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Human Rights Paradox: A Comparative Analysis of International Law Receptiveness in Mexico and the United States

Rima Nathan

"The life of the law has not been logic; it has been experience . . . The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become."

- Oliver Wendell Holmes

Abstract: The usage of international and foreign law in domestic courts has been met with increasing controversy. Judicial activists praise the inclusion of international and foreign law because they see it as a modernization of entrenched legal theories. Textualists fear the implications of blurring the lines between established law and the laws of other systems, the inclusion of which may offset the fragile nature of the judiciary. Despite concerns on both sides, the positive benefits of inclusion are met with pessimism. Even if a state makes it past the hurdle of including international and foreign law in judicial decisions, there is little evidence that inclusion advances human rights, increases judicial stability and certainty, or expands access to justice. Mexico, however, is changing the landscape of inclusion with the passage of the Human Rights Amendments in 2011. The Human Rights Amendments have brought a wave of judicial change in decisions relating to marriage equality, indigenous consultation, and marijuana possession and consumption. While noting the unique landscape of Mexican legal reform, this paper praises Mexico's inclusion of international law in the constitution and demonstrates how such inclusion serves as a huge source of analysis for comparativists and governments around the world.

Introduction

International law provides a plethora of guidance for defending human rights.¹ Despite the extensive availability of human rights standards, the United States Supreme Court (the Supreme Court or the Court) rarely utilizes international human rights law in decisions. Entrenched ideology has fueled the debate on the appropriateness of utilizing international or foreign law in domestic courts.² Whether or not to utilize international or foreign law in domestic courts is a hotly debated issue because of how outdated the United States Constitu-

1. See United Nations Human Rights Office of the High Commissioner, *The Core International Human Rights Instruments and their monitoring bodies*, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited Mar. 19, 2019).

2. See Hadar Harris, "We Are the World" – Or Are We? *The United States' Conflicting Views on the Use of International Law and Foreign Legal Decisions*, 12 HUM. RTS. BRIEF 5 (2005).

tion is when compared with international law, which is almost continuously updated.³ If rewritten today, one could not deny that the United States Constitution would look completely different. While it would be a subjective analysis to conclude that a rewritten constitution would have broader recognition of human rights, other countries are increasingly utilizing international human rights law in judicial decisions and even implementing international law into their constitutions.

A comparative analysis of international and foreign law utilization is noteworthy because it would provide the Supreme Court with an insight into the legal experience and evolution of other countries. In turn, an open interpretation of international and foreign law utilization by other countries would provide the Supreme Court with the tools and reasoning necessary to hold in favor of stronger human rights recognition and protections given that so many other countries and treaties specifically recognize such rights.⁴

The influence and relevance of international and foreign law change depending on the type of case being decided. For example, Justice Breyer suggests that application of foreign law will differ when applied to Eighth Amendment questions and when applied to matters of contract law. Breyer suggests that differing legal systems will have a greater influence towards the latter due to the structural elements of each system, rather than the general moral questions of dignity.⁵ Overall, seemingly similar democratic countries may differ significantly with respect to the admissibility of international and foreign law. However, they are useful comparisons given the commonality of fundamental legal principles. Israel, Canada, and other countries of the British Commonwealth make extensive use of comparative law, while the United States does not.⁶ Justice Breyer and former justice of the Israel Supreme Court, Aahron Barak, note that comparative law can “expand[] horizons and cross-fertilization of ideas across legal systems” and enhance our understanding of how democratic values play out across the globe.⁷ In quoting Justice O’Connor, Justice Ginsburg notes the importance and relevance of looking to international law because legal systems around the world are continuously innovating and we can likely learn and benefit from their trial and error.⁸ Therefore, international and foreign law both have the potential to play a very significant role in the expansion of human rights.

The United States Constitution does not specifically foreclose utilizing international or foreign law. However, the mere age and relative success of the Constitution provide for limited incentives to look across the pond at how other countries may do things – regardless of whether such alternative legal endeavors have been successful or not. This essay will look to a relatively successful example on our side of the pond: Mexico’s recent constitutional amendments which

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3. Wojciech Sadurski, *Constitutional Review in Europe and in the United States: Influences, Paradoxes, and Convergence* 515–16 (Sydney L. Sch. Res. Paper No. 11/15, Feb. 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1754209.
 4. See *infra* The Effects of the HRA.
 5. The Relevance of Foreign Legal Materials in United States. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer, 3 INT’L J. CONST. L. 519, 529 (2005).
 6. Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in A Democracy*, 116 HARV. L. REV. 19, 113–14 (2002).
 7. *Id.* at 112.
 8. Harris, *supra* note 2, at 8.

have entrenched international law into the constitution and paved the way for increased defense of human rights. While such an inclusionary clause in the United States Constitution is unlikely, Mexico's constitutional developments provide a useful comparison for human rights advancement and, optimistically, may quell the fears of inclusionary skeptics.

I. International Law in the United States

On the rare occurrences that international and foreign law are utilized in the United States, they are accompanied by extensive justification.⁹ The Supremacy Clause of the United States Constitution is the most relevant authority in determining when to place international law in domestic courts and has been essential to the development of the country since its inception.¹⁰ The role of the Supremacy Clause would be fundamentally altered if international law was explicitly seen as on par with Supreme Court precedent and the United States Constitution.¹¹ Would such a fundamental alteration be detrimental to constitutional precedent, or would it allow for legal advancement in realms of the law starved for progressive precedent? Is it useful and appropriate to look at the experiences of other countries, or should the United States stick strictly to its own texts for legal interpretation and enforcement? Given that the United States is a “delinquent” in the international human rights community,¹² what standards should the United States be concerned with setting when it comes to respect for human rights, and how might international human rights norms parallel with domestic norms? Questions like these are at the heart of a vigorous debate concerning the appropriateness of utilizing international and foreign law in Supreme Court decisions, further fueled by the increasing usage of such sources of law.¹³

International and foreign law utilization in domestic courts often centers around elements of human dignity and Eight Amendment concerns.¹⁴ Human dignity has become a buzz word for shaping the law by applying a very broad and “inherently elastic” term.¹⁵ Dignity concerns are part of almost every legal debate, from criminal procedure to socioeconomic rights. Because dignity is such an amorphous term, the usage of international and foreign law in regard to dignity concerns has not resulted in concrete analyses for the types of legal questions that may call for international and foreign legal standards. The following cases are examples of the different ends of the international and foreign law spectrum in the Supreme Court.

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9. See *Roper v. Simmons*, 543 U.S. 551, 576–77 (2005).
 10. Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J. L. & PUB. POL'Y 291, 316 (2005).
 11. *Id.*
 12. Amy C. Harfeld, *Oh Righteous Delinquent One: The United States' International Human Rights Double Standard – Explanation, Example, and Avenues for Change*, 4 N.Y. CITY L. REV. 59, 59–60 (2001).
 13. See generally Harris, *supra* note 2.
 14. See, e.g., *Roper*, 543 U.S. at 605; *Trop v. Dulles*, 356 U.S. 86 (1958); *Thompson v. Oklahoma*, 487 U.S. 815 (1988).
 15. Michèle Finck, *The Role of Human Dignity in Gay Rights Adjudication and Legislation: A Comparative Perspective*, 14 INT'L J. CONST. L. 26, 53 (2016), <https://doi.org/10.1093/icon/mow009>.

A. *Roper v. Simmons*

The most significant Supreme Court case that has paid respect to both international law and foreign law is *Roper v. Simmons*.¹⁶ In *Roper*, the Court looked to foreign jurisdictions as well as the International Covenant on Civil and Political Rights and the United Nations Convention on the Rights of the Child to analyze the imposition of the juvenile death penalty.¹⁷ *Roper* aided in sparking the extensive and contentious debate about the relevance of international and foreign law in Supreme Court decisions.¹⁸ Justice Kennedy, writing for the Court, noted the lack of controlling precedent under international and foreign law, but maintained his stance that it was appropriate to utilize international and foreign law in the legal analysis of *Roper* because of the unique position of the United States in contrast to the rest of the world.¹⁹ The United States was overwhelmingly singled out as being the only country that still used the juvenile death penalty.²⁰ Even in the dissenting opinion, Justice O'Connor made a point of giving credence to international law and, specifically, international law as it relates to Eighth Amendment analyses due to the weight that such an analysis places on the "maturing values of civilized society."²¹

Cases like *Roper*, with an inclusion of international and foreign law, are extremely rare in United States jurisprudence.²² Further, in her dissenting opinion, Justice O'Connor specifically addressed the common American constitutional value of dignity and how it relates to the Eighth Amendment, an issue which inherently calls for a broad analysis of human values and how they relate to the Constitution.²³ Therefore, while *Roper* is a major highlight of the United States' approach to international law, the legal arguments do not provide promising precedent upon which human rights advocates can build.

B. *Medellin v. Texas*

While *Roper* exemplified international law being successfully utilized in a Supreme Court decision, *Medellin v. Texas* is an example of the alternative.²⁴ The Court, in *Medellin*, found that International Court of Justice (ICJ) decisions are not automatically binding on federal or state courts.²⁵ Similar to Canada's international law approach, the Supreme Court held that no treaty is self-executing—treaties are not a source of law.²⁶ *Medellin* discussed the ICJ's *Avena*

16. *Roper*, 543 U.S. at 578.

17. *Id.* at 576–77, 622.

18. *Id.* at 554, 575–77; *Id.* at 621–28 (Scalia, J., dissenting); *Id.* at 604–05 (O'Connor, J., dissenting in part).

19. *Id.* at 578 ("It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.")

20. *Id.* at 577.

21. *Id.* at 605 (O'Connor, J., dissenting).

22. Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 127 (2005).

23. *Roper*, 543 U.S. at 605 (O'Connor, J. dissenting).

24. See generally *Medellin v. Texas*, 552 U.S. 491 (2008).

25. *Id.* at 511.

26. César Nava Escudero, *Indigenous Environmental Rights in Mexico: Was the 2001 Constitutional Reform Facilitated by International Law?*, 4 MEX. L. REV. 209, 222 (2011).

decision, which held that the United States violated the Vienna Convention on Consular Relations (“VCCR”) by failing to inform fifty-one Mexican nationals (including petitioner Medellín who was convicted of capital murder and sentenced to death) of their rights pursuant to the VCCR.²⁷ The Court reasoned that enforcing the ICJ judgment in the *Avena* decision would be against Article 94 of the United Nations Charter, which allows for member states to comply with decisions at their own discretion.²⁸ The Court went to great lengths to differentiate that the VCCR, which obligates compliance with ICJ judgments, was still legitimate despite the United States not adopting it in domestic law.²⁹

The dissent calls the fundamental treaty noncompliance into question, but this concern ultimately does not rule the decision.³⁰ Justice Breyer went further in the dissent to point out the hypocrisy of the ruling and to argue for the applicability of the ICJ judgment and, overall, a more open approach to international law.³¹ Breyer’s functionalist argument looked to the purpose, historical context, and judicial application focus of the VCCR because there was an absence of meaningful text with which to decide where the applicability of international law fit in to domestic law.³²

These decisions have different approaches to the application of international and foreign law and are present in entirely different legal contexts. *Roper* addressed Eighth Amendment standards as they pertain to the application of the death penalty on juveniles, a practice which the United States was highly outnumbered in continuing.³³ *Medellin* more specifically addressed the appropriate place of international law as it pertains to domestic law, and decided to deny the application of such, a practice in which the United States is surely not outnumbered.³⁴ These cases provide two different ends of the spectrum, but still highlight the extreme hesitation to utilizing international and foreign law in domestic courts.

While international and foreign law decisions are hotly contested as precedent in Supreme Court decisions, it must be noted that the United States Constitution did not mature into what it is today through continuous textual interpretation. Vicki Jackson explains,

The Constitution is ours because many generations have made it so, through a complex process that begins with the adoption of the original text and amendments but entails layers of contest and interpretation – including prior interactions with ideas and practices shared by transnational commu-

27. *Medellin*, 552 U.S. at 511–14.

28. *Id.* at 500.

29. *Id.* at 519.

30. *Id.*

31. *Id.* at 557 (“What sense would it make (1) to make a self-executing promise and (2) to promise to accept as final an ICJ judgment interpreting that self-executing promise, yet (3) to insist that the judgment itself is not self-executing (i.e., that Congress must enact specific legislation to enforce it)?”).

32. Justin Desautels-Stein, *Race As A Legal Concept*, 2 COLUM. J. RACE & L. 1, 10, n.39 (2012).

33. *Roper*, 543 U.S. at 560–69, 577.

34. *Medellin*, 552 U.S. at 532; see generally United Nations Treaty Collection Status of Treaties: Listing declarations and reservations to the Vienna Convention on the Law of Treaties (May 23 1969), https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&cclang=_en.

nities – that shape its meaning over time. The Constitution did not come to protect equality for women and racial minorities only because it was “self-given” in 1789, or 1868, or 1920, but because of ongoing contests over its meaning.³⁵

Therefore, it would be fruitful for the American legal community to open itself up to constitutional interpretations which recognize the experience and prevalence of international law—“testing understanding of one’s own traditions and possibilities by examining them in the reflection of others.”³⁶ Mexico’s recent constitutional amendments, entrenching international law into the domestic judiciary, are an ideal place to begin the analysis.

II. Mexico’s 2011 Human Rights Amendment

Historically, Mexico has been more open to international and foreign law than the United States, and scholars have assumed that the balance of international versus domestic law tipped in favor of treaties in Mexico.³⁷ A 1999 decision of the Supreme Court of Justice of the Nation (SCJN), Mexico’s Supreme Court, held that “international treaties take precedent over contradictory domestic laws, federal or state, even if the federal or state law is adopted after the treaty,” with only the Mexican Constitution being superior.³⁸ More recently, Mexico has seen rapid changes in human rights recognition within their constitutional jurisprudence, particularly the 2011 Human Rights Amendments (HRA), solidifying the superior role of international law in Mexico’s domestic legal affairs.

The HRA most drastically affects human rights cases. Historically, the sole avenue for human rights protection in Mexico was through a writ of *amparo*.³⁹ The HRA, which amended eleven articles in total, significantly altered the way the SCJN addressed human rights.⁴⁰ The HRA is comprised of multiple elements, three of which are particularly relevant to a comparative human rights analysis.⁴¹ First, the HRA amended Article I of the Mexican Constitution, which now reads, “In the United States of Mexico, all persons shall enjoy the rights recognized

35. Jackson, *supra* note 22, at 121.

36. *Id.* at 114.

37. STEPHEN ZAMORA, JOSÉ RAMÓN COSSÍO, LEONEL PEREZNIETO, JOSÉ ROLDÁN-XOPA, & DAVID LOPEZ, *MEXICAN LAW 90* (Oxford 2005).

38. *Id.*

39. Victor Manuel Collí Ek, *Improving Human Rights in Mexico: Constitutional Reforms, International Standards, and New Requirements for Judges*, 20 HUM. RTS. BRIEF 7, 8 (2012); Mario Alberto Becerra Becerril, *A New Beginning for Mexico’s Constitutional Justice System*, UNIVERSITY OF TEXAS COLLOQUIUM 1, 16 (2012), https://law.utexas.edu/colloquia/archive/papers-public/2011-2012/03-19-12_A%20New%20Beginning%20for%20Mexico’s%20Constitutional%20Justice%20System.pdf.

40. Constitución Política de los Estados Unidos Mexicanos, CP, Diario Oficial de la Federación [DOF], 05-02-1917, últimas reformas DOF 11-30-2012 (Mex.); Ek, *supra* note 39, at 7.

41. Ek, *supra* note 39, at 8.

by the Constitution and international treaties to which the Mexican State is party.⁴² This clause enables the application of international human rights law for asserting human rights violations in Mexico.⁴³ This clause is significant given that Mexico has signed on to over 100 international treaties, covenants, and conventions.⁴⁴

Second, the HRA amended the writ of *amparo*, previously “the only constitutional procedure available for citizens to defend human rights violations.”⁴⁵ The intended force behind the *amparo* amendment was to broaden judicial access under the *amparo* procedure through enshrining international treaties and enabling class action.⁴⁶ Previously, *amparo* proceedings, if successful, would only benefit the party who obtained the judgment and only for that specific case.⁴⁷ Post HRA, two consecutive judicial precedents (with the exception of tax matters) allow the SCJN to notify the issuing legislative or administrative authority responsible for the unconstitutional norm or statute that it must be amended within ninety days.⁴⁸ If no change is made within the ninety day window, the SCJN will then have the authority to issue a general ruling of unconstitutionality by a supermajority vote.⁴⁹ However, it is unclear to what extent this part of the amendment has been formally recognized as a legitimate path for change.⁵⁰

The HRA further expands the former *amparo* standard from “legally affected interest” to “legitimate affected interest.” A legitimate affected interest is a much broader conception and “implies that the presentation of an *amparo* by a person can benefit those who suffer the same legal breach, even if they are not claimants to the suit.”⁵¹

Paired with the inclusion of international law inclusion, the new *amparo* will allow constitutional challenges to government acts which violate any legitimate human right.⁵² Adapting the *amparo* doctrine is crucial to any advancement in Mexican human rights jurisprudence. The novelty of *amparo* has led to its falling behind similar instruments from other countries.⁵³ Similar jurisdictional elements in other parts of Latin America, while initially created to emu-

42. *Id.* at 4; Constitución Política de los Estados Unidos Mexicanos, CP, art. 1, para. 1, Diario Oficial de la Federación [DOF], 05-02-1917, últimas reformas DOF 11-30-2012 (Mex.). “En los Estados Unidos Mexicanos todas las personas gozarán de los derechos humanos reconocidos en esta Constitución y en los tratados internacionales de los que el Estado Mexicano sea parte, así como de las garantías para su protección, cuyo ejercicio no podrá restringirse ni suspenderse, salvo en los casos y bajo las condiciones que esta Constitución establece.”

43. *Ek, supra* note 39, at 10.

44. Raúl Placencia Villanueva,, *The Constitutional Reform on Human Rights*, 91 VOICES OF MEXICO 6, 7 (2011).

45. *Ek, supra* note 39, at 8; Constitución Política de los Estados Unidos Mexicanos, CP, art. 103, 107, Diario Oficial de la Federación [DOF], 05-02-1917, últimas reformas DOF 11-30-2012 (Mex.).

46. *Ek, supra* note 39, at 8.

47. Becerril, *supra* note 39, at 18–19 (This principle is referred to as “*principio de relatividad de las sentencias*.”).

48. *Id.* at 19.

49. *Id.*

50. *See infra* notes 79, 113–115 (conflicting reports on the status of the two-decision threshold, possibly still recognized as a five-decision threshold).

51. Becerril, *supra* note 39, at 19.

52. *Id.*

53. *Id.*

late *amparo*, have been more successful at adapting to changing circumstances. Conversely, *amparo* has become increasingly ineffective.⁵⁴

Finally, the HRA established the principle of *pro homine*, which calls for applying the legal standard that most broadly protects an individual's rights.⁵⁵ By default, *pro homine* calls for the recognition of the human rights provisions in international treaties when deciding rights cases.⁵⁶ *Pro homine* is a doctrine agreeable to Aharon Barak's view that "[e]xamining a foreign solution may help a judge choose the best local solution" by allowing a court to consider a broad array of factors that could contribute to advancing human rights.⁵⁷

The HRA was also filled with symbolic phrase changes. For example, the title of Article 1 of the Mexican Constitution went from being called "*De las Garantías Individuales*" (Individual Rights) to "*De los Derechos Humanos y sus garantías*" (Human Rights and their guarantees).⁵⁸ The change was made because the reform was meant to address issues beyond individual rights; the early nineteenth century idea that rights are given to subjects was no longer proper. Additionally, the term "fundamental" rights was also deemed inappropriate due to the view that fundamental rights were those only specified in the Mexican Constitution and, being that the supremacy principle of the Mexican Constitution was modified with the HRA, recognizing the term "fundamental rights" would have signified a conflict with the inclusionary clause and the supremacy principle.⁵⁹

The former President of the National Human Rights Commission has touted the HRA as the generation's "best legacy to society," giving credit to the HRA for funneling in a new age of human rights protections and viewing the HRA as having the potential to continue fortifying human rights recognition.⁶⁰ Despite significant reform, there was a setback to the HRA in 2014 when the SCJN held that "any restriction established in a constitutional provision should prevail over human rights."⁶¹ Nevertheless, scholars are confident that the HRA has paved the way for recognition of progressive individual rights such as the right to education, LGBT rights, rights of refugee and asylum seekers, prisoners' rights, and due process for foreign citizens.⁶² Since the HRA, the SCJN has utilized provisions in the Inter-American Convention on

54. *Id.*

55. Ek, *supra* note 39, at 9; Constitución Política de los Estados Unidos Mexicanos, CP, art. 1, para. 2, Diario Oficial de la Federación [DOF], 05-02-1917, últimas reformas DOF 11-30-2012 (Mex.) ("Las normas relativas a los derechos humanos se interpretarán de conformidad con esta Constitución y con los tratados internacionales de la materia favoreciendo en to-do momento a las personas la protección más amplia.").

56. See generally Yuri Vázquez, *Applying the Principle of Pro Homine*, WORLD INTELL. PROP. REV. (2014), <https://www.worldipreview.com/article/applying-the-principle-of-pro-homine>.

57. Barak, *supra* note 6, at 111.

58. Ek, *supra* note 39, at 8.

59. *Id.* at 8–9.

60. Villanueva, *supra* note 44, at 10.

61. José Ramón Cossío Díaz, Carlos Herrera Martín, Raúl M. Mejía, Camilo Saavedra Herrera & Mariana Velasco Rivera, *Developments in Mexican Constitutional Law*, in THE I-CONNECT-CLOUGH CENTER 2016 GLOBAL REVIEW OF CONSTITUTIONAL LAW 130, 131 (Richard Albert, David Landau, Pietro Faraguna & Šimon Drugda eds., 2017) (ebook), available at SSRN: <https://ssrn.com/abstract=3014378> (hereinafter *Developments in Mexican Constitutional Law*) (citing SCJN, CT 293/2011).

62. See *id.*; Ek, *supra* note 39, at 7–10; Patrick Del Duca et al., *Mexico*, 46 INT'L LAW. 583, 583–85 (2012).

Human Rights, the International Convention on the Rights of Persons with Disabilities, the Convention on the Elimination of all Forms of Discrimination Against Women, and the International Covenant on Economic, Social and Cultural Rights in its rulings.⁶³ For example, in *Amparo en Revisión 750/2015*, a case dealing with the right to education, the Court used an interpretation of the progressiveness principle from the Committee on Economic, Social and Cultural Rights. The Court held that once a socioeconomic right [the right to education] has been established, any rollback of such a right would be subject to strict scrutiny.⁶⁴ It is now clear that the SCJN is consistently using international human rights instruments to delineate interpretative frameworks.⁶⁵

The historical context of the HRA is hugely significant in understanding the relative success and subsequent human rights defenses that have occurred. The HRA is the culmination of an extensive push to enhance constitutional protection of human rights in Mexico.⁶⁶ The push began several decades ago as part of a general state reform.⁶⁷ A 2006 amendment to the Mexican Constitution legitimized the National Human Rights Commission, but concrete practical changes did not begin until 2007.⁶⁸ The push has been supported by a history of Mexico being influenced by human rights norms, more so than the United States.⁶⁹ Mexico also holds a seemingly better system for public interest law and a broader base of recognized socioeconomic rights than the United States does.⁷⁰ These two factors further contribute to the integration of international human rights concerns within Mexican jurisprudence.⁷¹

The push has also been felt regionally. For example, other Latin American countries [Belize, Bolivia, Nicaragua, and Peru] include the United Nations Universal Declaration of Human Rights in their Constitutions.⁷² The historical and regional context of the HRA is therefore relevant to any comparative analysis for determining the rise of, and predicting the success of, human rights advancement.

III. The Effects of the HRA

While it seems daunting for change at the level of the HRA to be successful in the United States, it would be a poor analysis to view such progress as too distant given the decades of incremental steps beforehand. Indeed, such a drastic turnaround of entrenching human rights

63. *Developments in Mexican Constitutional Law*, *supra* note 61, at 132–33.

64. *Id.* at 133.

65. *See id.*; Ek, *supra* note 39, at 10 (“Through these reforms, the new Mexican Constitution offers a large umbrella of protection for human rights and creates new, effective tools for human rights defenders and advocates.”).

66. Ek, *supra* note 39, at 7–8.

67. *Id.* at 8.

68. *Id.*; Villanueva, *supra* note 44, at 7.

69. Deborah M. Weissman, *Remaking Mexico: Law Reform as Foreign Policy*, 35 CARDOZO L. REV. 1471, 1497 (2014).

70. *Id.* at 1499.

71. *Id.* at 1498–99.

72. Edward Delman, *Is Smoking Weed a Human Right? Why the SCJN Thinks the Answer is Yes*, THE ATLANTIC (Nov. 9 2015), <https://www.theatlantic.com/international/archive/2015/11/mexico-marijuana-legal-human-right/415017/>.

into a constitution is not necessarily something that the United States would wholly benefit from. However, studying the consequences of the HRA can provide other countries with a useful comparative analysis for developing their own country-specific human rights reforms. Looking at three specific areas of individual rights recognized by international law – gender and marriage equality, indigenous consultation, and self-determination – provides a contextual analysis of what impact the HRA has had on different individual rights and how similar amendments may affect individual rights in other countries.

A. Marriage Equality

In 2012, the SCJN utilized both foreign decisions and international law to find that the civil code of the state of Oaxaca, which limited marriage to a man and a woman, was unconstitutionally discriminatory.⁷³ The decision cited cases by the European Court of Human Rights, the Inter-American Court of Human Rights, and the United States Supreme Court.⁷⁴ The Court ruled that the marriage laws violated federal discrimination laws by requiring marriage to be between one man and one woman and to be purposed on perpetuating the species. This decision was discriminatory on the basis of the right of individuals and couples to form a family.⁷⁵ Additionally, the case was unanimously decided.⁷⁶

The SCJN had been slowly issuing progressive decisions on same-sex marriage since 2009,⁷⁷ but the 2012 decision was the first to pave the way for opening the door to same-sex marriage across all of Mexico and the first to significantly utilize foreign and international law. Progressive decisions on same-sex marriage were decided in 2015,⁷⁸ 2016,⁷⁹ and 2017.⁸⁰ While none of the decisions utilized international and foreign law as significantly as the 2012 decision, many continuously give credence to the treaties to which Mexico is a signatory.⁸¹

73. Redacción DJ MX, *Inconstitucional que en Oaxaca matrimonio tenga como fin perpetuar especie*: SCJN, DIARIO JURIDICO (5 dic. 2012), <http://diariojuridico.com.mx/actualidad/noticias/inconstitucional-que-en-oaxaca-matrimonio-tenga-como-fin-perpetuar-especie-scn.html#comments>.

74. Amparo en Revisión 581/2012, <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=143969>.

75. *Id.*

76. *Id.*

77. *Mexican Court Upholds Capital's Gay Marriage Law*, THE DAILY CALLER (Aug. 5, 2010), <http://dailycaller.com/2010/08/05/mexican-court-upholds-capitals-gay-marriage-law/>.

78. Randal C. Archibold & Paulina Villegas, *With Little Fanfare, SCJN Legalizes Same-Sex Marriage*, N.Y. TIMES (June 14, 2015), https://www.nytimes.com/2015/06/15/world/americas/with-little-fanfare-mexican-supreme-court-effectively-legalizes-same-sex-marriage.html?_r=0.

79. *La SCJN Determina que la Ley del ISSSTE Excluye a las Parejas del Mismo Sexo*, SIN EMBARGO (Dec. 1, 2016), <http://www.sinembargo.mx/01-12-2016/3121441>.

80. *Derecho a la Vida Familiar de las Parejas del Mismo Sexo*, Amparo en Revisión 581/2012, 152/2013, 263/2014, 704/2014, 735/2014, Tesis de Jurisprudencia 8/2017, http://sjf.scjn.gob.mx/SJFSem/Paginas/DetalleGeneralV2.aspx?Epoca=&Apendice=&Expresion=&Dominio=Tesis%20publicadas%20el%20viernes%2027%20de%20enero%20de%202017.%20Primera%20Sala&TA_TJ=2&Orden=3&Clase=DetalleSemanaarioBL&Tablero=&NumTE=6&Epp=20&Desde=-100&Hasta=-100&Index=0&SemanaId=201704&ID=2013531&Hit=6&IDS=2013536,2013535,2013534,2013533,2013532,2013531&Epoca=-100&Anio=-100&Mes=-100&SemanaId=201704&Instancia=1&TATJ=2.

81. Archibold, *supra* note 78.

Coming before the SCJN, the couple from Oaxaca based their argument on protections in the American Convention on Human Rights.⁸² The SCJN also referenced “human dignity” to justify social progress, a term utilized by the United States Supreme Court when considering foreign law.⁸³ The SCJN has proven to be a powerful ally to couples in areas of Mexico that still discriminate based on sexuality.⁸⁴

This case was also significant in that it was decided before the United States Supreme Court addressed whether it would take up the same-sex marriage debate.⁸⁵ Similar to the marijuana legalization debate discussed below, this is a fascinating social argument given that Mexico’s Catholic Church provides strong influence, resulting in lower public support of same-sex marriage relative to the United States.⁸⁶

B. Indigenous Consultation

Mexico has also appeared progressive with recognizing the right to indigenous consultation, but the international law link with these decisions is less direct.⁸⁷ Indigenous environmental rights have been increasingly recognized in international law, but indigenous rights generally have had less concrete support from the international community.⁸⁸ In Mexico, a major 2001 constitutional amendment addressed indigenous rights.⁸⁹ The amendment explicitly recognized indigenous environmental rights, addressed how those rights relate to environmental concerns, and included related human rights issues.⁹⁰ However, the 2001 amendments were criticized for being too vague and not fully protecting the indigenous rights they purported to address. An

82. J. Lester Feder, *Mexican Supreme Court Rules for Marriage Equality*, SALON (Dec. 6, 2012), https://www.salon.com/2012/12/06/mexican_supreme_court_rules_for_marriage_equality/.

83. See *Roper*, 543 U.S. at 605; see also Finck, *supra* note 15 (citing Accio:n de inconstitucionalidad 2/2010, Pleno de la Suprema Corte de Justicia de la Nacio?n, Novena Epoca, 16 de agosto de 2010 (Mex.) (“This Court [has affirmed] that, from human dignity, as a superior fundamental right, . . . the free development of the personality is derived, that is, the rights of every person to choose, in a free and autonomous manner, how to live her life, which implies, among other expressions, the freedom to contract marriage or not to; have children and how many, as well as not to have them; to choose their personal appearance; as well as their free sexual option.”).

84. Archibold, *supra* note 78.

85. Feder, *supra* note 82.

86. David Landau, *The Surprising Cascade of Pro-Gay Marriage Decisions in Latin America*, INT’L J. CONST. L. BLOG (Jan. 9, 2013), <http://www.iconnectblog.com/2013/01/the-surprising-cascade-of-pro-gay-marriage-decisions-in-latin-america/> (citing Germa?n Lodola and Margarita Corral, *Support for Same? Sex Marriage in Latin America*, 44 AMERICAS BAROMETER INSIGHTS 1, 2 (2010), <http://www.generoydiversidad.org/estadisticas/encuestas2010.pdf>); *México Avalará el Matrimonio Gay a Partir del Lunes*, EL UNIVERSO (Jun. 19, 2015), <https://www.eluniverso.com/noticias/2015/06/19/nota/4972027/mexico-avalara-matrimonio-gay-partir-lunes?hootPos-tID=9c020055de33cb3b52bdb56ac154cec2>; Archibold, *supra* note 78.

87. Naayeli E. Ramirez Espinosa, *Consulting Indigenous Peoples in the Making of Laws in Mexico: The Zirahuén Amparo*, 32 ARIZ. J. INT’L & COMP. L. 647, 647 (2015); Michelle Mark, *Monsanto Blocked by Mexico Supreme Court Injunction Until Consultation with Indigenous Communities Occurs*, INT’L BUS. TIMES (Nov. 5, 2015), <http://www.ibtimes.com/monsanto-blocked-mexico-supreme-court-injunction-until-consultation-indigenous-2171513>; *Mexico Court Blocks Monsanto Until Indigenous Groups Consulted*, TELESUR (Nov. 5, 2015), <https://www.telesurtv.net/english/news/Mexico-Court-Blocks-Monsanto-Until-Indigenous-Groups-Consulted-20151105-0021.html> (hereinafter *Blocks Monsanto*).

88. Escudero, *supra* note 26, at 210.

89. *Id.* at 225.

90. *Id.* at 226.

example of this criticism is exhibited by the states of Oaxaca, Chiapas, and Guerrero—the states with the largest indigenous populations—failing to ratify the amendments because they felt that the reforms contradicted efforts that the states had already taken independently.⁹¹ The Mexican Constitution has been updated in 2012 and 2014 to reflect more progressive indigenous rights, but such progression has arguably gone unnoticed and unenforced.⁹²

Other indigenous rights cases that have addressed international law include a 2012 case in which the SCJN held that an indigenous community had the right to participate in tourism development efforts in the state of Chihuahua.⁹³ The SCJN recognized the significance of the International Labor Organization's Convention No. 169, which protects the rights of indigenous communities and tribal peoples.⁹⁴ Further, in 2015, the SCJN upheld a ban on the use of genetically modified seeds by Monsanto in the Mexican states of Campeche and Yucatan until the indigenous communities who would be affected were consulted, pursuant to the Mexican Constitution.⁹⁵ In this case, Monsanto's seeds would have had a detrimental effect on honey production and the bee population, significantly affecting the livelihoods of the local indigenous communities.⁹⁶ The SCJN refused to hear Monsanto's appeal of the case in 2017, signaling a huge victory for indigenous consultation rights in Mexico.⁹⁷

However, César Nava Escudero questions whether amending the Mexican constitution to incorporate already legally-binding treaties related to indigenous consultation makes any difference.⁹⁸ As an example, Escudero looks to the 1989 Indigenous and Tribal Peoples Convention, which was fully implemented into Mexican law upon ratification.⁹⁹ Given that they often complement each other, Escudero posits that any recognition of international law has a direct impact on the way that constitutional and legal modifications are made.¹⁰⁰ Escudero gives more credit to the 1994 indigenous uprising in Chiapas and the rise of the Partido Acción Nacional for furthering indigenous rights in Mexico than the specific constitutional amendments aimed at addressing such.¹⁰¹

91. *Id.* at 238.

92. Espinosa, *supra* note 87, at 666.

93. John Ahni Schertow, *Mexico Supreme Court says Tarahumara have Constitutional right to participate in projects that would affect them*, INTERCONTINENTAL CRY (Mar. 30, 2012), <https://intercontinentalcry.org/mexico-supreme-court-says-tarahumara-have-constitutional-right-to-participate-in-projects-that-would-affect-them/> (citing Nordigital.mx, March 28, 2012; El Seminario de Nuevo Mexico, March 22 and 29, 2012; Elpueblo.com (Chihuahua), March 15, 2012; *Diariojuridico.com.mx*, March 14, 2012).

94. *Id.*

95. *Blocks Monsanto, supra* note 87; *Mexico's Top Court Blocks Move to Plant Genetically Modified Soya*, REUTERS (Nov. 5, 2015), <https://www.reuters.com/article/us-mexico-gmo/mexicos-top-court-blocks-move-to-plant-genetically-modified-soya-idUSKCN0SU0IE20151105#vmH255sweOJLLC8J>.97.

96. Schertow, *supra* note 93.

97. *SCJN Refuses to Review Monsanto Appeal on GMO Maize Permits*, SUSTAINABLE PULSE (May 12, 2017), <https://sustainablepulse.com/2017/05/12/mexican-supreme-court-refuses-to-review-monsanto-appeal-on-gmo-maize-planting/#.WuidjtPwbfY>.

98. Escudero, *supra* note 26, at 230.

99. *Id.*

100. *Id.* at 231.

101. *Id.* at 231–34.

Indigenous environmental rights are already established in Article 2 of the Mexican Constitution and the rights have been developed through socio-political change as opposed to explicit recognition of international law.¹⁰² Moreover, the possible impact of international law as it relates to indigenous rights was fundamentally ignored in the 2001 amendment.¹⁰³ Almost immediately after the 2001 amendment, numerous local authorities brought constitutional claims before the SCJN, but the SCJN denied the claims on the grounds that it lacked the authority to decide such cases due to the sovereign power of the legislature.¹⁰⁴ While the HRA more explicitly directs power to the SCJN to decide cases on the basis of international law, the SCJN's history offers evidence for huge discretion in taking cases. Escudero called for a full integration of international law into the Mexican Constitution in order for indigenous rights to be properly addressed after the disappointment of the 2001 amendment, and the HRA seems to have done just that.¹⁰⁵ However, constitutional amendments such as the HRA could be a false promise similar to what occurred with indigenous rights and the 2001 amendment—aiming to advance principles in international conventions but ultimately falling short of that goal.

C. Marijuana Possession and Consumption

One of the most pertinent fields for considering Mexico's adherence to international law is the right to possess and consume marijuana. Stepping ahead of the United States' marijuana jurisprudence, Mexico effectively legalized marijuana in 2015 under the "fundamental right to free development of one's personality" in the Mexican Constitution.¹⁰⁶ Despite a lack of broad public support,¹⁰⁷ and by a vote of four to one, the SCJN declared that Ministry of Health's prohibition on consumption and usage was an "undue restriction of the fundamental rights to personal identity, self-image, free development of personality, self-determination and individual freedom, all in relation to the principle of human dignity and the right to health," and found such rights to be recognized in international treaties to which Mexico is a signatory.¹⁰⁸ The SCJN ruled the restrictions unconstitutional because they "involve the suppression of behavior that gives the individual a specific difference according to its uniqueness."¹⁰⁹ The SCJN even

102. *Id.* at 211.

103. *Id.*

104. *Id.* at 235.

105. *Id.* at 238.

106. Sam Mendez, *Analyzing Mexico's Supreme Court Case on Legalization of Marijuana*, UNIV. OF WASH. CANNABIS L. & POL'Y PROJECT BLOG (Mar. 31, 2016), <https://blogs.uw.edu/clpp/2016/03/31/initial-thoughts-analyzing-mexico-supreme-court-case-on-legalization-of-marijuana/> (quoting Pleno de la Suprema Corte de Justicia de la Nación [SCJN], Noviembre de 2015, Amparo en Revisión 237/2014, Pagina 1, 20 (Mex.), *English translation* available at <https://www.scribd.com/document/289159427/Mexico-s-Supreme-Court-Ruling-on-Cannabis-English-Translation>).

107. Sean Williams, *Mexico Aims to Legalize Recreational Marijuana Before October*, The Motley Fool (Apr. 28, 2019), <https://www.fool.com/investing/2019/04/28/mexico-aims-to-legalize-recreational-marijuana-bef.aspx> (citing to a poll that 80% of Mexicans disagreed with the Court's decision).

108. Pleno de la Suprema Corte de Justicia de la Nación [SCJN], Noviembre de 2015, Amparo en Revisión 237/2014, Pagina 3, 7, 24, 30, 32 (Mex.), *English translation* available at <https://www.scribd.com/document/289159427/Mexico-s-Supreme-Court-Ruling-on-Cannabis-English-Translation>; Deborah Bonello, *Mexico Ruling on Personal Marijuana Use for 4 Hailed by Legalization Backers*, L.A. TIMES (Nov. 4, 2015), <http://www.latimes.com/world/mexico-americas/la-fg-mexico-marijuana-20151104-story.html>.

