks.¹⁸⁸ These proponents suggest that private management can lead to more efficient operations and targeted rehabilitation programs. Critics, however, voice concerns about accountability, transparency, and the ethical implications of profiting from incarceration.¹⁸⁹ They argue that where profit is the objective, there is always a risk that corners will be cut and standards eroded in order to "maximise returns."¹⁹⁰ The Australian government, while acknowledging these concerns, has implemented oversight mechanisms, including monitoring by the National Preventive Mechanism and the Commonwealth Ombudsman, to ensure standards are maintained and mistreatment is addressed.¹⁹¹ Nevertheless,

183. Pfaff, *supra* note 68, at 1004-05.

184. ANDREW BUSHNELL, CUTTING COSTS AND REDUCING REOFFENDING: REDESIGNING PRIVATE PRISON CONTRACTS FOR BETTER RESULTS 4 (Oct. 11, 2019), <https://ipa.org.au/publications-ipa/improve-private-prison-contracts-to-cut-costs-and-reduce-reoffending> [https://perma.cc/H8DJ-M7FB].

185. *Id.* at 19; Pfaff, *supra* note 68, at 995-96.

186. BUSHNELL, *supra* note 184, at 4.

187. Andrew Bushnell, *Improve Private Prison Contracts to Cut Costs and Reduce Reoffending*, INST. PUB. AFFS. (Oct. 10, 2019), <https://ipa.org.au/publications-ipa/improve-private-prison-contracts-to-cut-costs-and-reduce-reoffending> [https://perma.cc/3UJT-9TFC]; Joe Lonsdale, *Align Incentives to Solve Recidivism*, 8VC (May 15, 2018), <https://www.8vc.com/resources/align-incentives-to-solve-recidivism> [https://perma.cc/YK4P-CXPZ].

188. Richard W. Harding, *Private Prisons in Australia*, in 36 TRENDS & ISSUES IN CRIME & CRIM. JUST. 1, 2 (1992).

189. *Id.* at 3.

190. *Id.* at 2.

191. AUSTRALIAN HUM. RTS. COMM'N, *Implementing OPCAT in Australia*, 7-13 (2020), https://humanrights.gov.au/_data/assets/file/0020/46307/Ahrc_2020_implementing_opcat.pdf [https://perma.cc/SJ8Q-R77T].

a growing trend towards returning private prisons to public management, as seen in New South Wales, Queensland, and Western Australia, reflects a reassessment of the effectiveness and alignment of values of private correctional facilities within the broader criminal justice system.¹⁹²

While Australia has taken great steps to align private prison incentives with rehabilitation goals, comprehensive implementation of such programs across the private prison system remains limited. The debate continues over how to best structure contracts to encourage private operators to prioritize reducing reoffending and supporting prisoners' reintegration into society.

A. The Private Prison Model in New Zealand

1. Origins of the For-Profit Model

The introduction of private prisons in New Zealand was a contentious process that began in the late 1990s, driven by a combination of factors and key players. Rising prison populations and subsequent overcrowding in public facilities created a pressing need for additional capacity.¹⁹³ Proponents of privatization argued that private prisons could operate more efficiently and at a lower cost than their public counterparts, without compromising quality.¹⁹⁴ This push towards privatization aligned with broader neoliberal economic policies being implemented at the time and followed international trends seen in countries like the United States, Australia and the United Kingdom. The first privately run prison in New Zealand, Auckland Central Remand Prison (also known as Mount Eden Prison), opened its doors in 2000 under a contract with Australian Correctional Management ("ACM"), marking a significant shift in the country's corrections policy.¹⁹⁵

However, the journey of prison privatization in New Zealand has been marked by policy reversals and ongoing debate. In 2004, the Labour-led government, opposing privatization, repealed a law aimed at prohibiting the extension of private prison contracts.¹⁹⁶ This led to Mount Eden reverting to public control in 2005. The pendulum swung back in 2010 when the national government reintroduced the private prisons policy, resulting in Serco Pacific being awarded a contract to run Mount Eden Corrections Facility in 2011.¹⁹⁷

192. See Bucci, *supra* note 159.

193. John Braddock, *Official report exposes dire conditions in New Zealand prisons*, WORLD SOCIALIST WEB SITE (Sep. 6, 2019), <https://www.wsws.org/en/articles/2019/09/06/nzpr-s06.html> [<https://perma.cc/2SL9-KVFF>].

194. Dolovich, *supra* note 2, at 441.

195. Naomi Cervin, *Private Prisons: Should Crime Pay?*, AUCKLAND U.L. REV. 48, 58 (2000).

196. Corrections (Contract Management of Prisons) Amendment Bill 2009 (20-2) (N.Z.).

197. Martin Kay, *Govt awards first private prison contract*, STUFF (Dec. 13, 2010), <https://www.stuff.co.nz/national/4455745/Govt-awards-first-private-prison-contract> [<https://perma.cc/LE3N-9834>].

2. *A Rehabilitative Model*

The expansion of private prisons continued with the announcement in 2012 that a new private prison would be built at Wiri, South Auckland. This facility, known as the Auckland South Corrections Facility, opened on May 8, 2015, under a contract set to run until 2040.¹⁹⁸ It was New Zealand's first full services Public Private Partnership ("PPP") in the corrections sector and was designed with a focus on rehabilitation and reintegration.¹⁹⁹ A PPP in New Zealand is a long-term contract between the public and private sectors for the delivery of a service. The private sector finances, designs, builds, and operates the facility, and then transfers it back to the government at the end of the contract.²⁰⁰

New Zealand's experience with PPPs in the prison sector is exemplified by the Auckland South Corrections Facility (known as "Wiri"), which opened in May 2015.²⁰¹ This facility, operated by SecureFuture consortium, represents New Zealand's first full-service PPP in corrections.²⁰² The Wiri contract innovatively incorporates service outcomes based on social impact goals, including reducing recidivism rates among Māori prisoners by at least 10% compared to other prisons.²⁰³ The facility can accommodate up to 960 sentenced male prisoners and is classified as a high-security prison.²⁰⁴ Early results have been promising, with the Department of Corrections reporting in its 2013-2014 report that Wiri was "Exceeding" expectations in the Prison Custodial Performance Table.²⁰⁵ The New Zealand Government offers up to \$1.5 million if recidivism rates among formerly incarcerated men are reduced compared to government-run facilities.²⁰⁶ These financial incentives align private operators' goals with societal benefits, encouraging them to prioritize effective rehabilitation over mere incarceration. The facility also offers air-conditioned cells equipped with televisions that double as computers, ensuring prisoners have access to educational resources. Programs, like construction training through the YMCA, prepare inmates for employment after release, further

198. *Auckland South Corrections Facility Official Opening*, SERCO (May 8, 2015), <https://www.serco.com/aspac/news/media-releases/2015/auckland-south-corrections-facility-official-opening> [<https://perma.cc/8QJ5-CHTQ>].