109. Amparo en Revisión 237/2014, at 4.

recognized the right to autonomy in using and possessing marijuana, given that usage in itself does not harm others.¹¹⁰

“The right to the ‘free development of personality’ appears in Article 22 of the United Nations Universal Declaration of Human Rights.”¹¹¹ This right recognized in Mexico is similar to the right in the United States Constitution to self-determination, which recognizes, for example, that the Supreme Court cannot prevent you from eating junk food even if it is bad for your health.¹¹² The legal arguments recognized in the decision are, however, drastically different from those in the United States, where the focus is more on overhauling criminal laws or pushing for medicinal use.¹¹³

The case was brought by four members of the Mexican Society for Responsible and Tolerant Consumption (or SMART, in Spanish).¹¹⁴ The plaintiffs argued that their rights to health, privacy, self-ownership and free development of personality granted them protection to grow and use cannabis for personal use.¹¹⁵ SMART framed their argument around personal freedom, positing that the Mexican Constitution protects the individual’s right to be unique and independent, and that choosing whether or not to consume marijuana encompasses such a right.¹¹⁶ While there is a large debate surrounding legalization and disempowering drug traffickers in Mexico, the fundamental rights argument was a surprising take which has the potential to set a broad precedent.¹¹⁷

The decision does not legalize marijuana for all Mexican citizens, but merely granted the *amparo* right to the four individual plaintiffs. Given the unique nature of constitutional rights recognition in Mexico, the court would have to rule similarly at least four more times, and issue a jurisprudential thesis, for the right to consume marijuana to expand beyond the four plaintiffs in this specific case.¹¹⁸ However, such a progression of reform is not out of the picture given that this was exactly how same-sex marriage was previously recognized in Mexico.¹¹⁹ Further, a case of this caliber concerning drug policy is of monumental importance given Mexico’s legitimacy when speaking of drug policy.¹²⁰ Therefore, the decisions lay the groundwork for more expansive and progressive drug policy in Mexico.¹²¹

110. Bonello, *supra* note 108.

111. Delman, *supra* note 72, at 3.

112. Christopher Ingraham, *Mexico’s Supreme Court Rules That Smoking Pot is a Fundamental Human Right*, THE WASHINGTON POST (Nov. 5, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/11/05/mexicos-supreme-court-rules-that-smoking-weed-is-a-fundamental-human-right/?utm_term=.e429876ac699.

113. Bonello, *supra* note 108.

114. Delman, *supra* note 72.

115. Andrés Aguinacoa & Aram Barra, *Cannabis for Personal Use in the Supreme Court of Mexico: Legal Case and Potential for Policy Change*, 50 INT. J. DRUG POLICY 9 (2017).

116. *Id.*

117. *Id.*

118. *Id.*

119. Tesis de Jurisprudencia, *supra* note 80.

120. Delman, *supra* note 72 (citing Hannah Hetzer, who focuses on the Americas at the Drug Policy Alliance).

121. Elisabeth Malkin & Azam Ahmed, *Ruling in Mexico Sets Into Motion Legal Marijuana*, N.Y. TIMES (Nov. 4, 2015), <https://www.nytimes.com/2015/11/05/world/americas/mexico-supreme-court-marijuana-ruling.html>.

After the 2015 marijuana decision, a SMART plaintiff pointed out the absurdity of anti-drug policies, noting that Mexicans are “killing [themselves] to stop the production of something that is heading to the U.S., where it’s legal.”¹²² The hypocrisy of the anti-drug policies can offer a unique layer of support for jurisprudence that is more open to decriminalization.¹²³ Further, while the legal environment in the United States regarding drug laws is constantly in flux, Mexico continues to account for a large proportion of drug supply to the United States. However, shifting drug policies could soon dry up Mexico’s drug economy.¹²⁴

The SCJN decision withheld the grave concerns surrounding the drug economy and instead focused almost exclusively on human rights principles.¹²⁵ It is worth considering the political slant of the decision, which effectively ignored the 60% of inmates in Mexico’s federal prisons who were convicted of drug crimes involving marijuana.¹²⁶ However, the decision has paved the way for extensive debate in both the executive and legislative branches of the Mexican government, aimed at modifying the prohibitionist policies.¹²⁷ Furthermore, it is noteworthy that parts of Mexico are more advanced in decriminalization than parts of the United States, yet Americans express more overwhelming support for decriminalization than Mexicans do.¹²⁸ Despite optimistic arguments, there is no concrete correlation between decriminalization and less violence in Mexico, particularly given that the extensive decriminalization in the United States may be pushing the Mexican economy towards more hardcore drugs, which often result in more violent tactics.¹²⁹

This was the first time in Mexican history that drug policy has been addressed from a constitutional perspective, and it was not the last.¹³⁰ In January of 2018, Tourism Secretary Enrique de la Madrid pushed for marijuana legalization.¹³¹ Recreational marijuana remains largely illegal in Mexico but was legalized for medical and scientific purposes in 2017 and decriminalized for personal possession of small amounts in 2009.¹³² While the 2015 decision, which heavily utilized international law, is not a concrete guarantee of a direct path to complete

122. *Id.* at 2.

123. Emily Green, *In Mexico, Is Legalized Pot Just A Pipe Dream?*, NPR (Feb. 5, 2018), <https://www.npr.org/sections/parallels/2018/02/05/582829086/in-mexico-is-legalized-pot-just-a-pipe-dream> (discussing the double-standard of legalization in multiple states while the United States continues to spout anti-drug policies and aid requirements for Mexico).

124. *Id.*

125. Malkin, *supra* note 121.

126. *Id.*

127. Andrés Aguinacoa & Aram Barra, *Cannabis for Personal Use in the Supreme Court of Mexico: Legal Case and Potential for Policy Change*, 50 INT. J. DRUG POL’Y 9, 10 (2017); Redacción DJ MX, *Perredistas presentan en el Senado propuesta sobre marihuana*, DIARIO JURIDICO (19 Feb. 2014), <http://diariojuridico.com.mx/destacado-home/perredistas-presentan-en-el-senado-propuesta-sobre-marihuana.html>.

128. Malkin, *supra* note 121.

129. Green, *supra* note 123.

130. Aguinacoa, *supra* note 127.

131. Green, *supra* note 123.

132. *Id.*

legalization,¹³³ it is an optimistic example of how progressive drug policy is beginning to change in Mexico. Such policies have made a significant leap with the help of the HRA by allowing the SCJN to utilize precedent that most significantly affects how and why marijuana is accepted.

D. Did the HRA Change the Projection of Judicial Decisions?

Mexico has a long political history with judicial activism. The SCJN was at the whim of the Partido Revolucionario Institucional (PRI) party during its rule.¹³⁴ After years of bureaucratic recruitment and advancement in the SCJN, reformation began when Ernesto Zedillo became president in 1994 and pushed Mexico towards the political court model of review.¹³⁵ However, the writ of *amparo* remained unchanged, perhaps stalling more major constitutional reforms in Mexico.¹³⁶ Following the 1994 constitutional reforms, the SCJN became extremely active in issuing decisions contrary to the political interests of those in power.¹³⁷ After these reforms, the SCJN bore a strong resemblance to the American Marshall Court, assuming the role of maintaining separation of powers, particularly between the nation and the state.¹³⁸ Therefore, beginning in 1994 with the constitutional reforms and subsequent legislative efforts, Mexico was already working towards a more progressive rights platform and following a self-executing approach to treaties.¹³⁹ Currently, the Mexican Constitution is progressing in a hyper-reformist fashion, which has allowed for an extensive number of amendments and convoluted clauses.¹⁴⁰ The HRA may have been the icing on the cake for human rights advancement, but it is difficult to assess how much credit should be given to the Amendments, given the extensive progression of human rights recognition.

The HRA should not immediately be taken as a guarantee that broad human rights recognition and defense are on the immediate horizon. Various other societal factors may be at play for why the progressive decisions that have been issued so far have seen such success. In response to the marriage equality trends, progressive decisions could be due to other Latin and

133. See generally Mariana Velasco Rivera, *The (un)Certain Path Towards the Legalization of Marijuana in Mexico*, INT'L J. CONST. L. BLOG (Nov. 16, 2015), <http://www.iconnectblog.com/2015/11/the-uncertain-path-towards-the-legalization-of-marijuana-in-mexico>.

134. Miguel Schor, *An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Columbia*, 16 IND. J. GLOBAL LEGAL STUD. 173, 177–79 (2009).

135. *Id.* at 179–81.

136. *Id.* at 182.

137. *Id.* at 182–83.

138. *Id.* at 193.

139. Escudero, *supra* note 26, at 223, n.36 (“Article 133 of the Mexican Constitution states that the Constitution, Congressionally-passed laws and treaties reached pursuant to the Constitution comprise the Supreme Law of the Union.”).

140. See generally Andrea Pozas-Loyo, *A Way Out of Hyper-Reformism? A Project of Constitutional Reorganization and Consolidation in Mexico*, INT'L J. CONST. L. BLOG, (Mar. 2, 2016), at <http://www.iconnectblog.com/2016/03/a-way-out-of-hyper-reformism-a-project-of-constitutional-reorganization-and-consolidation-in-mexico>. For example, the current text contains more than three times the number of words it had when it was enacted in 1917.

South American trends on marriage equality.¹⁴¹ Indigenous rights successes could be due to a broad overall increase in recognition on an international level.¹⁴² Drug policy could be due to other Latin American decriminalization trends and increasing scrutiny of the political activities and influence of the United States in Latin America.¹⁴³ Further, the Mexican Constitution is amended nearly every year. Therefore, the social interpretation of amendments is more open and there is less resistance to amendments than in societies where amendments are infrequent.¹⁴⁴ The Mexican Constitution of 1917 is still the governing constitutional text of Mexico, although it has been amended well over 300 times.¹⁴⁵

Despite the chicken and egg dilemma of analyzing the effects of the HRA, the SCJN has specifically cited international treaties and norms in various cases and international human rights instruments have clearly been used in setting the interpretive framework.¹⁴⁶ For example, Amparo Directo en Revisión 2255/2015 addressed principles of criminal law and legal certainty following claims that a law, which made it a crime to insult an authority, was unconstitutional.¹⁴⁷ The SCJN cited to Article 9 of the Inter-American Convention on Human Rights (ACHR).¹⁴⁸ In Amparo en Revisión 750/2015, the SCJN cited to the International Covenant on Economic, Social and Cultural Rights and the interpretation of the progressiveness principle in relation to education developed in General Comments no. 11 and 13 developed by the Committee on Economic, Social and Cultural Rights in ruling that that a Public University in Michoacan could not charge registration fees.¹⁴⁹ In Amparo en Revisión 59/2016, the SCJN cited to the Convention on the Elimination of All Forms of Discrimination Against Women in a case on gender equality.¹⁵⁰ The claimant was a married man who was denied day care service for his child because provisions in the Social Insurance Law only granted the right to childcare for women.¹⁵¹ In Amparo en Revisión 710/2016, the SCJN cited decisions by the Inter-American Court of Human Rights to rule that denying the claimant the ability to register her wife

141. See, e.g., Daniel Berezowsky Ramirez, *Latin America Could Lead the Way for LGBT Rights in 2018*, HUM. RTS. WATCH (Feb. 6, 2018), <https://www.hrw.org/news/2018/02/06/latin-america-could-lead-way-lgbt-rights-2018>; Colombia *Legalizes Gay Marriage*, BBC NEWS (Apr. 26, 2016), www.bbc.com/news/world-latin-america-36166888; Simeon Tegel, *Buenos Aires is Becoming a Mecca for Gay Marriage Tourism*, PRI (Sept. 12, 2015), <https://www.pri.org/stories/2015-09-12/buenos-aires-becoming-mecca-gay-marriage-tourism>.

142. See Escudero, *supra* note 87.

143. See *infra* notes 168–70; Elizabeth Gonzalez, *Weekly Chart: Where Does Latin America Stand on Marijuana Legalization?*, AMERICAS SOCIETY/COUNCIL OF THE AMERICAS (Apr. 13, 2017), <https://www.as-coa.org/articles/weekly-chart-where-does-latin-america-stand-marijuana-legalization> (discussing how Latin America overall is becoming increasingly receptive to legalization arguments).

144. Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All?: Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 INT'L J. CONST. L. 686, 689 (2015).

145. ZAMORA, et al., *supra* note 37.

146. *Developments in Mexican Constitutional Law*, *supra* note 61, at 132 (citing SCJN, CT 293/2011).

147. *Id.*

148. *Id.*

149. *Id.* at 133.

150. *Id.*

151. *Id.*

for social security benefits was unconstitutional because the Social Services and Security for Government Employees Law utilized heteronormative language, resulting in discrimination against same-sex couples.¹⁵²

When international law is utilized in SCJN decisions, and when such utilization is a make-or-break inclusion, is extremely difficult to discern. When case law does reference the role of the broad range of international treaties that have influenced the decisions, it is almost always also controlled by general human rights clauses independently recognized in the Mexican Constitution.¹⁵³ Therefore, without further investigation and interviewing, it is difficult to pinpoint exactly how much influence the HRA has had on subsequent decisions of the SCJN.

Both skeptics and optimists should be sensitive to the HRA as a different type of amendment than has previously been adopted in Mexico's jurisprudential history. One significant difference with the HRA is the educational effect and focus, which had never been so explicitly codified.¹⁵⁴ Article 3 of the Mexican Constitution now requires education to be provided to the entire population, specifically addressing respect for human rights.¹⁵⁵ Amartya Sen and Lynn Hunt have both recognized the importance of education in ensuring societal change and that educational tools aide in provoking change in cultural perception.¹⁵⁶ This effort is particularly noteworthy in Mexico, given the significant effort of Mexican government officials and activists to include the general population in governmental processes, and the relatively enormous want of the Mexican population to be included in such.¹⁵⁷

E. *Radilla-Pacheco* as Evidence of Success

The HRA has raised questions concerning the interplay of national and international legal standards. The question of diffuse control of conventionality *ex officio* (that any federal or state judge may analyze laws without taking into account if a right is established in the Constitution or international treaties and how this will affect outcomes) was addressed in the *Radilla-Pacheco* case before the Inter-American Court of Human Rights in 2011.¹⁵⁸ This case established that all Mexican judges must take the Mexican Constitution and international treaties as controlling

152. *Id.*

153. *See, e.g.*, Amparo en Revisión 237/2014, at 32, English translation available at <https://www.scribd.com/document/289159427/Mexico-s-Supreme-Court-Ruling-on-Cannabis-English-Translation> (“[T]he Supreme Court has understood that the free development of personality is a fundamental right derived from the right to dignity, which in turn is provided for in Article I of the Constitution and it is implicit in international human rights treaties signed by our country); Amparo en Revisión 581/2012, <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=143969> (citing Articles 1 and 4 of the Mexican Constitution, as well as multiple sources of international and foreign law); *supra* notes 89–90, 94 (discussing indigenous rights recognized in the Mexican Constitution).

154. Ek, *supra* note 39, at 9–11.

155. *Id.* at 9.

156. *Id.* at 10.

157. *Id.*; Weissman, *supra* note 69, at 1514–15.

158. Ek, *supra* note 39, at 11.

precedent.¹⁵⁹ *Radilla-Pacheco* helped ensure that the HRA will have a substantial effect on the protection of human rights in Mexico because it will be more difficult for judges to ignore their duty to abide by the Mexican Constitution and international treaties.¹⁶⁰

F. The Role of the Drug Economy in Effective Human Rights Protections

The effects of the drug economy and the war on drugs, launched by then President Felipe Calderón in 2006, is seen in and of itself as a human rights crisis for Mexico.¹⁶¹ Such effects cannot be ignored in a comparative analysis of human rights. One manifestation of the drug war in respect to human rights abuses has been the utilization of military and the lack of accountability for soldiers accused of human rights abuses.¹⁶² An average of four human rights complaints per day are a result of the drug war.¹⁶³ Despite positive rulings that the SCJN must abide by the Inter-American Court of Human Rights, the practical difference of such rulings has proven minimal for military accountability.¹⁶⁴ Reports of forced disappearances, torture, and extrajudicial executions have been on a consistent rise, which some scholars partially credit to the continued involvement of the United States and the Mérida Initiative.¹⁶⁵ Human rights complaints related to drug trafficking and the drug economy should be of grave concern to scholars and activists because they signal an “attitude of tainting or criminalizing human rights defenders, which puts [rights] in greater jeopardy.”¹⁶⁶

The Mérida Initiative is a rule of law program, administered by the United States Agency for International Development and the Department of Justice, aimed at reforming Mexico’s legal system.¹⁶⁷ The plan involves redesigning the administration of justice by training prosecutors, funding forensic software, monitoring, enhancing sentencing, and improving prison structures, all to develop a “culture of lawfulness” in Mexico.¹⁶⁸ However, the Mérida Initiative has been unreceptive to the specific culture and history of the Mexican legal system and has not actually improved human rights conditions in Mexico.¹⁶⁹ Rule of law programs like the Mérida Initiative have proven to be ignorant of local initiatives and concerns while feeding United States donors more than the people the plan is aiming to help.¹⁷⁰

159. *Id.* at 12.

160. *Id.*; see Villanueva, *supra* note 44, at 8.

161. Laura Carlsen, *Mexico’s False Dilemma: Human Rights or Security*, 10 NW. J. INT’L HUM. RTS. 146, 146 (2012).

162. Human Rights Watch [HRW], *Mexico: Ruling Affirms Obligation for Military Justice Reform*, (Jul. 6, 2001), <https://www.hrw.org/news/2011/07/06/mexico-ruling-affirms-obligation-military-justice-reform>.

163. Carlsen, *supra* note 161, at 150.

164. See *id.* at 148 (“[I]n practice citizens must file for an injunction against trial in military courts on a case-by-case basis in order to demand investigation and trial in civilian courts.”).

165. *Id.* at 148–49; Weissman, *supra* note 69, at 1521.

166. Carlsen, *supra* note 161, at 151.

167. Weissman, *supra* note 69, at 1483–84.

168. *Id.* at 1484–86.

169. *Id.* at 1489–90, 1505–06.

170. *Id.* at 1494.

The Mérida Initiative is a highlight of the inefficient and illogical mechanisms that the United States uses to impose Western legal philosophies and control over the Mexican government and economy, often to the detriment of Mexican citizens and without proof that such policies actually increase security or decrease human rights abuses.¹⁷¹ The Mérida Initiative is also an example of the United States' double standard in calling attention to foreign human rights violations while failing to act on domestic human rights issues.¹⁷² However, more recently, Mexico and other governments have begun to push back. For example, President Juan Manuel Santos of Colombia ordered a halt to the aerial spraying of illegal coca fields due to cancer concerns, effectively rejecting a major tool of the United States' anti-drug campaign.¹⁷³ This pushback may signify that Mexico is at an unusually open moment for welcoming new legal trends.

In contrast to the HRA, the Mérida Initiative is a poor fit for Mexico's legal history and culture.¹⁷⁴ For rule of law transitions and reforms, it is often crucial that "efforts must originate within the polity for whom judicial processes are designed to serve," which the Mérida Initiative goes directly against.¹⁷⁵ Mexicans have expressed a desire for international legal presence within their criminal system and the opportunity for grassroots engagement—significantly different approaches from mere United States involvement.¹⁷⁶ For example, a 2011 case against the administration of former president Felipe Calderón, regarding the consequences of the war on drugs, was presented to the International Criminal Court with an unprecedented 23,000 signatures.¹⁷⁷ Furthermore, Mexicans have more faith in their peers to serve as jurors than Americans do.¹⁷⁸ The current Mérida Initiative implicates the systems of criminal justice in which Mexicans have the least amount of trust, while the HRA seems to signify the societal consensus of the significance of international norms.¹⁷⁹

As Deborah Weissman has noted, a drastic criminal justice reform in Mexico is only going to be possible if citizen engagement and grassroots activism is supported and the political economic determinants of drug-related violence are recognized and meaningfully responded to.¹⁸⁰ As an example, the state of Guerrero has developed a justice system combining indigenous laws, Mexican statutory laws, and international human rights principles, which has resulted in a violence reduction of 92% in the region.¹⁸¹ Various nongovernmental organizations and academics have advocated for the use of international law principles to address the drug-related violence that has been systemically detrimental to the social and economic health of the coun-

171. *Id.* at 1497.

172. Harfeld, *supra* note 12.

173. Malkin, *supra* note 121.

174. Weissman, *supra* note 69, at 1474.

175. *Id.* at 1473.

176. *Id.* at 1515.

177. Carlsen, *supra* note 161, at 152.

178. Weissman, *supra* note 69, at 1503–04.

179. *Id.* at 1502.

180. *Id.* at 1473–75.

181. *Id.* at 1507.

try.¹⁸² The people of Mexico are eager to utilize international law and are utilizing it for themselves in extremely effective and efficient ways, while the United States is still at the initial stages of the international law debate.

The significance of the war on drugs gives credence to the argument that there cannot be substantial human rights reforms in Mexico without specifically addressing security and rethinking the war on drugs.¹⁸³ Laura Carlsen posits that “[t]he Mexican government’s retort that criminals are the major violators of human rights minimizes government responsibility for ensuring a society that respects human rights and for presenting and punishing violations by state actors.”¹⁸⁴ Even without explicitly looking at the violence and political corruption stemming from the war on drugs, it is still significant that over two million people can no longer survive within the dismantled economy and have turned to growing drug crops, as opposed to traditional farming and agricultural methods, to sustain themselves.¹⁸⁵

IV. Future Implications of the HRA and Suggestions for Interpretation

Due to the extensive dismantling of the criminal justice system in Mexico and the ineffective and often increasingly detrimental influence of the United States’ exportation of law, the HRA may have different effects on criminal and civil matters.¹⁸⁶ Looking back at the relative effectiveness of the same-sex marriage decisions provides a critical example for contrasting civil rights recognition and criminal rights failures. Coinciding with the increase in individual rights, but also the maintained absence of equality across the criminal justice and economic spectrums, the same-sex marriage decisions highlight how the new human rights frontier of Mexico still ignores the systemic problems that Mexico faces due to the drug economy and widespread violence.¹⁸⁷ Given the nature of the SCJN relying on the injunction process and not establishing new law, gay couples with the resources to go to court can get married but couples without monetary support are still denied marriage equality.¹⁸⁸ The difference in criminal and civil legal matters is also present in the SCJN’s approach to the ruling on marijuana possession and consumption, which aimed to stray from decriminalization arguments.¹⁸⁹

While acute sociocultural and socioeconomic rights may be advancing with wholesome support and precedent in Mexico, progress will always be overruled by the extensive and detrimental effects of the drug market. The rights that are being recognized and supported in Mexico because of the HRA and the ability for the SCJN to rule in favor of such rights under international treaties are often civil in nature, and are a far cry from the more drastic need for change in prosecutorial power, corruption, disappearances, and other areas of law which are tainted by the drug

182. *Id.* at 1509–10 (the people of Ciudad Juárez have invoked the Istanbul Protocol to find relief for families of murder and torture victims and succeeded in obtaining an independent investigation under international standards).

183. Carlsen, *supra* note 161, at 153; Weissman, *supra* note 69, at 1510–12.

184. Carlsen, *supra* note 161, at 153.

185. Weissman, *supra* note 69, at 1477.

186. *Id.* at 1481–86.

187. *Cf.* Archibold, *supra* note 78.

188. *Id.*

189. *See supra* text accompanying notes 125–29.

economy.¹⁹⁰ International treaties such as the International Covenant on Economic, Social, and Cultural Rights contain wording which is hugely important for recognition of certain rights, but it is unlikely that the entire Mexican criminal justice system will be rejuvenated based on rights laid out in international treaties. The rights being progressed are of the kind which allow the SCJN to decide more liberally without imposing concrete socioeconomic rights that would hold priority over other individual rights less controversial or more easily obtainable. Advancement of human rights law often clashes with the reality that Mexico continues to face extensive obstacles concerning the drug trade, political corruption, and the criminal justice system.¹⁹¹

V. What the United States Can Learn

While an inclusionary clause such as the HRA is unlikely in the United States, particularly given the absence of the focused, decades-long reform push that occurred in Mexico,¹⁹² Mexico's experience in international law should not go unnoticed by the United States. From environmental issues, to prisoner's rights, to privacy concerns, individuals in the United States do not have the monetary means, judicial access, or the legal arguments to succeed in cases that arise from situations that would undoubtedly be in violation of multiple international human rights treaties.¹⁹³ Mexico's human rights success, while limited to civil and individual rights, still provides a huge opportunity for other countries to examine how the human rights discourse in Mexico has become so prominent.

Mexico's inclusionary clause with the HRA follows the Convergence Model, under Vicki Jackson's comparative standards, in that the Mexican Constitution now explicitly requires that international law be taken into account when interpreting constitutional rights.¹⁹⁴ Such a clause comes with the benefits of promoting general respect for international law and the ability to further influence international law and other customary international norms.¹⁹⁵ Jackson posits that the Engagement Model, as opposed to the Convergence Model, is presently the most realistic approach for the United States to adopt when it comes to including international law in Supreme Court decisions.¹⁹⁶ This is because the Convergence Model would allow the Supreme Court to focus primarily on the United States Constitution but would not "purport to require intellectual blindness to the transnational legal world in which our Constitution functions."¹⁹⁷ Therefore, while the United States is unlikely to ever adopt an inclusionary

190. *See generally*, Carlsen, *supra* note 161.

191. *Developments in Mexican Constitutional Law*, *supra* note 61, at 131 (citing SCJN, CT 293/2011) ("The normalization of the use of the military for public security functions and the constitutional reforms that have been adopted aimed at, arguably, transforming the justice system into one that fits into a true liberal democracy seem to be colliding. On the one hand, the government wants to provide the military with more power and discretion in order to efficiently tackle the problem of organized crime; but on the other hand, doing that would mean putting into question the realization of true liberal democracy.").

192. *See supra* text accompanying notes 64–69.

193. *See, e.g.*, Connie de la Vega, *Using International Human Rights Standards to Effect Criminal Justice Reform in the United States*, 41:2 A.B.A. HUM. RTS. J. (2015).

194. *See* Jackson, *supra* note 22, at 113–14.

195. *Id.* at 124.

196. *Id.*

197. *Id.*

clause similar to the HRA, the SCJN can still serve as a significant example to the United States for how to unequivocally include international law in decisions consistent with public support and what such inclusion might mean for the advancement and effective enforcement of human rights in the future.

Conclusion

The disparity with which different countries utilize international law calls into question when exactly the usage of such law is effective – must there be a ceased reverence of politically powerful countries in order to welcome international law, as Leonardo García Jaramillo has suggested?¹⁹⁸ Will international norms always raise domestic law to the pinnacle of human rights recognition? And how do paradoxes and ironies of countries respecting selective rights, or imposing double standards on foreign countries, play into the comparative and predictive analysis? For human rights concerns, much of Latin America has looked increasingly to international law.¹⁹⁹ The Colombian Constitutional Court has issued decisions along a similar progressive human rights perspective to that of Mexico.²⁰⁰ Latin America has had a distinct interpretation and application of international legal norms for years.²⁰¹ International law inclusion is changing.

Drastic constitutional reform has taken place in Mexico and throughout Latin America.²⁰² However, Latin America has been a leader in human rights interpretation, with little international recognition.²⁰³ There is a paradox—that human rights norms are being advocated, yet the practices on the ground exhibit a vacuum of respect for human rights—which leads to an improper lack of human rights credibility for Mexico.²⁰⁴ Issues related to due process and criminal law enforcement are still routinely decided against plaintiffs whose rights have been violated, and the drug war continues to dismantle societal and legal progress.²⁰⁵ However,

198. Leonardo García Jaramillo, *Transformative Constitutionalism in Latin America: A Dialogic Route to Utopia?* INT'L J. CONST. L. BLOG (Apr. 13, 2018), <http://www.iconnectblog.com/2018/04/transformative-constitutionalism-in-latin-america-a-dialogic-route-to-utopia/>.

199. Kathryn Sikkink, *Latin American Countries as Norm Protagonists of the Idea of International Human Rights*, 20 GLOBAL GOVERNANCE 389, 398–90 (2014); Alexandra Hunees, *Introduction to Symposium on the Constitutionalization of International Law in Latin America*, 109 AJIL UNBOUND 89 (2015); Jaramillo, *supra* note 198.

200. *See generally* Justice Manuel José Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOBAL STUD. L. REV. 529 (2004).

201. Arnulf Becker Lorca, *International Law in Latin America or Latin American International Law? Rise, Fall, and Retrieval of a Tradition of Legal Thinking and Political Imagination*, 47 HARV. INT'L L. J. 283 (2006).

202. Hunees, *supra* note 199.

203. Sikkink, *supra* note 199, at 399.

204. *Id.*

205. *Developments in Mexican Constitutional Law*, *supra* note 61, at 134 (citing AR 964/2015 and 937/2015).

significant human rights advancement and precedent coming out of Mexico cannot be ignored and must be offered an opportunity for review despite continuing criminal justice reform struggles.

Optimistically, the discourse of human rights in Mexico is “thick,”²⁰⁶ and it is inevitable that we will continue to see unexpected and often groundbreaking changes in constitutional structure and precedent. It is entirely plausible that the rights revolution and openness to international law regarding human rights violations was already well on its way in Mexico.²⁰⁷ Nevertheless, it is now settled practice for the SCJN to incorporate international law into decisions.²⁰⁸ For many sociocultural changes, revised interpretations of constitutional texts have proven fruitful, particularly in Latin America.²⁰⁹ References to foreign law function as “justificatory elements capable of framing socio-cultural change” due to their quasi-legal appearance, enabling progressive rights to be justified while minimizing the fear that judges may have for invoking strong socio-legal change.²¹⁰

A pessimistic outlook would view recent substantial human rights progress in Latin America as a distraction from the more systemic problems stemming from the drug economy and likely ineffective in the broader picture of total human rights advancement. Alternatively, one could consider the same progress as a real indicator that extensive human rights dialogue in Latin America is doing its work in advancing human rights protections in the region, regardless of how slow or incremental each step might seem. Indeed, the extensive focus on human rights frameworks in Mexico has been described as having “the potential to considerably expand access to justice for ordinary people.”²¹¹

Mexico has experience with human rights law. Whether as an enforcer or a violator, Mexico has been through trial and error with maneuvering human rights law and seeing what sticks and what exacerbates. Given this particular transformative constitutional moment, it is worth tuning in to Mexico’s human rights experience. A further comparative analysis, which looks more explicitly into the wording and theory behind recent SCJN decisions, could expand the scope of judicial logic currently being utilized by the United States Supreme Court and human rights activists across the globe.

206. David Landau, *The Surprising Cascade of Pro-Gay Marriage Decisions in Latin America*, INT’L J. CONST. L. BLOG, Jan. 9, 2013, <http://www.iconnectblog.com/2013/01/the-surprising-cascade-of-pro-gay-marriage-decisions-in-latin-america/>.

207. Jaramillo, *supra* note 198.

208. *Developments in Mexican Constitutional Law*, *supra* note 61, at 131 (citing SCJN, CT 293/2011).

209. *See generally* Finck, *supra* note 15, <https://doi.org/10.1093/icon/mow009>.

210. *Id.* at 53.

211. Weissman, *supra* note 69, at 1510 (citing Julio Ríos-Figueroa, *Sociolegal Studies on Mexico*, 8 ANN. REV. L. & SOC. SCI. 307, 317–18 (2012)).

A Pseudo Calabresian Sunset Down Under: The Anachronism of Disqualifying Australian Members of Parliament for Holding a Foreign Citizenship

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Introduction

In October 2017, the High Court of Australia (“HCA”) decided *Re Canavan*,² now known as the *Citizenship Seven* case. Six months later, in May 2018, the HCA decided *Re Gallagher*.³ Both cases debated whether particular Members of Parliament are incapable of sitting by reason of dual citizenship. Unlike the United States and Canada, Australia interprets its constitution as barring members of Parliament from holding foreign citizenship.⁴ This constitutional crisis is likely to be enlivened after every federal election, with new members entering the Senate and the House of Representatives in the Australian Parliament. Legislators have failed to reform the law due to the onerous requirement of holding referenda to repeal the relevant sections of the Constitution, notwithstanding calls for constitutional reform.⁵

The eligibility to sit in Parliament is governed by §§ 34(ii) and 44(i) of the Australian Constitution:⁶

34 Qualifications of members

Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:

...

(ii) he must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State.

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 2. *Re Canavan (Citizenship Seven)* (2017), 263 CLR 284 (Austl.).
 3. *Re Gallagher* (2018), 263 CLR 460 (Austl.).
 4. For the United States perspective, see generally PETER J SPIRO, AT HOME IN TWO COUNTRIES: THE PAST AND FUTURE OF DUAL CITIZENSHIP (2016). For the Canadian perspective, see Donald Galloway, *Citizenship Rights and Non-Citizens: A Canadian Perspective*, in CITIZENSHIP IN A GLOBAL WORLD: COMPARING CITIZENSHIP RIGHTS FOR ALIENS (2001) 176. For a summary of the situation in Australia, see Helen Irving, *The Concept of Allegiance in Citizenship Law and Revocation: An Australian Study* (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403388.
 5. Andrew Brown, *Referendum to Change Section 44 Should Be Held at Election, Law Expert Says*, CANBERRA TIMES (Mar. 10, 2018, 6:17 PM), <https://www.canberratimes.com.au/national/act/referendum-to-change-section-44-should-be-held-at-election-law-expert-says-20180307-h0x5oe.html> (citing Professor George Williams, Dean of the law school at the University of New South Wales).
 6. *Australian Constitution* §§ 9, 34(ii), and 44(i). (emphasis added).

44 Disqualification

Any person who:

(i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power;

...

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

In *Citizenship Seven*, questions concerning the qualifications of six senators, Fiona Nash, Malcolm Roberts, Scott Ludlam, Larissa Waters, Matthew Canavan, and Nick Xenophon, were referred to the HCA (sitting as the Court of Disputed Returns).⁷ The references concerned circumstances in which there was material to suggest that each of the senators held dual citizenship at the date they were nominated for election.⁸ The House of Representatives referred to like questions with respect to the qualifications of The Hon. Barnaby Joyce MP.⁹ The issue was whether the referred Members of Parliament were incapable of sitting as senators or members of the House of Representatives under § 44(i) of the Australian Constitution.¹⁰ The HCA, following strict textualism in interpreting § 44(i), held that only Mr. Canavan and Mr. Xenophon were not in breach of § 44(i).¹¹ The disqualification of Mr. Joyce by the HCA meant that the Turnbull Government lost its one-seat majority in the House of Representatives.¹² On the same day the HCA judgment was handed down, a writ was issued for a by-election of Mr. Joyce's former seat of New England.¹³ By mid-November 2017, the crisis was snowballing. According to one commentator, "[t]he dual citizenship crisis is like a crazy conga line slicing through our politics and institutions: it means more by-elections and threatens Malcolm Turnbull's majority government and his ability to survive as Prime Minister and the functioning of parliament over the next several months."¹⁴

Since the decision in *Citizenship Seven*, more members of Parliament have resigned. Those members include Stephen Parry, the Liberal senator for Tasmania, who resigned on November 2, 2017, and Liberal MP John Alexander, who resigned on November 11, 2017, with both

7. *Re Canavan* (2017), 263 CLR 284 (Austl.).

8. *Id.*

9. Commonwealth, *Parliamentary Debates*, House of Representatives, 14 Aug. 2017, 8239 (Sturt Pyne, Leader of the House and Minister for defence Industry) (Austl.).

10. *Id.*

11. *Id.*

12. Rob Taylor, *Australian Government Loses Majority After Court Ousts Dual-Citizen Lawmakers*, THE WALL STREET JOURNAL (Oct. 27, 2017), <https://www.wsj.com/articles/australian-government-loses-majority-after-court-disqualifies-lawmakers-1509076826>.

13. *Id.* (this by-election saw that Mr. Joyce returned to the Australian House of Representatives).

14. Paul Kelly, *Turnbull Leadership: Dangers Abound as Citizenship Crisis Plays Out*, THE AUSTRALIAN (Nov. 11, 2017, 12:00 AM), <http://www.theaustralian.com.au/nation/inquirer/turnbull-in-a-minefield-of-primed-citizenship-bombs/news-story/117fa68314fa63e7cc23c951f511394c>.

members holding British citizenships.¹⁵ After *Citizenship Seven*, there was a long list of senators who may be in breach of the citizenship requirement in § 44(i). These senators included Senator Derryn Hinch, founder of the Justice Party; Labor Senators Katy Gallagher and Lisa Singh; Liberal Senator Arthur Sinodinos; One Nation Senator Pauline Hanson; Senator Jacqui Lambie, founder of the Jacqui Lambie Network, (JLN); Labor MPs Justine Keay and Susan Lamb; NXT MP Rebekha Sharkie; Liberal MPs Julia Banks, Josh Frydenberg, Nola Marino, Alex Hawke, and Josh Wilson; and liberal backbencher Ann Sudmalis.¹⁶

Re Gallagher questioned the qualifications of Senator Katy Gallagher, due to her British citizenship, and referred her to the HCA.¹⁷ The Court followed its reasoning in *Re Canavan* and found that under § 44(i) of the Australian Constitution, Senator Gallagher was disqualified from sitting in the Australian Parliament.¹⁸

Some observers suggest that these HCA judgments will open the door to legal challenges to government decisions.¹⁹ The disqualified senators and members had collected over \$9 million in base salary, ministerial bonuses and other allowances over the period that they were ineligible to sit.²⁰ The Government has undertaken payment of the legal costs of all parties and of Tony Windsor.²¹

In *Citizenship Seven* and *Re Gallagher*, the HCA's analysis exclusively focused on interpreting the second requirement of § 44(i), more specifically, on disqualification where a person is a dual citizen.²² The HCA's textual interpretation of § 44(i) will result in the disqualification of a member of Parliament if, at the time of nomination, that member had the status of a citizen of a foreign state based on the law of that State.²³

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15. Rosie Lewis, *Stephen Perry Confirmed to be British*, THE AUSTRALIAN (Nov. 1, 2017), <https://www.theaustralian.com.au/nation/politics/no-problem-here-its-business-as-usual-bishop/news-story/226e8cf8187081030b570ea660330d95>.
 16. *Dual citizenship: which politicians still have questions to answer in this constitutional crisis?*, ABC NEWS (May 11, 2018), <https://www.abc.net.au/news/2017-08-19/whos-next-in-the-dual-citizenship-mess/8819510>.
 17. *Re Gallagher* (2018), 263 CLR 460 (Austl.).
 18. *Id.*
 19. Adam Gartrell & Stephanie Peatling, *More Than 100 Joyce and Nash Decisions at Risk From Legal Challenge: QCs*, THE SYDNEY MORNING HERALD (Oct. 30, 2017, 10:39 AM), <https://www.smh.com.au/politics/federal/more-than-100-joyce-and-nash-decisions-at-risk-from-legal-challenge-qcs-20171029-gzafux.html>.
 20. Adam Gartrell, *Citizenship Five Paid Nearly \$9 Million in Salaries They Were Not Entitled to*, THE SYDNEY MORNING HERALD AGE (Oct. 30, 2017, 5:30 PM), <https://www.smh.com.au/politics/federal/citizenship-five-paid-nearly-9-million-in-salaries-they-were-not-entitled-to-20171030-gzazka.html>.
 21. *Re Canavan* (2017), 263 CLR 284 (Austl.), transcript proceedings 1–3.
 22. *Id.*; *Re Gallagher* (2018) 263 CLR 460 (Austl.). Although the distinction between a “subject” and “citizen” is no longer significant, this distinction plays an important part in establishing how section 44(i) was informed by the citizenship law applicable in Australia at the time. See GERARD CARNEY, MEMBERS OF PARLIAMENT: LAW AND ETHICS 3034–3630 (2000); see also JOHN QUICK & ROBERT GARRAN, THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH 449, 956–58 (rev. ed. 2015).
 23. After *Re Gallagher*, the reasonable steps test only applies where an Australian citizen would otherwise be irretrievably prevented from standing for Parliament. See Anne Twomey, *Re Gallagher: Inconsistency, Imperatives and Irremediable Impediments* (May 28, 2018), <https://auspublaw.org/2018/05/re-gallagher-inconsistency-imperatives-and-irremediable-impediments>.

An alternative interpretation is that § 44(i) is not a section about the disqualification of citizens, but a section about the disqualification of non-citizens, from nomination for, and sitting in, the Australian Parliament. Based on its history, the section is interpreted as a restatement of the common law principles relating to British citizenship law applicable in Australia at the time, and not as providing any *sui generis* conditions on the disqualification of members of Parliament. Section 44(i)'s only function is to clarify § 34(ii); it makes explicit what is implicit under § 34(ii). Following this interpretation, § 44(i) was already redundant when the Australian Constitution was passed.²⁴ The section became anachronistic in the sense that it has no legal effect under current Australian citizenship law, which allows Australian citizens to concurrently hold a foreign citizenship.

The analytical focus of this article is exclusively on interpreting the second requirement of § 44(i), specifically, on disqualification of a person holding dual citizenship. Section 44 states that: "Any person who: (i) . . . is a subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power . . . shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives . . ." ²⁵ The distinction between a "subject" and "citizen" is no longer significant.²⁶ This Article compares and contrasts three approaches to interpreting subsection 44(i)'s citizenship requirement, and the latest HCA decisions will be used to support this analysis. This Article argues that adopting multiple analytical lenses when analyzing this subsection can provide valuable insight into how it should be applied.

I. The Pseudo-Calabresian Doctrine and Anachronism

The starting point for explaining the anachronism of the citizenship requirement of § 44(i) is what came to be known as the pseudo-Calabresian doctrine, which is an extension of the proposition by Professor Guido Calabresi that encourages courts to "strike down obsolete statutes under a common law justification."²⁷ According to Calabresi, courts should declare a statute obsolete when a legislature would not reenact its provisions.²⁸ The rationale for this proposition is that courts should not maintain statutes that no longer have majoritarian support.²⁹ Instead, courts should exercise a sunset function where a provision does not fit with the current legal landscape. Courts have adopted this function through a coherent constitutional doctrine.³⁰ Instead of adopting a common law justification, which could create difficulties for the democratic ideal,³¹ constitutional courts have adopted a pseudo-Calabresian

24. This is not a radical argument as other provisions in the Australian Constitution have been said to be so redundant such as § 59. Note that the Australian Constitution is found in clause 9 of an Imperial Act, passed in the United Kingdom for Australia in 1900. See *Australian Constitution* §§ 34(ii) and 44(i).

25. *Australian Constitution* § 44.

26. CARNEY, *supra* note 22, at 30; see also QUICK & GARRAN, *supra* note 22, at 564.

27. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (reprint ed. 1985); Joshua M. Divine, *Statutory Anachronism as a Constitutional Doctrine*, 12 U. ST. THOMAS L. J. 146 (2015). For a critique of the Calabresian doctrine, see Allan C. Hutchinson & Derek Morgan, *Calabresian Sunset: Statutes in the Shade*, 82 COLUM. L. REV. 1752 (1982).

28. CALABRESI, *supra* note 27, at 121–23.

29. *Id.*

30. Divine, *supra* note 27, at 148.

31. Hutchinson & Morgan, *supra* note 76, at 1762, 1765.

doctrine wherein the sunseting function emerges from a constitutional limit that serves as an alternative to a living constitutionalism analysis or from an explicit textual authority to allow the constitutional court to exercise its common law jurisdiction.³² In doing so, constitutional courts can circumvent the requirement of expanding their constitutional role under the common law jurisdiction advocated by the Calabresian doctrine.³³ Under the pseudo-Calabresian doctrine, courts need not alter their function, and can thus maintain the separation of powers underlining their constitutional role.³⁴ The pseudo-Calabresian doctrine does not predict any reallocation of legislative powers to courts, and, as a result, the anachronism findings under the pseudo-Calabresian doctrine are limited to narrow rulings rather than wider rules that push the boundary of separation of powers.³⁵

The pseudo-Calabresian doctrine allows constitutional courts to make value judgments on the anachronism of a given provision, given the majoritarian support for the said provision.³⁶ The revisionist bias advocated by the pseudo-Calabresian doctrine is revived where there has been change around the challenged statute, either due to technological, social, or intellectual advances. Under this doctrine, anachronism arises where legislative review proves onerous or impractical, the constitutional provision does not fit the legal landscape, or where Parliament can respond to an anachronism declaration through the constitutional court.³⁷ The latter is to ensure that the doctrine does not lead to abuse and that the legislature can respond in such instances.³⁸

The United States courts have adopted a similar sunseting function. One such example provided by Professor Calabresi was the United States Supreme Court's striking down statutes to force their legislative review.³⁹ One of the clearest instances of the application of the pseudo-Calabresian doctrine is *Shelby County v. Holder*,⁴⁰ wherein the Court struck down a statute for becoming anachronistic due to changes in its underlying justifications.⁴¹ That case dealt with the Voting Rights Act of 1965 ("VRA"), which was intended to curb racial discrimination in voting.⁴² Under § 5 of the VRA, certain states and local governments required preclearance from the U.S. Attorney-General or the U.S. District Court for the District of Columbia for changes to their voting laws, to ensure that they did not encroach on the voting rights of minority groups.⁴³ The decision on which states and local governments would require this preclearance was made under § 4(b) of the VRA.⁴⁴ Initial decisions were based on conditions from

32. Divine, *supra* note 27, at 148.

33. *Id.* at 170–71.

34. *Id.* at 172.

35. *Id.* at 160–61.

36. *Id.* at 169–70.

37. *Id.* at 149–50.

38. *Id.* at 153, n.51, 161.

39. CALABRESI, *supra* note 27, at 39.

40. See *Shelby County v. Holder*, 570 U.S. 529 (2013).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

the mid-1960s to early 1970s, where a state or local government maintained prohibited conditions on voter registration or had a voting-age population wherein less than fifty percent of individuals were registered to vote or actually voted in presidential elections.⁴⁵ In 2006, Congress reauthorized § 5, but did not update the coverage formula from its 1975 version, which was the last VRA amendment updating § 4(b).⁴⁶ In 2011, in the U.S. District Court for D.C.,⁴⁷ Shelby County challenged the preclearance and coverage sections as unconstitutional. However, the court found evidence to uphold both provisions and the decision was affirmed on appeal.⁴⁸ Nevertheless, in 2013,⁴⁹ in a 5-2 decision, the U.S. Supreme Court struck down the VRA as anachronistic.⁵⁰ While § 4(b) of the VRA required preclearance under § 5 of the Act before making changes to voting laws, the coverage formula was based on forty-year-old data and had no logical relation to the national circumstances in 2006.⁵¹

Other cases applying the pseudo-Calabresian doctrine by the United States Supreme Court include the 1960s reapportionment cases and cases decided under the living constitutionalism paradigm.⁵² Of particular interest are cases decided based on an evolving understanding of the constitutional text, as they also exhibit an application of the pseudo-Calabresian doctrine. For example, in *Lawrence v. Texas*,⁵³ the United States Supreme Court found that laws criminalizing sodomy were anachronistic. In 1998, John Geddes Lawrence Jr. and his partner, Tyron Garner, were charged with a misdemeanor under Texas' anti-sodomy law.⁵⁴ Lawrence and Garner appealed their sentence to the Texas Court of Appeals, which held that the sodomy law was unconstitutional.⁵⁵ A further appeal to the court en banc overturned the prior judgment and upheld the law.⁵⁶ The United States Supreme Court granted certiorari and held that the anti-sodomy law, along with similar statutes in thirteen other states, was unconstitutional.⁵⁷ The Court reasoned that these statutes were anachronistic because they did not represent current majoritarian principles.⁵⁸

45. *Id.*

46. *Id.*

47. *See generally* *Shelby County v. Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011).

48. *See generally* *Shelby County v. Holder*, 679 F.3d 848 (D.C. Cir. 2012).

49. *See* *Shelby County*, 570 U.S. 529.

50. *Id.* at 557. Another basis for striking down the Act was constitutional sensitivity given the VRA's encroachment on fundamental constitutional structural values, namely, equal sovereignty of the states and federalism. *Id.* at 544.

51. Divine, *supra* note 27, at 147.

52. *Id.* at 154–59.

53. *See generally* *Lawrence v. Texas*, 539 U.S. 558 (2003).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

The pseudo-Calabresian doctrine is revived where one of the following necessary conditions is present:⁵⁹ (1) textual authority - where the text of the statute at issue can be interpreted as authorizing a common law adjudication or (2) constitutional sensitivity - where the statute is affected by a judicially-enforceable constitutional limit.⁶⁰ For example, in *Shelby County*, the constitutional sensitivity flowed from the notion of equal sovereignty between the states and the maintenance of federalism. The call for common law adjudication can be found, for example, in *Lawrence*, where the words “liberty” and “equal” were interpreted as evolving standards from which the court could decide whether the statute was impermissibly anachronistic.⁶¹ However, for a sufficient justification for invoking the sunset function, additional bolstering factors are necessary including: (1) legislative inertia which requires the judicial branch to exercise their checks and balances function towards the legislative branch or (2) prior judicial signaling to the legislature that the statute needs updating.⁶² Regarding the first factor, the relevant question is whether a legislature would be likely to pass a similar provision given the current legal landscape.⁶³

II. Textual Authority: Section 44(i) Origins

According to the House of Representatives Standing Committee on Legal and Constitutional Affairs, the legal principle expressed in § 44(i) is that “members of parliament must have a clear and undivided loyalty to Australia and must not be subject to the influence of foreign governments.”⁶⁴ A key point in the Committee’s report is that “[t]he language in which the principle is expressed is archaic.”⁶⁵ It was drafted before the concept of Australian citizenship developed, and the scope of the subsection is uncertain.⁶⁶ The language of § 44(i) suggests that a historical analysis of its origin may help elucidate its purpose. In *Sykes v. Cleary*,⁶⁷ the majority took judicial notice of the historical setting of the provision, noting that § 44(i) is “in a Constitution which was enacted at a time, like the present, when a high proportion of Australians, though born overseas, had adopted this country as their home.”⁶⁸ The Court held that it was not the intention of the founders to disqualify an Australian citizen from election to Parliament because that person continued to possess a foreign citizenship if that person had taken “all reasonable steps” to renounce that citizenship.⁶⁹ However, this test is not in accord with the evolution of § 44 from its English origins.

59. Divine, *supra* note 27, at 177.

60. *Id.* at 148.

61. *Id.* at 162.

62. *Id.* at 161–64.

63. *Id.* at 149.

64. Commonwealth, *Parliamentary Debates*, House of Representatives, 25 Aug. 1997, 10 (Austl.).

65. *Id.*

66. *Id.* at 10.

67. *Sykes v. Cleary* [No 2] (1992), 176 CLR 77, 107 (Austl.).

68. *Id.*

69. *Id.* (the Court cited § 42 of the Constitution, which requires a member of Parliament to take an oath or affirmation of allegiance.). After *Re Gallagher*, taking reasonable steps to divest oneself of the foreign citizenship is no longer sufficient under § 44(i).

A. An Historical Note

In *Sue v. Hill*, the HCA considered the construction and application of § 44(i).⁷⁰ The election of Queensland candidate Heather Hill to the Senate in the 1998 election was challenged by Henry Sue, a voter from Queensland, on grounds of disqualification under the second provision of § 44(i) because Mrs. Hill was a dual citizen of the United Kingdom at the time of nomination.⁷¹ The HCA confirmed the approach taken in *Sykes v. Cleary*, reasoning that Mrs. Hill's disqualification under the second provision of § 44(i) turned on her citizenship status under United Kingdom law.⁷² The HCA agreed in *Bonser v. La Macchia*⁷³ with the proposition that "[t]he words of the Constitution must be read" with the "march of history" in mind.⁷⁴ In other words, the provisions of the Australian Constitution are to be interpreted in a changing manner (i.e. as capable of being altered), where circumstances external to the Constitution are taken into consideration when construing its provisions.

Section 44(i) exhibits textual characteristics similar to nineteenth century constitutions of the British Empire, in particular, § 7 of the British North America Act of 1840 as replicated in §§ 36 and 50 of the New Zealand Constitution Act of 1852,⁷⁵ and § 31(2) of the British North America Act of 1867.⁷⁶ However, the origins of § 44(i) can be traced back even further to § 3 of the Act of Settlement 1701.⁷⁷ The Act was passed at a time when "the jealousy of foreigners, fostered, as it had been, by the dislike of the partiality of William III to his foreign favorites, was rampant in the country, expressly excluded residents and naturalized persons also from the exercise of all important political functions."⁷⁸ Prior to this section, aliens were disqualified at common law.⁷⁹ Section 3 of the 1701 Act states that:⁸⁰

Further Provisions for securing the Religion, Laws, and Liberties of these Realms.

. . . That after the said Limitation shall take Effect as aforesaid no Person born out of the Kingdoms of England Scotland or Ireland or the Dominions thereunto belonging although he be . . . made a Denizen (except such as born of English Parents) shall be capable to be of the Privy Councill or a Member of either House of Parliament or to enjoy any Office or Place of Trust either Civill or Military or to have any Grant of Lands Tenements or Hereditaments from the Crown to himself or to any other or others in Trust for him.

70. *Sue v. Hill* (1999), 199 CLR 462, 486 (Austl.).

71. *Id.*

72. *Id.*

73. *See Bonser v. La Macchia* (1969), 122 CLR 177 (Austl.).

74. *Id.*

75. New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict. c. 72, §§ 36, 50.

76. British North America Act 1867 (Imp) 30 Vict. c. 3, § 31(2).

77. Act of Settlement 1700 (Imp), 12 & 13 Will c. 2, § 3 (Eng.); *see also* Gerard Carney, *Foreign Allegiance: A Vexed Ground of Parliamentary Disqualification*, 11 BOND L. REV. 245, 247 (1999).

78. H.S.Q. Henriques, *The Political Rights of English Jews*, 19 JEWISH QUARTERLY REV. 298, 311 (1907).

79. CARNEY, *supra* note 25, at 24629246, n. 102.

80. Act of Settlement 1700 (Imp), 12 & 13 Will c. 2, § 3 (Eng.). *See* CARNEY, *supra* note 26, at 59.

The genesis of § 44(i) exhibits discrimination between naturalized British citizens, and those who became British citizens through *jus sanguinis* or *jus soli*. The section is not concerned with dual citizenship *per se*, it simply excludes those who became British citizens through naturalization from becoming members of parliament, regardless of whether they have renounced their foreign citizenship or not. Section 3 was, however, repealed before it took effect.⁸¹ Seven years later, the section was replaced by § 24 of The Succession to the Throne Act 1707 (6 Ann. c. 41).⁸² The 1707 Act is still in force in the United Kingdom, although § 24 was repealed by the House of Commons Disqualification Act of 1957.⁸³

Another predecessor of § 44(i) appears in § 7 of the Union Act, and reads as follows:

And be it enacted, That if any Legislative Councillor of the Province of Canada . . . shall do, concur in, or adopt any Act whereby he may become a Subject or Citizen of any Foreign State or Power, or whereby he may become entitled to the Rights, Privileges, or Immunities of a Subject or Citizen of any Foreign State or Power. . . his Seat in such Council shall thereby become vacant.⁸⁴

This 1840 version continues the same discrimination underlying the 1700 version, namely, the alienage proposition at common law. The approach was eventually enshrined in the Naturalization Act of 1870, which is discussed in detail in Section IV below. This version became a boilerplate provision for constitutions across the British Empire, and in fact, the boilerplate language can be found even today in all subsections of § 44 (of the Australian Constitution).⁸⁵ The second provision of subsection 44(i), however, became the exception.

Examples of this boilerplate language are found in §§ 36 and 50 of the New Zealand Constitution Act of 1852, which state that:

36. If any Legislative Councillor of New Zealand . . . *shall do, concur in, or adopt any act whereby he may become a subject or citizen of any foreign state or power, or become entitled to the rights, privileges, or immunities, of a subject or citizen of any foreign state or power.* . . his seat in such Council shall thereby become vacant.

50. If any member of the said House of Representatives shall . . . *do, or concur in, or adopt, any act whereby he may become a subject or citizen of any foreign state or power, or become entitled to the rights, privileges, or immunities of a subject of any foreign state or power* . . . his seat in such house shall there by become vacant.⁸⁶

81. CARNEY, *supra* note 26, at 59.

82. *Id.*

83. *Id.* at 59–60.

84. Act of Union 1840, 3 & 4 Vict., c. 35 § 7 (UK). (emphasis added).

85. The parts relevant to the other subsections of § 44 have been intentionally omitted.

86. New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict. c. 72, §§ 36, 50. (emphasis added).

The exact same language can be found in § 31(2) of the British North America Act of 1867:

31. The Place of a Senator shall become vacant . . . (2) If he . . . *does an Act whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or Citizen, of a Foreign Power;*⁸⁷

The same boilerplate provision was replicated by the constitutions of each of the Australian colonies which were to become States.⁸⁸ Hence, in §§ 13 and 24 of the Constitution Act of 1854 we find:

XIII. If any Legislative Councillor . . . *shall do concur in or adopt any act whereby he may become a subject or citizen of any Foreign State or Power . . .* his seat in such Council shall thereby become vacant.

. . .

XXIV. If any Member of the House of Assembly shall . . . *adopt any act whereby he may become a subject or citizen of any Foreign State or Power . . .* his seat in such Assembly shall thereby become vacant.⁸⁹

The same language can be seen in §§ 5 and 26 of the New South Wales Constitution Act of 1855;⁹⁰ § 24 of the Victoria Constitution Act of 1855;⁹¹ §§ 12 and 25 of the South Australia Constitution Act of 1855-6;⁹² § 23 of the Constitution Act of 1867;⁹³ and in Western Australia, we have § 29(3) of the Western Australia Constitution Act of 1890.⁹⁴ These predecessors to § 44(i) in Australian “State” constitutions require disqualification of sitting members rather than candidates, which means that disqualification applied only where the member acts in the proscribed manner after being elected.⁹⁵ The boilerplate provisions differ from § 44(i) in two respects:⁹⁶ (1) disqualification requires some positive act after being elected; and (2) candidates who are Australian citizens cannot be disqualified by these provisions. However, if, for example,

87. British North America Act 1867 (Imp) 30 Vict. c. 3, § 31(2). (emphasis added).

88. Constitution Act 1854 (Tas) §§ 13, 24 (Austl.); New South Wales Constitution Act 1855 (Imp) sch 1, §§ 5, 26 (Austl.); Victoria Constitution Act 1855 (Imp) sch. 1, § 24 (Austl.); Constitution Act 1855-6 (SA) §§ 12, 25 (Austl.); Constitution Act 1867 (Qld) § 23 (Austl.); Western Australia Constitution Act 1890 (Imp) sch. 1, § 29(3) (Austl.).

89. Constitution Act 1854 (Tas) (18 Vict. No. 17), §§ 13, 24. (emphasis added).

90. New South Wales Constitution Act 1855 (Imp) (18 & 19 Vict. c. 54), sch. 1, §§ 5, 26.

91. Victoria Constitution Act 1855 (Imp) (18 & 19 Vict. c. 55), sch. 1, § 24.

92. South Australia Constitution Act 1855-6 (SA) §§ 12, 25.

93. Constitution Act of 1867 (Qld) (31 Vic. No. 38), § 23.

94. Western Australia Constitution Act 1890 (Imp) (53 & 54 Vict. c. 26), sch. 1, § 29(3).

95. CARNEY, *supra* note 26, at 36–37.

96. *Id.*

a candidate with dual citizenship renews his or her foreign passport after being elected to Parliament, they will be disqualified.⁹⁷ The same result occurs under the British North America Act of 1840, the New Zealand Constitution Act of 1852, and the British North America Act of 1867.

The key point from this historical canopy is that the rationale underpinning § 44(i) predecessors came from the common law. The reasoning originated with discrimination against naturalized British citizens. Later, however, British (and later Australian) citizens were not disqualified unless they renewed their allegiance to a foreign power after being elected to Parliament.

In summary, § 44(i) has roots that can be traced back to the early eighteenth century, within the United Kingdom and its colonies. The earliest version of the section suggests discrimination between naturalized and British born citizens, to the benefit of the latter. Consequently, later versions adopted the philosophy underlying this section to simply ensure that whoever was elected to Parliament had not alienated his or her (British) citizenship, and therefore, would not be able to nominate or stand.

B. The Legislative Process

The HCA suggests that a consideration of the drafting history of § 44(i) does not warrant a different conclusion aside from a wide construction.⁹⁸ However, the first official draft of § 44(i), clause 46(1) of the Commonwealth Bill of 1891 suggests otherwise. The legislative intent is closer to that seen in the boilerplate provisions discussed earlier, which in turn would suggest a narrow construction.⁹⁹

Within a week of the first official draft, clause 46(1) was recast in the form in which precursors to § 44(i) came to be adopted.¹⁰⁰ The clause departed from the imperial and colonial precedents in that the clause was no longer confined to acts done after election. The clause now extended to disqualify for acts before election.¹⁰¹ The draft clause at the Sydney session was as follows:¹⁰²

Any person . . . [w]ho has . . . done any act whereby he has become a . . . citizen . . . of a Foreign Power . . . shall be incapable of *being chosen* or of *sitting* as a Senator or Member of the House of Representatives until the disability is removed by a grant of a discharge . . . or otherwise.

97. Constitution Act 1934 (SA) §§ 17(2) and 31(2) (Austl.) (only in South Australia is this outcome expressly avoided. In contrast, in Victoria, the Northern Territory, and the Australian Capital Territory, no disqualification applies to candidates or members as a consequence of acknowledging foreign allegiance. See CARNEY, *supra* note 26, at 37).

98. *Re Canavan (Citizenship Seven)* (2017), 263 CLR 284 (Austl.).

99. Commonwealth, *Parliamentary Debates*, H.R., 9 Apr. 1891, 987 (Alexander Forrest, Esquire, II.P.) (Austl.).

100. *Id.*

101. *Id.*

102. *Id.* (emphasis added).

This draft then became clause 46(1) of the Commonwealth Bill of 1891:

Disqualifications of Members.¹⁰³

46. Any person—

(1) Who . . . has done any act whereby he has become a . . . citizen . . . of a Foreign Power . . . shall be incapable of *being chosen* or of *sitting* as a Senator or Member of the House of Representatives until the disability is removed by a grant of a discharge

The two elements of clause 46(1) mirror the two provisions in § 44(i), although the elements of clause 46(1) are stated in the present perfect form, while the simple present form is used in § 44(i).¹⁰⁴ The second element of clause 46(1) and the second provision of § 44(1) are, however, quite different.

There are three differences between the boilerplate provisions and § 44(i).¹⁰⁵ The first relates to the person to whom the disqualification applies.¹⁰⁶ Clause 46(1) extends the application of the disqualification to candidates, not only elected members.¹⁰⁷ This change was maintained in § 44(i).¹⁰⁸ In clause 46(1), the present perfect tense applies in two instances: before being elected, and after being elected. This is due to the use of the words “any person.”¹⁰⁹ The first instance ends upon being elected; the second does not, it is continuous in nature. In the boilerplate provisions, the disqualification is in the future tense, and applies to elected members only. However, even though the boilerplate version applies only to the instance that is continuous in nature, there is no equivalent between the future and present tenses.

The second change relates to the relevant time window for establishing disqualification. Under clause 46(1), the time window extends to the interval before being elected, instead of being only forward looking, as under the boilerplate provisions. This is a reasonable and efficient consequence of the first change. Since the disqualification now applies to candidates and members, it is reasonable to examine a time frame that extends to the interval before election.

Under § 44(i), a third change has been introduced. The second element of clause 46(1) refers to a person that “has done any act whereby he has become a subject or citizen or entitled

103. This was the heading used for the April draft. The March draft, however, omitted the reference to members. Similarly, the heading of sub-section 44 does not make reference to members. See Drft. of a Bill to Constitute the Commonwealth of Australia, *reprinted in* NAT'L ARCHIVES OF AUSTRALIA: NAA: R25, 4. For the purposes of this analysis, nothing turns on the changes to the heading of § 44. (emphasis added).

104. Aside from the first provision, clause 46(1) and § 44(i) are otherwise almost identical. The verbs “taken” and “made” were dropped. In addition, “made an acknowledgement” was replaced with “is under any acknowledgement”. See Drft. of a Bill to Constitute the Commonwealth of Austl. 1891(Cth) ch. 1 pt. 4 cl 46 (Austl.), *reprinted in* NAT'L Archives of Austl. NAA: R25, 4; see also *Australian Constitution* § 44(i).

105. Gerard Carney, *DISQUALIFICATION OF MEMBERS OF THE AUSTRALIAN PARLIAMENT – RECENT DEVELOPMENTS AND THE CASE FOR REFORM*, 7 JCU L. REV. 89 (2018).

106. *Id.* at 111–12.

107. CARNEY, *supra* note 26, at 9.

108. Carney, *supra* note 105.

109. *Id.*

to the rights or privileges of a subject or a citizen of a Foreign Power,” while the second provision of § 44(i) refers to a person who “is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power.”¹¹⁰ The phrase “has done any act whereby he has become” is economized to one word: “is.”¹¹¹ The phrase in clause 46(1) has two uses of the perfect tense: (1) “has done any act”, and (2) “has become.” This perfect tense suggests emphasis on the present results of actions completed in the past, with no specification of any past timeframe. The use of the word “is,” on the other hand, puts emphasis on a general state, whether temporary, permanent or habitual. While there is congruence between the present tense “is” and the second use of the present perfect, namely “has become,” given that both clause 46(1) and § 44(i) look at the entire time-axis, there can be similarities between the first use of the present perfect, i.e., “has done,” and the simple present tenses seen in clause 46(1) and § 44(i) respectively, if and only if the § 44(i) version applied exclusively to naturalized citizens. This is reminiscent of the earliest version that can be found of § 44(i), namely § 3 of the Act of Settlement of 1701. Under *jus sanguinis* and *jus soli*, the only act caught by the first use is the act of being born, which can attract no accountability. A legislative intent to affect this third change would hence mean an intent to extend the disqualification to obtaining citizenship other than by naturalization.

The critical change in the drafting of clause 46(1) was to make the disqualification apply to the input of the election process, rather than to its output. The disqualification looks at not only the citizenship status of the person before the person is elected, but also post-election. Therefore, the additional change to the present tense under § 44(i) extended the disqualification to naturally-born citizens.¹¹²

Clause 46(1) became the text of § 44(i) soon after the beginning of the Melbourne session of the Australasian Federal Convention in March 1898.¹¹³ The redrafting was part of a large number of amendments to the Constitution Bill approved at the Adelaide session, in response to confidential memoranda from the Colonial Office.¹¹⁴ These amendments were not intended to alter the “sense” of the draft Bill approved at the Sydney session.¹¹⁵ Additionally, according to the HCA, the drafting differences between the 1891 and 1898 texts were not intended to alter the

110. *Australian Constitution* § 44.

111. *Id.*

112. See e.g., MODEL PENAL CODE § 2.01(3) (AM. LAW INST. 2018) (stating that an omission will constitute an *actus reus* and give rise to liability only when the law imposes a duty to act and the defendant is in breach of that duty); RESTATEMENT (SECOND) OF TORTS § 314 (AM. LAW. INST. 1965) (similarly stating that liability will be imposed for an omission only exceptionally, when it can be established that the defendant was under a duty to act); RESTATEMENT (SECOND) OF TORTS § 281 (AM. LAW. INST. 1965) (stating that if the defendant’s conduct took the form of an omission, rather than a positive act, then it will be more difficult to establish that she owed a duty of care to the plaintiff. The rationale is that a positive duty is more onerous to fulfil than a negative duty, and therefore limits the liberty of the duty-bearer more severely). At common law, an omission, which is a failure to act, generally has different legal consequences than positive conduct.

113. *Citizenship Seven (Re Canavan; Re Ludlam; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon (2017))*, 349 CLR 534, 543 [(Austl.)]-[34]; see JOHN M. WILLIAMS, *THE AUSTRALIAN CONSTITUTION: A DOCUMENTARY HISTORY* 849 (Melbourne Univ. Press 2005).

114. *Re Canavan (2017)*, 263 CLR 284, 303 [33] (Austl.).

115. *Re Canavan; Re Ludlam; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon (2017)*, 349 CLR at 534, 543 (Austl.); see WILLIAMS, *supra* note 113.

purpose of § 44(i).¹¹⁶ Nevertheless, the 1891 version that made reference to disqualification arising out of an act, cannot evince an intention to follow imperial and colonial precedents. According to the HCA, “[t]he earlier reference to an ‘act’ was obviously drawn from the Imperial and colonial precedents. But the drafting history, beginning in 1891, cannot be treated as indicative of an intention on the part of the framers to cleave particularly closely to those precedents.”¹¹⁷

The 1891 version of the second text was virtually identical to the provision in the British North America Act 1867 (differing only in the use of the past tense) and this was the wording debated in the 1897 convention. The second provision was changed some time after the 1897 Debates to the wording found in the present § 44(i). This had the effect of changing the test from one requiring the performance of a positive act to acquire the citizenship of another country, to a wider test of whether the person is technically such a citizen. The practical significance is that the earlier provision would not have disqualified a person who had acquired his or her other nationality by birth or descent. “This change probably occurred in the 1898 Debates in Melbourne, . . . but the change does not appear to have been discussed.”¹¹⁸

A change to the draft section, now clause 44 (sometimes appearing as clause 45), was suggested at the Adelaide Convention Debates in 1897 “as being necessary to soften its impact on dual nationals.”¹¹⁹ It was suggested that persons who had taken an oath of foreign allegiance (i.e., German colonists who may have taken an oath of allegiance to Germany and served in the German army) should not be disqualified if they had since become naturalized as British subjects.¹²⁰ The proponent, Mr. Gordon, asked “would it not be necessary to add [to § 44(i)] . . . the words ‘or who has not since been naturalized’ . . . ?”¹²¹ The suggestion was not received favorably.¹²² At the Sydney Debates of 1897, an amendment to give the Federal Parliament power to change the disqualification tests by inserting in clause 45 (i.e., § 44) the words “until parliament otherwise provides,” was defeated by a vote of 26 to 8.¹²³

The key point is that although history does not evince an intention to “cleave particularly close” to the boilerplate version of the disqualification (as suggested by the HCA),¹²⁴ there is no evidence either that the framers did not so intend, i.e. to cleave close to those versions. Abduc-

116. *Re Canavan; Re Ludlam; Re Roberts* [No 2]; *Re Joyce; Re Nash; Re Xenophon* (2017), 349 CLR at 543–44.

117. *Id.*

118. Sarah O’Brien, *Dual Citizenship, Foreign Allegiance and s. 44(i) of the Australian Constitution*, PARLIAMENTARY RESEARCH SERV. 1, 34 (1992), <https://www.aph.gov.au/binaries/library/pubs/bp/1992/92bp29.pdf>.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* (citing *Official Record of the Debates of the Australasian Federal Convention (Adelaide)*, Mar 22 to May 5, 1897. 736. Adelaide, C.E. Bristow, Government Printer, 1897).

123. *Official Record of the Debates of Australasian Federal Convention, Second Session, Sydney*, Sept. 21, 1897, 1011–15, 21, (1897). (Moved by Mr. Glynn (SA)). Sydney, William Applegate Gullick, Government Printer, 1897. The phrase “until the parliament otherwise provides” can be found in section 34 of the Constitution. See *Australian Constitution* § 34.

124. *Re Canavan* (2017), 263 CLR 284, 304 [35].

tively, within a context of scanty discussion of changes to boilerplate language, and of inertia to any changes said language, § 44(i) continues to represent the common law jurisdiction of the boilerplate version.

In summary, the history of the legislative process of § 44(i) suggests no intention to innovate on the disqualification of members of parliament. The lack of discussion of the 1897 changes, and the rejection of naturalization as a guarantee, as well as the rejection of the phrase “until parliament otherwise provides”, gives assurance that § 44(i) was replicating similar disqualification provisions in force across the British Empire.

III. Constitutional Limits: Section 44(i) and Citizenship Law

Citizenship is understood as the right to have rights,¹²⁵ and, thus, as a homogenous category, providing a standardized bundle of rights to all citizens. Those afforded lower standards are not citizens but legal residents (analogous to permanent residents today).¹²⁶ These groups were not citizens, in the sense that some of their rights were curtailed. Of course, not every such curtailment of rights would render a person as non-citizen. This is clear from the disqualification provisions in §§ 44(ii)-(iv), and their predecessors. However, where these rights are curtailed as a result of facts beyond one’s control (i.e., due to one’s place of birth or due to the assertions of a foreign citizenship law), that restriction does exclude the person from being a citizen. Thus, for example, while in 1701 under common law, a resident was a foreigner allowed certain rights analogous to permanent residency today, he or she was not a citizen.¹²⁷ Residency remained the usual way foreigners swore allegiance to the Crown until the passing of the Naturalization Acts of 1844, 1847, and 1870.¹²⁸ Similarly, naturalized persons did not enjoy the same rights as natural-born British subjects.¹²⁹ In 1701, they were thought of as having rights akin to permanent residents today but were not considered citizens.¹³⁰ Gradually, however, citizenship laws, in particular the British Nationality Act 1981 (U.K.), expanded the rights of naturalized citizens to make them the equal to those native born.¹³¹

With this understanding of citizenship, it can be argued that § 3 of the Act of Settlement 1701 is a restatement of the common law citizenship framework applicable in Great Britain at the time. This framework was based on a regime of perpetual allegiance under the (common

125. See, e.g., Virginia Leary, *Citizenship Human Rights, and Diversity*, in *CITIZENSHIP, DIVERSITY AND PLURALISM: CANADIAN AND COMPARATIVE PERSPECTIVES* 247 (Alan C. Cairns et al. eds., 2000); Marc Steinberg, “*The Great End of All Government . . .*”: *Working People’s Constitution of Citizenship Claims in Early Nineteenth-Century England and the Matter of Class*, in *CITIZENSHIP, IDENTITY AND SOCIAL HISTORY* 19 (Charles Tilly ed., 1996).

126. This distinction continues to be relevant today in relation to political participation (at least in some jurisdictions, including Australia).

127. See, e.g., Henriques, *supra* note 77, at 311–12; see 1 WILLIAM BLACKSTONE, *COMMENTARIES* * Book I, Chapter 362, 370, AVALON PROJECT, YALE L. SCH., http://avalon.law.yale.edu/18th_century/blackstone_bk1ch10.asp.

128. Note that under The Naturalization Act 1870, 33 Vict. c. 14 (UK), an alien was able to be naturalized under § 7 upon taking the oath of allegiance under § 9.

129. See BLACKSTONE, *supra* note 127, at 362.

130. *Id.*

131. RANDALL HANSEN, *CITIZENSHIP AND IMMIGRATION IN POSTWAR BRITAIN: THE INSTITUTIONAL ORIGINS OF A MULTICULTURAL NATION* (2000).

law) feudal doctrine of *nemo potest exuere partiam*.¹³² Section 3 was a restatement of the common law proposition that citizenship could not be removed, renounced or revoked.¹³³ Section 3, however, states the qualification in the negative. The section refers to four different categories: natural-born British subjects, naturalized subjects, residents, and aliens. The section exhibits a discrimination based on the citizenship status of these categories, by stating that persons who are not British citizens cannot become members of Parliament.

The 1701 Act was passed at a time when “the jealousy of foreigners, fostered, as it had been, by the dislike of the partiality of William III to his foreign favorites, was rampant in the country.”¹³⁴ The Act expressly excluded non-citizens from the exercise of all (important) political functions.¹³⁵ Prior to this 1701 provision, aliens were disqualified at common law.¹³⁶ Section 3 also excludes those who were born “out of the Kingdoms of England Scotland or Ireland or the Dominions thereunto belonging,” which refers to aliens, residents, and naturalized subjects.¹³⁷ The section continues its discriminatory rationale with the exception afforded to those “born of English Parents.”¹³⁸ This part of § 3 extends the protection of the Crown to include a subject’s children (to one generation). This qualification was a modification of the position under common law, under which children born in foreign countries were aliens regardless of the nationality of their parents.¹³⁹ The inclusion of those “born of English Parents” is a restatement of the doctrine of *jus sanguinis*, and signifies the emergence of a national identity in Great Britain.¹⁴⁰

The nexus between § 3 and British citizenship law can also be explained in terms of the *Case of the Postnati* from 1608,¹⁴¹ which established the rule of birthright citizenship via *jus soli*. In that case, the court cited the Status of Children Born Abroad Act 1350¹⁴² in support of the principle that allegiance was tied to the person of the king, rather than to the kingdom itself or to its laws.¹⁴³ In doing so, the court gave effect to the doctrine of perpetual allegiance.¹⁴⁴ Section 3 is both a qualifying and disqualifying section. It makes British citizenship (i.e., the status of natural-born British subjects and those born to British parents) a necessary condition for membership in Parliament. At the same time, it disqualifies those who are not citizens (aliens, resi-

132. See Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411, 1420 (1997).

133. See BLACKSTONE, *supra* note 127.

134. Henriques, *supra* note 78.

135. Henriques, *supra* note 78, at 311.

136. CARNEY, *supra* note 26, at 246.

137. Henriques, *supra* note 78, at 311.

138. *Id.*

139. UK VISAS AND IMMIGRATION, *Historical Background Information on Nationality*, HOME OFFICE at 6, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/650994/Background-information-on-nationality-v1.0EXT.pdf. (UK).

140. See, e.g., KOSTAKOPOULOU, *THE FUTURE GOVERNANCE OF CITIZENSHIP* (2008).

141. Calvin’s Case (1608) 77 Eng. Rep. 377, 7 Co. Rep. 1a, (Eng.), reprinted in JOHN HENRY THOMAS & JOHN FARQUHAR FRASER, *THE REPORTS OF SIR EDWARD COKE* vol. 4, 1 (1826).

142. De Natis Ultra Mare 1840, 25 Ed Edw. 3.

143. Polly J. Price, *Natural Law and Birthright Citizenship in Calvin’s Case (1608)*, 9 YALE J. L. 74, 101–02 (1997).

144. See Nancy L. Green, *Expatriation, Expatriates, and Expats: The American Transformation of a Concept*, 114 AM. HIST. REV. 307, 315 (2009) (the doctrine of perpetual allegiance continued to dominate nationality law in Europe until its decline in the 1870s. In 1870, Great Britain revised its Nationality Law to allow for expatriation).

dents, and naturalized subjects) from membership. There is complete congruence between qualification and disqualification. Knowing the qualification category is enough to infer that the other categories were disqualified, without the need for an explicit disqualification provision.

Therefore, the introduction of two separate sections would have made the disqualification section redundant. A separate disqualification section would not have added any new information to the qualification section. Given that only natural-born British subjects and those born to British parents were given an unencumbered bundle of rights, renders adding a disqualification section superfluous. It would make explicit what is already implicit, namely that other categories, such as aliens, residents, or naturalized subjects, were non-citizens, and, thus, not allowed to become members of Parliament. Section 3 does not add anything new in terms of disqualification. It is a mirror image of a qualification requirement marking citizenship a necessary precondition to qualification.

In summary, the earliest predecessor to § 44(i) is § 3 of the Act of Settlement 1701. Section 3 was a codification of the common law. The text of this section suggests that it was based on the disqualification of non-citizens (foreigners, residents, and naturalized subjects), based on the status of British subjects applicable in 1701. Only through *jus soli* or *jus sanguinis* (with the latter being passed down only to one generation) did a person become a British citizen, i.e., allowed to have a bundle of rights unencumbered by facts outside of their control. Under this construction, § 3 does not add anything to a qualification requirement making citizenship a necessary requirement for membership in Parliament.