199. ARA POUTAMA AOTEAROA [DEP'T CORR.], ANNUAL REPORT 2014/15, https://www.corrections.govt.nz/_data/assets/pdf_file/0016/13165/Annual_Report_2014-15_full_report.pdf [<https://perma.cc/9QLV-TTQE>].

200. *Public-Private Partnerships (PPP)*, NAT'L INFRASTRUCTURE, <https://nationalinfrastructure.govt.nz/public-private-partnerships-ppp/> [<https://perma.cc/CRL9-CJMH>].

201. SHAH & BROUSSE, *supra* note 14, at 8-10.

202. *Id.* at 10.

203. *Id.*

204. *Id.*

205. ARA POUTAMA AOTEAROA [DEP'T CORR.], ANNUAL REPORT 2013/14, https://www.corrections.govt.nz/_data/assets/pdf_file/0020/12656/Corrections_Annual_Report_2013-14_Full.pdf [<https://perma.cc/SQ8U-VVVD>].

206. Eisen, *supra* note 16.

reducing the likelihood of reoffending.²⁰⁷ These initiatives demonstrate how PPPs can combine improved physical environments with practical skills training to create effective pathways for rehabilitation.

While the prison's design focuses on rehabilitation and reintegration, featuring impressive workshop facilities and a progression pathway for prisoners that promotes increased self-responsibility. However, challenges remain, including staffing issues and an over-reliance on technology for prisoner communication.²⁰⁸

While the full long-term impact is yet to be determined, the Wiri and Ravenhall PPPs have introduced innovative approaches to prisoner rehabilitation and outcome-based contracting in New Zealand's corrections system.²⁰⁹

3. Systemic Challenges: Racial Disparities and Approaches

Both the United States and New Zealand grapple with significant racial disparities within their prison systems, although the specific demographic groups most affected differ. In the U.S., African Americans are disproportionately represented in the prison system, particularly in private facilities.²¹⁰ Data indicate that African Americans face imprisonment rates significantly higher than their white counterparts in the general population.²¹¹ This disparity is particularly concerning given broader debates around racial bias within the criminal justice system. In contrast, New Zealand's prison system is characterized by the overrepresentation of Māori. Māori, comprising only 17.8% of the general population, account for 52% of the prison population as of June 2022.²¹² This disproportionate incarceration rate has persisted for decades, with Māori people accounting for 40% of convictions between 1996-2005.²¹³

The problem is even more acute for Māori women, who make up around

207. *Id.*

208. PETER BOSHIER, OPCAT REPORT: REPORT ON AN ANNOUNCED INSPECTION OF AUCKLAND SOUTH CORRECTIONS FACILITY UNDER THE CRIMES OF TORTURE ACT 1989 (Feb. 20, 2019), https://www.ombudsman.parliament.nz/sites/default/files/2019-03/Final_OPCAT_Prison_Report_-_ASCF_-_PDF_online_.pdf [https://perma.cc/V93X-JLC6].

209. See SHAH & BROUSSE, *supra* note 14; Pfaff, *supra* note 68, at 1004-05.

210. Wendy Sawyer, *Visualizing the racial disparities in mass incarceration*, PRISON POL'Y INITIATIVE (July 27, 2020), <https://www.prisonpolicy.org/blog/2020/07/27/disparities/> [https://perma.cc/JK7T-3PV4]; Rina Palta, *Why For-Profit Prisons House More Inmates Of Color*, NPR (Mar. 13, 2014), <https://www.npr.org/sections/codeswitch/2014/03/13/289000532/why-for-profit-prisons-house-more-inmates-of-color> [https://perma.cc/84PN-K3HW].

211. Palta, *supra* note 210.

212. *Hāpaitia te Oranga Tangata*, N.Z. MINISTRY OF JUST., <https://www.justice.govt.nz/justice-sector-policy/key-initiatives/key-initiatives-archive/hapaitia-te-oranga-tangata/> [https://perma.cc/V6Q3-FB6S] (last visited Mar. 3, 2026).

213. DEP'T CORR., OVER-REPRESENTATION OF MĀORI IN THE CRIMINAL JUSTICE SYSTEM, 13, 19 (2007) (N.Z.).

60% of the female prison population in privately run institutions.²¹⁴ Factors contributing to this overrepresentation include higher rates of police apprehension, charges, and sentencing for Māori compared to other groups.²¹⁵ The issue extends beyond incarceration, with over 30% of Māori males aged 20-29 having a record of serving sentences administered by the Department of Corrections.²¹⁶ This situation has far-reaching consequences for Māori communities, perpetuating cycles of disadvantage and raising concerns about systemic bias within the criminal justice system.

New Zealand is implementing several initiatives to address the overrepresentation of Māori in the private prison system. In 2018, the government launched a cross-sector initiative to gather diverse perspectives on reducing the Māori incarceration rate, ensuring significant Māori involvement in the process.²¹⁷ This effort aligns with a broader shift towards a Māori-centered approach in policy development and implementation across various sectors, including state care for children.²¹⁸ The police force has developed new tools, programs, and policies aimed at reforming approaches and reducing the Māori incarceration rate.²¹⁹

At the highest levels, the Justice Sector Leadership Board (“JCLB”) is fostering new relationships with Māori leaders to address systemic inequalities, acknowledging Māori importance within the state structure.²²⁰ There is also an increased focus on prevention and early intervention strategies to stem the flow of Māori into the criminal justice system. Te Ao Mārama aims to make the District Court more accessible, culturally responsive, and community-connected by partnering with iwi and using best-practice, therapeutic approaches, which help reduce Māori offenders and inmate population by improving understanding, engagement, and support for whānau, ultimately lowering reoffending through more meaningful, timely, and effective court processes.²²¹ Despite these comprehensive efforts, the government acknowledges that addressing this complex issue requires long-term solutions

214. *Id.* at 6.

215. *Id.* at 13, 19, 22.

216. *Id.* at 6.

217. *Hāpaitia te Oranga Tangata*, *supra* note 212.

218. Kate Mabus, *Māori in New Zealand are Reimagining Child Protection*, PULITZER CTR. (Feb. 3, 2023), <https://pulitzercenter.org/stories/maori-new-zealand-are-reimagining-child-protection> [https://perma.cc/4C7D-Z9FB].

219. Jeff Thompson, *New Zealand Police Leadership: A Goal-Focused and Human-Centered Approach*, POLICE CHIEF MAG., <https://www.policechiefmagazine.org/nz-police-leadership/> [https://perma.cc/LPC5-AFXN].

220. *Te Rau o te Tika: Justice System Kaupapa Inquiry (Wai 3060)*, N. Z. MINISTRY JUST., <https://www.justice.govt.nz/justice-sector-policy/about-the-justice-sector/#board> [https://perma.cc/58TZ-F5KC] (last visited Mar. 26, 2026).