A. From Perpetual to Undivided Allegiance

While § 44(i) has counterparts in the *Union Act*,¹⁴⁵ § 7, as replicated in the New Zealand Constitution Act 1852,¹⁴⁶ §§ 36 and 50, and the British North America Act 1867,¹⁴⁷ § 31(2),¹⁴⁸ the origin of § 44(i) can be traced back even further, to § 3 of the Act of Settlement 1701. The design seen in § 3 continued to be applied in the British Empire even after British Dominions passed their own citizenship laws. The design in § 3 was based on congruence between qualification and disqualification. While status as British citizen was a necessary rather than a sufficient condition for qualification, the disqualification sections analogous to § 44(i) were only clarifying the conditions under which that status would be lost. However, the constitutions of the British colonies needed to depart from this complementarity to prevent persons with multiple allegiances from becoming members of their respective parliaments. Until 1870, under the perpetual allegiance doctrine that informed British citizenship at the time, these persons continued to be British citizens. The disqualification provisions were intended to rectify this inconsistency, by ensuring that these persons renounced their other allegiances upon becoming members of the relevant parliament—a forerunner of the doctrine of undivided allegiance that later replaced perpetual allegiance as the doctrine informing British citizenship law.

145. The Union Act 1840, 3 & 4 Vict. c. 35., § 7 (UK).

146. The Constitution Act 1852, 15 & 16 Vict. c. 72., §§ 36, 50 (UK).

147. The Constitution Act 1867, 30 & 31 Vict. c. 3., § 31(2) (UK).

148. *Re Canavan* (2017), 263 CLR 284.

The historical context of the War of 1812 between the United States and the United Kingdom explains why this complementarity was lost.¹⁴⁹

As part of its war with Napoleonic France, Britain enforced a naval blockade on neutral trade with France.¹⁵⁰ Britain needed to recruit more men into its Royal Navy for the blockade, some of whom were American merchant sailors who were impressed to join the Royal Navy.¹⁵¹ In 1807, during one of these blockades off the coast of Norfolk, Virginia, a number of Royal Navy seamen deserted from their ships and were given sanctuary by the American Government.¹⁵² One of the deserters, Jenkin Ratford, joined the crew of an American frigate, the *USS Chesapeake*.¹⁵³ The English warship *HMS Leopard* attacked the *USS Chesapeake* in its drive to look for deserters.¹⁵⁴ The battle came to be known as the *Chesapeake-Leopard Affair*. Similar incidents followed and, by 1812, James Madison declared war on Britain.¹⁵⁵ At the crux of this war was a disagreement about the effect of the doctrine of perpetual allegiance on the status of British citizens.¹⁵⁶ The U.S. gave the deserters the right to become U.S. citizens but Britain did not recognize that right.¹⁵⁷ Under British law, any U.S. citizens who were born in Britain were still British citizens and liable for impressment.¹⁵⁸

While the War of 1812 ended in 1815, the tensions flowing from the doctrine of perpetual allegiance did not. This required British colonies to introduce a disqualification provision in addition to the necessary condition of being a British citizen (similar to § 44(i) preventing such persons from becoming members of Parliament, even though these persons maintained their status as British subjects under the perpetual allegiance doctrine). These provisions were enacted in a world where individuals lacked the capacity to renounce their sovereign. In this world, “the law did not recognize dual nationality as a legitimate status”¹⁵⁹ and “the term ‘dual nationality’ [was not] employed to describe the phenomenon . . . until at least the turn of the century.”¹⁶⁰ The design of these provisions, therefore, did not target those of dual citizenship

149. For a detailed account, see CARL BENN, *THE WAR OF 1812* (2002).

150. Jonathon Hooks, *Redeemed Honor: The President-Little Belt Affair and the Coming of the War of 1812*, 74 *THE HISTORIAN* 317–18 (2012).

151. ALEXANDER SLIDELL MACKENZIE, *LIFE OF STEPHEN DECATUR, A COMMODORE IN THE NAVY OF THE UNITED STATES* (1846).

152. BRADFORD PERKINS & LEONARD LIVY, *EMBARGO: ALTERNATIVE TO WAR*, CHAPTER 8: PROLOGUE TO WAR: ENGLAND AND THE UNITED STATES, 1805–1812 (Dryden Press 1974).

153. *Id.* at 315.

154. *Id.*

155. *An Act Declaring War Between the United Kingdom of Great Britain and Ireland and the Dependencies Thereof and the United States of America and Their Territories*, YALE L. SCH. (June 18, 1812), https://avalon.law.yale.edu/19th_century/1812-01.asp.

156. N.A.M. RODGER, *COMMAND OF THE OCEAN* 565–66 (2005).

157. JON LATIMER, 1812: WAR WITH AMERICA 17 (2007).

158. HOWARD JONES, *CRUCIBLE OF POWER: A HISTORY OF AMERICAN FOREIGN RELATIONS TO 1913* 68 (2009).

159. Spiro, *supra* note 132, at 1420.

160. *Id.* at 1431 (section 44 was giving expression to an emerging world yet to be dominated by the technological advantages ushered by the Second Industrial Revolution; in particular, in relation to transportation and mobility. This mobility, by the middle of the twentieth century, crystalized the need for, and the development of, the principle of citizenship as we know it today).

prior to being elected but proscribed any voluntary acts of allegiance to foreign powers once elected. This is in line with the perpetual allegiance doctrine, since these dual citizens did not forfeit their status as British citizens and were able to be nominated to become members of Parliament under the qualification provisions. What was being proscribed was the renewal of such allegiance after being elected as a member of Parliament. The practical effect from the disqualification was that persons had to renounce their other citizenship before becoming members of Parliament.¹⁶¹

An early example of this design appears in § 7 of the Union Act of 1840, which provides the following disqualification provision (reproduced from § 3):

And be it enacted, That if any Legislative Councillor of the Province of Canada . . . shall do, concur in, or adopt any Act whereby he may become a Subject or Citizen of any Foreign State or Power, or whereby he may become entitled to the Rights, Privileges, or Immunities of a Subject or Citizen of any Foreign State or Power. . . his Seat in such Council shall thereby become vacant.¹⁶²

While the 1840 Act did not introduce any new concept of national citizenship through § 7, it details conditions under which a person is disqualified from sitting as a Member of the Legislative Council of the Province of Canada.¹⁶³ The section refers to voluntary acts of transfer of allegiance.¹⁶⁴ The section, therefore, departs from the discrimination underlying the 1701 version by disqualifying British citizens rather than disqualifying non-British citizens.¹⁶⁵ Before enactment of the Canadian Citizenship Act of 1947, a person born or naturalized in Canada was considered a British subject under the Naturalization Act of 1868.¹⁶⁶ Section 4 of the 1840 Act explains the continued use of the concept of British subjects in the qualification of persons for Legislative Council:

And be it enacted . . . that no Person shall be summoned to the said Legislative Council of the Province of Canada who shall not be of the full Age of Twenty one Years, and a natural born Subject of Her Majesty, or a Subject of Her Majesty naturalized by Act of the Parliament of Great Britain, or by Act of the Parliament of the United Kingdom of Great Britain and Ireland, or by an Act of the Legislature of either of the Provinces of Upper or Lower Canada, or by an Act of the Legislature of the Province of Canada.¹⁶⁷

By 1840, British citizenship in the Dominions was enlarged to include naturalized British subjects. But now, given the common law doctrine of perpetual allegiance at the time, § 7

161. The same rationale guided early versions of the Oath of Allegiance in Australia. See discussion *infra* Section VII.

162. The Union Act 1840, 3 & 4 Vict. c. 35, § 7 (UK.). (emphasis added).

163. *Id.*

164. *Id.*

165. *Id.*

166. Note that after the British North America Act 1867 (Imp), 30 & 31 Vict. c. 3, § 25 (UK), the Parliament of Canada had authority over 'Naturalization and Aliens' by virtue of § 91(25).

167. The Union Act 1840, 3 & 4 Vict. c. 35, § 7 (UK.).

introduced a disqualification requirement that was not contemplated by the concurrent British subject requirement under § 4. Thus, § 7 was not a clarifying section—it was not only stating what was implicit under the concept of British citizen as applied in the Dominions but introduced a new condition on the disqualification of members of the Legislative Council.

The text of § 7 of the 1840 Act became a boilerplate provision for the constitutions of British colonies. The exact same language in the 1840 Act can also be found in the British North America Act 1867,¹⁶⁸ § 31(2). This boilerplate provision was also replicated in the constitutions of each of the Australian colonies, which were to become States.¹⁶⁹ For example, the boilerplate provision can be seen in Tasmania's constitution,¹⁷⁰ §§ 13 and 24.¹⁷¹ It is evident that the same version of the boilerplate provisions was also drafted into the New South Wales Constitution Act of 1855,¹⁷² schedule 1, §§ 5 and 26; the Victoria Constitution Act 1855,¹⁷³ schedule 1, § 24; the South Australia Constitution Act 1855-6 (SA),¹⁷⁴ §§ 12 and 25; the Queensland's Constitution Act 1867,¹⁷⁵ § 23, and in the Western Australia Constitution Act 1890,¹⁷⁶ schedule 1, § 29(3). All required disqualification of sitting members rather than candidates, which means that disqualification applied only where the member acted in the proscribed manner after being elected.¹⁷⁷ The boilerplate language can be found, even today, in all paragraphs of § 44 of the Australian Constitution.¹⁷⁸ The second provision of § 44(i), however, became the exception. The paragraph evolved beyond the boilerplate formulation to account for the concurrent evolution in British citizenship law, namely the introduction of the right of alienage under the Naturalization Act of 1870, as delineated in Section VII below.

168. British North America Act 1867 (Imp) 30 & 31 Vict. c. 3. (UK).

169. Constitution Act 1854 (Tas) §§ 13, 24 (Austl.); New South Wales Constitution Act 1855 (NSW) sch. 1 §§ 5, 26 (Austl.); Victoria Constitution Act 1855 (Imp) sch. 1 § 24 (Austl.); Constitution Act 1855-6 (SA) §§ 12, 25 (Austl.); Constitution Act 1867 (Qld) § 23 (Austl.); Western Australia Constitution Act 1890 (Imp) sch. 1 § 29(3) (Austl.).

170. Constitution Act 1854 (Tas) §§ 13, 24 (Austl.).

171. *Id.* at §§ 7, 15. For completeness, it is pertinent to also cite §§ 7 and 15 of the Constitution Act, 1854 (Tas), which correspond to § 34(ii) of the Australian Constitution:

VII. No person shall be capable of being elected a Member of the Legislative Council who shall not be of the full age of thirty years and a natural-born or naturalised subject of Her Majesty or legally made a denizen of Van Diemen's Land.

XV. The House of Assembly shall consist of Thirty elected Members and any person (except as hereinafter excepted) shall be capable of being elected a Member of the House of Assembly who shall be a natural-born or naturalised subject of Her Majesty or legally made a denizen of Van Diemen's Land – Provided that no Judge of the Supreme Court or Minister of Religion shall be capable of being elected a Member of the House of Assembly.

This 1854 version has now enlarged the citizenship class to include residents, in line with the evolving nature of British citizenship to account for the continuing expansion of the British Empire.

172. New South Wales Constitution Act 1855 (NSW) sch. 1 § 5 (Austl.).

173. Victoria Constitution Act 1855 (Vic) sch. 1 § 24 (Austl.).

174. Constitution Act 1855-6 (SA) §§ 12, 25 (Austl.).

175. Constitution Act 1867 (Qld) § 23 (Austl.).

176. Western Australia Constitution Act 1890 (Imp) 53 & 54 Vict. ch. 26.

177. CARNEY, *supra* note 27, at 258.

178. The parts relevant to the other paragraphs of § 44 are omitted.

Note that unlike § 3 of the Act of Settlement 1701, the qualification provisions in these constitutions allowed naturalized subjects and residents to be elected to the Legislative Council and the House of Assembly. This innovation was also in line with changes in British citizenship law, as residents could become naturalized British subjects after 1844.¹⁷⁹ Similarly, the disqualification sections were not clarifying sections, as they introduced a disqualification outside the concurrent British citizenship law.

The prophylactic intervention seen in the disqualification provisions in the British colonies anticipated a departure from perpetual allegiance to undivided allegiance. The departure was precipitated by what came to be known as the Fenian Rising of 1867, when U.S. citizens joined the rebellion against British rule in Ireland.¹⁸⁰ Some of these fighters were caught and charged with treason, given that they did not lose their status as British subjects under the doctrine of perpetual allegiance, a doctrine that also formed the basis for U.S. citizenship law at the time.¹⁸¹ As a result, the U.S. Congress passed the Expatriation Act of 1868 to allow U.S. citizens to renounce their U.S. citizenship.¹⁸² The British followed suit by passing the Naturalization Act 1870. By the mid-nineteenth century, due to continued tensions with the United States, the doctrine of perpetual allegiance was replaced by a doctrine of undivided allegiance. In particular, after the passing of § 6 of the Naturalization Act 1870, British subjects forfeited this status automatically if they became a naturalized citizen of another country. The non-congruence between boilerplate qualification and disqualification provisions was now restored as it was under the 1701 Act. The 1870 Act reduced disqualification provisions analogous to § 44(i) to merely clarifying provisions of qualification provisions analogous to § 34(ii): these disqualification sections only made explicit what was now implicit under the qualification section.

In summary, § 44(i) has a pedigree that can be traced back to the early eighteenth century, within the United Kingdom, and its colonies. The earliest version of § 44(i) suggests disqualifying non-citizens from becoming members of Parliament. However, later versions foreshadowed the shift from perpetual allegiance to undivided allegiance by requiring members to renounce other allegiances. This was also in line with the expansion of the citizenship class (in the dominions) to include naturalized British subjects and residents. These sections were not clarifying the British citizenship requirement for membership in parliaments, as they required more than what could result in forfeiture of that status. The key point, however, is that both qualifying and disqualifying sections were informed by British citizenship law concepts and their evolution.

179. See United Kingdom, *Parliamentary Debates*, House of Lords, 18 July 1844, 995–96 (Lord Brougham).

180. Daniel Rice, *The 'Uniform Rule' and its Exceptions: a History of Congressional Naturalization Legislation*, 40 THE OZARK HIST. REV. 23, 50–51 (2011).

181. Edward J. Erler, *From subjects to citizens: the social compact of origins of American citizenship*, in THE AMERICAN FOUNDING AND THE SOCIAL COMPACT 163, 191 (2003).

182. See John C. Yoo, *Survey of the Law of Expatriation: Memorandum Opinion for the Solicitor General* (June 12, 2002), <https://web.archive.org/web/20060603210348/http://www.justice.gov/olc/expatriation.htm> (the Expatriation Act of 1868 provided an explicit rejection of the doctrine of perpetual allegiance).

B. Section 44(i) and Undivided Allegiance

The boilerplate provisions differ from § 44(i), since an Australian citizen with dual citizenship cannot be disqualified by these provisions.¹⁸³ However, if, for example, a candidate with dual citizenship renews his or her foreign passport after being elected to Parliament, disqualification will ensue.¹⁸⁴ We get the same outcome under the British North America Act 1840, the New Zealand Constitution Act 1852, and the British North America Act 1867. The reason for this difference is key to understanding the declaratory nature of § 44(i).

The starting point is to recall that the HCA suggests that the drafting history of § 44(i) does not warrant a different conclusion other than a wide construction.¹⁸⁵ However, the first official draft of § 44(i), clause 46(1) of the Commonwealth Bill of 1891 suggests otherwise. As discussed below, the legislative intent is closer to that seen in the boilerplate provisions discussed earlier, which in turn would suggest a narrow construction instead, one closer to that argued by Deane J's dissenting judgment in *Syke*. Section 44(i) was intended to ensure that nominating or elected individuals did not forfeit their British citizenship.

As detailed in Section III of this Article, within a week of the first official draft, clause 46(1) was redrafted in the form of § 44(i)'s predecessors of § 44(i). The clause departed from the imperial and colonial precedents. The clause was no longer confined to acts done after election, a sign of the currency of the issue of dual citizens at the time and the concurrent doctrine of undivided allegiance (after the passing of the Naturalization Act 1870). The two elements of clause 46(1) are stated in the present perfect form, as opposed to the simple present that is found in § 44(i).¹⁸⁶ The second element of clause 46(1) and the second provision of § 44(i) are, however, quite different.

For the undivided allegiance argument in this section, however, the key point is that a naturalized citizen needed to take an oath of allegiance under § 9 of the 1870 Act, the wording of which is provided below:

The oath in this Act referred to as the oath of allegiance shall be in the form following; that is to say, 'I do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, her heirs and successors, according to law. So help me GOD.'¹⁸⁷

183. See also the discussion in Section III *supra*.

184. Only in South Australia is this outcome expressly avoided. *Constitution Act 1934* (SA) §§ 17(2), 31(2) (Austl.). In contrast, in Victoria, the Northern Territory, and the Australian Capital Territory, no disqualification applies to candidates or members, as a consequence of acknowledging foreign allegiance. See CARNEY, *supra* note 26, at 258.

185. *Re Canavan*, (2017), 263 CLR 284 at [19].

186. The first provision of clause 46(1) and § 44(i) are otherwise almost identical. The verbs "taken" and "made" were dropped, and "made an acknowledgement" is replaced with "is under any acknowledgement." See Drft. of a Bill to Constitute the Commonwealth of Austl. 1891 (Cth) ch. 1 pt. 4 § 46 (Austl.). See also *Australian Constitution* § 44(i).

187. The Naturalization Act 1870, 33 Vict. c. 14 (UK).

The Oath requires bearing “true allegiance” to the Crown. Under the undivided allegiance doctrine informing British citizenship law at the time, this oath suggests renouncing all other allegiances. In other words, regardless of whether a person held a foreign citizenship or not, becoming a naturalized British citizen meant that the person had to divest themselves of any other allegiance. However, if they were to renew their allegiance to the foreign State, that would automatically result in their disqualification (under § 6 of the Naturalization Act of 1870 as discussed below).

It is also informative to recall that at the Sydney Debates of 1897, an amendment to give the Federal Parliament power to change the disqualification tests by inserting in clause 45 (i.e., § 44) the words “until parliament otherwise provides”, was defeated by 26 votes to 8.¹⁸⁸ The defeat suggests that the intention was to follow the legislation relating to citizenship renunciation under British law. It was not to introduce any possibilities for divergence, except through § 34 (for which the phrase “until parliament otherwise provides” was adopted), namely by adopting a different citizenship standard in Australia. The phrase “until parliament otherwise provides” in § 34(ii) is critical, given that the Australian Constitution does not offer any standard of citizenship.¹⁸⁹ The argument is reinforced by the following comments from the Hon. Simon Fraser, a member of the Victorian Legislative Assembly:

I think the 1st paragraph [of s 44(i)] is absolutely necessary. A foreigner might get into our parliament, and sell our defense secrets to a foreign power. We must look forward to the time when we will be a powerful nation, or even now when we are weak it is still more desirable that we should be in safe keeping within ourselves. *Such a clause is in force in every country.* Would a foreign country [start page 1015] allow a Britisher to go into its parliament? There would not be the slightest chance, and their laws will scarcely allow a foreigner to travel through their country.¹⁹⁰

Fraser is concerned about a “foreigner” entering Parliament.¹⁹¹ The concern is with discrimination between citizens and non-citizens flowing from § 3 of the Act of Settlement 1701. Moreover, the intention behind § 44(i), as understood by Fraser, was to introduce the clause “in force in every country”, rather than a *sui generis* rationale for disqualification.¹⁹² Section 44(i) was intended to prevent a violation of the doctrine of undivided allegiance that informed similar clauses in other countries, especially in Great Britain at the time. The section is pre-

188. Commonwealth, *Parliamentary Debates*, H.R., 21 Sept. 1897, 1011–15 (George Houstoun Reid, P.C., M.L.A.) (Austl.). The phrase “until the parliament otherwise provides” can be found in § 34 of the Constitution. *Australian Constitution* § 34.

189. Sangeetha Pillai, *Non-Immigrants, Non-aliens and People of the Commonwealth: Australian Constitutional Citizenship Revisited*, 39(2) MONASH UNIV. L. REV. 568 (2013).

190. Commonwealth, *Parliamentary Debates*, H.R., 21 Sept. 1897, 1014–15 (Hon. S. Fraser) (Austl.). (emphasis added).

191. *Id.*

192. *Id.*

sented as a provision “in force in every country.”¹⁹³ The intention was therefore simply to disqualify non-British citizens. The section declared and clarified British citizenship, and the circumstances under which it is revoked.

However, if § 44(i) was already redundant under current British citizenship law, why was it kept in the Australian Constitution? It is reasonable to suggest that the drafters of the Australian Constitution were aware of the citizenship law applicable in Australia at the time, namely, the Naturalization Act 1870. Why did they adopt § 44(i), if it were not adding anything to that British citizenship law as enunciated under § 34(ii)?

The reason is that the section was a standard provision across the British Empire, which would have militated against its removal. Keeping that section meant that the design was giving the assurance of following a long tradition of similar designs in other British colonies. Moreover, the clarifying nature of § 44(i) added valuable guidance to the Australian Constitution, given that the constitution does not furnish an Australian standard of citizenship. Section 44(i) was useful in clarifying § 34(ii) vis-à-vis the British citizenship law applicable at the time, namely the Naturalization Act 1870. Hence, in keeping the section, it was still necessary to ensure that it was consistent with the 1870 Act. This explains the final changes to the section as discussed below in Section [III-C].

Clause 46(1) was redrafted as seen in the text of § 44(i) soon after the start of the Melbourne session of the Australasian Federal Convention in March 1898.¹⁹⁴ The change does not appear to have been discussed.¹⁹⁵ The redrafting was part of a large number of amendments to the Constitution Bill that were approved at the Adelaide session, in response to confidential memoranda from the Colonial Office.¹⁹⁶ This lack of discussion suggests that the amendments were not intended to alter the “sense” of the draft Bill approved at the Sydney session.¹⁹⁷ The same understanding was furnished by the HCA: the drafting differences between the 1891 and 1898 texts were not intended to alter the purpose of § 44(i).¹⁹⁸ Nevertheless, the 1891 version that had reference to disqualification arising out of an act, cannot, according to the HCA, evince an intention to follow Imperial and colonial precedents.¹⁹⁹ However, § 44(i) could not have been intended to be inconsistent with British nationality law applicable in Australia at the time, as exemplified in the Naturalization Act 1870. Extending § 44(i)’s disqualification to those nominated for Parliament meant that the section is consistent with § 6 of the 1870 Act, which ensured that dual citizens forfeited their status as British subjects automatically. Adding § 44(i) for purposes beyond clarifying § 34(ii) could not have been intended by the drafters of the Australian Constitution. It is this understanding of the role of the Naturalization Act 1870 that can best explain the changes made to § 44(i) by the Colonial Office.

193. *Id.*

194. *Citizenship Seven* (2017), 349 CLR 534, 543 ¶¶ 33–34 (Austl.). See WILLIAMS, *supra* note 113, at 849.

195. O’Brien, *supra* note 118, at 35.

196. *Re Canavan* (2017), 263 CLR 284, 303 [33] (Austl.).

197. Commonwealth, *Parliamentary Debates*, H.R., 4 Mar. 1898, (Austl.).

198. *Citizenship Seven* (2017), 263 CLR 284, ¶ 35 (Austl.).

199. *Id.*

Thus, § 44(i) was intended to confirm the requirement that a member of Parliament must be a British citizen, by restating the naturalization concepts articulated in §§ 4 and 6 of the Naturalization Act 1870.

C. Redundancy Under the Naturalization Act of 1870

In the previous sections, this Article argued that § 44(i) is a mirror image of § 34(ii).²⁰⁰ It is informed by the citizenship law applicable in Australia. This assertion was motivated by tracing the rationale enunciated in § 44 back to the Act of Settlement 1701. Section 44 operates in conjunction with several other provisions of the Australian Constitution and Australian legislation.²⁰¹ Collectively, these sections define who can stand for Parliament, as well as conditions wherein a seat may be declared vacant. The other main provisions are §§ 16, 34, 43, 45 of the Constitution, and §§ 93 and 163 of the Commonwealth Electoral Act of 1918. This section of the Article focuses on § 34 since it informs the construction of § 44(i).²⁰²

At the time § 44(i) was passed, the key to understanding its meaning was the interaction with § 34(ii). This point, however, was discussed by the HCA only briefly, and only in the following terms:²⁰³

[36] There is another aspect of the historical context in which the Constitution was drafted which affirmatively supports the wider purpose of s 44(i) which its language suggests. The addition of disqualification under s 44(i) to qualification under s 34 would, at the time of federation, have been redundant unless disqualification under s 44(i) was capable of applying to a person qualified under s 34. Section 34(ii) required, in 1901 and until the Parliament otherwise provided, that a senator or member of the House of Representatives “must be a subject of the Queen”. By operation of the *Naturalization Act 1870* (Imp), a subject of the Queen who by voluntary act became a subject or citizen of a foreign state automatically ceased to be a subject of the Queen and was “from and after” that time to ‘be regarded as an alien.’ A person who by voluntary act had become a subject or citizen of a foreign state was therefore not qualified under s 34(ii). For the second limb

200. Until Parliament decided otherwise with the introduction of Australian citizenship law in 1949.

201. Ian Holland, *Section 44 of the Constitution, E-Brief: Online Only issued March 2004*, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/Section44.

202. *Citizenship Seven* (2017), 263 CLR 284, ¶ 36 [36] (Austl.).

203. The HCA does not furnish an analysis of § 44(i) vis-à-vis § 34(ii). The only discussion in this judgment was in relation to the ‘constitutional imperative’ at [43] where the Court stated that:

[A]n Australian citizen who meets the qualifications for election as a senator or member set by [§§] 16 and 34 of the Constitution or by a law enacted by the Commonwealth Parliament under [§] 51(xxxvi) for the purpose of [§] 34 of the Constitution is not to be permanently disabled from participating in the parliamentary and executive government of Australia by a disqualification in [§] 44, with the possible exception only of an Australian citizen who ‘is attainted of treason’ within the meaning of [§] 44(ii).

Re Gallagher (2018), 355 ALR 1, ¶ 43 (Austl.).

of s 44(i) to add anything to s 34(ii), that limb needed to extend beyond acquisition of the status of a subject or citizen of a foreign power by some voluntary act.²⁰⁴

The interpretation of § 44(i) as a clarifying section requires a deeper understanding of HCA's reasoning above, in particular the last sentence. When § 44(i) is understood as part of the historical context that gave rise to the Naturalization Act 1870 and its impact on British nationality and its renunciation, it is reasonable to conclude that § 44(i) has to be interpreted as a disqualification of non-citizens under the concurrent 1870 Act. This part of the Article interprets § 44(i) as it would have been under British law in 1901. The applicable nationality law was still that relating to Britain. Eligibility for nominating and standing in Parliament depended on being a British subject under § 34(ii). In Section VIII (below), § 44(i) is interpreted under current Australian nationality law.

According to the House of Representatives' Standing Committee on Legal and Constitutional Affairs, the legal principle expressed in § 44(i) is that "members of parliament must have a clear and *undivided* loyalty to Australia . . .".²⁰⁵ A key point in the Committee's report is that "[t]he language in which the principle is expressed is archaic. It was drafted before the concept of Australian citizenship developed and the scope of the subsection is uncertain."²⁰⁶ In *Sue v. Hill*,²⁰⁷ the majority took judicial notice of the historical setting of the provision.²⁰⁸ The majority held that it was not the intention of the founders to disqualify an Australian citizen from election to Parliament due to his or her continued foreign citizenship, if that person took "all reasonable steps" to renounce that citizenship.²⁰⁹ The case, as delineated below, applies to the second construction of the interpretation of § 44(i) under British naturalization laws.

The Naturalization Act of 1870 discriminates between natural-born and naturalized citizens in terms of the requirements under which they forfeit their status as citizens. This was one of the reasons that made the HCA reject the dissenting opinion of Justice Deane in *Sykes*: ". . . the approach of Deane J places naturalized Australian citizens in a position of disadvantage relative to natural-born Australian citizens. [The] majority in *Sykes* [. . .] did not countenance such a distinction."²¹⁰ The origins of § 44(i), nevertheless, suggest that Justice Deane's approach is more appropriate for giving effect to legislative intent.

The rest of this section considers the alienation of British citizenship as exemplified by the 1870 Act in greater detail, for further clarification of how § 44(i) should have been interpreted before the promulgation of Australian citizenship law. Under § 44(i), there can be only three ways leading to dual citizenship: (1) where an individual obtained their British *and* foreign cit-

204. Citizenship Seven (2017), 263 CLR 284, ¶ 36 (Austl.).

205. Commonwealth, *supra* note 64, at 10, 11 (emphasis added).

206. *Id.* at 10.

207. *Sue v. Hill* (1999), 199 CLR 462 (Austl.).

208. *Sykes v. Cleary* [No. 2] (1992), 176 CLR 77, 107 (Austl.).

209. *Id.* at 107–08 (majority citing § 42 of the Constitution in further support of this interpretation, which requires a member of Parliament to take an oath or affirmation of allegiance).

210. Citizenship Seven (2017), 263 CLR 284, ¶ 53 (Austl.).

izenships through *jus sanguinis* or *jus soli*; (2) where the individual obtained their foreign citizenship through *jus sanguinis* or *jus soli*, or through naturalization, and their British citizenship through naturalization; and (3) where the person acquires their foreign citizenship after their British citizenship. The effect of these three cases on disqualification requires legal tests which can be found in the 1870 Act, discussed below.

First, this construction of § 44(i) applies where an individual obtains their British *and* foreign citizenships through *jus sanguinis* or *jus soli*. This occurs when the foreign and British citizenships were acquired concurrently. Under this interpretation, the individual cannot be *automatically* disqualified under the citizenship provision of § 44(i), due to § 4 of the Naturalization Act 1870:

4. How British-born subject may cease to be such

Any person who by reason of his having been born within the dominions of Her Majesty is a natural-born subject, but who also at the time of his birth became under the law of any foreign state a subject of such state, and is still such subject, may, if of full age and not under any disability, make a declaration of alienage . . .

Any person who is born out of Her Majesty's dominions of a father being a British subject may, if of full age, and not under any disability, make a declaration of alienage . . .²¹¹

A wide reading of § 44(i) would contravene the requirements under § 4 of the Naturalization Act of 1870. Alienage in the case of a natural-born subject is not automatic on becoming a subject of a foreign State. The person has to alienate their British citizenship. Similarly, a person born in Australia, who also at the time of his or her birth became a citizen of a foreign State, needs a declaration of alienage to become eligible to stand for the Australian Parliament. To prevent inconsistency, the language for § 44(i) would have to revert back to the present perfect used in clause 46(1) (see Section II-B above). For disqualification, there must be a positive act of affirming the foreign citizenship, such as submitting a passport application.

In 1901, a British subject born in Australia was able to be nominated for the Australian Parliament (until the passing of the Australia Act 1986).²¹² As discussed below, the predecessor to § 44(i), clause 46(1) of the Commonwealth Bill of 1891 was intended to prevent the outcome suggested by the HCA in *Citizenship Seven*.²¹³ In fact, it was this other case covered by § 4 of the 1870 Act, that was relevant to most of the individuals considered in that case.

The second construction of § 44(i) involves two time-periods. This construction applies where the individual obtained their foreign citizenship through *jus sanguinis* or *jus soli*, or through naturalization, and their British citizenship through naturalization. This interpretation

211. The Naturalization Act 1870, 33 Vict. c. 14 (UK).

212. *Sue v. Hill* (1999), 199 CLR 462, 490 [59] (Austl.).

213. *Id.* at 303, ¶ [36].

applies where the foreign citizenship was obtained before the British one. Thus, § 44(i) results in automatic disqualification based on status rather than the actions taken by the individual.²¹⁴

Under §§ 7 and 9 of the Naturalization Act of 1870, an alien can obtain British citizenship as detailed below:

7. Certificate of naturalization

An alien . . . may apply . . . for a certificate of naturalization . . . [B]ut such certificate shall not take effect until the applicant has taken the oath of allegiance.

. . .

9. Form of oath of allegiance

The oath in this Act referred to as the oath of allegiance shall be in the form following; that is to say, "I do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, her heirs and successors, according to law. So help me GOD."²¹⁵

The effect of these sections agrees with Justice Deane's dissent in *Sykes*, who held that the oath of allegiance, which at the time included an unreserved renunciation of other allegiances, and the years spent as Australian citizens, was sufficient to constitute reasonable steps to renounce foreign citizenship.²¹⁶ After *Re Gallagher*, however, the reasonable steps test applies only when an Australian citizen would otherwise be irremediably prevented from standing for election to Parliament.²¹⁷ The HCA elaborated on this point as follows:

[25] In *Re Canavan* the qualification to s 44(i) was expressed as an exception: A person who, at the time that he or she nominates for election, retains the status of subject or citizen of a foreign power will be disqualified by reason of s 44(i), except where the operation of the foreign law is contrary to the constitutional imperative that an Australian citizen not be irremediably prevented by foreign law from participation in representative government. Where it can be demonstrated that the person has taken all steps that are reasonably required by the foreign law to renounce his or her citizenship and within his or her power, the constitutional imperative is engaged.

[26] It may be observed from this paragraph, and from earlier passages in the reasons in *Re Canavan*, that for s 44(i) to be read as subject to the exception two circumstances must be present. The first arises from the terms of the constitutional imperative. It is that a foreign law operates irremediably to prevent an Australian citizen from participation. The second is that that

214. *Id.* at 309, ¶ [53]. This construction must be reconciled with the textual analysis furnished by HCA precedents and other relevant case law on the interpretation of the citizenship provision in § 44(i), when the person obtained their foreign citizenship before their British one.

215. The Naturalization Act 1870, 33 Vict. c. 14 (UK).

216. *Sykes v. Cleary* (1992), 176 CLR 77, 130 (Austl.).

217. *See Twomey, supra* note 23, at 5.

person has taken all steps reasonably required by the foreign law which are within his or her power to free himself or herself of the foreign nationality.

[27] A foreign law will not ‘irremediably prevent’ an Australian citizen from renouncing his or her citizenship simply by requiring that particular steps be taken to achieve it. For a foreign law to meet the description in *Re Canavan* and *Sykes v. Cleary* it must present something of an insurmountable obstacle, such as a requirement with which compliance is not possible. Consistently with the approach taken in *Re Canavan*, the operation of the foreign law and its effect are viewed objectively.

[28] In *Re Canavan* an example was given of a foreign law which operated in a way that would engage the constitutional imperative. The example was a foreign law which permitted renunciation of foreign citizenship but required foreign citizens to carry out the necessary acts of renunciation in the territory of the foreign power. Compliance with this requirement was not possible because it put the person at risk. So understood, the foreign law would irremediably disqualify the person.

[30] Contrary to a submission made by Senator Gallagher, the ‘test’ for the engagement of the constitutional imperative is not contained in the second sentence of the passage from *Re Canavan* set out above. It is not sufficient that a person in her position has taken all steps reasonably required by the foreign law which are within her or his power for the exception to s 44(i) to apply. The exception stated in *Re Canavan* requires for its operation that a foreign law operate in the way described. The ‘foreign law’ referred to in the second sentence is the same body of law which operates to irremediably prevent the person’s participation, as described in the preceding sentence.²¹⁸

Thus, HCA’s interpretation of § 44(i) is based on a test wherein the foreign law irremediably prevents a person from participation in the nomination process, rather than one based on a construction that makes the nature of § 44(i) operative as a restatement of the citizenship law applicable in Australia from the time the *Australian Constitution* was passed and until a separate citizenship law was adopted in 1949. However, when the latter citizenship interpretation is invoked, § 44(i) can only be interpreted in a manner consistent with the Naturalization Act of 1870.

The third construction applies where the person acquires their foreign citizenship after their British citizenship. This is the case where the individual obtained their British citizenship through *jus sanguinis* or *jus soli*, or through naturalization, and their foreign citizenship through naturalization. The key analytical signifier is that British citizenship was obtained prior to the foreign citizenship.

218. *Re Gallagher* (2018), 263 CLR 460, 473 [30] (Austl.).

Section 6 of the 1870 Act refers to the case where a British subject becomes ‘naturalized’:

6. Capacity of British subject to renounce allegiance to Her Majesty

Any British subject who . . . voluntarily become naturalized in [a foreign] state, shall from and after the time of his so having become naturalized in such foreign state, be deemed to have ceased to be a British subject and be regarded as an alien; Provided,—

(1) That where any British subject has before the passing of this Act voluntarily become naturalized in a foreign state and yet is desirous of remaining a British subject, he may, at any time within two years after the passing of this Act, make a declaration . . .

(2) A declaration of British nationality may be made, and the oath of allegiance be taken as follows. . . ²¹⁹

Section 6 of the 1870 Act mirrors provisions like § 44(i), which, at the time, were found in legislation applicable only to the colonies. The section refers to foreign citizenship, which, if acquired, would result in alienage. However, the section still provides British citizens the option of keeping their citizenship.

Thus, we have two different “default” positions. The first is one of alienage whenever a person obtains a foreign citizenship by naturalization. Under this category, the person needs to make a declaration to remain a British subject. This position is influenced by the same rationale behind the undivided allegiance doctrine. The second position is one of no alienage, provided that the person obtained their foreign citizenship by *jus sanguinis* or *jus soli*. Here, the person must alienate their citizenship in order to cease being a British subject. This second position is also based on undivided allegiance, which allows for alienage by declaration.

To prevent inconsistency with the 1870 Act, the individual is shielded by construing § 44(i) as reverting to the language of clause 46(1). Otherwise, the citizenship provision of § 44(i) would be inconsistent with § 6 of the Naturalization Act of 1870 on alienage. The test under § 6 of the 1870 Act must be whether the individual has obtained the foreign citizenship voluntarily.

D. Anachronism Under Current Australian Law

So far, this article has argued that § 44(i) is concerned with disqualifying non-citizens rather than adding any special requirement for disqualification. This led to the conclusion that § 44(i) only clarifies § 34(i) and, thus, was redundant in 1901. The second step of the argument is based on an analysis of the changes to the citizenship law applicable in Australia. Section 44(i) continued to be redundant after the introduction of the Australian Citizenship Act of 1948, given that it was based on the same undivided allegiance doctrine informing British citizenship law. However, the analysis suggests that the alienage conditions in § 44(i) no longer apply to § 34(ii), given that Australian citizenship law has allowed for dual citizenship since

219. The Naturalization Act 1870, 33 Vict. c. 14 (UK).

2002. The key point, again, is that § 44(i) was designed as a disqualification of non-citizens rather than as a disqualification of citizens. Section 44(i) is now considered anachronistic and of no legal effect.²²⁰

The first instruments of Australian citizenship law followed the approach seen in the Act of Settlement of 1701, by codifying the common law rules governed at the time by the doctrine of undivided allegiance. The first of these instruments was the British Nationality and Status of Aliens Act of 1914. Loss of British Nationality under this Act was consistent with the 1870 Act. Thus, § 13 of the 1914 Act states that “A British subject, who, when in any foreign state and not under disability, by obtaining a certificate of naturalization or by any other voluntary and formal act, becomes naturalized therein, shall thenceforth be deemed to have ceased to be a British subject.”²²¹ The section is consistent with § 6 of the 1870 Act. Section 14 of the 1914 Act is identical to § 4 of the 1870 Act. The next instrument was the Nationality Act of 1920.²²² Similar consistency with the 1870 Act as to loss of British nationality can be seen under §§ 21 and 22 of the 1920 Act, which are identical to §§ 13 and 14 of the 1914 Act.

With the passing of the Nationality and Citizenship Act of 1948, an Australian citizenship was created separate from that of the United Kingdom, although Australian citizens were still considered British subjects at the time of its adoption in 1949.²²³ However, it was only after the passing of the Australia Citizenship (Amendment) Act of 1984, that British subjects in Australia lost their special status and were referred to as aliens.²²⁴ From that point on, § 34(ii) meant that only Australian citizens can be nominated and sit in the Australian Parliament. Nevertheless, the 1948 Act maintained the rationale behind the undivided allegiance doctrine in that an Australian citizen who acquired another citizenship lost their Australian citizenship automatically. Section 17 of the 1948 states that:

17. An Australian citizen of full age and of full capacity, who, whilst outside Australia and New Guinea, by some voluntary and formal act, other than marriage, acquires the nationality or citizenship of a country other than Australia, shall thereupon cease to be an Australian citizen.

18.-(1.) Where, under the law of some country other than Australia, an Australian citizen acquires, at birth or whilst not of full age or by reason of marriage, the nationality or citizenship of that country, he may, at any time after attaining the age of twenty-one years or after the marriage, make a declaration renouncing his Australian citizenship.²²⁵

220. See Divine, *supra* note 27, at 171.

221. British Nationality and Status of Aliens Act 1914 § 13.

222. See generally, *Historical Background Information on Nationality* (Jul. 21, 2017) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/650994/Background-information-on-nationality-v1.0EXT.pdf.

223. Michael Klapdor, Moira Coombs & Catherine Bohm, *Australian citizenship: a chronology of major developments in policy and law* (Sep. 11, 2009), https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/0910/AustCitizenship#_Toc224109065 (in 1973, the *Nationality and Citizenship Act 1948* (Cth) (Austl.) was renamed the *Australian Citizenship Act 1948* (Cth) (Austl.)).

224. Nolan v. Minister for Immigration and Ethnic Affairs (1988), 165 CLR 178 (Austl.).

225. Nationality and Citizenship Act 1948 (Cth) §§ 17, 18 (Austl.).

Prior to April 4, 2002, it was still possible for Australians to hold dual citizenship where they did so automatically through birth, or where their former country did not revoke their citizenship when they became naturalized citizens of Australia.²²⁶ However, under the Nationality and Citizenship Act of 1948, non-British subjects were required to attend a citizenship ceremony and pledge an oath of allegiance.²²⁷ In 1966, the Holt Government added the clause “renouncing all other allegiance” to the oath,²²⁸ though there was no requirement for new citizens to formally take steps under the law of their former country to renounce their previous citizenship. Until this point, § 44(i) was still redundant in that it did not add anything new to what disqualified a person for not being an Australian citizen.²²⁹ However, after April 4, 2002, there were no restrictions on Australians holding the citizenship of another country.

4 Application of amendment—section 17 of the *Australian Citizenship Act 1948*

The repeal of section 17 of the Australian Citizenship Act 1948 by this Schedule applies to an acquisition of nationality or citizenship of a foreign country, where the acquisition occurs after the commencement of this item.²³⁰

In essence, Australian citizenship law has moved away from the doctrine of undivided allegiance that characterizes the rationale in § 44(i). This transition terminates the clarifying function of § 44(i). It no longer makes explicit what is implicit under current Australian citizenship law. Instead, the section provides guidance that is inconsistent with that law. Thus, this transition rendered § 44(i) anachronistic and of no legal effect.

IV. Reform Proposals and Legislative Inertia

The effect of § 44 garnered attention in Australian constitutional discourse only after the creation of Australian citizenship in 1949. Until that point, all Australians remained citizens of the British Empire. Since 1949, this section has been the subject of several inquiries and reviews.²³¹ These reviews all identified problems with the operation of § 44 and accurately predicted an increased number of future disqualifications of members of Parliament.²³² In particular, notwithstanding that the citizenship provision of § 44(i) has been subject to reform proposals since the 1980s, the Australian Parliament has consistently exhibited an unwilling-

226. Australian Citizenship Legislation Amendment Act 2002 (Cth), sch. 1 (Austl.).

227. Nationality and Citizenship Act 1948 (Cth), sch. 2 (Austl.).

228. Nationality and Citizenship Act 1966 (Cth) sch. 3 (Austl.).

229. In 1986, the Hawke Government removed the renunciation requirement. See *Australian Citizenship Act 1986* (Cth) § 10 (Austl.); See Deirdre McKeown, *Changes in the Australian Oath of Citizenship: Research Note No 20*, DEP'T PARLIAMENTARY LIBR. (Nov. 19, 2002), https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1VW76/upload_binary/1vw766.pdf;fileType=application%2Fpdf#search=%22library/prspub/1VW76%22.

230. *Australian Citizenship Legislation Amendment Act 2002* (Cth) ch. 1 (Austl.).

231. Ian Holland, *Section 44 of the Constitution, E-Brief: Online Only issued March 2004*, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/Section44.

232. *The history and interpretation of section 44*, PARLIAMENT OF AUSTRALIA, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/Inquiry_into_matters_relating_to_Section_44_of_the_Constitution/Report_1/section?id=committees%2Freportjnt%2F024156%2F25931 (last visited Jan. 3, 2020).

ness to rectify the status quo. This part of the article canvasses these reform proposals in support of the second element for reviving the pseudo-Calabresian doctrine, namely, the inertia that prevents the legislature from carrying out its obligations.²³³

The earliest calls for reform came in 1981, when the Senate Standing Committee on Legal and Constitutional Affairs recommended that § 44(i) be deleted.²³⁴ The main concern was that the section would bar those whose foreign citizenships could not be voluntarily relinquished under the relevant foreign law.²³⁵ The report observed that the concept of dual nationality would affect large numbers of Australian citizens.²³⁶ The report stated:

. . . Australian citizens with unsought dual nationality should be free to participate in the highest levels of political life in the Australian democratic system. To deny them this right of citizenship on the basis of a determination by a foreign system of law . . . would be most invidious.²³⁷

In 1985, the Structure of the Government Sub-Committee of the Australian Constitutional Convention voiced its agreement with the 1981 Senate Standing Committee recommendations in its Report on Constitutional Qualifications of Members.²³⁸ However, the Sub-Committee noted that the Senate Standing Committee did not address the situation where a member “voluntarily acquired another nationality after election.”²³⁹ The Sub-Committee further recommended that a provision be inserted in the Constitution requiring members and senators to vacate their seat, in the event that they ceased to be Australian citizens, with a “general power for Parliament to deal with other situations as they arise.”²⁴⁰ Similarly, the 1985 Brisbane Session of the Australian Constitutional Convention expressed its support for the recommendations of the 1981 Senate Standing Committee and 1985 Structure of Government Sub-Committee, and made a motion for constitutional amendment of § 44(i).²⁴¹

The 1988 Constitutional Commission recommended that § 44(i) be deleted rather than replaced, with Australian citizenship being the only minimum requirement for nomination and

233. See Ashley Kelaita, *Section 44(i) of the Constitution: Where to From Here?*, CONST. CRITIQUE, U. SYDNEY (Jun. 5, 2018), http://blogs.usyd.edu.au/cru/2018/06/section_44i_of_the_constitutio.html.

234. *The history and interpretation of section 44*, *supra* note 231.

235. S. STANDING COMM. ON CONSTITUTIONAL & LEGAL AFFAIRS, THE CONSTITUTIONAL QUALIFICATIONS OF MEMBERS OF PARLIAMENT 11 (1981).

236. *Id.*

237. *Id.*

238. *F. Extracts: 1976, 1983 and 1985 Constitutional Conventions*, PARLIAMENT OF AUSTRALIA, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/Inquiry_into_matters_relat-ing_to_Section_44_of_the_Constitution/Report_1/section?id=committees%2freportjnt%2f024156%2f25934 (last visited Jan. 3, 2020).

239. CARNEY, *supra* note 26, at 36, n.141.

240. Legal & Constitutional Committee, *First Report on the Australian Constitutional Convention* (1985), <https://www.parliament.vic.gov.au/papers/govpub/VPARL1985-87No26.pdf>.

241. *The history and interpretation of section 44*, *supra* note 232.

election.²⁴² The Commission drew on the 1987 report of the Advisory Committee to the Constitutional Commission on Individual and Democratic Rights, which recommended that a referendum be called to amend § 44(i), given its rigid and inflexible application.²⁴³

In 1997, the House of Representatives Standing Committee on Legal and Constitutional Affairs recommended that § 44(i) be deleted and that Parliament be empowered to “enact legislation determining the grounds for disqualification of members in relation to foreign allegiance.”²⁴⁴ In response to the report in December 1997, the Government supported the Committee’s recommendations.²⁴⁵ The report noted that “many Australian citizens are unaware that they are dual citizens”²⁴⁶ and that § 44(i) is a “significant problem.”²⁴⁷ The report stated:

A large number of Australians . . . are quite probably unaware that they are disqualified from . . . parliament by the provision. Second, the steps that are necessary for the purpose of divesting foreign citizenship are unclear in many cases and whether or not any steps taken are effective can only be finally determined by the High Court.²⁴⁸

The Committee considered § 44(i) outdated as it is expressed in “archaic” language and was drafted before the concept of Australian citizenship existed.²⁴⁹ However, the Committee also recommended that appropriate legislative safeguards be introduced to prevent divided loyalty.²⁵⁰

Section 44(i) was also considered by the Joint Standing Committee on Electoral Matters in its inquiry into the 1996 and 1998 federal elections. In 1996, the Committee proposed that § 44(i) be deleted, and recommended that a referendum be held to amend § 44(i), so that a candidate’s nomination would be recognized as “immediately extinguishing any allegiance to a

242. FINAL REPORT OF THE CONSTITUTIONAL COMMISSION (1988).

243. See Kelaita, *supra* note 232 (Ashley Kelaita notes that the above recommendations pre-dated the HCA’s interpretation in *Sykes v. Cleary*, where the Court held that § 44(i) would not disqualify Australian dual citizens who have taken “reasonable steps to renounce their foreign citizenship.” This case eliminated the concerns raised by the above committees, that § 44(i) was overly-restrictive, and would disqualify Australian dual citizens, who were unable to renounce their foreign citizenship under foreign law. However, post *Re Gallagher*, it seems that the inflexible nature of the section has been reinstated with the HCA rejecting the reasonable steps test, and opting instead to apply the constitutional imperative, only where the foreign law prevents the concerned citizen from relinquishing their foreign citizenship. This interpretation revives the concerns raised by these committees from 1981 to 1988.).

244. *Aspects of Section 44 of the Australian Constitution - Subsections 44(i) and (iv)*, PARLIAMENT OF AUSTRALIA (1998), https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/inquiryinsec44.htm.

245. *Government Response to the Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs*, PARLIAMENT AUSTL, (Dec. 4, 1997), http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/governmentresponse/section44.pdf.

246. Commonwealth, *supra* note 64, at 22.

247. *Id.* at 24.

248. *Id.* at 25.

249. *Id.*

250. *Id.*

foreign country,” provided that the candidate also held Australian citizenship.²⁵¹ While the Government agreed with this recommendation subject to a “clear indication of widespread support for the measure being proposed”,²⁵² it was not progressed. The Committee most recently considered § 44(i) in its 2018 report, which recommended that a referendum be called to either repeal §§ 44 and 45 of the Australian Constitution in their entirety, or amend §§ 44 and 45 to include the words “Until the Parliament otherwise provides.”²⁵³ If the referendum passed, the Committee further recommended that the Australian Government set out the rules governing disqualification in legislation.²⁵⁴ The Committee concluded that being entitled to dual citizenship “does not in and of itself” mean that candidates have a divided allegiance.²⁵⁵

In summary, notwithstanding reform proposals spanning four decades, the Australian Parliament failed to act to either repeal § 44(i) or to call for a referendum. This legislative inertia meets the second element of the sunseting function envisaged under the pseudo-Calabresian doctrine, and enables the HCA to strike down § 44(i) as unconstitutional for being anachronistic. However, the sunseting function can also be revived through the other two elements under the pseudo-Calabresian doctrine, constitutional sensitivity and judicial signaling. The following section provides the structure for such an analysis.

V. Judicial Signaling and the Constitutional Imperative

The argument that citizenship cannot be alienated by facts outside the control of a given person has support in the constitutional imperative discussed in *Re Canavan* and *Re Gallagher*: “an Australian citizen [may] not be irremediably prevented by foreign law from participation in representative government.”²⁵⁶ The imperative is concerned with participation in representative government.²⁵⁷ This constitutional imperative applies to prevention by foreign law as much as to prevention by Australian law, when understood as applying to all Australian citizens.²⁵⁸ Such limits on the rights of Australian citizens are repugnant to the concept of citizenship as understood today. The idea that the bundle of rights afforded to a citizen can be discounted in terms of ability to qualify to Parliament because said person happens to have other bundles of rights by virtue of foreign citizenship, creates two classes of citizenship. The fact that today Australian citizens are not barred from holding dual citizenship suggests that the

251. *Report of the Inquiry into the Conduct of the 1998 Federal Election and Matters Related Thereto*, JOINT STANDING COMM. ON ELECTORAL MATTERS (2000). See also the Minority Report from the Australian Democrats.

252. *Government Response to Joint Standing Committee on Electoral Matters (JSCEM) Report—the 1998 Federal Election*, PARLIAMENT AUSTR., (1998), http://aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=elect98/reportelect.pdf (last visited Apr. 2, 2019).

253. *Joint Standing Committee on Electoral Matters, The Impact of Section 44 on Australian Democracy* (2018), https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/Inquiry_into_matters_relating_to_Section_44_of_the_Constitution/Report_1.

254. *Id.*

255. *Id.*

256. *Citizenship Seven* (2017), 349 CLR 534, 539 [72] (Austl.); *Re Gallagher* (2018) 355 CLR 1, 5 [11] (Austl.).

257. *Id.*

258. *Id.*

same cannot be used to curtail some of their rights if they do so. A standard of citizenship cannot usurp a citizen's right to be nominated for and sit in Parliament, when the reason for such usurpation is a right afforded to other citizens.

This understanding of the constitutional imperative is strengthened by the fact that the constitutional Convention Debates leading to the adoption of the Australian Constitution did raise the issue of including a concept of citizenship, although there was no consensus on this point.²⁵⁹ What was agreed on, instead, was the codification in § 117 of the Australian Constitution of an equal protection clause based on the United States Constitution's amendment XIV § 1.²⁶⁰ The latter ensures that no state can abridge the privileges or immunities of citizens. Section 117 provides similar protections against "disability or discrimination" against any "subject of the Queen."²⁶¹ The protection of British subjects against any discrimination as to privileges and immunities, and the lack of any direct reference to any concept of citizenship in the Australian Constitution suggests that § 44(i) was intended as no more than a restatement of the citizenship requirement under § 34(ii), and, specifically, to make explicit the circumstances under which that citizenship is lost. If it is accepted that § 44(i) is no more than a clarifying provision, then it would apply only to clarify how alienage would be obtained under the status of British subject, i.e., the applicable national citizenship law at the time the provision was drafted and passed. This clarifying function makes § 44(i) redundant. It only makes explicit what is implicit under § 34(ii).

With this understanding of § 44(i) emerges a constitutional sensitivity, namely, the inalienable rights associated with a given citizenship framework, especially where a purported seizure of these rights takes place irrespective of any fault on the part of the holder of this citizenship. This understanding of the constitutional sensitivity necessary for invoking the sunset function of courts can be reconciled with Deane J's understanding of the constitutional imperative as found in *Sykes v. Cleary*.²⁶²

In *Sykes*, the second respondent, Jean Charles Delacretaz, was born in Switzerland in 1923, and from the time of his birth was a Swiss citizen.²⁶³ He migrated to Australia in 1951 and lived there since that date.²⁶⁴ On April 20, 1960, he became naturalized as an Australian citizen pursuant to the Nationality and Citizenship Act of 1948, and, thus, renounced all allegiance to any sovereign or State of which he was a subject or citizen.²⁶⁵ He took an oath of allegiance to Her Majesty the Queen whereby he swore to "be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Her heirs and successors according to law" and to "faithfully observe the laws of Australia and fulfil [his] duties as an Australian citizen."²⁶⁶ He

259. See John M. Williams, "With Eyes Open": *Andrew Inglis Clark and Our Republican Tradition*, 23 FED. L. REV. 149, 175-78 (1995).

260. *Id.* at 176.

261. *Australian Constitution* § 117.

262. *Sykes v. Cleary* [No 2] (1992), 176 CLR 77 (Austl.).

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

did not at any time apply to the Government of Switzerland to renounce or otherwise terminate his Swiss citizenship.²⁶⁷

The third respondent in *Sykes* was born “Vasilios Kardamitsis” in Corfu, Greece, in 1952, and from the time of his birth was a Greek citizen.²⁶⁸ He came to Australia in 1969 as a migrant sponsored by his brother and lived in Australia since then.²⁶⁹ In 1975, he became an Australian citizen pursuant to the Australian Citizenship Act of 1948.²⁷⁰ He renounced all other allegiance, and swore an oath of allegiance to “be faithful and bear true allegiance to Her Majesty Elizabeth the Second, Queen of Australia, Her heirs and successors according to law” and to “faithfully observe the laws of Australia and fulfil [his] duties as an Australian citizen.”²⁷¹ The third respondent did not at any time apply to the Government of Greece to discharge his Greek nationality.²⁷² A 5-2 majority held that the second and third respondents were disqualified under § 44(i), as they did not take all reasonable steps to relinquish their foreign citizenship.²⁷³ In his dissent, Deane J stated that:

Considerations of content and of context seem to me to favor the narrow construction. The provisions of s. 44 do not represent a code determining which citizens are and which citizens are not qualified to be elected to the Parliament. Legislative power to determine the qualifications of members of the Parliament is conferred upon the Parliament itself by virtue of the combined operation of ss. 34, 51(xxxvi) and 16 of the Constitution. What s. 44 does is to impose an overriding disqualification of any person who comes within its terms regardless of whether the Parliament thinks (or seeks to enact), in the context of contemporary circumstances and standards, that that disqualification is unjustified. *Such an overriding disqualification provision should, in my view, be construed as depriving a citizen of the democratic right to seek to participate directly in the deliberations and decisions of the national Parliament only to the extent that its words clearly and unambiguously require.*²⁷⁴

Deane J preserved the integrity of Australian citizenship by arguing that, at the time, no Australian citizen could be a dual citizen.²⁷⁵ The form of oath and affirmation required by the Citizenship Act, as it stood in 1975, was introduced in 1966, when § 11 of the Nationality and Citizenship Act 1966 (“the 1966 Act”) amended the second schedule to the 1948 Act “by inserting after the letters ‘A.B.’ . . . the words ‘renouncing all other allegiance.’”²⁷⁶ The renunciation of all other allegiance remained part of the oath and affirmation required for naturaliza-

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Sykes v. Cleary* [No 2] (1992), 176 CLR 77, [121] (Deane J) (Austl.). (emphasis added).

275. *Id.*

276. The Nationality and Citizenship Act 1966 § 11 (Austl.).

tion until 1986. From the enactment of the 1948 Act, the Citizenship Act made provision for the renunciation of Australian citizenship. One other feature of the Citizenship Act as it stood in 1975 provided that:

An Australian citizen of full age and of full capacity, who, whilst outside Australia and New Guinea, by some voluntary and formal act, other than marriage, acquires the nationality or citizenship of a country other than Australia, shall thereupon cease to be an Australian citizen.²⁷⁷

However, it is generally accepted that, at common law, a person could have dual citizenship or allegiance.²⁷⁸ Of course, the common law has been modified to the extent that statutory law now provides for the loss of Australian citizenship by the acquisition of foreign citizenship.

In summary, under the applicable oath of allegiance at the time, the naturalization process was all that was required to denounce any other citizenship. Later, however, the content of the oath changed, and brought about the current interpretation of the constitutional imperative as announced in *Re Gallagher*. A sound understanding of the constitutional imperative discussed in *Re Canavan* and in *Re Gallagher* suggests that the same homogeneity of the rights under Australian citizenship continued after the legalization of dual citizenship in 2002.

Conclusion

In the wake of recent HCA decisions regarding the second provision of § 44(i), it is useful to re-examine this section to clarify its application to the eligibility question. This section has become critical, if only due to the constitutional crisis that has been unfolding in Australia since mid-2017.

This Article has argued that the HCA's construction of § 44(i) of the Australian Constitution, especially its recent decisions in *Citizenship Seven* and *Re Gallagher*, seems to conflate the disqualification of citizens and the disqualification of non-citizens. There is a need to unpack the inherent complexity of § 44(i) to clarify the difference. To do so, this Article traced the construction of this provision through a textual approach that builds on the common law origin of § 44(i). The analysis is based on the evolution of § 44(i) from § 3 of the Act of Settlement of 1701, and its interaction with British nationality law (in 1900).

This Article has suggested that the second provision of § 44(i) is less exceptional than suggested by the HCA in *Re Canavan* and *Re Gallagher*. Namely, § 44(i) is a clarifying provision that does not add anything to § 34(ii). Additionally, after Parliament exercised its prerogative under § 34(ii) to change the applicable citizenship law in Australia,²⁷⁹ by enacting § 4 of the Australian Citizenship Legislation Amendment Act 2002, § 44(i) became anachronistic; it had

277. *Sykes v. Cleary* [No 2] (1992), 176 CLR 77, [121] (Caudron J.).

278. *Id.*

279. The Australian Parliament first exercised this option by passing the *Nationality Act 1920* (Cth) (Austl.), which ushered Australian nationality as a distinct concept from the English common law concept of a British subject.

no legal effect. The pseudo-Calabresian doctrine enabling constitutional courts to practice their sunset function in such circumstances is invoked to inform the rationale underlying a finding of anachronism.

Section 44(i) simply clarifies the qualification requirement under § 34(ii), by making explicit how alienage under the then applicable nationality law in Australia resulted in disqualification. Given that the Australian Constitution makes no direct reference to any concept of national citizenship, it is reasonable to suggest that § 44(i) was intended to clarify the qualification of members of Parliament under § 34(ii).²⁸⁰ The Australian Constitution does not identify a class that holds citizenship as of right, nor does it provide the Commonwealth with any clear legislative power with respect to citizenship. Within this constitutional design, § 44(i) provides a prophylactic function by delineating the alienage provisions that were applicable under British citizenship law at the time the Australian Constitution came into force.

However, the changes to Australian nationality law since the passing of the Australian Constitution, in particular since enactment of § 4 of the Australian Citizenship Legislation Amendment Act of 2002, which allowed Australian citizens to hold dual citizenship, suggests that § 44(i) can no longer perform its function as a clarifying provision of citizenship law applicable in Australia. In other words, Parliament's exercise of § 34(ii)'s option, "[u]ntil the Parliament otherwise provides," means that today § 44(i) is not redundant but anachronistic. It cannot have any legal effect in terms of disqualification from nomination or sitting of members of Parliament. Recent judgments handed down by the HCA do not accord with the historical analysis developed in this Article, let alone contemplate the redundancy or anachronism of § 44(i).

280. Sangeetha Pillai, *Non-Immigrants, Non-Aliens and People of the Commonwealth: Australian Constitutional Citizenship Revisited*, 39 MONASH U. L. REV. 568, 572 (2013).

Data Privacy In Cross-Border Insolvency: A Fundamental Right Or A Threat To Open Access

Michael R. Fabrizio

Introduction

On May 25, 2018, the General Data Privacy Regulation (“GDPR”) took effect in the European Union (“EU”).¹ This law has been described as “a sweeping privacy law granting individuals within the EU enhanced privacy protections.”² In the United States court system in general, and in the bankruptcy system in particular, there is a strong public policy providing for open access to court records, documents, and proceedings.³ This note will discuss the interplay between the European Union’s General Data Privacy Regulation and cross-border bankruptcy cases in the United States.

The problem is illustrated by the following scenario. Suppose there is a multinational company (“Company M”) with operations in both the EU and the United States, that is insolvent. Company M wants to file for bankruptcy in a country other than the United States. However, as a multinational business with operations in the United States, Company M must have the bankruptcy proceeding recognized in the United States.⁴ Chapter 15 of the Bankruptcy Code provides an avenue for the recognition of foreign bankruptcy proceedings in United States Bankruptcy Courts.⁵ As required under the Bankruptcy Code, Company M must supply a full list of creditors for notice to be given to.⁶ Typically included in this list are employees of the company who may still be owed wages. Individuals, including such employees, are protected under the GDPR against having any personally identifiable information indefinitely disseminated on the internet without their revocable consent. However, in the United States, whenever any court documents are filed, they are uploaded to an internet database of all electronic court filings without the prior consent of individuals whose data may be part of such shared information. Since many multinational companies have assets and employees in the United States as well as an EU member State, the GDPR creates a conflict of laws by making requirements opposite to United States policies and practices. Should a multinational corporation which is already insolvent face severe monetary penalties under the GDPR? Or should its assets not be protected during bankruptcy proceedings in the United States? Alternatively, should the United States accommodate the vast European regulations and remove and

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1. See Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1, at Art. 99.2 (hereinafter “GDPR”).
 2. Camisha L. Simmons, *Privacy Law Compliance in Bankruptcy: The EU’s New GDPR*, 37 AM. BANKR. INST. J. 18, 18 (2018).
 3. See *infra* notes 71–92 and accompanying text.
 4. See 11 U.S.C. § 1501(b) (2005), *infra* note 65.
 5. See 11 U.S.C. § 1501 (2005) *et seq.*
 6. See 11 U.S.C. § 342(c)(1) (2009).

seal bankruptcy proceedings in order to prevent Company M from facing fines and, thus, ignore its own policy of open access to court information and records? Or could there be a compromise?

Consequently, the issue is whether the United States' principles of open access to court records and proceedings particularly through public court filings on digital systems such as Public Access to Court Electronic Records ("PACER") are in conflict with the GDPR's recognition of data privacy as a fundamental right.⁷ By contrast, the United States typically views data privacy as an economic right.⁸ This Note will analyze the presence of such potential conflict between the United States' strong public policy of judicial transparency and the GDPR's strong public policy of protecting individuals' personal information. Should there be a conflict of laws, comity principles may override United States courts' public policy considerations. Otherwise, multinational corporations conducting business in the EU and the United States may be forced to find an alternative to bankruptcy, should they find themselves insolvent, or potentially face substantial fines for releasing personal data at a time when they are already unable to meet their financial obligations.⁹ It is essential for insolvent companies' creditors to get as much of the money they are owed as possible, thus rendering broad fines for violating the GDPR unreasonable. Consequently, the principles of cooperation as promulgated by the authors of the GDPR should be considered in cases of cross-border bankruptcy proceedings. For proceedings recognized or initiated in the United States, international businesses should be allowed to use data protection mechanisms already in place in the United States to allow creditors to have access to, and faith in, the bankruptcy system.

Part I will give a broad overview of the GDPR and then disseminate the specific provisions that may affect insolvent companies filing for bankruptcy recognition in the United States.¹⁰ Part II will discuss United States law, specifically, how open access to the court system is a strong public policy and why that is not likely to change.¹¹ Part II will also discuss the Bankruptcy Code and accompanying procedural rules of the United States Bankruptcy Courts, focusing on provisions that could prevent GDPR compliance and those that could allow for it.¹² Finally, Part II will argue that the principle of comity does not apply in the case of the GDPR, and that the public policy of transparency and open access to court records overrides the diplomatic concerns of the GDPR.¹³ Part III will focus on the conflicts of laws that occur, and possible solutions to these conflicts under both United States law and the GDPR.¹⁴ Part III will then pose a viable solution.¹⁵

7. See *infra* notes 19–42 and accompanying text (Open access to court records in the United States is accomplished through public court filings on digital systems, such as Public Access to Court Electronic Records ("PACER")).

8. See *infra* notes 29–30 and accompanying text.

9. See *infra* notes 43–46 and accompanying text.

10. See *infra* notes 16–46 and accompanying text.

11. See *infra* notes 47–101 and accompanying text.

12. *Id.*

13. See *infra* notes 93–101 and accompanying text.

14. See *infra* notes 102–132 and accompanying text.

15. See *infra* notes 119–132 and accompanying text.

I. The GDPR and Data Privacy

The GDPR took effect in May 2018.¹⁶ Within the GDPR is a framework for the protection of personal data.¹⁷ These protections apply to data transfers both within the EU and outside of the EU.¹⁸

A. The Background and Purpose of the GDPR

The predecessor to the GDPR was the 1995 Directive 95/46/EC (“Directive”).¹⁹ This Directive paved the way for data privacy as a fundamental right in Europe.²⁰ However, the Directive provided that “Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1.”²¹ One issue with the Directive was that this and other language led to unpredictable outcomes in cases involving it.²² However, it should be noted that “[the Directive] laid the groundwork for GDPR by broadly defining personal data and mandating that personal data cannot be processed unless adequate measures surrounding transparency, explicit legitimate purposes, and proportionality are undertaken.”²³

Legal uncertainty about the Directive, coupled with ever-increasing amounts of online activity, led the European Council to convene a commission, which ultimately recommended the adoption of a new policy on personal data protection.²⁴ As a result, the EU “decided to replace the Data [Privacy] [sic] Directive and the e-Privacy Directive and change from a Directive to a binding Regulation[,]”²⁵ the GDPR.²⁶

16. See *supra* note 1 and accompanying text.

17. Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party at 5; *In re Microsoft Corporation* (No. 17-2), 2017 WL 6383224, at *5 (U.S., 2017) (“The GDPR contains specific rules to ensure that the high level of data protection within the European Union is ensured where personal data is transferred to a non-EU state.”).

18. *Id.*

19. See Lindsay A. Seventko, *GDPR: Navigating Compliance As A United States Bank*, 23 N.C. BANKING INST. 201, 203 (2019).

20. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 O.J. (L. 281) 31, 38 (“In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.”).

21. *Id.*

22. Seventko, *supra* note 19 (“Since its implementation, however, the case law interpreting Directive 95/46/EC varied across Member States, resulting in inconsistent treatment of similar actions across the European Union.”).

23. *Id.*

24. See Rachel de Vries, *The European Legal Context: EU Data Protection*, LEGAL INFO. INST. (Aug. 2017), https://www.law.cornell.edu/wex/inbox/european_legal_context_privacy_directives (“The Commission concluded that the EU needs a more comprehensive and coherent policy on the fundamental right to personal data protection.”).

25. *Id.* (N.B. the original source defines the Data Privacy Directive as what has been referred to already as the 1995 directive. The e-Privacy Directive refers to: Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), Official Journal L 201, 31/07/2002 P. 0037–0047).

26. de Vries, *supra* note 24.

B. Individuals' Rights Under the GDPR

Individuals are given many protections under the GDPR.²⁷ These protections include the right to privacy.²⁸ In the United States, the right to privacy is considered more of an economic right.²⁹ In the EU, by contrast, this is a fundamental right.³⁰ As such, these protections are held to a higher standard in the EU than in the United States.³¹ This higher standard is memorialized in the GDPR.³² As a result of the GDPR, individuals in the EU must consent to the use and release of their personal data in a public forum.³³

Additionally, the applicability of the GDPR is incredibly far-reaching.³⁴ It applies to “the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system.”³⁵ It specifically governs “controllers” and “processors” of personal data, both those within and those outside of the EU.³⁶ The GDPR broadly defines “controllers” and “processors” for statutory purposes.³⁷ This comprehensive definition means that the GDPR potentially applies to any business with a computer that has any connection to

27. See, e.g., *GDPR Recital 14*, *supra* note 1. See also European Parliament, Fact Sheets on the European Union, Personal data protection at Achievements A.3.a. (“The new rights for citizens include a clear and affirmative consent for their data to be processed and the right to receive clear and understandable information about it; the right to be forgotten: a citizen can ask for his/her data to be deleted; the right to transfer data to another service provider (e.g. when switching from one social network to another); and the right to know when data has been hacked. The new rules apply to all companies operating in the EU, even if these companies are based outside of the EU. Furthermore, it will be possible to impose corrective measures, such as warnings and orders, or fines on firms that break the rules.”).
28. *GDPR Art. 1*, *supra* note 1.
29. See generally Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393 (1978).
30. *GDPR Recital 1.1*, *supra* note 1 (“The protection of natural persons in relation to the processing of personal data is a fundamental right.”).
31. See *America should borrow from Europe’s data-privacy law*, THE ECONOMIST (Apr. 5, 2018), <https://www.economist.com/leaders/2018/04/05/america-should-borrow-from-europes-data-privacy-law> (subscription required to view article).
32. See generally *GDPR*, *supra* note 1.
33. *Id.* at Recital 7.2 (“Natural persons should have control of their own personal data.”); see generally *GDPR Art. 1*.
34. See *infra* notes 35–46 and accompanying text.
35. *GDPR*, at Art. 2.1, *supra* note 1.
36. *Id.* at Art. 3 (“1. This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not. 2. This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to: (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or (b) the monitoring of their behaviour as far as their behaviour takes place within the Union. 3. This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law.”).
37. *Id.* at Art. 4(7) (“‘controller’ means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law); Art. 4(8) (“‘processor’ means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller”).

Europe.³⁸ The GDPR also broadly defines “processing” and “personal data”.³⁹ Having such expansive definitions casts a wide net onto the applicability of the GDPR’s enforcement, and a high likelihood of its violation.⁴⁰ Further, the GDPR applies extraterritorially.⁴¹ Contemplating court orders from States outside the EU, the GDPR only allows the disclosure or transfer of personal data to such States when authorized by a treaty.⁴² This further increases the likelihood of a violation, whether intentional or accidental.

C. The Rights and Obligations Under the GDPR for Controllers and Processors

The ability to enforce any statute or regulation is crucial for its effectiveness. The GDPR has particularly strong enforcement provisions.⁴³ Under the GDPR, EU member States each have broad authority to “monitor controllers and processors, investigate GDPR violations, and impose administrative fines for violations of the GDPR.”⁴⁴ These fines can be quite significant.⁴⁵ The GDPR grants the supervising authorities of member States the power to fine non-complying companies up to the greater of ?20 million or four percent of “the total worldwide annual turnover of the preceding financial year.”⁴⁶

38. See Françoise Gilbert, *EU General Data Protection Regulation: What Impact for Businesses Established Outside the European Union*, 19 J. INTERNET L. 3 (2016) (“[T]he GDPR will apply to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the EU/EEA regardless of whether the processing takes place in the EU/EEA or not. In addition, it will apply to the processing of personal data of individuals who reside in the EU/EEA when the processing is conducted by a controller or processor that is not established in the EU/EEA, if such processing relates to: (1) the offering of goods or services, whether payment is required or not; or (2) the monitoring of individuals’ behavior, to the extent that such behavior takes place within the EU/EEA.”).

39. *GDPR*, at Art. 4(2), *supra* note 1 (“‘processing’ means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction”); Art. 4(1) (“‘personal data’ means any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person”).

40. *Id.*

41. See *supra* note 17 and accompanying text.

42. See *GDPR* at Art. 48, *supra* note 1 (“Any judgment of a court or tribunal and any decision of an administrative authority of a third country requiring a controller or processor to transfer or disclose personal data may only be recognised or enforceable in any manner if based on an international agreement, such as a mutual legal assistance treaty, in force between the requesting third country and the Union or a Member State, without prejudice to other grounds for transfer pursuant to this Chapter.”).

43. See *id.* at Arts. 51–59.

44. Simmons, *supra* note 2, at 18; see also *GDPR* at Arts. 51–59.

45. *GDPR* at Art. 83.5–6, *supra* note 1.

46. *Id.*

II. Cross-Border Bankruptcies and Open Access to Court Proceedings in the United States

In the United States, the bankruptcy system is a fundamental part of the legal system. It provides a way for individuals and entities to get relief from debts that they are unable to continue to pay. This can result in a restructuring of the debts or a liquidation and distribution of assets and then a forgiveness of the debts.⁴⁷

A. Bankruptcy in the United States and How a Case is Commenced

1. A Brief Introduction to U.S. Bankruptcies in General for Non-Individuals

The United States Bankruptcy System stems directly from the Constitution.⁴⁸ However, the Bankruptcy Code as we know it today came into effect with the Bankruptcy Reform Act of 1978.⁴⁹ While gallons of ink have undoubtedly been spilled discussing the scope and reasons for bankruptcy law in the United States, the Supreme Court put it well in saying that bankruptcy law “gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.”⁵⁰

The Bankruptcy Code provides for several ways to overcome pre-existing debt. The most common ways are a liquidation of assets, and distribution of the proceeds to creditors in exchange for a discharge of debt and a reorganization of debts.⁵¹ A caveat to a reorganization is that a creditor can reject a plan, if it will not receive as much as it would have received in a liquidation.⁵² A case may be filed voluntarily,⁵³ or a debtor may have a bankruptcy proceeding commenced against them involuntarily under chapters 7 or 11 of the bankruptcy code.⁵⁴

2. Chapter 7 or 11 Bankruptcy for a Foreign Debtor

In order to file for bankruptcy in a particular United States jurisdiction, a debtor must have some connection to that forum.⁵⁵ Courts have set a low threshold as to what this connec-

47. See *infra* note 51.

48. U.S. CONST. art. I, § 8, cl. 4 (“The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States”).

49. See generally Pub. L. No. 95–598 (HR 8200), PL 95–598, Nov. 6, 1978, 92 Stat. 2549. This is now in Title 11 of the United States Code (as amended); see Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47 (1997) (demonstrates a detailed discussion of the surrounding environment that led to these sweeping changes to the bankruptcy system).

50. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

51. See 11 U.S.C. § 701 *et seq.* and 11 U.S.C. § 1101 *et seq.*

52. 11 U.S.C. § 1129(a)(7) (2012).

53. See 11 U.S.C. § 301.

54. 11 U.S.C. § 303.

55. 11 U.S.C. § 109(a) (“ . . . only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.”); 11 U.S.C. § 101(41) (Under the Bankruptcy Code, “[t]he term ‘person’ includes individual, partnership, and corporation. . . .”).

tion entails.⁵⁶ In fact, some bankruptcy courts have held that even “having a dollar, a dime or a peppercorn located in the United States” is sufficient to allow a foreign entity to gain a bankruptcy discharge in the United States.⁵⁷ The test for a foreign debtor then becomes which district in the United States to file in, and that is where the debtor’s principal assets are located.⁵⁸ For affiliated debtors, only one must have its principal assets in the United States, and they can be any amount of property in a particular district to begin the proceeding.⁵⁹ Once a case is commenced, the debtor gains the protections under the United States Bankruptcy Code afforded to them, including the automatic stay.⁶⁰

3. Chapter 15 Bankruptcy for a Foreign Debtor

Chapter 15 of the Bankruptcy Code was enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.⁶¹ Chapter 15 was enacted “to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency. . . .”⁶² The Model Law on Cross-Border Insolvency was first promulgated by the United Nations Commission on International Trade Law (“UNCITRAL”) in 1997.⁶³ The Model Law itself was designed to promote the objectives of:

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56. See Maurice Horwitz, *Pitfalls for Foreign Enterprises Seeking to Restructure Under the Bankruptcy Code*, WEIL BANKR. BLOG (June 9, 2015), <https://business-finance-restructuring.weil.com/breaking-the-code/pitfalls-for-foreign-enterprises-seeking-to-restructure-under-the-bankruptcy-code/> (“ . . . virtually any amount of property in the United States will enable most foreign entities to commence a case under chapter 11 of the Bankruptcy Code.”).
57. *In re McTague*, 198 B.R. 428, 432 (Bankr. W.D.N.Y. 1996) (Denying a motion to dismiss for lack of a sufficient amount of property in the United States to file for a chapter 7 liquidation).
58. 28 U.S.C. § 1408 (1984) (“ . . . a case under title 11 may be commenced in the district court for the district--
 (1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district; or (2) in which there is pending a case under title 11 concerning such person’s affiliate, general partner, or partnership.”). § 1408(2) is relevant in choosing a venue since an affiliate of a business may join a case filed in any district for the purpose of consolidating the cases for an efficient court proceeding. This allows for forum shopping of foreign debtors in the United States, as only one affiliate has to have its principal assets (meaning any amount of property) in a particular forum to allow for the case to commence under the bankruptcy code.
59. See *In re Glob. Ocean Carriers Ltd.*, 251 B.R. 31, 39 (Bankr. D. Del. 2000) (holding that the retainer fee paid by one debtor could allow for a number of affiliated international debtors to join the same case) (“The retainers were paid on behalf of all the Debtors and, therefore, all the Debtors have an interest in those funds. It is not relevant who paid the retainer, so long as the retainer is meant to cover the fees of the attorneys for all the Debtors. . .”).
60. 11 U.S.C. § 362 (2010).
61. *Bankruptcy Basics*, ADMIN. OFFICE OF THE U.S. COURTS (Sept. 17, 2019, 2:24 PM), <http://www.flmb.uscourts.gov/bankruptcybasics/documents/bankruptcybasics.pdf>.
62. 11 U.S.C. § 1501(a) (2005).
63. 8 NORTON BANKR. L. & PRAC. § 306 (3d ed. 2019) (“The Model Law was promulgated by UNCITRAL at its Thirtieth Session on May 12–30, 1997, UN Sales No. E.99V.3. H.R. Rep. 109–31, pt. 1, 109th Cong., 1st Sess. at 105 to 107 (2005)”).