221. See District Court of New Zealand, *Te Ao Mārama Best Practice Framework: Enhancing Justice for All* (2023), <https://www.districtcourts.govt.nz/assets/Uploads/Te-Ao-Marama-Te-Ao-Marama-Best-Practice-Framework-for-website.pdf> [https://perma.cc/HG2K-PCK8].

and continued collaboration across justice and social sectors.²²²

4. Current Challenges

Despite these developments, the private prison experiment in New Zealand has faced significant challenges. In July 2015, Serco's contract to run the Mount Eden prison was revoked due to numerous scandals, including the emergence of footage showing "fight clubs" within the prison.²²³ This incident highlighted the potential risks and controversies associated with private prison management.

As of 2019, more than 18% of inmates in New Zealand are housed in private prisons.²²⁴ However, the debate over the efficacy and ethics of private prisons continues, with ongoing discussions about their role in addressing New Zealand's growing prison population and reducing recidivism rates.

Throughout this process, proponents saw private prisons as a way to address capacity issues, reduce costs, and potentially introduce innovative rehabilitation programs.²²⁵ However, the efficacy and ethics of private prison management in New Zealand remain subjects of ongoing debate, reflecting the complex and often controversial nature of prison privatization.²²⁶ Regardless, New Zealand presents a good example of the PPP model, which has so far provided positive outcomes.

V. COMPARING THE UNITED STATES USE OF PRIVATE PRISONS AND OVERALL OUTCOMES AGAINST INTERNATIONAL MODELS

The United States stands out globally for its extensive use of private prisons. As of 2022, approximately 8% (90,873) of America's state and federal prisoners were incarcerated in privately operated facilities.²²⁷ While this percentage may seem relatively small, it's important to note that, due to the US having the world's largest prison population, this represents the highest absolute number of prisoners in private facilities globally. The international landscape of prison privatization is diverse, with some countries operating a high percentage of fully privatized prisons, while others employ hybrid public-private partnership

222. *Experts of the Committee on the Elimination of Racial Discrimination Commend New Zealand on Efforts to Welcome Refugees, Ask Questions on Historic Abuse of Persons with Disabilities in State Care and Challenges in Education for the Māori*, U.N. OFF. HIGH COMM'R FOR HUM. RTS. (Nov. 26, 2025),

<https://www.ohchr.org/en/meeting-summaries/2025/11/experts-committee-elimination-racial-discrimination-commend-new-zealand> [<https://perma.cc/4BXJ-HJLW>].

223. JUSTICE ACTION, INQUIRY INTO PARKLEA CORRECTIONAL CENTRE AND OTHER OPERATIONAL ISSUES SUBMISSION NO. 34, at 10 (Feb. 28, 2018), <https://www.parliament.nsw.gov.au/lcdocs/submissions/60234/0034%20Justice%20Action.pdf> [<https://perma.cc/44RE-UN3Y>].

224. Eisen, *supra* note 16.

225. *Id.*

226. *Id.*

227. Budd, *supra* note 1.

models.²²⁸

Notably, countries such as Australia, New Zealand, Scotland, Wales, and England have proportionally higher percentages of privately held prisoners than the U.S. However, due to the sheer size of the U.S. prison population, the absolute number of prisoners in private facilities in the U.S. far exceeds that of any other nation. This disparity underscores the unique scale of privatization in the American correctional system.

The international landscape of prison privatization is diverse. While some countries, such as England, Scotland, Wales, South Africa, New Zealand, and Australia, operate a high percentage of fully privatized prisons, others, such as Germany, France, Japan, Brazil, and Chile, employ a hybrid PPP model.²²⁹ This spectrum of approaches contrasts with the U.S. model, which tends towards full privatization in its for-profit facilities.

A. Governance, Accountability, and Oversight Mechanisms

The relationship between the government and private prisons in the United States is fraught with issues of accountability, transparency, and conflicting incentives. One of the primary concerns is the lack of oversight and public access to information about private prison operations. The governance and accountability structures of private prisons in the U.S. often fall short of international practices. For instance, the United Kingdom has implemented a robust oversight system for its private prisons.²³⁰ In England and Wales, privately run prisons operate under contracts that stipulate specific performance standards, with financial penalties for poor performance.²³¹ Moreover, government monitors, known as “controllers,” work and have offices within each privately managed prison to oversee conditions and treatment of prisoners.²³² In contrast, the U.S. system lacks consistent, independent monitoring mechanisms for private prisons.²³³ This deficiency has contributed to numerous scandals and human rights concerns in American private facilities. Unlike the UK model, which includes formalized inspection mechanisms, oversight in the United States relies on different accountability structures that

228. Harding, *supra* note 11.

229. *Understanding Hybrid Public-Private Partnerships: A Model for Delivering Infrastructure*, WORLD BANK, <https://www.worldbank.org/en/topic/sustainableinfrastructure/finance/brief/understanding-hybrid-public-private-partnerships-a-model-for-delivering-infrastructure> [https://perma.cc/8F5C-MYW5] (last visited Mar. 26, 2026).

230. See HM Chief Inspector of Prisons, *supra* note 124.

231. David Pozen, *Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom*, 19 J.L. & POL. 253, 281 (2003).

232. Joanna Hargreaves & Amy Ludlow, *Holding Private Prisons to Account: What Role for Controllers as ‘the Eyes and Ears of the State?’*, in *MARKETISATION AND PRIVATISATION IN CRIMINAL JUSTICE* 151, 153-56 (Kevin Albertson, Mary Corcoran & Jake Phillips eds., 2020).

233. Alex Friedmann, *Apples-To-Fish: Public and Private Prison Cost Comparisons*, 42 FORDHAM URB. L.J. 503, 559 (2016).

may limit continuous governmental monitoring for enhanced accountability.²³⁴

Figure 2: International Comparison Table²³⁵

Feature	United States	United Kingdom	Australia	New Zealand
Government Monitors	Limited, inconsistent	Permanent, on-site (“controllers”)	Monitors, part of Australian National Preventative Mechanism (“NPM”) Network	None known
FOIA Applicability	Often Exempt	Fully Applicable	Fully Applicable	Fully Applicable
Performance Standards	Varies, enforcement can be weak	Contractually Stipulated, financial penalties	Financial Rewards for cost cutting	Financial rewards tied to rehabilitation outcomes
Public Transparency	Limited, data difficult to obtain	Publicly Reported Inspections (HMIP)	Prisoners have an unrestricted right to communicate with ombudsmen in most states	

Source: Author’s elaboration

This table presents a structured comparison of governance, accountability, and oversight mechanisms in private prison systems across four countries: the United States, the United Kingdom, Australia, and New Zealand. It highlights key differences in government monitoring, applicability of freedom of information laws (“FOIA”), stringency of performance standards, and the level of public transparency. Notably, the United States lags behind the UK, Australia, and New Zealand in several crucial areas. The UK employs permanent, on-site government monitors (“controllers”) in each private prison, while the U.S. has limited and inconsistent monitoring. FOIA laws, which promote public access to information, are fully applicable to prisons in the UK, Australia, and New Zealand, but often exempt private prisons in the U.S.²³⁶ While the UK and New Zealand utilize performance standards tied to financial rewards or penalties, the U.S. performance standards vary, and enforcement can be weak. This table underscores the more robust oversight frameworks in place in the UK, Australia, and New Zealand, which aim to ensure accountability and adherence to standards in private prisons, in contrast to the comparatively weaker oversight in the U.S. system.

In 2023, the Private Prison Information Act was introduced in the United States to require private prisons holding federal prisoners to disclose the same information as federal prisons.²³⁷ The bill is currently under review by the Committee on the Judiciary.²³⁸

234. See Eisen, *supra* note 15.

235. Freedom of Information Act, 5 U.S.C. § 552 (2016).

236. *Will Private Prisons Finally Be Subject to the Freedom of Information Act?*, NAT’L FREEDOM INFO. COAL., <https://www.nfoic.org/blogs/will-private-prisons-finally-be-subject-freedom-information-act/> [https://perma.cc/7U7Y-L4YL] (last visited Mar. 2, 2026).

237. Private Prison Information Act of 2023, S.1983, 118th Cong. (2023).

238. *Id.*

B. Comparing Public v. Private Prisons

Research comparing public and private prisons in the U.S. has yielded concerning results that diverge from the promises of privatization. A 2016 Department of Justice report found that private prisons had significantly higher incidents of violence than their government-operated counterparts, including nine times as many lockdowns, 28% higher average of inmate-on-inmate assaults, over 17% more use-of-force incidents, and over twice as many assaults on staff each month on average.²³⁹ In private prisons, inmates routinely struggle to access adequate medical care, face significant barriers when raising healthcare grievances, and are subject to cost-cutting practices that compromise the quality of treatment they receive.²⁴⁰ Furthermore, private prison corporations have discretion to reject unhealthy inmates to cut down costs compared to public prisons, whereas public prisons are required to provide medical and mental health services to inmates regardless of the severity of their condition.²⁴¹ These findings suggest that the profit motive in private prisons may lead to cost-cutting measures that compromise safety and security.²⁴²

In contrast, studies in the UK have shown mixed results. An Institute of Criminology study at Cambridge University found that while public-sector staff tended to be more knowledgeable and confident, private-sector staff treated prisoners more respectfully.²⁴³ Another study found marked improvements in prisoners' quality of life at Birmingham prison after its transfer from public to private-sector management, though conditions later deteriorated.²⁴⁴ Inspectorate reports have found that prisoners were kept in their cells for too long, roughly for 22 hours a day, and were kept from educational opportunities and training.²⁴⁵ This led HMP to demand action from GEO, which manages Birmingham, to improve and resolve these issues, with a plan to be submitted to the HMI Prisons Bureau prior to the next inspection.²⁴⁶ These findings suggest that while

239. U.S. DEP'T JUST., OFF. INSPECTOR GEN., REVIEW OF THE FEDERAL BUREAU OF PRISONS' MONITORING OF CONTRACT PRISONS 18-21 (Aug. 2016), https://oig.justice.gov/sites/default/files/reports/e1606_0.pdf [<https://perma.cc/9GVL-KVQH>].

240. Brian Nam-Sonenstein, *Cut-Rate Care: The Systemic Problems Shaping 'Healthcare' Behind Bars*, PRISON POL'Y INITIATIVE (Feb. 2025), <https://www.prisonpolicy.org/reports/healthcare.html> [<https://perma.cc/V7BV-K7CG>].

241. MEGAN MUMFORD, DIANE WHITMORE SCHANZENBACH & RYAN NUNN, THE ECONOMICS OF PRIVATE PRISONS 1 (Hamilton Project, Oct. 2016), https://www.hamiltonproject.org/assets/files/economics_of_private_prisons.pdf [<https://perma.cc/W3UY-9TW6>].

242. *Id.* at 4, 6.

243. Ben Crewe, Alison Liebling & Susie Hulley, *Staff-Prisoner Relationships, Staff Professionalism, and the Use of Authority in Public- and Private-Sector Prisons*, 40 L. & SOC. INQUIRY 309, 326 (2015).

244. HM CHIEF INSPECTOR OF PRISONS, *supra* note 124, at 7-8.

245. Charlie Taylor, *Purposeful Prisons: Time Out of Cell — A Key Findings Paper*, HM CHIEF INSPECTOR OF PRISONS 5-18 (Sep. 2024), <https://cdn.websitebuilder.service.justice.gov.uk/uploads/sites/19/2024/09/Purposeful-prisons-time-out-of-cell-web-2024.pdf> [<https://perma.cc/LGD7-SFA3>].

246. *Id.* at 5.

privatization may not automatically lead to poor conditions, the U.S. system has largely failed to deliver on its promises of improved service and efficiency.²⁴⁷

One of the primary arguments for prison privatization in the U.S. has been cost savings. However, recent studies have cast doubt on this claim. The U.S. Department of Justice concluded that private prisons do not save substantially on costs.²⁴⁸ A 2011 study by the Arizona Department of Corrections found that public prisons were not significantly more expensive and, in some cases, were as much as \$1,600 cheaper per inmate per year than private facilities.²⁴⁹ A University of Utah analysis conducted in 2007 found that savings from private prisons were “not guaranteed and appear minimal.”²⁵⁰ Many of these “savings,” if any, are due to cuts in staffing, educational programs, and labor costs at the expense of the inmates.²⁵¹

Unlike government-run facilities, private prisons are often exempt from Freedom of Information Act (“FOIA”) requirements, making it difficult for the public to obtain crucial data on prison conditions, incident reports, and staffing information.²⁵² This opacity hinders proper evaluation of the effectiveness and ethics of private prisons, leaving inmates vulnerable to potential abuses and substandard conditions.

C. Politics by Private Prison Giants

Another significant issue is the political influence wielded by private prison companies. These corporations, Serco, Geo, CCA, etc., engage in extensive lobbying efforts and have been found to play a role in shaping immigration and incarceration policies to their benefit.²⁵³ For instance, private prison companies have been involved in drafting and promoting legislation like Arizona’s immigration bill SB 1070, which led to increased immigrant detention and, consequently, profit for these companies.²⁵⁴ This creates a perverse incentive structure where private prisons may prioritize maintaining high incarceration rates over rehabilitation and reduced recidivism. Furthermore, the revolving door between government officials and the private prison industry raises concerns about potential conflicts of interest in policymaking and contract

247. Hadar Aviram, *Are Private Prisons to Blame for Mass Incarceration and its Evils?* *Prison Conditions, Neoliberalism, and Public Choice*, 42 *FORDHAM URB. L.J.* 411 (2014).