- (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
- (b) Greater legal certainty for trade and investment;
- (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) Protection and maximization of the value of the debtor's assets; and
- (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.⁶⁴

In adopting the Model Law in Chapter 15, the United States Congress preserved these objectives in substance.⁶⁵ Thus, Chapter 15 applies to insolvency proceedings outside the United States where a foreign debtor hopes to have the proceedings recognized by the United States Bankruptcy System.⁶⁶ A case is commenced under Chapter 15 when a foreign representative of the debtor files a petition for recognition.⁶⁷ Under Chapter 15, like other provisions of the Bankruptcy Code, there are a number of reliefs that are granted to the debtor upon recognition of the proceeding by the United States Bankruptcy Court, which includes the stay.⁶⁸ Chapter 15 then allows the case to commence in the foreign jurisdiction and at the same time protects the debtor's assets in the United States.⁶⁹ However, Chapter 15 provides an exception to such recognition when an action taken by a court is "manifestly contrary to the public policy of the United States."⁷⁰

B. Under United States Law, Transparency and Public Access to Records are Mandated

In the United States, it has long been held that there is "a common-law right of access to judicial records . . ."⁷¹ "This preference for public access is rooted in the public's [F]irst [A]mendment right to know about the administration of justice."⁷² This principle is no differ-

64. U.N. Comm. on Int'l Trade Law, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, U.N. Doc. A/52/17 (1997).

65. See 11 U.S.C. § 1501(a)(1)–(5) (2012).

66. 11 U.S.C. §1501(b) (2005). ("This chapter applies where—(1) assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding; (2) assistance is sought in a foreign country in connection with a case under this title; (3) a foreign proceeding and a case under this title with respect to the same debtor are pending concurrently; or (4) creditors or other interested persons in a foreign country have an interest in requesting the commencement of, or participating in, a case or proceeding under this title.").

67. See 11 U.S.C. § 1504 (2005); see also 11 U.S.C. § 1515(a) (2005).

68. See 11 U.S.C. § 1521 (2010); see also 11 U.S.C. § 1520 (2005).

69. *Id.*

70. 11 U.S.C. § 1506 (2005); see *infra* notes 93–100 and accompanying text.

71. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978).

72. *In re Orion Pictures Corp.*, 21 F.3d 24, 26 (2d Cir. 1994).

ent in the Bankruptcy System.⁷³ Federal Rule of Bankruptcy Procedure 5001 provides that federal bankruptcy courts in the United States are always to remain open proceedings.⁷⁴ Specifically, “[t]he courts shall be deemed always open for the purpose of filing any pleading or other proper paper, issuing and returning process, and filing, making, or entering motions, orders and rules.”⁷⁵ This Rule further mandates that “[a]ll trials and hearings shall be conducted in open court.”⁷⁶ Black’s Law Dictionary defines open court as:

1. A court that is in session, presided over by a judge, attended by the parties and their attorneys, and engaged in judicial business. • Open court [usually] refers to a proceeding in which formal entries are made on the record. The term is distinguished from a court that is hearing evidence in camera or from a judge that is exercising merely magisterial powers. 2. A court session that the public is free to attend trials.⁷⁷

This concept of transparency in bankruptcy proceedings is further underscored by Section 107 of the Bankruptcy Code.⁷⁸ This statute provides that “a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times.”⁷⁹ While there are exceptions carved out in Section 107(b) and (c), these exceptions are not applicable in this case.⁸⁰ One such exception provides that “[o]n request of a party in interest, the bankruptcy court shall . . . protect an entity with respect to a trade secret or confidential research, development, or commercial information.”⁸¹ Bankruptcy courts have said that, “[o]ne court has found that the meaning of ‘commercial information’ extends beyond the requirement that such information will give an entity’s competitors an unfair advantage.”⁸² However, in *Lomas Fin. Corp.*, the court held that only four sentences of commercial information should be sealed because revealing them may have a “chilling effect on negotiations, ultimately affecting the viability of Debtors.”⁸³ Additionally, the court in *Borders Grp.* held that “the Court must also find that the redacted information ‘is so critical to the operations of the entity seeking the protective order that its disclosure will unfairly benefit the entity’s competitors.’”⁸⁴

73. See *In re Anthracite Capital, Inc.*, 492 B.R. 162, 170 (Bankr. S.D.N.Y. 2013) (“Section 107(a) of the United States Bankruptcy Code codifies the public’s common law right to inspect and copy judicial records and creates a presumption that all documents filed in a bankruptcy case are accessible to the public and subject to examination by the public at reasonable times without charge.”). See also *infra* notes 89–92 and accompanying text.

74. FED. R. BANKR. P. 5001.

75. FED. R. BANKR. P. 5001(a).

76. FED. R. BANKR. P. 5001(b).

77. OPEN COURT, Black’s Law Dictionary (10th ed. 2014).

78. See 11 U.S.C. § 107 (2010).

79. *Id.* at § 107(a).

80. See generally *id.* at § 107(b), (c).

81. *Id.* at § 107(b)(1).

82. *In re Borders Grp., Inc.*, 462 B.R. 42, 47 (Bankr. S.D.N.Y. 2011) (citing *In re Lomas Fin. Corp.*, No. 90 Civ. 7827, 1991 WL 21231 *1, *2 (S.D.N.Y. Feb. 11, 1991)).

83. *In re Lomas Fin. Corp.*, 1991 WL 21231, at *2.

84. *In re Borders Grp.*, 462 B.R. at 47–48 (citing *In re Barney’s, Inc.*, 201 B.R. 703, 708–09 (Bankr. S.D.N.Y. 1996)).

Federal Rule of Bankruptcy Procedure 9018 provides that:

On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information . . . or (3) to protect governmental matters that are made confidential by statute or regulation.⁸⁵

As the language of provision (1) closely tracks that of 11 U.S.C. § 107(b)(1), similar reasoning can be applied showing that an interpretation of Bankruptcy Rule 9018 which provides for unspecified sealing of information is overly broad. *In re Glob. Crossing, Ltd.* states that when Bankruptcy Rule 9018 is satisfied, confidentiality can be protected “in the interests of justice.”⁸⁶ In order to seal a record, bankruptcy courts have held that “the moving party bears the burden of showing that the information is confidential.”⁸⁷ That same court held that, “[t]he whole point of that provision is to protect business entities from disclosure of information that could reasonably be expected to cause the entity *commercial* injury.”⁸⁸

Bankruptcy courts in general have held that the open access “public policy is of special importance in the bankruptcy arena, as unrestricted access to judicial records fosters confidence among creditors regarding the fairness of the bankruptcy system.”⁸⁹ This is a well-established principle.⁹⁰ There needs to be a compelling justification to seal any court record, let alone an entire docket.⁹¹ “The presumption of open access, as codified in § 107(a), ‘is based on the need for federal courts . . . to have a measure of accountability and for the public to have confidence in the administration of justice’”⁹² These cases are among a few that emphasize the well defined public policy of open access to Bankruptcy Courts, and why such a policy exists in the United States.

C. The Principle of Comity Does Not Apply When There is a Direct Conflict to the Public Policy of the United States

Section 1506 of the Bankruptcy Code states that “[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly

85. FED. R. BANKR. P. 9018.

86. *In re Glob. Crossing, Ltd.*, 295 B.R. 720, 724 (Bankr. S.D.N.Y. 2003).

87. *In re Borders Grp., Inc.*, 462 B.R. at 46 (*citing In re Food Mgmt. Grp., LLC*, 359 B.R. 543, 561 (Bankr. S.D.N.Y. 2007)).

88. *In re Glob. Crossing*, 295 B.R. at 725 (emphasis added).

89. *In re Stone*, 587 B.R. 678, 681 (Bankr. S.D. Ohio 2018) (quoting *In re Motors Liquidation Co.*, 561 B.R. 36, 41 (Bankr. S.D.N.Y. 2016)) (internal quotations omitted).

90. *See, e.g., In re Bell & Beckwith*, 44 B.R. 661, 664 (Bankr. N.D. Ohio 1984) (“This policy of open inspection, established in the Bankruptcy Code itself, is fundamental to the operation of the bankruptcy system and is the best means of avoiding any suggestion of impropriety that might or could be raised.”)

91. *See In re Motors Liquidation Co.*, 561 B.R. 36, 41 (Bankr. S.D.N.Y. 2016) (“In the Second Circuit, documents which are part of the court record should not remain under seal absent the most compelling reasons.” (*quoting In re FiberMark, Inc.*, 330 B.R. 480, 503–04 (Bankr. D. Vt. 2005))).

92. *In re Anthracite Capital, Inc.*, 492 B.R. 162, 173 (Bankr. S.D.N.Y. 2013) (internal citations omitted).

contrary to the public policy of the United States.”⁹³ Others have relied on the principle of comity mentioned in Section 1507(b) of the Bankruptcy Code.⁹⁴ Black’s Law Dictionary defines comity as “[a] practice among political entities (as countries, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts.”⁹⁵ But comity is only one factor to take into account in analyzing issues arising under Section 1507(b).⁹⁶ Section 1507(b) has five other factors including the reasonable assurance of: “(1) just treatment of all holders of claims against or interests in the debtor’s property; [and] (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding”⁹⁷

While the principle of comity is very important to Chapter 15 as it is necessary to understand and respect the laws of other nations in cross-border insolvencies, the purpose of Section 1507 is to allow “additional assistance” to foreign representatives.⁹⁸ This additional assistance is “[s]ubject to the specific limitations stated elsewhere in this chapter”⁹⁹ This is not a catch-all at the end of the statute but how Section 1507 as a whole begins. Within Section 1507, there are provisions calling for the protection of all claim holders, particularly those in the United States.¹⁰⁰ The sealing of the names and identities of certain creditors outside the United States from all other creditors will create prejudice and inconvenience in the processing of claims, ultimately hurting claim holders in the United States.

Further, Section 1506 of the Bankruptcy Code is a specific limitation stated elsewhere in Chapter 15 that Section 1507 discusses.¹⁰¹ As aforementioned, open access to court filings and proceedings is a public policy of the United States. Further, open access to courts implies that an impartial finder of fact should decide contested issues. Therefore, the sealing of these records would be manifestly contrary to public policy.

III. The Conflict of Laws and Possible Solutions

As discussed in Part I, to safeguard the multitude of protections afforded to individuals under the GDPR, there are substantial penalties for data controllers and processors who violate it; a toothless law would be a waste of ink.¹⁰² For an insolvent international company in need of bankruptcy protections, the threat of such fines could be a deterrent to filing in the United States, either as a main or an ancillary proceeding.¹⁰³ As detailed in Part II, this goes against the

93. 11 U.S.C. § 1506 (2005).

94. 11 U.S.C. § 1507(b) (2005).

95. *Comity*, Black’s Law Dictionary (11th ed. 2019).

96. *See* 11 U.S.C. § 1507(b) (2005).

97. 11 U.S.C. § 1507(b)(1)–(2) (2005).

98. 8 *Collier on Bankruptcy* P 1507.01 (Richard Levin & Henry J. Sommer eds., 16th ed. 2019).

99. 11 U.S.C. § 1507(a) (2005).

100. 11 U.S.C. § 1507(b)(1)–(2) (2005).

101. *Id.*; *see also* 11 U.S.C. § 1506 (2005).

102. *See supra* notes 16–46 and accompanying text.

103. *See supra* notes 43–46 and accompanying text.

purpose of the bankruptcy system: giving a fresh start to honest debtors.¹⁰⁴ A further consideration is the protection of creditors. If a company has to pay significant fines for violating the GDPR, the amount of money available to creditors will be significantly less.

A. For Foreign Main Proceedings: The High Burden of the Public Policy Exception Under § 1506 of the Bankruptcy Code

In a United States Bankruptcy Court, there is generally a high burden to meet in showing that an action taken by a court “would be manifestly contrary to the public policy of the United States.”¹⁰⁵ It is established precedent that the party opposing recognition bears this burden.¹⁰⁶ The height of this burden hinges on the word *manifestly*.¹⁰⁷ United States courts look to the UNCITRAL Model Law Guide to Enactment, under which it is only in exceptional cases that a public policy exception should ever apply.¹⁰⁸ In essence, the public policy exception is not meant to apply to run-of-the-mill issues out of bankruptcy court; rather, only to grave violations of the law.

Thus far, there are few instances where such high burden was satisfied, with the result of preventing the recognition of the entire proceeding.¹⁰⁹ In *In re Toft*, the Bankruptcy Court for the Southern District of New York found that a particular German insolvency proceeding could not be recognized in the United States.¹¹⁰ The rationale was that the sole purpose of the foreign representative bringing forth the proceeding under Chapter 15 was to gain access to a German debtor’s e-mail accounts which were on servers in the United States.¹¹¹ This motive

104. See *supra* notes 47–101 and accompanying text.

105. 11 U.S.C. § 1506; see also Ronit J. Berkovich & Olga F. Peshko, US – *The High Burden to Satisfy the ‘Manifestly Contrary to Public Policy’ Standard of Chapter 15*, GLOBAL RESTRUCTURING REV. (Nov. 15, 2018). <https://globalrestructuringreview.com/insight/the-restructuring-review-of-the-americas-2019/1176952/us-the-high-burden-to-satisfy-the-‘manifestly-contrary-to-public-policy’-standard-of-chapter-15> (discussing “the exceptionally high burden parties must overcome to prove that requested relief is manifestly contrary to public policy, and in fact, bankruptcy courts make such findings only in rare circumstances.”).

106. *In re Ashapura Minechem Ltd.*, 480 B.R. 129, 138–39 (S.D.N.Y. 2012) (“Parties opposing the recognition of proceedings generally bear the burden of proof on applying public policy exceptions.”).

107. See *In re ABC Learning Centres Ltd.*, 728 F.3d 301, 309 (3d Cir. 2013) (“The public policy exception has been narrowly construed, because the ‘word “manifestly” in international usage restricts the public policy exception to the most fundamental policies of the United States.’”) (citing H.R. REP. NO. 109–31(1), at 109 (2005), *reprinted in* U.S.C.C.A.N. 88, 172)).

108. *Id.* (“The purpose of the expression “manifestly”, . . . is to emphasize that public policy exceptions should be interpreted restrictively and that [the exception] is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.’ U.N. Comm’n on Int’l Trade Law, Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, ¶ 89, U.N. Doc A/CN.9/442 (1997).”).

109. See *In re Gold & Honey, Ltd.*, 410 B.R. 357 (Bankr. E.D.N.Y. 2009); see also *In re Toft*, 453 B.R. 186 (Bankr. S.D.N.Y. 2011).

110. *In re Toft*, 453 B.R. at 198.

111. *Id.* (“Here, [. . .] the relief sought by the Foreign Representative is banned under U.S. law, and it would seemingly result in criminal liability under the Wiretap Act and the Privacy Act for those who carried it out. The relief sought would directly compromise privacy rights subject to a comprehensive scheme of statutory protection, available to aliens, built on constitutional safeguards incorporated in the Fourth Amendment as well as the constitutions of many States.”).

was held to be contrary to the public policy of the United States because violation of the right to data privacy in the context of search and seizure would be impermissible.¹¹²

Thus, *Toft* illustrates that, under extraordinary circumstances, the protection of personal electronic data is a strong public policy under the bankruptcy code. Importantly, however, this is the exception, and not the general rule.¹¹³ The text of the statute as well as common practice has paved the way for courts to typically recognize the foreign proceedings and grant the requested relief.¹¹⁴

B. For Domestic Main Proceedings: Compliance with Foreign Laws Under § 1505 of the Bankruptcy Code

Neither cross-border insolvency nor Chapter 15, are limited to cases primarily occurring outside of the United States. Certain provisions of Chapter 15 of the Bankruptcy Code apply to insolvencies wherein the main proceeding is in the United States,¹¹⁵ for example section 1505.¹¹⁶ This statute provides that “A trustee or another entity (including an examiner) may be authorized by the court to act in a foreign country on behalf of an estate created under section 541.”¹¹⁷ An entity authorized to act under this section may act in any way permitted by the applicable foreign law.¹¹⁸ This particular provision provides that the main proceeding taking place in the United States may be viewed as such in other jurisdictions.¹¹⁹

112. *Id.* at 201 (“This is one of the rare cases in which an order of recognition on the terms requested would be manifestly contrary to U.S. public policy, reflected in rights that are based on fundamental principles of protecting the secrecy of electronic communications, limiting the powers of an estate representative, and providing notice to parties whose rights are affected by a court order.”).

113. *See* Berkovich & Peshko, *supra* note 105 (“[T]he burden to overcome the presumption in favour of recognition of a foreign proceeding based on the public policy exception in section 1506 of the Bankruptcy Code is difficult to meet, even when the issues at stake are due process or litigation rights. It is not enough that a creditor may get a different result under US law. It is also not enough that a US law is in conflict with the foreign law in question. The only cases where this burden was met included elements of egregiousness and lack of fundamental fairness that cannot be easily demonstrated by creditors under the section 1506 public policy exception.”).

114. *See* Berkovich & Peshko, *supra* note 105 and accompanying text.

115. *See* Maurice Horwitz, *Section 1505 – Authorization to Act In A Foreign Country*, WEIL BANKR. BLOG (Dec. 10, 2015), <https://business-finance-restructuring.weil.com/breaking-the-code/section-1505-authorization-to-act-in-a-foreign-country/> (“The primary purpose of chapter 15 is for a debtor in a foreign proceeding to commence an ancillary proceeding in a United States bankruptcy court for the purpose of assisting in the administration of the debtor’s foreign proceeding. Most of the chapter’s provisions are devoted to this purpose; thus, most practitioners assume it is its only purpose. Not so. Several provisions of chapter 15 are applicable in ‘plenary’ (as opposed to ‘ancillary’) cases, such as those under chapter 7 and 11, where some international component is present. This makes sense in light of chapter 15’s origins in the Model Law, the purpose of which is to authorize and encourage cooperation and coordination between jurisdictions.”).

116. 11 U.S.C. § 1505 (2005).

117. *Id.*

118. *Id.*

119. *See* Horwitz, *supra* note 115 (“Section 1505 allows a debtor in possession (or a chapter 7 or 11 trustee, or an examiner) to obtain court approval to submit a petition to a foreign court that (i) requests recognition of the debtor’s U.S. bankruptcy case, and (ii) recognizes the debtor (or trustee, or examiner) as the ‘foreign representative’ of the debtor’s estate.”).

C. Personally-Identifiable Information in the United States and Public Interest in the GDPR: Meeting in the Middle

While the United States has a public policy of open access to court proceedings, this is not to say that there is no data privacy within the United States. The United States has certain data privacy protections, including many that apply to the bankruptcy system.¹²⁰ Among these is the E-Government Act of 2002, which requires the promulgation of rules concerning data privacy in electronic filings of court documents.¹²¹ The relevant bankruptcy law provision is Rule 9037,¹²² which prescribes the redacting of parts of Social Security numbers or IRS Taxpayer Identification numbers, individuals' birth years, financial account numbers, and the full name of an individual known to be a minor.¹²³ This is not to say all of the items listed in Rule 9037 are to be protected. For example, Social Security numbers or Taxpayer Identification numbers are not to be fully redacted. The rule says that disclosure in a filing must be limited to the last four digits of these numbers,¹²⁴ applying to both paper and electronic filings.¹²⁵ Therefore, the United States court system has some protections in favor of data privacy.

Similarly, the GDPR contains provisions pertaining to the transfer of data freely to non-member states. Articles 44-50 provide rules for the transfer of data to "third countries" or international organizations.¹²⁶ Article 44 specifically provides some of the general rules for such transfers.¹²⁷ There currently is an EU-US Data Privacy Shield.¹²⁸ However, it does not allow for the unlimited transfer of data between the EU and the United States.¹²⁹ This stands in stark contrast to certain States that have been "whitelisted" by the GDPR, such as Japan; data can freely flow between an EU member State and nations that are "whitelisted," as they are presumed to be GDPR compliant.¹³⁰ So, one solution to this problem would be to whitelist the United States, at least to the extent that court documents are concerned.

120. See Wendy Tien, *USTP's Efforts to Protect Against Creditors' Disclosure of Individuals' Personally Identifiable Information*, https://www.justice.gov/sites/default/files/ust/legacy/2011/07/13/abi_201005.pdf (last visited Nov. 3, 2019).

121. *Id.*; see 44 U.S.C. § 3501 *et seq.*

122. FED. R. BANKR. P. 9037.

123. FED. R. BANKR. P. 9037(a).

124. *Id.*

125. Tien, *supra* note 120.

126. See GDPR Articles 44–50.

127. *Id.* at art. 44.1 ("Any transfer of personal data which are undergoing processing or are intended for processing after transfer to a third country or to an international organisation shall take place only if, subject to the other provisions of this Regulation, the conditions laid down in this Chapter are complied with by the controller and processor, including for onward transfers of personal data from the third country or an international organisation to another third country or to another international organisation.")

128. See *Privacy Shield Overview*, PRIVACY SHIELD FRAMEWORK, <https://www.privacyshield.gov/Program-Overview> (last visited Oct. 4, 2019).

129. *Id.*

130. See Anne Friedman, *EU & JAPAN: Free flow of personal data from EU to Japan soon possible*, DLA PIPER (Jul. 24, 2018), <https://www.technologysledge.com/2018/07/eu-japan-free-flow-of-personal-data-from-eu-to-japan-soon-possible/> (discussing how when a third country is declared under an adequacy decision by the EU to have adequate levels of data protection, personal data can flow from the European Economic Area to such third country without further scrutiny).

There are also some concerns in the GDPR about international data transfers as a matter of public policy. The GDPR mentions that “[f]lows of personal data to and from countries outside the Union and international organisations are necessary for the expansion of international trade and international cooperation.”¹³¹ The GDPR provides exceptions for certain cases of international data transfers.¹³² Further, the GDPR provides for data transfers for matters of public interest.¹³³ Surely cross-border insolvency issues are enough of an economic public interest concern to promote the free access of information in a cross-border insolvency proceeding in the United States. A further solution to this issue may be for the EU to recognize that the personal information of European individuals who are parties to a bankruptcy proceeding in the United States can be redacted, which would be equivalent to the information traditionally redacted in United States bankruptcy proceedings: some, but not all identifying information.¹³⁴ This would protect the data of EU citizens while not restricting the rights of open access to court proceedings and documents in the United States.

Conclusion

In Part I, this note has examined the GDPR and data privacy overall. It has examined the background and purpose of the GDPR and how it protects individuals. It also discussed how the GDPR can be enforced against data controllers and processors who violate the GDPR, including financial penalties. In Part II, this note has also given a broad overview of the bankruptcy system for foreign entity debtors and how one can receive bankruptcy protection in the United States. It elaborated on the necessity of transparency in the bankruptcy system, and why it is this way. In Part III, this note examined the conflict of laws that arose, and proposed a possible solution.

There is a clear conflict between the GDPR and the United States’ PACER system, particularly in bankruptcy cases. Chapter 15 of the U.S. Bankruptcy Code, which is based on the UNCITRAL model cross-border insolvency laws, largely depends on the principle of comity, and, therefore, should accommodate the laws of other nations. However, the Bankruptcy System of the United States is based on transparency, and every party to a bankruptcy proceeding

131. *GDPR, supra* note 1, at Recital 101.

132. *See GDPR, supra* note 1, at Recital 111(1)–(3) (“(1) Provisions should be made for the possibility for transfers in certain circumstances where the data subject has given his or her explicit consent, where the transfer is occasional and necessary in relation to a contract or a legal claim, regardless of whether in a judicial procedure or whether in an administrative or any out-of-court procedure, including procedures before regulatory bodies. (2) Provision should also be made for the possibility for transfers where important grounds of public interest laid down by Union or Member State law so require or where the transfer is made from a register established by law and intended for consultation by the public or persons having a legitimate interest. (3) In the latter case, such a transfer should not involve the entirety of the personal data or entire categories of the data contained in the register and, when the register is intended for consultation by persons having a legitimate interest, the transfer should be made only at the request of those persons or, if they are to be the recipients, taking into full account the interests and fundamental rights of the data subject.”).

133. *See GDPR, supra* note 1, at Recital 112(1) (“Those derogations should in particular apply to data transfers required and necessary for important reasons of public interest, for example in cases of international data exchange between competition authorities, tax or customs administrations, between financial supervisory authorities, between services competent for social security matters, or for public health, for example in the case of contact tracing for contagious diseases or in order to reduce and/or eliminate doping in sport.”)

134. *See supra* notes 119–124 and accompanying text.

needs equal access to other parties' information to know where it stands, especially in knowing how to add value to its claim if it is a creditor. Concurrently, there are concerns in the United States about electronic data privacy. A reasonable solution to this conflict would be to build on the principles of cooperation built into the GDPR and the principles of comity of the United States, and have some, but not all, data be redacted and some, but not all, data be made public on PACER.

U.S. Obligations Under the General Agreement on Trade in Services Trump the Buy American, Hire American Executive Order

Rita Kim

Introduction

An anti-globalist sentiment propelled by a “resurgent popularity of nationalist policies” is emerging in certain parts of the world, as evidenced by free trade renegotiations and treaty withdrawals.¹ A revival of nationalist policies stems from the perceived negative effects of free trade, such as the institution of sweatshops in developing countries and the influx of foreign workers creating competition in the workplace, thus, depressing wages.² The nationalist sentiment has inspired major trend shifts such as the victory of Emmanuel Macron in France’s presidential election, the United Kingdom’s BREXIT referendum, and government policies in the Philippines and China.³ In particular, the United States experienced such shift, culminating in the election of President Donald Trump, which brought about the United States’ withdrawal from the Trans-Pacific Partnership Agreement (“TPP”), the renegotiation of the North American Free Trade Agreement (“NAFTA”), and several major changes to immigration policies.⁴

President Trump’s recently enacted “Buy American, Hire American” Executive Order (“BAHA”) purports to implement drastic reform for visa eligibility requirements regarding foreign workers in specialty occupations.⁵ Specifically, § 5(b) of BAHA targets highly-skilled workers under the H-1B visa program in an effort to decrease workplace competition and give priority to American workers.⁶ Under Article II’s “Most-Favored-Nation Treatment” clause of the General Agreement on Trade in Services (“GATS”), to which the U.S. is a party, uniform treatment that is no less favorable must be given to all like services and service suppliers of member States.⁷ This Note will argue that the “Buy American, Hire American” Executive Order violates the United States’ obligations under Article II of the General Agreement on Trade in Services by *de facto* discriminating against the highly-skilled-foreign-worker sector.

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1. Lord Peter H. Goldsmith QC, PC, Keynote Address to the Atlas Conference: “International Business Disputes in an Era of Receding Globalism,” 34 GA. ST. U. L. REV. 765, 778 (2018).
 2. *Id.* at 773.
 3. Ian Bremmer, *The Wave to Come*, TIME (May 11, 2017), <http://time.com/4775441/the-wave-to-come> (Macron’s win in France’s presidential election stands for the rhetoric of prioritizing the interests of citizens before strengthening foreign alliances. The United Kingdom’s proposal to exit the European Union carries a similar message. It purports to advance national interests above all, including resentment of foreign workers perceived to displace citizens of jobs and drive down wages. No different are the policies implemented in the Philippines and China, where the government implements regulation to collect data and monitor its citizens in an effort to “create a harmonious society and a ‘culture of sincerity.’”).
 4. Goldsmith, *supra* note 1.
 5. Exec. Order No. 13788, 82 Fed. Reg. 18837 (Apr. 21, 2017).
 6. *Id.*
 7. General Agreement on Trade in Services art. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) (hereinafter *GATS*).

Although the United States enacted these policy changes to increase employment opportunities for American workers, they disproportionately restrict labor mobility for foreign workers under the H-1B visa category.⁸ For example, the policy changes include issuing substantial Requests for Evidence (RFEs), being highly suspicious of low wage levels, and denying petitions under an unprecedented standard of scrutiny.⁹ Under § 6(a)(iii) of BAHA, which states in relevant part, that “nothing in this order shall be construed to impair or otherwise affect existing rights or obligations under international agreements,” the United States fails to uphold its international commitments.¹⁰

In Part I, this Note will discuss the GATS and the United States’ obligations under Article II, as a result of being a State party. Additionally, Part I will address the immigration policy changes implemented under the BAHA directive, specifically targeting H-1B visa petitions. Part II will analyze the negative impact of the new H-1B visa requirements on applicants and their employers, creating unpredictability and confusion, less job portability, and the overall decline in approval rates. Lastly, Part III will apply the test for *de facto* discrimination under the GATS by identifying like services and service suppliers and treatment less favorable to certain member States.

I. The United States’ Obligations Under the General Trade in Services Agreement

According to the International Monetary Fund, services exports account for one fourth of total global exports.¹¹ In addition to services exports growing exponentially since 1990, developing countries have grown at “twice the rate of services exports from advanced economies.”¹² Under the World Trade Organization (“WTO”) umbrella, the GATS is a treaty inspired by its sister agreement, the General Agreement on Tariffs and Trade (“GATT”),¹³ and arose from a need for a framework to regulate such unprecedented growth in services exports.¹⁴

The GATS, which entered into force in January 1995 for all WTO members, covers most service sectors, except for “services supplied in the exercise of governmental authority.”¹⁵ First, the

8. *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models* (Mar. 19, 2019), <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models> (the H-1B visa category is an employer-sponsored non-immigrant visa for temporary workers looking to perform services in the United States in a specialty occupation. It requires a bachelor’s degree or the equivalent in experience and a Labor Condition Application.).
9. Exec. Order No. 13788, 82 Fed. Reg. 18837 (Apr. 21, 2017).
10. *Id.*
11. Prakash Loungani et. al., *Services Exports Open a New Path to Prosperity*, IMF BLOG (Apr. 5, 2017), <https://blogs.imf.org/2017/04/05/services-exports-open-a-new-path-to-prosperity>.
12. *Id.*
13. Court tests used in identifying violations of GATT provisions are frequently applied to the newer sister agreement, the GATS.
14. Juan A. Marchetti & Petros C. Mavroidis, *The Genesis of the GATS (General Agreement on Trade in Services)*, 22 EUR. J. OF INT’L L. 689, 691 (2011).
15. *Guide to reading the GATS schedules of specific commitments and the list of article II (MFN) exemptions*, WTO, https://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (last visited Mar. 29, 2019) (these are services provided at “non-market conditions.” Specific examples include social security, health, and education.).

GATS differentiates between “four modes of supplying services: cross-border trade, consumption abroad, commercial presence, and presence of natural persons.”¹⁶ Second, the GATS outlines the scope and purpose of the agreement and lists general obligations between member States regarding trade in services.¹⁷ This Note specifically focuses on Mode Four, the presence of natural persons, and discusses United States’ obligation to provide “Most-Favoured-Nation Treatment.”¹⁸

Mode Four, presence of natural persons, encompasses “persons of one Member entering the territory of another Member to supply a service.”¹⁹ The presence of a natural person under Mode Four can be commercial in nature, such as managers, executives and other intra-corporate transferees.²⁰ It can also be independent of commercial presence, such as employees of foreign service suppliers in another Member’s territory fulfilling a service contract.²¹ The Annex on Movement of Natural Persons Supplying Services Under the Agreement states that the GATS does not apply to attempts to regulate employment on a permanent basis, permanent residence, or citizenship.²² Although not specifically defined, the GATS covers the temporary movement of natural persons, also known as migrant workers.²³ Moreover, “most Mode 4 movements involve highly-skilled workers” who are largely represented by H-1B visa holders.²⁴

A. Interpretation and Practical Implications of the “Most-Favoured-Nation Treatment” Clause of the GATS

Article II of the GATS states that “each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and services suppliers of any other country.”²⁵ Courts have unanimously held the interpretation of “like services and service suppliers” to mean similar suppliers providing the same type of service.²⁶ For purposes of this Note, a deeper analysis and under-

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16. *The General Agreement on Trade in Services (GATS): objectives, coverage and disciplines*, WTO, https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (last visited Mar. 29, 2018) (hereinafter *GATS: Objectives*).
 17. *GATS*, *supra* note 7.
 18. *GATS: Objectives*, *supra* note 16 (in the context of the GATS, presence of natural persons means the physical entry of a member State into another member State’s territory for purposes of supplying services).
 19. *Id.*
 20. Philip Chang et. al., *GATS, the Modes of Supply and Statistics on Trade in Services*, 33 J. WORLD TRADE 93, 96 (1999).
 21. *Id.*
 22. *GATS*, *supra* note 7.
 23. Philip L. Martin, *GATS, Migration, and Labor Standards*, *Inst. for Labour Studies*, DP/165/2006 (2006), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_193612.pdf (Martin gives as example an Indian IT worker employed for Deutsche Bank as covered under GATS’ Mode Four but the same worker would not be covered if employed by Citibank).
 24. *Id.*
 25. *GATS*, *supra* note 7, at Art. 2.
 26. *GATS – Article II (Jurisprudence)*, https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art2_jur.pdf (last visited Mar. 29, 2019).

standing of the interpretation of “treatment no less favourable” is dispositive. The law on treaty interpretation lies in Article 31 of the Vienna Convention on the Law of Treaties (“VCLT”), as well as jurisprudence on Article II’s “Most-Favored-Nation Treatment” (“MFN”) clause.²⁷

First, under Article 31 of the VCLT, “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”²⁸ Discerning the context, one can look to any State party agreements relating to the treaty, as well as any subsequent agreement or State practice in implementing the terms of the treaty.²⁹ Furthermore, if the plain meaning of the terms is ambiguous or leads to absurd results, Article 32 of the VCLT suggests that *travaux préparatoires* may be used to supplement their interpretation.³⁰ According to the International Law Commission (“ILC”), MFN clauses used in agreements under the WTO umbrella are interpreted similarly.³¹ In reviewing the draft articles of the MFN clause and compiling its report, the ILC found two views on interpreting the provision on “treatment no less favourable.”³² One interpretation is “the desire of the beneficiary State to ensure that there is equality of competitive opportunities between its own nationals and those of third States.”³³ Alternatively, the clause is meant to preserve equality among foreign investors’ competitive opportunities.³⁴

Second, jurisprudence on interpreting MFN provisions concludes that treatment is less favorable when it “modifies the conditions of competition to the detriment of like services and service suppliers of any other Member.”³⁵ Additionally, the Appellate Body suggests that “treatment no less favourable” includes *de facto* as well as *de jure* discrimination.³⁶ *De jure* discrimination occurs when the measure calls for differential treatment towards a specific State party.³⁷ In contrast, analyzing *de facto* discrimination is outlined by the court in *Canada-Autos* as a two-step process: (1) the measure must be covered by the GATS, and (2) appraisal of the measure as applied to similarly situated services and service suppliers of other countries to identify dispro-

27. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (hereinafter *VCLT*); *GATS – Article II (Jurisprudence)*, *supra* note 26.

28. *Id.* at Art. 31.

29. *Id.* (*travaux préparatoires* or preparatory works refer to prior discussions and negotiations leading up to the agreement, similar to legislative history).

30. *VCLT*, *supra* note 27, at Art. 32.

31. Int’l Law Comm’n Final Rep. on the Work of Its Sixty-Seventh Session, U.N. Doc. A/CN.4/L.852, at 12 (2015) (hereinafter *Int’l Law Comm’n*).

32. *Id.* at 19.

33. *Int’l Law Comm’n*, *supra* note 31, at 19.

34. *Id.*

35. *GATS – Article II (Jurisprudence)*, *supra* note 26.

36. Donald McRae, *MFN in the GATT and the WTO*, 7 ASIAN J. WTO & INT’L HEALTH L & POL’Y 1, 17 (2012).

37. William Thomas Worster, *Conflicts Between United States Immigration Law and the General Trade in Services Agreement on Trade in Services: Most-Favored-Nation Obligation*, 42 TEX. INT’L L. J. 55, 74 (2006).

portionate effects.³⁸ The most commonly used test in identifying disproportionate effects is the “asymmetric impact test” which “compar[es] the proportion of service suppliers with each nationality receiving less favorable treatment.”³⁹

B. Current Changes in Effect Under the “Buy American, Hire American” Executive Order for H-1B Visa Applicants

The United States has long implemented immigration policies aiming to protect the employment sector from foreign competition.⁴⁰ As early as 1885, Congress enacted the Contract Labor Law in an effort to deter cheap foreign labor.⁴¹ In 1952, Congress repealed the law to fill the need for immigrant workers and instead adopted the first labor certification provision.⁴² This provision essentially blocked foreign employees from filling U.S. jobs that threatened to displace American workers, or that negatively impacted wages and working conditions.⁴³ Since 1965, section 212(a)(5)(A)(i) of the Immigration and Nationality Act (“INA”) codifies the labor certification provision and requires the noncitizen and the intending employer to show that no domestic workers can fill those positions and that foreign workers will not adversely affect the wages and working conditions of U.S. employees.⁴⁴

Further, the intending employer must apply for the labor certification with the Department of Labor (“DOL”) who may either approve the application, request further evidence, audit the application, or ultimately deny it.⁴⁵ If the DOL approves the application, the employer must file the approved labor certification, Form ETA 9089, together with a visa petition, Form I-140, with United States Citizenship and Immigration Services (“USCIS”) within 180 days.⁴⁶ In the event of a denial, the employer may appeal to the Board of Alien Labor Certification Appeals, and seek further judicial review in a federal district court.⁴⁷ Labor certifica-

38. Appellate Body Report, *Canada-Certain Measures Affecting the Automotive Industry*, ¶ 185(e), WTO Doc. WT/DS139/AB/R (adopted May 18, 2000) (hereinafter *Canada-Autos*) (holding that in failing to determine whether the measure was covered by the GATS, the Panel engaged in speculation regarding de facto discrimination. In *Canada-Autos*, the issue revolved around the duty-free treatment by Canada to certain automobile manufacturers in Canada. The main beneficiaries were United States manufacturers. Prior to the Appellate Body’s review, the panel below inquired as to the country of origin for the imports and found that Canada favored the products of certain countries. Therefore, Canada’s duty-free treatment was less favorable, rather non-existent, for products of other State parties. The Appellate Body affirmed the panel’s findings while rejecting the test applied by the panel for finding *de facto* discrimination, and implemented the test used in this Note.).

39. Worster, *supra* note 37, at 75.

40. ALEINIKOFF, IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY 353 (8th ed. 2016).

41. *Id.*

42. *Id.*

43. *Id.*

44. 8 U.S.C. § 1182 (2016).