248. AUSTIN & COVENTRY, *supra* note 27, at 59.

249. Badmus, *supra* note 18, at 147.

250. Young, *supra* note 8.

251. AUSTIN & COVENTRY, *supra* note 27, at 59.

252. See Libbi L. Vilher, *Private Prisons and the Need for Greater Transparency: Private Prison Information Act*, 12 *BROOK. J. CORP., FIN. & COM. L.* 213 (2017).

253. Michael Poyker & Christian Dippel, *How private prisons affect sentencing*, CEPR (Aug. 6, 2019), <https://cepr.org/voxeu/columns/how-private-prisons-affect-sentencing> [<https://perma.cc/9GAQ-VK3L>].

254. Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, NPR (Oct. 28, 2010), <https://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law> [<https://perma.cc/3JSK-2DME>].

negotiations. These issues collectively undermine the integrity of the correctional system and raise serious questions about the government's ability to ensure justice and protect inmates' rights when profit motives are involved. In comparison, Commonwealth countries have stricter regulations, greater transparency, and robust oversight mechanisms, which make it more difficult for these for-profit companies to exert the same level of political influence as they do in the U.S.

The private prison systems in Australia and New Zealand offer notable contrasts with those in the United States, particularly in accountability, performance incentives, and transparency. In Australia, private prisons have become an integral part of the correctional system since the first one opened in 1990. Unlike the U.S., some Australian states have reported positive cost-efficiency outcomes.²⁵⁵ For instance, a 2018 audit in Victoria found that two private prisons cost up to 20% less to run than comparable public prisons, without compromising inmate care or overall well-being.²⁵⁶

Australia has implemented more robust oversight mechanisms compared to the U.S. The Office of the Commonwealth Ombudsman, coordinator of the Australian National Preventive Mechanism ("NPM") Network, monitors prisons and other detention facilities across the country.²⁵⁷ Prisoners have an unrestricted right to communicate with ombudsmen in most states, providing a level of accountability that is lacking in the U.S.²⁵⁸

D. Rehabilitation and Incentive Programs

New Zealand's innovative approach to "payment-by-results" contracts, which tie financial rewards to successful rehabilitation outcomes, has shown early promise.²⁵⁹ Auckland South Correctional Facility at Wiri operates under a payment-by-results model that ties financial incentives to a 10% reduction in recidivism and better outcomes for Māori inmates.²⁶⁰ This model aims to align the profit motive of private operators with the societal goal of reducing recidivism, a concept that is largely absent in the U.S. The goal is to incentivize private companies to operate ethically and invest in proper rehabilitation

255. Harding, *supra* note 11, at 1.

256. VICTORIAN AUDITOR-GEN.'S OFF., SAFETY AND COST EFFECTIVENESS OF PRIVATE PRISONS 8 (Mar. 2018), <https://www.audit.vic.gov.au/sites/default/files/2018-03/20180328-Private-Prisons.pdf> [<https://perma.cc/3XJ2-CWN3>].

257. *The Commonwealth Ombudsman's roles Under OPCAT*, COMMONWEALTH OMBUDSMAN, <https://www.ombudsman.gov.au/industry-and-agency-oversight/monitoring-places-of-detention-opcat/the-commonwealth-ombudsmans-roles-under-opcat> [<https://perma.cc/374S-VAYN>] (last visited Mar. 25, 2026).

258. *Prisons*, VICTORIAN OMBUDSMAN, <https://www.ombudsman.vic.gov.au/complaints/prisoner-complaints/> [<https://perma.cc/K4B7-7U8X>] (last visited Mar. 25, 2026).

259. Rikha Sharma Rani, *New Zealand Tries an Innovative Private Prison*, BLOOMBERG (Aug. 31, 2017), <https://www.bloomberg.com/news/articles/2017-08-31/new-zealand-tries-an-innovative-private-prison> [<https://perma.cc/7KGE-L6TS>].

260. *Id.*

programming so that they receive payments for outperforming state facilities in reducing recidivism rates. For example, one prison in New Zealand received a \$1.1 million bonus for reducing recidivism at a greater rate for both Māori and non-Māori prisoners than the government achieved between 2016 and 2017.²⁶¹ If there is a serious breach, like inmate death or an escape, the private facility is charged a heavy financial penalty.²⁶² This system does not exist in the U.S. and has the potential of being more successful at forcing private prisons to run ethically and invest in rehabilitation programs than lobbying for harsher criminal sentencing or cutting costs that impact inmate care.

However, both countries still face challenges similar to those in the U.S. Transparency remains an issue, especially since private prisons are not required to release any information on how their funding is being used and statistics regarding their inmates, making informed debate difficult.²⁶³ There are also serious concerns about the absence of independent oversight, with the Bureau of Prisons' existing internal and external auditing bodies having repeatedly failed to ensure the humane treatment of prisoners or meaningfully address systemic deficiencies in medical care, mental health treatment, and administrative processes.²⁶⁴

The UK's experience with private prisons offers both similarities and contrasts with the U.S. system. Like the U.S., the UK introduced private prisons in the early 1990s to address overcrowding and reduce costs.²⁶⁵ Currently, 14 prisons in England and Wales are run by private companies, housing approximately 14.5% of the prison population.²⁶⁶

One key difference is the UK's more robust oversight mechanisms. Each private prison in the UK has an Independent Monitoring Board ("IMB") with direct reporting powers to the Secretary of State.²⁶⁷ Additionally, the Office of the Commonwealth Ombudsman monitors prisons and other detention facilities, providing a level of accountability often lacking in the U.S. system.

The UK has experimented with performance-based contracts, similar to

261. Eisen, *supra* note 16.

262. Rikha Sharma Rani & CityLab, *New Zealand Tries a Different Kind of Private Prison*, ATLANTIC (Aug. 31, 2017), <https://www.theatlantic.com/politics/archive/2017/08/new-zealand-tries-a-different-kind-of-private-prison/544883/> [<https://perma.cc/D6FV-EA8L>].

263. *Private Prisons vs. Public Prisons*, CRIMINAL JUSTICE PROGRAMS (May 4, 2021), <https://www.criminaljusticeprograms.com/articles/private-prisons-vs-public-prisons/> [<https://perma.cc/S9KW-JZ5N>].

264. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *Regarding Bureau of Prisons Oversight* (Aug. 13, 2022), <https://www.nacdl.org/Content/Regarding-Bureau-of-Prisons-Oversight> [<https://perma.cc/Q5DU-QZQ9>].

265. Young, *supra* note 8.

266. Marina Damji, *Prison Privatization: A Failure of the British Penal System*, ST. ANDREWS L. REV. (Mar. 20, 2022), <https://www.standrewslawreview.com/post/prison-privatisation-a-failure-of-the-british-penal-system> [<https://perma.cc/UD8S-HRPW>].

267. *Independent Monitoring Boards*, GOV.UK, <https://www.gov.uk/government/organisations/independent-monitoring-boards-of-prisons-immigration-removal-centres-and-short-term-holding-rooms> [<https://perma.cc/AT6J-YV9R>] (last visited Mar. 2, 2026).