45. ALEINIKOFF, *supra* note 40, at 355.

46. *Id.*

47. *Id.*

tion waivers are only available in rare circumstances such as for noncitizens with exceptional or extraordinary abilities or if it is in the national interest.⁴⁸ Thus, hiring foreign talent requires a labor certification most of the time.

For example, temporary foreign workers looking to obtain an H-1B visa go through an “attestation” process, similar to a labor certification.⁴⁹ H-1B visa applicants are temporary (nonimmigrant) foreign workers in a “specialty occupation,” defined under section 214(i) of the INA as requiring “highly specialized knowledge” and a bachelor’s degree or higher.⁵⁰ Applying for an H-1B visa entails the employer filing for a Labor Condition Application, attesting that it has notified relevant unions of the available position, and that the wage and working conditions offered conform to the DOL’s requirements.⁵¹ Employers with fifty or more workers must meet additional requirements such as a good-faith effort in recruiting U.S. workers and must demonstrate that no U.S. worker will be laid off as a result of hiring foreign talent.⁵² Moreover, H-1B visa applicants are subject to an annual statutory restriction (“cap”).⁵³ For every fiscal year, the cap is set to 65,000 H-1B visas.⁵⁴ However, several congressional exemptions from the cap, such as nonprofit or governmental organizations, raised actual H-1B approvals for fiscal year 2017 to 197,129 visas, with India in the lead for petitions filed.⁵⁵

Although BAHA does not explicitly reduce the cap, it places further restrictions on H-1B applicants and their prospective employers. H-1B visas are restricted to the “most-skilled or highest-paid petition beneficiaries.”⁵⁶ In an effort to identify fraudulent applications, USCIS has implemented “site visits” that are conducted without prior notice.⁵⁷ Additionally, DHS is seeking to rescind work authorizations for spouses of H-1B visa holders and has submitted a proposal to the Office of Management and Budget.⁵⁸ Furthermore, employers are experiencing

48. *Id.* at 372–74.

49. *Id.* at 402.

50. 8 U.S.C. § 1184 (2011).

51. ALEINIKOFF, *supra* note 40, at 402.

52. *Id.*

53. USCIS, *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models> (last visited Mar. 29, 2019) (hereinafter *H-1B Specialty Occupations*).

54. *Id.*

55. USCIS, *H-1B 2007-2017 Trend Tables*, <https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/BAHA/h-1b-2007-2017-trend-tables.pdf> (last visited Mar. 29, 2019) (hereinafter *H-1B 2007-2017 Trend Tables*).

56. Exec. Order No. 13788, 82 Fed. Reg. 18837 (Apr. 21, 2017).

57. H-1B Handbook § 4:37 (2019 ed.).

58. Ethan Baron, *H-1B spouse work ban pushed forward by Homeland Security*, SEATTLE TIMES (Feb. 22, 2019, 2:14 P.M.), <https://www.seattletimes.com/business/h-1b-spouse-work-ban-pushed-forward-by-homeland-security>.

higher denial rates and increased requests for evidence (“RFEs”).⁵⁹ As a result of these additional requirements, employers are forced to spend added time and capital in securing H-1B workers and may ultimately have to look for alternative ways in hiring foreign talent.⁶⁰

II. The Impact of Policy Changes Under BAHA

A. Uncertainty and Confusion Caused by Changes in Processing H-1B Visa Applications

Similar to all changes in administrative law, the government modifies high-skilled immigration policy by passing statutes and regulations, or through sub-regulatory actions, such as policy guidance memoranda and agency adjudication policies.⁶¹ The Trump administration has accomplished the vast majority of policy changes exclusively through sub-regulatory action, particularly an USCIS-issued policy memoranda and the DOS Foreign Affairs Manual.⁶² These sub-regulatory sources act as guidance on implementing existing statutes and regulations, often changing the way they are applied in adjudicating applications,⁶³ and thus, avoiding the need to go through rule-changing procedures under the Administrative Procedure Act.

In anticipation of BAHA and as part of a larger scheme to cut down on H-1B visas, in March of 2017, USCIS issued a policy memorandum indicating that “the occupation of ‘computer programmer’ might not be a specialty occupation eligible for H-1B classification” because a bachelor’s degree is not absolutely necessary for such employment.⁶⁴ An H-1B specialty occupation requires that the worker possess a bachelor’s degree or the equivalent thereof.⁶⁵ Historically, the DOL has issued H-1B visas predominantly to those in computer programming, engineering, and science disciplines.⁶⁶ Notably, computer programmers represent the third largest occupation of H-1B visa holders.⁶⁷ The new USCIS policy memorandum imposes a heightened evidentiary standard for computer programmers who now have to demonstrate that the position is complex or specialized enough to qualify as a specialty occupation.⁶⁸

59. *See H-1B Denials and Requests for Evidence Increase Under the Trump Administration*, National Foundation for American Policy (July 2018), <https://nfap.com/wp-content/uploads/2018/07/H-1B-Denial-and-RFE-Increase.NFAP-Policy-Brief-July-2018.pdf>.

60. *Id.*

61. Kevin Miner & Sarah K. Peterson, *High Stakes for Highly-Skilled Immigrants: An Analysis of Changes Made to High-Skilled Immigration Policy in the First Year of the Trump Administration in Comparison to Changes Made During the First Year of Previous Presidential Administrations*, 44 MITCHELL HAMLINE L. REV. 970, 974–75 (2018).

62. *Id.* at 990.

63. *Id.* at 991.

64. *Id.* at 996.

65. *New USCIS Guidance Restricts H-1B Eligibility for Computer Programmers*, FRAGOMEN (Apr. 3, 2017), <https://www.fragomen.com/insights/alerts/new-uscis-guidance-restricts-h-1b-eligibility-computer-programmers> (hereinafter *New USCIS Guidance*).

66. John Miano, *Wages for H-1B Computer Programmers* (Dec. 5, 2005), <https://cis.org/Report/Wages-H1B-Computer-Programmers>.

67. *H-1B Specialty Occupations*, *supra* note 53.

68. *New USCIS Guidance*, *supra* note 65.

Additionally, the same March 2017 USCIS policy memorandum directed officials to scrutinize H-1B applications using a Level 1 prevailing wage as indicating that the specialty occupation designation may not be warranted.⁶⁹ USCIS argued that because Level 1 represents entry-level compensation, “the offered position cannot possibly be providing ‘professional-level’ services, which is a required criterion for H-1B approval.”⁷⁰ Consequently, H-1B petitioners must prove that their position is complex enough to warrant the designation of a specialty occupation, but not too complex to justify entry-level pay.⁷¹ This is a hoop that H-1B applicants did not have to jump through prior to the policy memorandum.⁷² Therefore, this added obstacle led to increased denials and delays in processing H-1B petitions.⁷³ Prior to BAHA, USCIS processed H-1B petitions within ninety days as compared to the current five month delay experience.⁷⁴

Furthermore, all of the new evidentiary requirements and policy changes led to a dramatic increase in RFEs.⁷⁵ Employment immigration practitioners argue that “even some of the cleanest, seemingly ‘sl[a]m-dunk’ petitions have received 17-page long RFEs.”⁷⁶ In 2017 alone, almost 70% of H-1B petitions received RFEs — an increase of 300% from previous years.⁷⁷ The most common reasons for RFEs are incomplete applications that are missing information about the employer, doubts regarding the specialty occupation designation and wage level, the lack of a bachelor’s degree, and a questionable employer-employee relationship.⁷⁸ This in turn creates uncertainty and adds to the time and expense of an H-1B petition.⁷⁹ Under BAHA, USCIS has become increasingly restrictive of employment-based immigration and it is progressively difficult for employers to hire foreign talent.⁸⁰

Finally, USCIS has increased worksite visits to H-1B employers under BAHA.⁸¹ Although worksite visits have been on the rise since 2006, when Immigration and Customs Enforcement (“ICE”) implemented a comprehensive immigration enforcement strategy, there has been a

69. Miner & Peterson, *supra* note 61, at 996. FLC, *Online Wage Library*, <http://www.flcdatacenter.com/OesQuick-Results.aspx?area=40900&code=15-1031.00&year=88&source=1> (last visited Mar. 30, 2019) (according to the Foreign Labor Certification Data Center (“FLC”), there are four levels of wages that apply to computer software engineers which comprise the vast majority of H-1B petitions: (1) Level 1 Wage is \$24.06/hour or \$50,045/year; (2) Level 2 Wage is \$31.79/hour or \$66,123/year; (3) Level 3 Wage is \$39.53/hour or \$82,222/year; and (4) Level Four Wage is \$47.26/hour or \$98,301/year).

70. Dan Donnelly et. al., *Trump Year One*, 75 BENCH & B. MINN. 26, 27 (2018).

71. Autumn Misiolek Tertin, *Dancing in the Dark: Recent Developments in H-1B Visa Processing*, 103 WOMEN L. J. 18, 20 (2018).

72. *Id.* at 19–20.

73. *Id.*

74. Miner & Peterson, *supra* note 61, at 1000.

75. *Id.* at 996.

76. Donnelly et. al., *supra* note 70, at 27.

77. *Report Confirms Significant Increase in H-1B and L-1 RFE and Denial Rates*, FRAGOMEN (July 27, 2018), <https://www.fragomen.com/insights/alerts/report-confirms-significant-increase-h-1b-and-l-1-rfe-and-denial-rates> (hereinafter *Report*).

78. Beeraj Patel, Esq., *Most Common H1B RFE Reasons*, PRIDE IMMIGRATION (Feb. 16, 2018), <https://www.prideimmigration.com/most-common-h1b-rfe-reasons>.

79. Miner & Peterson, *supra* note 61, at 998.

80. *Report*, *supra* note 77.

81. H-1B Handbook § 1:16 (2019 ed.).

recent spike in visits without prior notice.⁸² Previous practice required USCIS to notify employers of upcoming visits three days in advance.⁸³ This notice gave employers an opportunity to prepare for the audits and even arrange for an attorney to be present.⁸⁴ Worksite visits can span over many days and involves speaking to Human Resources representatives and other employees, verifying the employer’s records, and overall ensuring that the representations made on H-1B petitions are accurate and in compliance with the law.⁸⁵ Due to the rise in worksite visits without prior notice, employers can no longer prepare in advance for such audits and do not have attorneys present.⁸⁶ Thus, impending visits cause anxiety in the workplace and require attorneys to train in-house counsel and personnel on how to best handle such situations, which costs the employer additional time and money.⁸⁷

B. The Negative Impact on Job Portability

In 1999, Congress enacted the American Competitiveness in the Twenty-first Century Act (“AC-21”) to help increase job portability for foreign employees.⁸⁸ Higher job portability acts as a safeguard against exploitation of foreign talent in the workplace.⁸⁹ Foreign employees can change jobs within the same field to avoid an employer taking advantage of their need for continuous employment for visa purposes.⁹⁰ Job portability is also likely to enhance a worker’s opportunity for a higher salary.⁹¹

Under AC-21, H-1B employees are authorized to accept new employment in a “same or similar” occupation provided that the new employer files a new petition on their behalf and the subsequent petition is approved.⁹² Additionally, AC-21 ensures a H-1B visa extension for foreign workers once their employment ends so that they may look for a new sponsor without having to leave the U.S. to do so.⁹³ Further, the H-1B visa remains valid while the worker is in the process of changing employers by granting a 60-day grace period at USCIS’ discretion.⁹⁴ This grace period ensures that the employee can safely change his workplace without being “out of status.”⁹⁵

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. See Michael R. Pfahl & Andrew Greenfield, *The Latest Updates on H-1B Visa Sponsorship*, 36 ASSOC. OF CORP. COUNSEL 72 (2018), <https://www.accdocket.com/articles/the-latest-updates-on-h-1b-visa-sponsorship.cfm>.

89. Stuart Anderson, *USCIS Policies Harming Labor Mobility Of H-1B Professionals*, FORBES (Dec. 17, 2018), <https://www.forbes.com/sites/stuartanderson/2018/12/17/uscis-policies-harming-labor-mobility-of-h-1b-professionals/#1778c15161f7>.

90. *Id.*

91. *Id.*

92. 8 U.S.C. § 1184(n) (2011).

93. See Pfahl & Greenfield, *supra* note 88.

94. *Id.*

95. U.S. Dep’t of Labor, *Factsheet #62W: What is “Portability” and to whom does it apply?* (Nov. 2016), <https://www.dol.gov/whd/regls/compliance/FactSheet62/whdfs62W.pdf>.

Prior to BAHA, a large percentage of petitions for a change of workplace were approved so long as the occupation was the same or similar enough to the previous title held.⁹⁶ However, the uncertainty, added costs, and long wait times under BAHA leave foreign employees wary of such attempts.⁹⁷ Additionally, approval of the 60-day grace period is no longer as predictable since it remains under the discretion of USCIS, which acts under BAHA orders to strictly enforce rules.⁹⁸ Moreover, USCIS suspended premium processing for new H-1B petitions and petitions to change employers.⁹⁹ Such premium processing guaranteed that an application would be expeditiously reviewed and a decision would be rendered within a reasonable time.¹⁰⁰ The suspension created a chilling effect on an employee's willingness to take the risk and apply for a change of workplace only to wait approximately ten months for approval, or worse, denial of their petition.¹⁰¹

C. The Overall Decline in H-1B Visa Approvals and Employer Willingness to Hire Foreign Talent

USCIS reported a sharp increase in denial rates for H-1B non-immigrant visa petitions.¹⁰² Although H-1B denial rates have been increasing since 2015, "the greatest increase occurred after the Trump Administration's Buy American, Hire American executive order."¹⁰³ Some employers are less inclined to file H-1B petitions due to the rise in cost, processing time, and unlikelihood of success.¹⁰⁴ According to the National Foundation for American Policy, H-1B petition denials have increased by 41%.¹⁰⁵ These denial rates most strongly impacted the information technology ("IT") sector dealing with the increase in RFEs due to the increased scrutiny on the computer programmer occupation. Consequently, some of the largest foreign IT outsourcing companies must depend less on H-1B foreign talent and are submitting fewer H-1B visa petitions.¹⁰⁶ The largest information technology outsourcing companies in the U.S. include Tata Consultancy Services Ltd. ("TCS"), Infosys Ltd., and Wipro Ltd.¹⁰⁷ Between 2015-2017, TCS's H-1B visa petitions dropped 18.3%, Infosys Ltd. reported a 38.1% drop, and Wipro Ltd. led with 52.4% less petitions filed.¹⁰⁸

96. Anderson, *supra* note 89.

97. *Id.*

98. Pfahl & Greenfield, *supra* note 88.

99. Anderson, *supra* note 89.

100. *See* Pfahl & Greenfield, *supra* note 88.

101. Anderson, *supra* note 89.

102. *Report, supra* note 77.

103. *Employers See More RFEs and Denials, USCIS Data Confirm*, FRAGOMEN (Feb. 25, 2019), <https://www.fragomen.com/insights/alerts/employers-see-more-rfes-and-denials-uscis-data-confirm>.

104. NFAP, *H-1B Denials and Requests for Evidence Increase Under the Trump Administration*, NFAP POLICY BRIEF (July 2018), <https://nfap.com/wp-content/uploads/2018/07/H-1B-Denial-and-RFE-Increase.NFAP-Policy-Brief.July-2018.pdf>.

105. *Id.*

106. *Indian IT Companies Reduce H-1B Visa Filings Drastically*, LIVEMINT (Apr. 4, 2018), <https://www.livemint.com/Politics/VrB1SRWgWp6BFRv1iikD6I/Indian-companies-have-dramatically-reduced-H1B-visa-filing.html> (Mint is one of India's leading business news publications).

107. *Id.*

108. *Id.*

Despite the Trump administration’s efforts to decrease H-1B visa applications, demand for foreign talent in tech industries is at an all-time high.¹⁰⁹ However, ever-increasing RFEs are making it harder for employers to take advantage of the benefits of H-1B visas and are allowing for overseas competition to become stronger and possibly hurt the U.S. economy.¹¹⁰ Whether due to a lack of American tech graduates or the increasing need for visa sponsorship of foreign-born graduates from U.S. colleges, many employers “just don’t have an option of not seeking an H-1B.”¹¹¹ Thus, the desired effects from implementing BAHA are not quantifiable and the core of the problem BAHA purports to fix may remain elsewhere.

Interestingly, among U.S. IT outsourcing companies, the results are noticeably different. The top five U.S. companies hiring H-1B workers are Amazon, Microsoft, Intel, Google, and Facebook.¹¹² These tech giants have reported a sharp increase in H-1B approvals, with Amazon in the lead.¹¹³ Additionally, Google, Intel and Facebook reported that 99 percent of their H-1B petitions were approved.¹¹⁴ Immigration officials explain that the bulk of denials stem from an employer’s inability to establish a valid relationship with the foreign workers and the worker’s failure to qualify for a “specialty occupation.”¹¹⁵ It is unclear from the data reported what percentage of RFEs and site visits targeted U.S. companies as compared to foreign outsourcers. Favoritism towards American parent companies or a better ability to attract the most highly skilled workers can be possible explanations of this phenomenon.¹¹⁶

III. U.S. Breach Under the GATS and Foreseeable Repercussions

Article 22 of the GATS provides that a State party may refer an arising dispute to the Council for Trade in Services or the Dispute Settlement Body (“DSB”) “to find a satisfactory solution through consultation.”¹¹⁷ If the dispute arises from a disagreement on whether the measure falls within the scope of the GATS, the matter must be resolved through arbitration, a decision that is final and binding.¹¹⁸ Additionally, under Article 23 of the GATS, such dispute between State parties may result in “modification or withdrawal of the measure.”¹¹⁹ The United States has made no reservations to the dispute settlement provisions of the GATS. Thus, claims may be brought before the DSB against the United States.

109. Laura D. Francis, *H-1B Program ‘Alive and Well,’ Latest Visa Lottery Results Show*, BLOOMBERG LAW: DAILY LABOR REPORT (Apr. 17, 2019, 5:55 A.M.), <https://news.bloomberglaw.com/daily-labor-report/h-1b-program-alive-and-well-latest-visa-lottery-results-show>.

110. *Id.*

111. *Id.*

112. Zoë Bernard, *Amazon is Hiring More Skilled Immigrant H-1B Workers Than Any Other Tech Company*, INC (Apr. 25, 2018), <https://www.inc.com/business-insider/h1b-visa-amazon-microsoft-google-tech-companies-hire-immigrant-foreign-workers.html>.

113. *Id.*

114. Luke Stangel, *Here’s how Silicon Valley’s largest tech employers did under Trump’s stricter H-1B process* (Feb. 25, 2019), <https://www.bizjournals.com/sanjose/news/2019/02/25/trump-h1b-silicon-valley-csco-aapl-fb-intc-goog.html>.

115. *Id.*

116. However, such analyses are beyond the scope of this Note and may serve as interesting future research topics.

117. *GATS*, *supra* note 7, at Art. 22.

118. *Id.*

119. *Id.* at Art. 23.

In analyzing whether there is a violation of Article II, no presumptions may be reached and each step of the test outlined in *Canada-Autos* must be completed. For example, the Appellate Body in *Argentina-Financial Services* found that the DSB failed to properly analyze “like services and service suppliers,” and, therefore, reversed the panel’s finding that Argentina breached its obligations towards Panama under Article II of the GATS.¹²⁰ Similarly, in *Canada-Autos*, the Appellate Body reversed the panel’s conclusion that there was an Article II violation under the GATS, although a duty-free advantage to cars originating in certain countries was not granted to all WTO members equally.¹²¹

Conversely, the Appellate Body in *EC-Bananas III* held that Ecuador’s banana suppliers were *de facto* discriminated against due to licensing procedures which conferred them less favorable treatment compared to some European countries.¹²² The Appellate Body agreed with the panel’s finding that the banana import licensing regime fell within the scope of GATS’ covered services.¹²³ Thus, the Appellate Body concurred with the panel’s finding that the “in-quota tariff rates create[d] less favourable conditions of competition for like service suppliers,” inconsistent with the requirements under the GATS.¹²⁴

Any argument that the provisions under the GATS are not binding domestically due to the non-self-executory nature of the agreement¹²⁵ is unwarranted in a dispute arising under international law.¹²⁶ Although historically immigration policies are left to the national government to regulate as it deems necessary in the interest of national security and benefit to its citizens,¹²⁷ the Charming Betsey canon requires that domestic law be interpreted in such a way so as not to conflict with international law.¹²⁸ Furthermore, under Article 19(c) of the VCLT, a State may

120. Appellate Body Report, *Argentina-Measures Relating to Trade in Goods and Services*, ¶ 7.1(a), WTO Doc. WT/DS453/AB/R (adopted Apr. 14, 2016) (hereinafter *Argentina-Financial*) (stating that the issue in *Argentina-Financial* revolved around a measure issued by Argentina which negatively affected services and service suppliers from States who did not share their tax information with Argentina. States who chose to not disclose tax information were classified as “non-cooperative” which in turn affected their financial services trade with Argentina).

121. *Canada-Autos*, *supra* note 38, at ¶ 185(e).

122. Appellate Body Report, *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, ¶ 255(u), WTO Doc. WT/DS27/AB/R (adopted Sept. 9, 1997) (hereinafter *EC-Bananas III*) (stating that in *EC-Bananas III*, the GATS violation arose from formally origin-neutral rules differentiating between banana wholesalers. The differentiation was based on past trade practices and led to African and Caribbean wholesalers being favored compared to all State parties. The panel found and the Appellate Body affirmed that using such differentiation amounted to a competitive disadvantage for some members and, therefore, violated Article II of the GATS.).

123. *Id.* at ¶ 222.

124. *Id.* at ¶ 244.

125. See *Suramerica de Aleaciones Laminadas, C.A. v. U.S.*, 966 F.2d 660, 667–68 (Fed. Cir. 1992) (holding that “[t]he GATT does not trump domestic legislation;” that it is a matter for Congress, not the court, to decide whether a domestic statute conflicts with the GATT and that a DSB interpretation of the GATT is not controlling in a United States court); See also *Reid v. Covert*, 354 U.S. 1, 15–18 (1957) (holding that Congress is only limited by the Constitution, not international law, in legislating).

126. *VCLT*, *supra* note 27, at Art. 2(b) (this argument becomes important when used as a defense against a dispute brought in a domestic court. Under international law, once a State party ratifies a treaty, the principles and norms outlined therein become binding.). However, the purpose of this Note is to analyze obligations and violations under international law. Whether the BAHA is also a violation of domestic laws is a topic that can be better explored in subsequent work.

127. See *Worster*, *supra* note 37.

not make any reservations that are “incompatible with the object and purpose of the treaty.”¹²⁹ In examining attitudes during the Uruguay Round of negotiations preceding the GATS, developing countries were reluctant to enter into the agreement absent a promise to liberalize the “movement of labour force” and an MFN provision ultimately championed by India, the leader in H-1B petitions.¹³⁰ Thus, policy measures further restricting labor mobility run contrary to the expectations of member States and frustrate the very purpose behind ratifying the GATS.

A. The Measure Affects Trade in Services

1. The Measure and Services are Covered by the GATS

Measures cover a broad array of State party acts “whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form.”¹³¹ The GATS places no limitations on some types of measures compared to others, and “there is no legal basis for an *a priori* exclusion of measures . . . from the scope of the GATS.”¹³² Assessing whether a measure is covered by the GATS requires that (1) the trade in services fall within one of the four Modes of Supply and (2) the measure must affect such trade.¹³³

First, the trade in services at issue here, nonpermanent foreign workers, falls squarely within Mode Four’s “temporary movement of natural persons,” as such workers temporarily travel to the United States to supply in-person services in various sectors.¹³⁴ Additionally, the U.S. made a specific commitment in the first round of GATS negotiations to allow for the approval of 65,000 H-1B visas a year.¹³⁵ Second, section 5(b) of BAHA specifically targets H-1B applicants, and requires an increase in the level of scrutiny for such petitions.¹³⁶ No other nonpermanent employment visa category is specifically listed therein.¹³⁷ Consequently, the sub-regulatory measure affects H-1B applicants covered by Mode Four of the GATS. Thus, the sub-regulatory measures implemented through BAHA are covered by the GATS.

2. Like Services and Service Suppliers

To assess “like services and service suppliers,” this note will adopt the definition given by the Appellate Body in *Argentina-Financial*. There, the denotation of “like” implies a service or services supplier with a number of characteristics or qualities similar to those of another, usually services placed in competition with each other.¹³⁸ The similarity approach applies in the con-

128. *Murray v. Schooner Charming Betsey*, 6 U.S. 64, 2 L. Ed. 208 (1804).

129. *VCLT*, *supra* note 27, at Art. 19.

130. Marchetti, *supra* note 14, at 717–18.

131. Worster, *supra* note 37, at 61 (quoting *GATS*, *supra* note 7, at Art. 28(a)).

132. *EC-Bananas III*, *supra* note 122, at ¶ 220.

133. *GATS-Article II (Jurisprudence)*, *supra* note 26, at ¶ 1.2(1).

134. Martin, *supra* note 23.

135. *Id.*

136. Exec. Order No. 13788, 82 Fed. Reg. 18837 (Apr. 21, 2017).

137. *See id.*

138. *GATS-Article II (Jurisprudence)*, *supra* note 26, at ¶ 1.3.

text of trade in goods or trade in services.¹³⁹ However, the Appellate Body cautioned that “likeness of services and service suppliers can only be determined on a case-by-case basis, taking into account the specific circumstances of the particular case.”¹⁴⁰

Certain nonpermanent employment visa categories requiring a higher level of skill garner the similarity required of “like services and service suppliers” because they share several elements in common with H-1Bs: they fall under Mode Four of the GATS due to their nature of supplying services by natural persons; they initially are of a non-permanent nature (many non-permanent visas lead to Legal Permanent Residence); they relate to similar services rendered, and they require advanced skills similar to highly-skilled H-1B workers. Thus, this Note will look at nonimmigrant employment categories classified as O, P, L, and E visas, and treat them as “like services and service suppliers.”¹⁴¹

The O-1 nonimmigrant visa category applies to noncitizens with extraordinary abilities “in sciences, arts, education, business, or athletics.”¹⁴² This category allows nonimmigrants such as artists and entertainers to be admitted in the U.S. “even if they would not qualify for H-1B status because they lack academic degrees.”¹⁴³ Accompanying individuals such as stage crew are admitted under the O-2 category, and spouses and children may be admitted under an O-3 visa.¹⁴⁴ The latter category is not authorized to work in the United States.¹⁴⁵ Additionally, there is no cap on the number of O visas granted each year and no wage regulation.¹⁴⁶ Although the duration of admission under an O visa is limited to the specific period of an event, it can be extended for up to ten years.¹⁴⁷ This is an alternative path to the H-1B category, although a much higher standard due to the “extraordinary ability” requirement not present under H-1B’s prerequisites.

The P-1 nonimmigrant category includes entertainers and athletes who are less accomplished than those in the O-1 category.¹⁴⁸ However, their achievement must be beyond ordinary and must be recognized in more than one country.¹⁴⁹ The P-2 and P-3 categories are reserved for those who do not meet the P-1 category standard and are a part of exchange programs or cultural uniqueness.¹⁵⁰ Similar to the O-visa category, spouses and children may be admitted under the O-4 category and are not authorized to work in the United States.¹⁵¹ Like the O category, P visas are not capped, their wages are not regulated, and their duration may extend for up to ten

139. *Id.*

140. *Id.* (quoting Argentina-Financial, *supra* note 120).

141. ALEINIKOFF, *supra* note 40, at 382.

142. *Id.* at 405.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 405–06.

148. *Id.* at 405.

149. *Id.*

150. *Id.*

151. *Id.*

years.¹⁵² In contrast to H-1B regulations, O and P visa regulations are a lot more relaxed, allowing for more employees, more discretion in wages paid and a longer term of employment.

Second to H-1B visas, L-1 Intracompany Transferees are the most common among non-immigrant work visas and are most often used by multinational corporations who transfer employees from one branch to another.¹⁵³ The corporation must establish a relationship between an “overseas parent, branch, affiliate, or subsidiary and the United States parent, branch, affiliate or subsidiary.”¹⁵⁴ Employees granted L-1 visas must serve “in a capacity that is managerial, executive, or involves specialized knowledge” of the company in international markets.¹⁵⁵ Additionally, such employees must have been with the company for at least a year prior to their transfer request, and large companies may file blanket petitions for their transferees.¹⁵⁶ Also, there is no cap on the L-1 visa pool and employers do not have to file an attestation as seen in the case of H-1Bs.¹⁵⁷ L-1 visa applicants are initially admitted for three years and may extend their stay for up to seven years.¹⁵⁸ Ultimately, only companies with overseas branches or subsidiaries may petition for L-1 visas for their employees. The number of L-visas has increased “from 26,535 in fiscal year 1980 to 149,621 in fiscal year 2014.”¹⁵⁹

Finally, E Treaty Traders and Treaty Investors must be nationals of a country with whom the U.S. has an international agreement or a treaty.¹⁶⁰ Although the U.S. has entered into a treaty agreement with most WTO member States, it has not done so with Cuba and India.¹⁶¹ Thus, employees from these States cannot qualify for a visa under this category.¹⁶² Initially, E-visas are awarded for up to two years and individuals may remain in the U.S. as long as they engage in the activities initially granted.¹⁶³ Additionally, E-visa applicants do not need to submit an initial petition by their U.S. employer.¹⁶⁴ Moreover, E visa holders may be accompanied by their spouses and children in the same capacity and they are authorized to work in the United States.¹⁶⁵ Comparing to H-1B visa requirements, E visas are more lenient in time limitations, the vetting process that employers have to succumb to and, possibly, their spouses’ right to work in the U.S.

Alternatively, an argument can be made for like services and services suppliers within the H-1B category, specifically the types of occupations filing for H-1B visas. According to the

152. *Id.* at 405–06.

153. *Id.* at 406.

154. Worster, *supra* note 37, at 110.

155. ALEINIKOFF, *supra* note 40, at 406 (quoting INA § 101(a)(44)).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 409.

161. Int’l Trade Admin., *Free Trade Agreements*, <https://www.trade.gov/fta> (last visited May 11, 2019).

162. *Id.*

163. ALEINIKOFF, *supra* note 40, at 409.

164. *Id.*

165. *Id.*

USCIS Trend Tables, the top three occupation categories are computer-related fields, architecture and engineering, and administrative specialization.¹⁶⁶ In applying the same analysis from *Argentina-Financial*, these occupations are in competition with each other for the number cap of H-1B approvals.¹⁶⁷ Moreover, they are like services or service suppliers because they supply employees in fields requiring highly-skilled labor.

B. Treatment No Less Favorable

Treatment is less favorable if it modifies the conditions of competition to the detriment of a State party when compared to the treatment of services and service suppliers of another member.¹⁶⁸ A good example is the *EC-Bananas III* case, where different licensing procedures on banana suppliers depending on their country of origin were deemed to amount to less favorable treatment.¹⁶⁹ Although there is no specific case regarding a dispute under Mode Four's natural persons supplying labor as a service, this Note will analyze the treatment afforded to H-1B petitioners under BAHA by analogy.

BAHA specifically targets H-1B visas and does not purport to regulate any other nonpermanent employment visa.¹⁷⁰ The two subsections dedicated to "Ensuring the Integrity of the Immigration System in Order to 'Hire American'" specifically focus on implementing reforms "to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries."¹⁷¹ Additionally, the Trump administration has not implemented any other policy changes, directives or memorandums impacting the O, P, and E visa classifications qualified as like services or service suppliers.

Conversely, BAHA has indirectly impacted the L-1 visa category by amending the Department of State Foreign Affairs Manual ("FAM").¹⁷² Although L-1 visa wages are not regulated, the FAM amendments place L-1 applicants with low-level wages under scrutiny, using them as an indicator that the position may not be managerial or executive in nature.¹⁷³ Also, similar to H-1B visas, L-1 applicants must confirm that they do not intend to displace any U.S. employees in addition to proving that a U.S. worker would not be able to fill their position.¹⁷⁴ Moreover, the increase in RFEs and site visits equally impacts L-1 employees,¹⁷⁵ especially in the

166. *H-1B 2007-2017 Trend Tables*, *supra* note 55. Computer-related occupations are clearly in the lead with 231,033 petitions out of a total of 336,207 receipts. The latter two categories are at a stark 28,133 petitions for architecture and engineering, and 21,472 petitions for administrative specializations. *Id.*

167. *GATS-Article II (Jurisprudence)*, *supra* note 26, at ¶ 1.3.

168. *Id.* at ¶ 21.

169. *EC-Bananas III*, *supra* note 120, at ¶ 220.

170. *See generally* Exec. Order No. 13788, 82 Fed. Reg. 18837 (Apr. 21, 2017).

171. *Id.*

172. Cyrus D. Metha & Sophia Genovese, *The Effects of 'America First Foreign Policy' and 'Buy American Hire American' on the Foreign Affairs Manual*, 22-21 BENDER'S IMMIGR. BULL. 1, 3 (2017).

173. *Id.*

174. "Buy American and Hire American" Executive Order, WEAVER SCHLENGER LLP, <https://www.wsmimmigration.com/immigration-resources/faqs/%E2%80%9Cbuy-american-and-hire-american%E2%80%9D-executive-order> (last visited Mar. 31, 2019).

175. *Id.*; H-1B Handbook § 1:47 (2019 ed.).

field of L-1 “new office” visas where there is a significant increase in outright denials.¹⁷⁶ Under BAHA, more than one in five L-1 visa petitions are denied.¹⁷⁷ Although BAHA negatively impacts L-1 visas similar to H-1Bs, the two are inextricably linked.¹⁷⁸ L-1 visas are used as alternatives to H-1Bs especially when “the employer may be prevented from utilizing the H-1B category because of the annual limits on new admissions.”¹⁷⁹ Corporate immigration leader, Fragomen, Del Rey, Bernsen & Loewy advises employers to consider the L-1 visa category as a safety net, even when the H-1B classification squarely applies.¹⁸⁰

Moreover, there is treatment less favorable within the H-1B visa category itself. The March 31, 2017 policy memorandum places an additional hurdle on the computer-related occupation, and calls for enhanced scrutiny due to the nature of the skill requirement, which allows for a bachelor’s degree or the equivalent in experience.¹⁸¹ This memorandum creates a benefit for all other occupations competing for the same H-1B visa cap, leaving the computer-related category, which is by far the largest, at a disadvantage.

Thus, among highly-skilled non-permanent employee visas, the USCIS screens H-1B petitions particularly harshly. It imposes complex RFEs, limits the applicability of the computer-related field, views Level 1 wages as suspect, and denies petitions that were historically granted. No other nonpermanent visa category receives such unfavorable treatment, except for the L-1 category which is closely linked and an ideal alternative to H-1B petitions. Under the *EC-Bananas III* analysis, this constitutes less favorable treatment compared to like services and service suppliers.

Conclusion

Labor mobility is an increasing necessity in a global economy and runs contrary to the anti-foreign-worker rhetoric of the times. The H-1B visa category is the most common form of recruiting foreign talent in the U.S., followed by L-1 intra-company transferees. In an effort to liberalize services and service suppliers, WTO members negotiated the GATS with protective provisions such as the MFN clause in mind. In particular, developing countries wanted to make sure that they benefitted from the GATS and made clear in their negotiations that being able to send workers to member States was an important provision. The duties under the GATS are binding on the U.S. who has specifically committed to 65,000 H-1B visas a year within the GATS Annex. Consequently, the U.S. has the obligation to afford treatment no less favorable to like services and service suppliers of all member States under Article II of the GATS.

176. Paul Altman, *L-1 Visa New Office Petitions: A Brave New World*, <http://dlgimmigration.com/l-1-visa-new-office-petitions-a-brave-new-world> (last visited Mar. 31, 2019) (an L-1 “new office” visa refers to a new overseas branch having the opportunity to establish a relationship with a U.S. company. The USCIS standard for approving the “new office” after the one-year mark was for the new branch to show that it benefitted the U.S. parent or subsidiary.).

177. *Id.*

178. H-1B Handbook, *supra* note 175.

179. *Id.*

180. *Id.*

181. *New USCIS Guidance*, *supra* note 65.

De facto discrimination under Article II requires a finding that a State party has implemented a measure covered by the GATS that disproportionately affects competition within like services and service suppliers to the agreement. BAHA seeks to do just that through its March 31, 2017 policy memorandums. The sub-regulatory measures it applies specifically to H-1B visa applicants makes it harder and costlier for employers to recruit foreign talent, especially in the computer-related field now viewed as suspect. Also, BAHA places added barriers to the H-1B cap by requesting lengthy RFEs that ultimately lead to confusion and uncertainty, delayed processing times, and less job portability. As denial rates increase, employers look for bleak alternatives to hiring foreign talent.

In three seminal cases, the Appellate Body laid out the test for identifying discriminatory measures: (1) the measures must be covered by the GATS, (2) they must affect like services and service suppliers, and (3) they must provide less favorable treatment to some service groups compared to others. This Note has concluded that the measures under BAHA fall squarely within Mode Four of the GATS, which deals with movement of natural persons. Highly-skilled nonpermanent workers from the H-1B, L-1, O, P and E categories qualify as like services and service suppliers. Within the same H-1B category, various occupations also classify as like services, with the top three contenders being in computer-related fields, architecture and engineering, and administrative specialization. BAHA measures specifically target H-1B petitions and computer-related employees, thus, putting them at a disadvantage to other visa petitioners. Consequently, such disadvantage rises to the level of treatment less favorable under GATS jurisprudence.

The Buy American, Hire American Executive Order purports to put American workers' interests first while increasing selectivity towards highly-skilled workers. Only the best of the best make the cut. However, the U.S. neglects its international law obligations under the GATS and violates the Most-Favored-Nation treatment clause in the process. H-1B visa applicants incur additional burdens compared to their competitive counterparts leaving a sour taste for employers looking to hire needed foreign talent. In effect, "America is still open for business, but it is harder to get in."¹⁸²

182. *Corporate Immigration 2018: Trends & Conclusions* (Apr. 6, 2018), <https://whoswholegal.com/analysis/analysis/corporate-immigration-2018-trends--conclusions>.

Foreign Law Makes a Mockery of International Instruments in an Attempt to Protect Voiceless Victims: A Call on the UK Modern Slavery Act to Adhere to International Anti-Trafficking Instruments

Amanda Luneburg

Introduction

Human trafficking is a global epidemic. In the United Kingdom, "[t]he full scale and extent of [human trafficking and slavery], we don't know. But what we have found is that in every medium-to-large town and every city in the U[nited] K[ingdom], [there is] evidence of vulnerable people being exploited."¹ As of 2017, the number of human trafficking victims in the United Kingdom ("UK") continues to increase.² Furthermore, over 1,700 victims were referred to the National Referral Mechanism within the UK between July and September 2018.³ The states that make up the UK try their best to handle the increase of victims by following guidelines outlined in international instruments and by creating their own domestic laws.⁴ The UK Modern Slavery Act allows for Northern Ireland to have its own human trafficking law, which has caused disparate treatment among victims within the UK as a whole.⁵ The UK, thus, became an easy target for both gang leaders and other countries to exploit; UK

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1. *Trafficking and slavery worse than feared: former top NI cop*, BELFAST TELEGRAPH (Aug. 11, 2017, 2:30 AM), <https://www.belfasttelegraph.co.uk/news/northern-ireland/trafficking-and-slavery-worse-than-feared-former-top-ni-cop-36020450.html>.
 2. See HOME OFFICE, 2017 UK ANN. REP. ON MOD. SLAVERY 4 (2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652366/2017_uk_annual_report_on_modern_slavery.pdf (hereinafter 2017 ANNUAL REPORT); *Record number of slavery victims referred in UK, says report*, BBC NEWS (Mar. 26, 2018), <https://www.bbc.com/news/uk-43535492> (stating that there were over 5,000 victims referred in 2017 alone).
 3. *National Referral Mechanism Statistics Quarter 3 2018 – July to September*, NAT'L CRIME AGENCY (Nov. 14, 2018), <https://www.nationalcrimeagency.gov.uk/who-we-are/publications/237-modern-slavery-and-human-trafficking-national-referral-mechanism-statistics-july-to-september-2018/file>.
 4. Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act, 2015, c. 2 (Northern Ireland) (hereinafter Northern Ireland Act); Modern Slavery Act 2015, c. 30 (U.K.); see generally Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Dec. 15, 2000, 2237 U.N.T.S. 319 (hereinafter Palermo Protocol).
 5. See generally Modern Slavery Act 2015, c. 30 (U.K.) (stating throughout the Act that the offenses and acts targeted are how it is "in England and Wales" and that the Independent Anti-Slavery Commissioner has limited authority over Northern Ireland); *Modern slavery A council guide*, INDEP. ANTI-SLAVERY COMM'R 1, 10 (2017), <https://www.antislaverycommissioner.co.uk/media/1201/modern-slavery-a-council-guide.pdf>; Christine Beddoe & Vicky Brotherton, *Class Acts? - Examining Modern Slavery Legislation Across the UK* (Oct. 2016), http://www.antislavery.org/wp-content/uploads/2017/01/atmg_class_acts_report_web_final.pdf.

nationals have also become the perfect trafficking victims.⁶ Despite England, Wales, and Northern Ireland being members of the UK, and all of the UK states deriving their human trafficking laws from the Convention on Action Against Trafficking in Human Beings and Directive 2011/36/EU,⁷ there are stark differences on how each state treats human trafficking victims. In order to comply with the Convention and the Directive, England and Wales' legislation should follow Northern Ireland's approach in providing statutory footing for victims' rights, not just for the victims but to ensure legislative unity amongst UK states.