New Zealand's "payment by results" model. However, the effectiveness of these contracts in improving outcomes remains debated. Critics, such as Sodexo, argued before the House of Commons that the "sheer weight of compliance and assurance reporting" for private prisons can hinder flexibility and innovation, and they wanted to remove the Controller's position.²⁶⁸ HMP Doncaster was one of the first prisons to operate under a performance-based contract, where the private operator was incentivized to reduce reconviction rates.²⁶⁹ Initial reports indicated some success in reducing reconviction rates. Advocates argue that the performance-based model has led to greater efficiency and, if implemented on a wide scale, would offer more innovation and reduce recidivism rates.²⁷⁰

E. Prison Labor

In the U.S., prison labor is used to exploit incarcerated workers for cheap labor. These inmates typically earn between \$0.13 to \$0.52 per hour, significantly lower than the federal minimum wage.²⁷¹ As discussed previously, the 13th Amendment allows for involuntary servitude as a punishment for crime, leading to widespread use of prison labor in both public and private sectors; however, it is abused more in the private sector.²⁷² Many incarcerated workers face coercion to work for nothing, a lack of proper training, and unsafe working conditions for hours on end. In all these countries, wages are still below national pay standards. While prisoners are not covered by the National Minimum Wage Act, they earn slightly higher wages compared to the U.S.²⁷³ The UK's approach needs dire reform to focus labor on rehabilitation and skill-building, but concerns about low pay still remain.

In Australia, prison labor is used as part of their rehabilitation program; prisoners earn as little as \$2 per hour for some Australian companies.²⁷⁴ The Australian minimum wage is \$21.38 an hour.²⁷⁵ These wages are higher than in the U.S. but still below the national minimum wage.²⁷⁶ Conditions vary widely, and some practices have been criticized as exploitative. These jobs include tasks

268. JUSTICE COMMITTEE ON PRISON GOVERNANCE, REPORT, 2019-20, HC 191, at 61 ¶ 157 (UK).

269. Alys V. Brown, *Are the U.K.'s Payment-By-Results Programs Right for U.S. Prisons?*, 33 EMORY INT'L L. REV. 183-84 (2018).

270. *Id.* at 200-01.

271. *Captive Labor: Exploitation of Incarcerated Workers*, *supra* note 84.

272. *Id.*

273. *Id.*

274. Millie Costigan, *Inmates usually work for around \$2 an hour*, CANBERRA TIMES (Oct. 18, 2022), <https://www.canberratimes.com.au/story/7947179/prisoners-are-often-paid-2-an-hour-but-corporate-australia-wont-let-you-know-it/> [<https://perma.cc/CQP4-W9CV>].

275. *Id.*

276. Wendy Sawyer, *How much do incarcerated people earn in each state?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/> [<https://perma.cc/CPA4-4743>].

in groundskeeping, maintenance, industrial work, and even supervisory roles.²⁷⁷ Participation in prison work is not mandatory or forced, but voluntary to earn extra money and gain new skills. New Zealand employs prison labor with a focus on rehabilitation, but wages are very low, ranging from \$0.20 to \$0.60 per hour.²⁷⁸ These rates have not been touched for 20 years. Issues such as overcrowding and inadequate mental health treatment have been highlighted, but there are no significant reports of forced labor. Minister for Corrections, Mark Mitchell, said the department was “reviewing the prisoner incentive allowance framework,” which included developing a framework to ensure prisoner earnings rates were regularly reviewed.²⁷⁹ Overall, while the U.S. has the most criticized system due to extremely low wages and harsh conditions, the UK, Australia, and New Zealand also face challenges in ensuring fair pay for incarcerated workers.

Despite these challenges, the approaches of Australia, the UK, and New Zealand to private prisons, particularly regarding performance-based contracts and strong oversight mechanisms, offer potential lessons for improving the U.S. system. These are lessons that can be implemented now and should be implemented now to protect inmates, protect the meaning of justice, and to actually invest in rehabilitation programming that can lower recidivism rates and turn our system into a rehabilitative one rather than a punitive one.

VI. RECOMMENDATIONS FOR THE UNITED STATES TO REFORM THE FOR-PROFIT PRISON INDUSTRY AND THE CRIMINAL JUSTICE SYSTEM

Based on the discussion of international practices and models and the current state of the U.S. private prison system, its treatment of our inmates, poor results and the extremely high levels of profits incurred, the following recommendations aim to address the shortcomings of the for-profit prison industry and improve the overall criminal justice system. The world and justice would do better without having billionaire companies run jails and prisons, but realistically, the government will continue to contract with private companies. But that does not mean the United States cannot learn from other countries on how to implement private contracts ethically and effectively, and to install proper, strict oversight mechanisms to reduce recidivism rates and aid inmates on their paths to freedom and rehabilitation.

277. *Work Areas*, GOV'T S. AUSTL.: DEP'T FOR CORR. SERVS., <https://www.corrections.sa.gov.au/Rehabilitation-education-and-work/work-opportunities/work-areas> [https://perma.cc/WX6L-25L9] (last visited Mar. 26, 2026).

278. Luka Forman, *Prison pay rates need reform, advocates say*, RNZ (Feb. 10, 2025), <https://www.prison-insider.com/en/articles/new-zealand-prison-pay-rates-need-reform-advocates-say> [https://perma.cc/LNP7-2BCZ].

279. *Id.*

A. Implement Performance-Based Contracts

The U.S. should adopt performance-based contracts for private prisons, tying financial incentives to positive outcomes rather than merely occupancy rates. These contracts should reward reduced recidivism rates, proper execution of rehabilitation programs, successful post-release employment, and improved inmate education and skills training. This program could actually help improve the criminal justice system if private prisons were given incentives to instill these programs. For example, in Pennsylvania, private community corrections providers reduced recidivism rates by 11.3% in two years after implementing performance-based funding formulas.²⁸⁰ Imagine if this were done on a mass scale federally across the country.

The United States can look to New Zealand's experience with performance-based contracts, which have shown promising results. Wiri's payment-by-results model that links payments to outcomes such as reduced recidivism rates has worked in reducing recidivism at a greater rate for both Māori and non-Māori prisoners compared to government-run facilities. Serco, the private operator of Wiri, received a \$1.1 million bonus for this.²⁸¹ This success demonstrates the high potential of well-designed incentive structures to drive positive outcomes in private prisons. The U.S. government, however, would actually need to recognize the state of private incarceration as a problem and work diligently to pass legislation like this one. Many scholars and elected officials have pushed for such programs; the U.S. Government just needs to demand it.²⁸²

B. Enhance Oversight and Accountability

The U.S. should establish independent monitoring commissions, similar to the UK's Independent Monitoring Boards ("IMBs"), to provide regular, unannounced inspections of private facilities. The IMBs have free access to every part of the prison and to every prisoner, with the ability to conduct private interviews. These boards are required to satisfy themselves as to the state of the prison premises, administration, and treatment of prisoners.

Private prisons are frequently exempt from FOIA requirements, limiting public access to data on conditions, incidents, and operations within these facilities.²⁸³ This lack of transparency hinders accountability and makes it challenging for external parties to assess whether private prisons meet safety and rehabilitation standards. Additionally, while the Department of Justice's

280. Leonard Gilroy, *Pay for Success Contracting Reducing Recidivism in Pennsylvania*, REASON FOUND. (Aug. 31, 2015), <https://reason.org/commentary/pennsylvania-contract-recidivism/> [<https://perma.cc/LLE3-BW3F>].

281. Eisen, *supra* note 16.

282. Rani, *supra* note 259.

283. Vilher, *supra* note 252.

Office of the Inspector General (“OIG”) periodically reviews private prison performance, these reports often reveal shortcomings in monitoring practices and recommending improvements that are not always implemented effectively.²⁸⁴

At the state level, oversight varies widely. Some states conduct audits or inspections of private facilities, but these efforts are inconsistent across jurisdictions. Meanwhile, immigrant detention facilities operated by private companies under contracts with ICE face similar criticisms for inadequate oversight and inhumane, poor conditions despite being subject to federal monitoring agreements.²⁸⁵ Overall, while systems exist to review private prisons in the U.S., they are often undermined by limited transparency, inconsistent enforcement, and an emphasis on cost-cutting over prisoner welfare.

To implement a similar system in the U.S., legislation should be enacted to grant oversight bodies unrestricted access to facilities, prisoners, and information. Furthermore, all of this information should be transparent to the public and the families of the inmates. This would address the current lack of consistent, independent monitoring systems for private prisons. Key features of an effective oversight system should include: unannounced visits to private facilities with access to full inspection, authority to conduct private interviews with inmates and guards privately, requirements to report all findings to the appropriate officials and make recommendations for improvement, and, if prisons are not operating humanely or ethically, there should be warnings of terminating contracts and taking government control to instill actual consequences on private companies that do not adhere to proper treatment of inmates and desired results.

C. Focus on Rehabilitation and Reentry

The U.S. must prioritize evidence-based rehabilitation strategies when renewing or entering into contracts with private prisons. These contracts should focus on strategies throughout the prison system, from initial intake to community reentry. This includes utilizing residential reentry centers and establishing clear, uniform standards for all providers, private and public.

Vocational training and education programs should be expanded, and there should not be “benefits” that are taken away from inmates if they engage in “bad behavior.” Inmates should be able to take care courses in various trades, engage in academic studies, and participate in job training programs that will provide them with the skills needed to succeed in life outside of prison. Furthermore, the government can invest in companies that offer these opportunities and

284. Lauren Krisai, Austill Stuart & Leonard Gilroy, *Annual Privatization Report 2017 – Criminal Justice and Corrections*, REASON FOUND. (Dec. 29, 2017), <https://reason.org/privatization-report/annual-privatization-report-2017-criminal-justice-and-corrections/> [https://perma.cc/86MR-7JJJ].

285. Cho, *supra* note 78.

psychological therapy, and partner with prisons to provide these services to inmates.

Just like how Australia and the UK have taken over or terminated contracts with private companies that ran private prisons, the U.S. should be willing to shut down private facilities or take them over if they are not reaching goals and reducing recidivism. Private companies should be worried about not getting contracts renewed if they are not meeting the desired goals and statistics in rehabilitation, rather than having such a pull in politics and legislation-making.

The United States can draw valuable lessons from New Zealand's approach to addressing the overrepresentation of Māori in its prison system, particularly concerning vulnerable communities and culturally responsive rehabilitation. Recognizing that both Māori in New Zealand and African Americans in the U.S. face extreme systemic disadvantages and hold the largest demographic of inmates in public and private prisons, the U.S. could emulate New Zealand's active implementation of strategies that acknowledge the unique cultural and historical context of its incarcerated population. The U.S. could and should develop culturally tailored rehabilitation programs that address the specific needs and experiences of African American inmates, involving community leaders and recognizing the historical disadvantages and events that have impacted African American communities, particularly the War on Drugs. This shift would require a greater emphasis on data collection and evaluation to assess the effectiveness of rehabilitation programs and ensure they genuinely benefit vulnerable communities, moving beyond a purely punitive approach toward one that fosters meaningful change.

D. Invest in Alternatives to Incarceration

The U.S. should prioritize developing and funding community-based alternatives to incarceration, focusing on addressing root causes of crime such as poverty, mental health issues, and substance abuse. This approach aligns with successful models seen in Norway, the United Kingdom, and New Zealand. Norway's approach emphasizes rehabilitation and reintegration over punishment. The country utilizes a system of small, community-based correctional facilities rather than large, centralized prisons.²⁸⁶ This model allows incarcerated individuals to remain geographically close to their homes, maintaining relationships with family and community support systems. Norway also implements the "import model," where services such as health care and education are provided to inmates just as they are to those not incarcerated.²⁸⁷

286. *What We Can Learn from Norway's Prison System: Rehabilitation And Recidivism*, FIRST STEP ALL. (May 1, 2024), <https://www.firststepalliance.org/post/norway-prison-system-lessons> [<https://perma.cc/G3V3-375L>].

287. *About the Norwegian Correctional Service*, KRIMINALOMSorgen [CORR. SERV.], www.kriminalomsorgen.no/informasjon-paa-engelsk.536003.no.html [<https://perma.cc/NMF7-BYEN>] (Nor.) (last visited Mar. 9, 2026).

The UK has experimented with community-based alternatives, including electronic monitoring and community service orders. These programs aim to reduce prison populations while still ensuring public safety and offender accountability. The UK has also implemented “Through the Gate” services, which provide intensive support to offenders as they transition from custody to the community.²⁸⁸ New Zealand has introduced innovative programs like the Māori Focus Units, which incorporate cultural practices into rehabilitation efforts.²⁸⁹ The country has also implemented restorative justice programs and community-based sentences, which aim to address the harm caused by crime while keeping offenders connected to their communities. By investing in these alternatives, the U.S. could reduce its prison population, lower recidivism rates, and improve outcomes for both offenders and communities.

Rather than spending billions on private prison contracts, investing in communities and inner-city neighborhoods, where educational outcomes are low due to a lack of funding for schools and extracurricular programs, helps set vulnerable communities up for success. Investing money in proper schooling, healthcare, and job training in these communities would not only boost the economy but also reduce the need for mass incarceration, with prisons taking in millions of inmates a year. The U.S. has a punitive system rather than a rehabilitative one and focusing on prevention rather than punishment could put the U.S. on track to not only lower our extremely high percentage of prisoners but also increase monetary and work opportunities for individuals of color or born into low-income households.

E. Explore Non-Profit Alternatives

Partnering with non-profits in the criminal justice system can offer significant benefits for rehabilitation and reintegration efforts within private and public prisons. Non-profit organizations like Justice System Partners (“JSP”) are committed to transforming criminal and juvenile legal systems to be more equitable, effective, and humane.²⁹⁰ This mission-driven approach contrasts highly with the profit-driven motives of private prison companies. Non-profits usually bring expertise in evidence-informed strategies and rigorous research. For example, the National Institute for Criminal Justice Reform (“NICJR”) provides technical assistance, consulting, and research to help reduce incarceration rates and improve outcomes for incarceration individuals and

288. JUSTICE COMMITTEE, THE FUTURE OF THE PROBATION SERVICE, 2019-21, HC 285, ¶ 92 (UK).

289. Neil Campbell, *The Department of Corrections’ tikanga-based programmes*, 4 N.Z. CORR. J. (Dec. 2016), https://www.corrections.govt.nz/resources/research/journal/volume_4_issue_2_december_2016/the_department_of_corrections_tikanga-based_programmes [https://perma.cc/HD9L-3J7B].

290. *See About Us*, JUSTICE SYSTEM PARTNERS, <https://justicesystempartners.org> [https://perma.cc/FVP4-QJG6] (last visited Mar. 26, 2026).

prisons.²⁹¹ The government should contract with organizations like the NICJR to plan reform initiatives within private prisons.

While not exclusive to non-profits, partnering with mission-driven organizations may make it easier to implement performance-based contracts that incentivize rehabilitation and successful reentry, similar to the models used in Australia and New Zealand. By leveraging the expertise, community connections, and mission-driven focus of non-profit organizations, hundreds of which exist in the U.S., our country can work towards a more rehabilitative and effective criminal justice system, reducing recidivism rates and improving the conditions and operations of private prisons that are currently unethically run. Ideally, the need for private prisons will cease to exist, and the government will realize how unethical and ineffective it is to sell out justice. But if their use is going to continue, there are significant ways to ensure they are run effectively, humanely, and ethically.

VII. CONCLUSION: RECLAIMING JUSTICE FROM THE MARKET

The United States stands at a crossroads, whether elected officials want to acknowledge it or not. The U.S. can continue down a path in which human lives are reduced to line items on corporate balance sheets, in which the pursuit of profit outweighs the need for rehabilitation, and in which justice itself can be bought and sold like a stock. Or this nation can choose to finally acknowledge the crisis at hand and choose a different path, one that prioritizes human dignity, invests in community well-being and success, and ensures that the scales of justice are balanced for all. Other countries have done so or are currently developing models to phase out private prisons or to heavily regulate them, so why can't we?

As this Note has shown, the for-profit prison industry in the United States has perpetuated a system that disproportionately harms marginalized and vulnerable communities, undermines effective rehabilitation, and erodes trust in our criminal justice system. From historical convict leasing to the modern-day occupancy guarantees that incentivize higher incarceration rates, the profit motive has consistently taken control of the United States' correctional system, prioritizing financial gain over human justice.

An examination of international models, especially those in New Zealand, Australia, and the United Kingdom, makes it clear that alternative approaches are possible. While those systems are not perfect either, they are taking steps that the United States has not and is not to improve their systems in any way possible. Performance-based contracts, effective oversight boards and mechanisms, and a steadfast commitment to evidence-based rehabilitation can create a more ethical and effective system, one that aligns the incentives of

291. See NAT'L INST. FOR CRIM. JUST. REFORM, <https://nicjr.org> [<https://perma.cc/L8AD-2JQW>] (last visited Mar. 26, 2026).

private operators with the public good. Elected officials have considered these plans, but need a greater push to pass legislation. Calling on our officials and volunteering with non-profits can show our government our need to reform the incarceration system and the ethics of big prisons. Research your elected officials and see how they have contributed or have not contributed to these big companies that have profited off inmates.

Phasing out this incredibly destructive for-profit system is not merely a matter of operational efficiency; it is a moral imperative. Privatization does not work and is not working; the outcomes are terrible, and human beings are suffering while in confinement. We have a responsibility to do better. When we allow private companies to profit from incarceration, we send a clear message that some lives are worth more than others, that the pursuit of profit trumps the pursuit of justice, and that the promise of rehabilitation is secondary to the bottom line.

The recommendations outlined in this Note offer a roadmap for necessary reform. By implementing performance-based contracts, enhancing oversight and accountability, regulating campaign contributions and influence from giants in the private prison industry, prioritizing rehabilitation and reentry, reforming sentencing practices, and investing in alternatives to incarceration, the United States can begin to reclaim justice from the stock market. These recommendations require a significant shift in perspective, a willingness to challenge deeply entrenched interests, and a commitment to building a just and equitable society by our government officials, who have the power to implement the legislation needed to fix the private prison and forced prison labor problem prevalent in America.

To understand mass incarceration is to confront an uncomfortable truth: the American carceral state is not a departure from slavery but its direct descendant. The 13th Amendment did not completely abolish slavery—it preserved it, carving out a constitutional exception where human beings could still be stripped of their freedom and compelled to labor without compensation, so long as they had been “duly convicted” of a crime. This was not an oversight. Within years of Emancipation, Southern states weaponized this exception through Black Codes and convict leasing systems that re-enslaved newly freed Black Americans, arresting them on specious charges and leasing their bodies to plantations, mines, and railroads where they were worked to death under conditions so brutal that in Mississippi, not a single leased convict survived a ten-year sentence. When convict leasing fell out of favor, it was replaced by chain gangs—shackled Black men forced to build the roads and infrastructure of the Jim Crow South under the watch of armed guards with whips and shotguns.

Today’s prison labor system operates on the same constitutional foundation, in facilities sometimes built on the very land where slaves once worked, extracting billions of dollars in labor from a population that remains disproportionately Black and Brown. The exposed wound of racialized mass

incarceration cannot be healed by reforms that leave the 13th Amendment's exception clause intact, any more than Jim Crow could have been dismantled while preserving the legal architecture of "separate but equal." Scholars, advocates, and lawmakers must engage with the full heritage of American punishment, from the plantation to the penitentiary, from the auction block to the prison labor camp, not as a matter of historical curiosity, but as an essential predicate to meaningful reform. Until we reckon with the truth that our carceral system was designed to maintain systemic racism under a different name, we will continue to tinker at the margins of a machine built to do exactly what it is doing. While one cannot compare the United States' history to that of another country, our nation can learn from the incarceration systems of similarly situated nations and from the values and practices that have prioritized rehabilitation, human rights, and reform. While these systems are far from perfect, the fact that these nations have recognized their shortcomings and have made meaningful and cognizant attempts to address them reflects a commitment to human dignity that the United States would do well to emulate, as a first step toward dismantling a system that was built to fail, reclaiming justice from the profit motive, and building a justice system that genuinely focuses on rehabilitation. At the heart of this effort must also be an honest confrontation with how incarcerated people are treated, because the inhumane conditions and lack of basic human dignity and oversight that define so much of the current system are not mere failures, but structural ones that demand urgent and deliberate reform now.