Part I of this Note will explore the meaning of human trafficking and how it relates to international agreements and directives, as well as legislation within the United Kingdom. Specifically, it will focus on UK's Modern Slavery Act and Northern Ireland's Human Trafficking and Exploitation Act. Part II will discuss Northern Ireland's current approach to victim identification and protection and will also highlight recommendations on how to improve its legislation. Part III will address England and Wales' current legislation and the chaotic system currently in place for victim identification and protection. It will also discuss the urgent calls for change from both the Group of Experts on Action against Trafficking in Human Beings and scholars. Part IV will argue that the most plausible solution to a majority of the issues the Modern Slavery Act contains, is to adopt Northern Ireland's victim identification and protection approach.

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6. See, e.g., Kieran Guilbert, *Criminal gangs 'abuse' UK anti-slavery law to recruit child drug mules*, REUTERS (Jan. 15, 2019, 11:48 AM), <https://www.reuters.com/article/us-britain-slavery-law/criminal-gangs-abuse-uk-anti-slavery-law-to-recruit-child-drug-mules-idUSKCN1P922F>; cf., *Trafficking in Human Beings*, EUROPOL, <https://www.europol.europa.eu/crime-areas-and-trends/crime-areas/trafficking-in-human-beings> (last visited Oct. 14, 2018) ("In 2014 . . . the majority of human trafficking victims (71 %) registered in Europol's database were EU citizens."); cf., *Human trafficking: more than 20 million victims worldwide*, EUROPEAN PARLIAMENT (Oct. 18, 2016, 3:55 PM), <http://www.europarl.europa.eu/news/en/headlines/world/20161014STO47261/human-trafficking-more-than-20-million-victims-worldwide> ("The majority of identified victims and suspected traffickers in the EU are EU nationals.").
 7. See GRETA (2015) 26, *Reply from the United Kingdom to the Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties*, Council of Eur. 43, (Jun. 10, 2015), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680665003> (hereinafter United Kingdom Reply) (the U.K. is a member of other international anti-trafficking instruments, but those are not the focus of this Note and are not mentioned in the states' respective legislations).

I. Understanding Human Trafficking and Relevant International Legislation

A. What Is Trafficking in Human Beings under International Law?

Human trafficking, or trafficking in human beings,⁸ is a lucrative form of organized crime that spreads transnationally.⁹ The act of trafficking human beings is an extraordinarily nefarious way of violating victims' fundamental human rights.¹⁰ Human trafficking is modern-day slavery; the victims can be recruited, transported, held by force, or coerced.¹¹ Victims are exploited via numerous methods including, but not limited to, sexual exploitation, forced labor, various criminal activities, and the removal of their organs.¹² The European Union ("EU") best described human trafficking as "a severe violation of individual freedom and dignity and a serious form of crime, that often has implications which individual countries cannot effectively address on their own."¹³

In 2016, according to the International Labour Organization ("ILO"), there were 5.4 victims of modern slavery for every one thousand people *in the world*.¹⁴ The ILO also stated that "in the past five years, 89 million people experience[d] some form of modern slavery for periods of time ranging from a few days to [] five years."¹⁵ In the UK—a human trafficking "destination country"—4,586 potential victims were identified in 2016 alone.¹⁶ Moreover, in March of 2017, England and Wales reported an increase of 159% in modern slavery crime.¹⁷ In contrast, only thirty-five similar cases were reported in Northern Ireland during the same time-frame.¹⁸

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8. *Human Trafficking*, U. N. OFFICE ON DRUGS AND CRIME, https://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html#What_is_Human_Trafficking (last visited Mar. 27, 2019); *Trafficking in Human Beings*, *supra* note 6.
 9. See *Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions—The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016*, COM (2012) 286 final (June 19, 2012) 2, https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/the_eu_strategy_towards_the_eradication_of_trafficking_in_human_beings_2012-2016_1.pdf ("A lucrative form of crime, trafficking in human beings generates profits of dozens of billions of euro for the perpetrators each year.") (hereinafter *Communication from the Commission*); see also *Trafficking in human beings*, https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/trafficking-in-human-beings_en (last visited Oct. 14, 2018) ("Trafficking in human beings is a grave violation of fundamental human rights and an extremely pernicious and highly lucrative form of transnational organised crime").
 10. *Trafficking in human beings*, *supra* note 9.
 11. *Communication from the Commission*, *supra* note 9.
 12. *Id.*
 13. *Id.*
 14. *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, ALLIANCE (2017), https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575479.pdf.
 15. *Id.*
 16. REPRESENTATIONS OF TRANSNATIONAL HUMAN TRAFFICKING: PRESENT-DAY NEWS MEDIA, TRUE CRIME, & FICTION 18 (Christiana Gregoriou ed., 2018); 2017 ANNUAL REPORT, *supra* note 2, at 4. Due to the hidden nature of this crime, getting accurate measurements of its prevalence is difficult. *Id.* at 7.
 17. 2017 ANNUAL REPORT, *supra* note 2, at 4.
 18. *Id.*

Some states have adopted the term “modern slavery” when talking about human trafficking. The term gained further recognition when the UK used it as the title of its anti-trafficking law.¹⁹ The UK defines “modern slavery” as encompassing slavery, servitude, forced or compulsory labor, and human trafficking.²⁰ The basic difference between the traditional definition of “trafficking” and “modern slavery” is that the general purpose of trafficking is to transport people, not necessarily across state lines, to exploitive environments, while modern slavery encompasses various forms of control and exploitation without the option to leave.²¹ “Trafficking” is, therefore, under the umbrella of “modern slavery.”²² However, what the UK defines as “modern slavery,” the United Nations’ Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children calls “trafficking in persons.”²³ The Protocol’s definition has been adopted and used in various international and foreign instruments, including the Council of Europe’s Convention on Action Against Trafficking in Human Beings, UK’s Modern Slavery Act, and Northern Ireland’s Human Trafficking and Exploitation Act.²⁴ Therefore, when discussing “modern slavery” and “trafficking” in this Note, the two terms can be seen as overlapping and fighting the same crime.

B. A Brief Review of the International Response to Human Trafficking

One of the first monumental international steps to address this epidemic was the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (“Protocol”), adopted in 2000 during the United Nations Convention against Transnational Organized Crime.²⁵ The Protocol is significant to combating human trafficking because it is the first universal instrument to address all aspects of trafficking people.²⁶ One aspect addressed in Arti-

19. Modern Slavery Act 2015, c. 30.

20. See *id.* at c. 30 § 1–3; see also INDEPENDENT ANTI-SLAVERY COMMISSIONER, MODERN SLAVERY A COUNCIL GUIDE, 2017, at 6, <https://www.antislaverycommissioner.co.uk/media/1201/modern-slavery-a-council-guide.pdf> (the three components of modern slavery are: slavery, trafficking, and forced labor); *Modern slavery and human trafficking*, NAT’L CRIME AGENCY, <https://www.nationalcrimeagency.gov.uk/what-we-do/crime-threats/modern-slavery-and-human-trafficking> (last visited Oct. 17, 2019).

21. *What is modern slavery?*, ANTI-TRAFFICKING INT’L, <https://www.antislavery.org/slavery-today/modern-slavery/> (last visited Oct. 25, 2019); *What is human trafficking?*, ANTI-TRAFFICKING INT’L, <https://www.antislavery.org/slavery-today/human-trafficking/> (last visited Oct. 25, 2019).

22. See Modern Slavery Act 2015, c. 30 § 2; *Modern Slavery*, SUSSEX POLICE, <https://www.sussex.police.uk/advice/advice-and-information/ms/modern-slavery/> (last visited Mar. 27, 2019); *What is modern slavery?*, *supra* note 21.

23. See Modern Slavery Act 2015, c. 30 § 1–4; see also Palermo Protocol, *supra* note 4, at art. 3(a).

24. See *e.g.*, Northern Ireland Act, *supra* note 4, at § 17; Modern Slavery Act 2015, c. 30, Explanatory Notes ¶ 5 (U.K.), http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpgaen_20150030_en.pdf.

25. See Palermo Protocol, *supra* note 4, at art. 1; see also *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, U. N. OFFICE OF DRUGS AND CRIME (2000), <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html>; see *Status of the Treaty Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, U. N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=XVIII-12-a&chapter=18&lang=en (last visited Feb. 20, 2019) (the UK and Northern Ireland signed the Protocol on December 14, 2000 and ratified it on February 9, 2006. No reservations or objections were made by those states).

26. See Palermo Protocol, *supra* note 4, at art. 2.

cle 2 of the Protocol is the need “[t]o protect and assist the victims of such trafficking, with full respect for their human rights.”²⁷ Additionally, Article 3 was the first of its kind to give a universal definition of “trafficking in persons.”²⁸ The Protocol states that “trafficking in persons” is:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.²⁹

Significantly, the Council of Europe’s Convention on Action against Trafficking in Human Beings, England, Wales, and Northern Ireland use this definition and other definitions outlined in Article 3 of the Protocol in their own respective anti-trafficking instruments.³⁰

On May 3, 2005, the Committee of Ministers of the Council of Europe initiated the Convention on Action Against Trafficking in Human Beings (the “Convention”).³¹ By February 1, 2008, the Convention was put into force³² as a means to cover all forms of trafficking and include all types of victims.³³ This instrument was not meant to hinder the Protocol, but to “enhance the protection afforded by it and develop the standards contained therein.”³⁴ Particularly, it goes beyond the minimum standards set by previous international anti-trafficking instruments and enhances victim protection.³⁵ More specifically, the Convention elaborates on the ways parties may draft their own anti-trafficking legislation to comply with the Group of Experts on Action against Trafficking in Human Beings (“GRETA”).³⁶ GRETA, which is outlined in Articles 36 through 38 of the Convention, “is responsible for monitoring [the] implementation of the [Council of Europe’s] Convention on Action against Trafficking in Human

27. *Id.*

28. *Id.* at art. 3; *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, *supra* note 25.

29. Palermo Protocol, *supra* note 4, at art. 3.

30. *See e.g.*, Northern Ireland Act, *supra* note 4, at § 17; Modern Slavery Act 2015, c. 30, Explanatory Notes ¶ 5.

31. *About the Convention*, COUNCIL OF EUR., <https://www.coe.int/en/web/anti-human-trafficking/about-the-convention> (last visited Dec. 9, 2018).

32. *Id.* (the Convention covers both national and transnational forms, as well as organized and non-organized crime).

33. *Id.*

34. Council of Europe Convention on Action against Trafficking in Human Beings, Art. 39, May 3, 2005, 2569 U.N.T.S. 33 (hereinafter Council of Europe Convention) (emphasis added).

35. *About the Convention*, *supra* note 31; Council of Europe Convention, *supra* note 34, at art. 39 (article 39 specifies that the Convention does not affect the Palermo Protocol and, in fact, enhances the victim protection standards within it); *id.* at art. 45 (additionally, parties cannot make reservations to any part of the Convention except to Article 31 ¶ 2).

36. *See generally About the Convention*, *supra* note 31.

Beings by the [p]arties.”³⁷ GRETA oversees each party’s legislation and regularly publishes evaluation reports.³⁸ Additionally, the Convention does not aim to hinder other international instruments, but, instead, attempts to coincide with such instruments regarding protection and assistance for trafficking victims.³⁹ The UK as a whole signed the Convention on March 23, 2007, and entered it into effect on January 4, 2009.⁴⁰

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims (“the Directive”) outlines standards that EU states should follow in their efforts to combat human trafficking.⁴¹ The Directive emphasizes that other international instruments should be utilized in the fight against human trafficking in addition to the Directive itself.⁴² The UK, still a member of the EU and the Council of Europe, adopted the Directive, which became one of the legal bases for both the Modern Slavery Act and Northern Ireland’s Human Trafficking and Exploitation Act.⁴³

C. International Law Obligations All UK States Must Adhere to Under the Directive and the Convention as They Relate to Victim Treatment

The Directive and Convention require parties, such as the UK, to take certain actions in order to comply with and adhere to the obligations thereunder.⁴⁴ For instance, the Convention requires that parties take necessary steps to ensure cohesion and harmony between all organizations within their state responsible for combating human trafficking.⁴⁵ Additionally, it requires the parties to form and enhance programs and policies relating to anti-trafficking, such as raising awareness, education, social and economic initiatives, and training programs.⁴⁶

37. GRETA, COUNCIL OF EUR., <https://www.coe.int/en/web/anti-human-trafficking/greta> (last visited Oct. 18, 2019); *United Kingdom // 47 States, one Europe*, COUNCIL OF EUR., <https://www.coe.int/en/web/portal/united-kingdom> (last visited Dec. 9, 2018).

38. See generally Council of Europe Convention, *supra* note 34, at art. 38; see also *United Kingdom // 47 States, one Europe*, *supra* note 37.

39. See Council of Europe Convention, *supra* note 34, at art. 40.

40. *Chart of signatures and ratifications of Treaty 197*, COUNCIL OF EUR., https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/197/signatures?p_auth=C8VCXTSf (last visited Mar. 31, 2019) (the Convention was ratified by the UK on December 17, 2008).

41. See generally Directive 2011/36/EU of the European Parliament and of the Council on preventing & combating trafficking in human beings and protecting its victims, 2011 O.J. (L 101) 1 (hereinafter Directive 2011/36/EU).

42. See generally *id.* at § 13.

43. *Id.* at art. 22(3); Modern Slavery Act 2015, c. 30, Explanatory Notes ¶ 5; see Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Bill as amended at Further Consideration Stage EFM 2014, N. Ir. Assemb. Bill 26/11-15 cl. 4 (N. Ir.), <http://www.niassembly.gov.uk/assembly-business/legislation/2011-2016-mandate/current-non-executive-bill-proposals/human-trafficking-and-exploitation-further-provisions-and-support-for-victims-bill-/human-trafficking-and-exploitation-efm/>. Regardless of the outcome of Brexit, the UK is still a member of the Council of Europe; therefore, its membership to the Directive should not be affected.

44. See generally Council of Europe Convention, *supra* note 34; Directive 2011/36/EU, *supra* note 41.

45. Council of Europe Convention, *supra* note 34, at art. 5(1).

46. *Id.* at art. 5(2); *id.* at art. 6(b) (it is important to enhance and strengthen the former programs and policies to combat the evil at its root).

Article 10 of the Convention relates to the “identification of victims” and requires that parties have competent authorities trained to combat trafficking, identify and help victims, and ensure that different organizations are working together.⁴⁷ Moreover, the competent authority should have “reasonable grounds” to believe someone is a victim of trafficking to ensure they receive proper assistance.⁴⁸ Article 12 explains what parties must do to provide assistance to victims.⁴⁹ Parties are required to provide assistance and support to victims’ “physical, psychological and social recovery.”⁵⁰ Article 12 subsequently sets a minimum threshold of services that a state must provide.⁵¹ This assistance shall take into account the victim’s needs, and no state can make receipt of such assistance services conditional on being a witness.⁵² Moreover, Article 13 addresses the obligation of providing a “recovery and reflection period” of “at least 30 days.”⁵³ The period should be long enough for a victim to recover and reduce their chances of recidivating to trafficking “and/or enough time to make an informed decision on cooperating with [the] competent authorities.”⁵⁴ During this period, the victim shall remain in the states’ territory and receive at a minimum the assistance discussed in Article 12.⁵⁵ The Convention’s Articles are designed to ensure parties are committed to obliterating human trafficking.

Applying predominantly to the EU and the Council of Europe, the Directive states that parties must ensure victims are given appropriate assistance and support before, during, and after criminal proceedings; the support shall be afforded as soon as a “reasonable grounds” decision is made by a competent authority that the person may be a victim.⁵⁶ Similarly, assistance and support cannot be made conditional to cooperating with law enforcement or prosecutors.⁵⁷ Additionally, the parties need to create appropriate mechanisms for early identification.⁵⁸ After a victim is identified, Article 11(5) of the Directive describes what assistance and support should be provided: “at least standards of living capable of ensuring victims’ subsistence through measures such as the provision of appropriate and safe accommodation and material assistance, as well as, necessary medical treatment.”⁵⁹ The Directive also requires states to take the necessary steps to discourage any trafficking in human beings.⁶⁰ Education and

47. *Id.* at art. 10(1).

48. *Id.* at art. 10(2).

49. *Id.* at art. 12.

50. *Id.* at art. 12(1).

51. Council of Europe Convention, *supra* note 34, at art. 12(1)(a)–(f) (the bare minimum of assistance to be provided includes access to emergency medical treatment, legal counsel, and adequate standards of living).

52. *Id.* at art. 12(2) & (6).

53. *Id.* at art. 13(1) (emphasis added).

54. *Id.* at art. 13(1).

55. *Id.* at art. 13(1) & (2).

56. Directive 2011/36/EU, *supra* note 41, at art. 11(1) & (2).

57. *Id.* at art. 11(3).

58. *Id.* at art. 11(4).

59. *Id.* at art. 11(5).

60. *Id.* at art. 18(1).

training, awareness campaigns, and codifying the acts involved in trafficking as criminal offenses are all measures that can be taken to discourage human trafficking.⁶¹ Both international instruments should be adhered to by their respective joining parties—like the UK.

D. Current Acts and Mechanisms in Place Within the United Kingdom that Stem from International Anti-Trafficking Instruments

In 2009, the UK created the National Referral Mechanism (“NRM”) as the first fulfillment of its obligations under the Convention.⁶² Deriving its definition of “trafficking in persons” from the Convention and Protocol, the NRM helps locate and identify potential victims and ensures they receive appropriate support.⁶³ First, a potential victim is referred to the NRM by a first responder.⁶⁴ A Competent Authority then makes a “reasonable grounds” decision.⁶⁵ Finally, a conclusive grounds decision is made on whether the individual is a victim under its definition.⁶⁶ There are currently two competent authorities in place to make these decisions: the National Crime Agency’s Modern Slavery Human Trafficking Unit (“MSHTU”) and the Home Office Visas and Immigration (“UKVI”).⁶⁷ Initially, all first responder referrals go through the MSHTU.⁶⁸ For UK and EEA nationals, the MSHTU then makes both the reasonable grounds and conclusive grounds decisions.⁶⁹ All non-UK and non-EEA citizens are referred to the UKVI, which will then make both the reasonable and conclusive grounds decisions.⁷⁰ If determined to be a victim, the individuals can be granted a discretionary one-year leave to stay in the UK, in order for them to co-operate with police investigations and/or potential prosecution.⁷¹ Should a non-UK or non-EEA victim desire, the Home Office can grant assistance for the victim to go home.⁷² When the Modern Slavery Act was enacted, the NRM was extended to all victims of modern slavery.⁷³

Northern Ireland’s Human Trafficking and Exploitation Act received its royal assent on January 13, 2015.⁷⁴ Northern Ireland’s Act aims “to eradicate human trafficking and modern slav-

61. *Id.* at art. 18.

62. *National referral mechanism reform*, GOV. U.K. (Oct. 16, 2018), <https://www.gov.uk/government/publications/national-referral-mechanism-reform/national-referral-mechanism-reform>.

63. *Id.*

64. *Id.* (listing first responders as including police forces, the NCA, UK Border Force, Home office immigration and visas, social services, or certain NGOs).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *National referral mechanism reform*, *supra* note 62.

70. *Id.*

71. *Id.*

72. *Id.* (the Home Office Assisted Voluntary Return of Irregular Migrants provides the assistance).

73. *Id.* (this included Northern Ireland); *see* INDEPENDENT ANTI-SLAVERY COMMISSIONER, *supra* note 4, at 10.

74. *Minister Sugden publishes Northern Ireland Human Trafficking and Modern Slavery 2016-17*, DEP’T OF JUST. (Nov. 18, 2016), <https://www.justice-ni.gov.uk/news/minister-sugden-publishes-northern-ireland-human-trafficking-and-modern-slavery-strategy-2016-17>; *see Modern slavery A council guide*, *supra* note 5, at 10.

ery and identifying, protecting and supporting victims.⁷⁵ Northern Ireland achieves these aims through legislation that maintains a strong focus on the assistance and support given to victims.⁷⁶ For instance, this is done in section 18 of the Act which outlines step-by-step instructions on how to handle victims.⁷⁷ Section 18 also details a non-exhaustive list of services that are to be provided, therefore creating a robust system that ensures victims are helped.⁷⁸ The Act further prioritizes victims by codifying and practicing the idea that a victim need not be an eyewitness for law enforcement and/or prosecutors in order to be eligible for support, and allowing victim services discretion to continue giving support after the usual forty-five days have elapsed.⁷⁹

After pressure from international entities like the UN and the EU, on March 26, 2015, the UK's Modern Slavery Act ("MSA") received its royal assent.⁸⁰ The MSA was the first of its kind to specifically address slavery and trafficking in the twenty-first century.⁸¹ By covering the main goals of the Convention and adopting its definitions, the MSA, like Northern Ireland's Act, fights modern slavery, ensures perpetrators are prosecuted, and victims are protected.⁸² The MSA primarily applies to England and Wales; any parts of the act which apply to the rest of the UK (i.e. Northern Ireland) are specified within the act itself.⁸³

Regarding the treatment of victims, the MSA delegates statutory authority to the Independent Anti-Slavery Commissioner to provide guidance to relevant authorities about identifying and providing resources to victims.⁸⁴ The Commissioner has claimed that because modern slavery is a vague and fluid crime, it is impossible to have a set list of steps on how to handle victims.⁸⁵ Additionally, the Commissioner explained that each first responders' council has its

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75. DEPARTMENT OF JUSTICE, NORTHERN IRELAND HUMAN TRAFFICKING AND MODERN SLAVERY STRATEGY 2016/17 1, 2 (2016), <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/ni-human-trafficking-and-modern-slavery-strategy-2016-17.pdf>.
76. Jason Haynes, *Northern Ireland's Human Trafficking and Exploitation Act (2015): a preliminary assessment*, 42 COMMONWEALTH L. BULL. 1, 14 (2016), https://www.researchgate.net/profile/Jason_Haynes4/publication/301487951_Northern_Ireland%27s_Human_Trafficking_and_Exploitation_Act_2015_a_preliminary_assessment/links/5a713949aca272e425ed4601/Northern-Irelands-Human-Trafficking-and-Exploitation-Act-2015-a-preliminary-assessment.pdf.
77. Northern Ireland Act, *supra* note 4, at § 18.
78. *Id.*; Haynes, *supra* note 76, at 17.
79. Haynes, *supra* note 76, at 18; Northern Ireland Act, *supra* note 4, § 18(3)–(4) (forty-five days is usually how long services are provided to victims to rehabilitate and receive services from the government).
80. Rose Broad & Nick Turnbull, *From Human Trafficking to Modern Slavery: The Development of Anti-Trafficking Policy in the UK*, EUR. J. CRIM. POL'Y RES. 119, 123 (2018), <http://doi.org/10.1007/s10610-018-9375-4>; Home Office, et. al, *Historic law to end Modern Slavery passed*, GOV. U.K. (Mar. 26, 2015), <https://www.gov.uk/government/news/historic-law-to-end-modern-slavery-passed>.
81. Broad & Turnbull, *supra* note 80, at 1.
82. *See generally* Modern Slavery Act 2015, c. 30; *Modern slavery A council guide*, *supra* note 5, at 11; Home Office, *Modern Slavery Act 2015*, GOV. U.K. (June 10, 2014), <https://www.gov.uk/government/collections/modern-slavery-bill>.
83. *See generally* Modern Slavery Act 2015, c. 30 (showing that the Act was intended to primarily cover England and Wales, unless specified otherwise); *Id.* at Explanatory Notes; *Modern slavery A council guide*, *supra* note 5, at 10.
84. *See* Modern Slavery Act 2015, c. 30 § 41(1), (3); *Id.* at c. 30, Explanatory Notes § 41.
85. *See Modern slavery A council guide*, *supra* note 5.

own method of making referrals to the NRM, leading to further disparate treatment.⁸⁶ One thing that is consistent under the MSA is that once a potential victim is referred, there is a “reasonable grounds decision” where the victim is then given forty-five days to be decided a victim on conclusive grounds.⁸⁷ If the individual is determined to be a victim, they are then given fourteen days to transition out into society.⁸⁸ Overall, unlike Northern Ireland’s Act, the MSA does not have a clear-cut process to identify and treat victims.

II. Victim Identification and Treatment in Northern Ireland and the Minute Critiques Concerning Specified Areas within its Legislation

A. The Current Clear Approach to Victim Identification and Protection in Northern Ireland

Northern Ireland follows a few international instruments in its approach to identify, protect, and assist victims of human trafficking. While using the definitions outlined in the Convention and Protocol, the state uses both the NRM and the Directive to outline how to identify and when to protect victims.⁸⁹ For example, one key part of the Directive used in Northern Ireland’s Act is the idea that support will only be given after a “competent authority” decides on “reasonable grounds” that someone is a victim.⁹⁰

Northern Ireland, however, has a different approach from England and Wales regarding victims of trafficking. The state statutorily assigns a duty to the Department of Justice (“DOJNI”) to give assistance and support to adult victims of trafficking while their “victim determination” is pending.⁹¹ Having the DOJNI’s duties to handle support and identification of victims stated within the statute allows for more of a legal standing to victim’s rights.⁹² Additionally, sections 18(5)(a)-(d) of Northern Ireland’s Act imposes four duties on the DOJNI for providing assistance post-conclusion of criminal proceedings.⁹³ The duties include that assistance and support:

- (a) Must not be conditional on the person[] acting as a witness in any criminal proceedings;
- (b) Must only be provided with the agreement of that person;
- (c) Must be provided in a manner which takes due account of the needs of that person [regarding] safety and protection from harm; [and]

86. *See id.*

87. *Id.* at 15–18; *National referral mechanism reform*, *supra* note 62.

88. *Modern slavery A council guide*, *supra* note 5, at 18.

89. *See* Directive 2011/36/EU, *supra* note 41, at art. 11(2); *see generally* Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act, 2015, c.2 (Northern Ireland); Northern Ireland Human Trafficking and Modern Slavery Strategy 2016/17, 5 & n.2, 9.

90. Directive 2011/36/EU, *supra* note 41, at art. 11(2).

91. Northern Ireland Act, *supra* note 4, at § 18.

92. *See, e.g., id.*

93. Northern Ireland Act, *supra* note 4, at § 18(5)(a)–(d).

(d) Must be provided to meet the assessed needs of that person, having regard in particular to any special needs or vulnerabilities of that person cause[d] by gender, pregnancy, physical or mental illness, disability or being the victim of serious violence or serious abuse.⁹⁴

Additionally, Northern Ireland assigns the Department of Health, Social Services, and Public Safety the lead responsibility of helping victims.⁹⁵ Under the Act, the Department must publish a strategy to be given out to other departments to ensure assistance and support is adequately given, in particular, to those leaving prostitution.⁹⁶

A unique feature of Northern Ireland's Act is that it allows for support to be given beyond the forty-five days, further proving that victims are a priority and that the state wants victims to have enough time to rehabilitate.⁹⁷ Currently, the DOJNI has awarded victim care contracts to two agencies, one for men and one for women.⁹⁸ More importantly, the Act states that a victim does not need to testify as an eyewitness in a criminal case in order to receive support.⁹⁹ Additionally, although discretionary, the Act allows for support to be provided even after someone is determined on "reasonable grounds" not to be a victim.¹⁰⁰ Simply put, the Act forms a robust system to ensure victims receive appropriate services and are protected.¹⁰¹ Because Northern Ireland writes these services and rights into the Act, victims have a legal claim to their rights.¹⁰²

Overall, Northern Ireland's Act is more distinct in its law concerning support entitlements for adult victims; the Act itself is more specific than the MSA because the MSA primarily shifts duties to the Commissioner or just fails to address certain issues concerning victims.¹⁰³ As a result of avoiding statutorily outlining the Commissioner's and the state's duties when it comes to helping victims, victims in England and Wales unfortunately do not have a legal claim to their rights.¹⁰⁴ More importantly, Northern Ireland's Act outlines step-by-step instructions on

94. Northern Ireland Act, *supra* note 4, at § 18(5)(a)–(d).

95. *Id.* at § 19; United Kingdom Reply, *supra* note 7, at 3, 6.

96. Northern Ireland Act, *supra* note 4, at § 19(1).

97. Haynes, *supra* note 76, at 17 (stating that Article 18 only applies to victims of trafficking).

98. United Kingdom Reply, *supra* note 7, at 6 (stating that Northern Ireland awarded victim care contracts to Migrant Help for male victims and to Belfast and Lisburn Women's Aid for female victims). The fact that Northern Ireland acknowledges and separates specialized treatment for both genders shows that states are making progress in victim treatment.

99. Haynes, *supra* note 76, at 16–17.

100. Beddoe & Brotherton, *supra* note 5, at 45.

101. Haynes, *supra* note 76, at 17.

102. *Cf.* Beddoe & Brotherton, *supra* note 5, at 46.

103. *See generally id.*

104. *Id.* at 46.

how to handle victims, which is something found in the Commissioner's guidance report, rather than in the MSA directly.¹⁰⁵ Northern Ireland's Act ensures that victims are a priority and, although limited, ensures they are taken care of.¹⁰⁶

B. GRETA's Trivial Critiques of Northern Ireland's Human Trafficking and Exploitation Act

Northern Ireland's legislation is not without flaws. GRETA has stated that despite the presence of comprehensive human trafficking legislation within the state, victims still need to be provided enough support and assistance beyond the forty-five days outlined in the NRM.¹⁰⁷ Northern Ireland responded that the Act already provides for support to those referred to the NRM, while the potential victims are waiting for a "reasonable grounds" determination or conclusive grounds determination.¹⁰⁸ Moreover, where a positive conclusive determination is reached, the DOJNI is still required to provide support until the end of the forty-five-day "recovery and reflection period" outlined by the NRM.¹⁰⁹ The "recovery and reflection" period is required under Article 13 of the Convention, meaning that all UK states must comply.¹¹⁰ This period is located in section 18 of Northern Ireland's Act as well as in the NRM.¹¹¹ Furthermore, section 18(7) of the Act outlines the types of assistance that should be provided according to the assessed needs of the victims *and* provides a non-exhaustive list of support.¹¹² Overall, Northern Ireland has exceeded what is required for victims under the Convention.

C. Additional Outside Critiques of Northern Ireland's Human Trafficking and Exploitation Act

There are a few critiques about Northern Ireland's Act in particular.¹¹³ First, section 18 of the Act only applies to victims of *trafficking*, which, to some, appears to form an image of hierarchy where some victims are more important than others.¹¹⁴ Additionally, the UK government

105. Compare Northern Ireland Act, *supra* note 4, at § 18 (addressing how to handle victims), with *Modern slavery A council guide*, *supra* note 5, at 15–25 (providing guidance on how to handle victims).

106. Haynes, *supra* note 76, at 19 (stating that Northern Ireland's act is limited because the state does not have authority to grant residency, which is something only England and Wales have the power to decide on for victims).

107. Recommendation CP(2016)12 on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom, 1, 2 (Nov. 4, 2016), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b7f34> (hereinafter Recommendation CP(2016)12).

108. Report submitted by the British authorities on measures taken to comply with Committee of the Parties Recommendation CP(2016)12 on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings 1, 6, (Oct. 31, 2017), <https://rm.coe.int/cp-2017-33-rr2-gbr-en/16807647ce> (hereinafter Report submitted by the British authorities).

109. See Northern Ireland Act, *supra* note 4, at 12; see also Claire Sugden, *Northern Ireland Human Trafficking and Modern Slavery Strategy 2016/17* 1, 17 (2017), <http://www.ictf.gov.uk/OCTF/media/OCTF/documents/publications/Human%20Trafficking/Final-NI-Human-Trafficking-and-Modern-Slavery-Strategy-2016-17.pdf>; see also Report submitted by the British authorities, *supra* note 108, at 1, 6.

110. Council of Europe Convention, *supra* note 34, at art. 13; Recommendation CP(2016)12, *supra* note 107, at 2.

111. Northern Ireland Act, *supra* note 4, at § 18; Report submitted by the British authorities, *supra* note 108, at 1, 6.

112. Northern Ireland Act, *supra* note 4, at § 18(7).

113. See Haynes, *supra* note 76, at 182.

114. *Id.* at 198.

has authority over Northern Ireland in specified areas which can limit Northern Ireland's anti-trafficking efforts in some respects.¹¹⁵ To illustrate, Northern Ireland does not have the authority to grant residency permits for trafficked victims and must defer those decisions to the Crown.¹¹⁶ Therefore, the Act is further critiqued for its limited power due to the nature and structure of the UK's jurisdiction.

Despite critiques about Northern Ireland's jurisdictional restraints, the state does its best. Northern Ireland helps victims of trafficking with transparency in its approach and success to back it up. Most importantly, while minor changes could remedy the critiques posed above, its victim treatment approach is rather clear-cut and guarantees victims' rights to ensure proper rehabilitation.

III. The Current Victim Identification and Protection Approach Through the National Referral Mechanism and the Modern Slavery Act Has Caused a Demand to Change Current Legislation

A. The Current Disengaged Procedure for Identification and Protection of Victims Within the Modern Slavery Act

The MSA integrated both the Convention and the Directive within its act by outlining the instruments' obligations within its statutes for trafficking crimes and designing victim identification and protection, as well as by creating the NRM.¹¹⁷ The NRM is UK's attempt to adhere to the Directive's idea that support will only be given after a "competent authority" decides on "reasonable grounds" that someone is a victim.¹¹⁸ However, despite adhering to these international conventions, "in England and Wales, victim support is not guaranteed by law."¹¹⁹ Instead, the MSA stands as nothing more than a nice touchstone to showcase the international movement toward eradicating trafficking.¹²⁰

The MSA's alternative to providing victim support statutorily is to give the *Commissioner* statutory authority to *guide* relevant authorities about identifying and providing resources to victims.¹²¹ The MSA assigns the authority to identify and support victims to multiple agencies

115. See, e.g., *id.* at 19 (2016); see generally *Northern Ireland Law: Legal System*, OXFORD LIBGUIDES (last updated Mar. 14, 2019, 4:53 PM), <https://libguides.bodleian.ox.ac.uk/c.php?g=423236&p=2889918> (outlining Northern Ireland's legal system and stating "[t]he UK Parliament in Westminster continues to have responsibility for some matters [regarding Northern Ireland]").

116. Haynes, *supra* note 76, at 19.

117. Modern Slavery Act 2015, c. 30, Explanatory Notes ¶ 5; compare Council of Europe Convention, *supra* note 34, at art. 4, and *United Kingdom // 47 States, one Europe*, *supra* note 37, with Modern Slavery Act 2015, c. 30, and *National referral mechanism reform*, *supra* note 62.

118. Directive 2011/36/EU, *supra* note 41, at art. 11(2).

119. Anna Sereni & Catherine Baker, *Before the Harm is Done - Examining the UK's Response to the Prevention of Trafficking* 52 (Sept. 2008), <http://www.antislavery.org/wp-content/uploads/2018/09/Before-the-Harm-is-Done-report.pdf>.

120. See Ruth van Dyke, *The law enforcement response to modern slavery in the United Kingdom*, ST. MARY'S U. TWICKERHAM LONDON, <https://www.stmarys.ac.uk/research/centres/modern-slavery/articles/law-enforcement-response.aspx> (last visited Apr. 2, 2019).

121. See Modern Slavery Act 2015, c. 30, § 41.

and a few deciding councils.¹²² Following that, referral to the NRM can vary because each first responder council has its own method of referral.¹²³ Moreover, there is difficulty in implementing, identifying, and protecting victim procedures due to the nature of the crime and, because the MSA is still in its infancy, police are still learning how to implement it.¹²⁴

Therefore, the MSA and its implementation have led to disparate and faulty treatment of trafficking victims which is evident in cases such as *R. (on the Application of Saadawi) v. Secretary of State for the Home Department* and *H v. Secretary of State for the Home Department*.¹²⁵ In *R. (on the Application of Saadawi)*, the claimant was first declared a victim of trafficking, but a year later the Home Department decided the claimant was not a victim.¹²⁶ The claimant fought the changed decision, but the Administrative Court ruled that the Home Department properly followed the guidelines and made a proper decision.¹²⁷ *H v. Secretary of State for the Home Department* further highlights UK's failings when it comes to treatment of trafficking victims.¹²⁸ The case concerns a Vietnamese minor who was trafficked to cultivate cannabis.¹²⁹ Though trafficked as a minor, he did not go through the NRM until he was nineteen years old and, therefore, a competent authority treated him as an adult; this meant that there were harder tests for him to satisfy in order to be considered a trafficking victim and for him to be granted asylum.¹³⁰ Due to the fact that most of the measures to identify and protect victims are developed through administrative direction, not statutory footings, such measures must either be screened by the Secretary of State or enacted as statutory through Parliament in order to ever have concrete effect.¹³¹ Agencies claiming to help victims do nothing more than determine whether individuals are victims of trafficking; there is little support provided after such determinations to ensure victims of such a heinous crime are supported for living a successful new life and do not recidivate into trafficking.¹³²

122. United Kingdom Reply, *supra* note 7, at ¶¶ 27–29.

123. *Modern slavery A council guide*, *supra* note 5, at 14–16.

124. See van Dyke, *supra* note 120; see also Ana Ionova, *ANALYSIS- Is landmark UK law falling short in fight against modern slavery?*, HUMAN THREAD FOUND., <https://humanthreadfoundation.org/analysis-is-landmark-uk-law-falling-short-in-fight-against-modern-slavery/> (last visited Dec. 14, 2018).

125. See *H v. Secretary of State for the Home Department* (2018) EWHC 2191 (Admin); *The Queen on the application of Said Abdelmoneim Ahmed Saadawi v. The Secretary of State for the Home Department* (2017) EWHC 3032 (Admin).

126. *The Queen on the application of Said Abdelmoneim Ahmed Saadawi v. The Secretary of State for the Home Department* (2017) EWHC 3032 (Admin).

127. *Id.*; *Administrative Court*, GOV. U.K., <https://www.gov.uk/courts-tribunals/administrative-court> (last visited Apr. 2, 2019) (the Administrative Court is “a specialist court within the Queen’s Bench Division of the High Court of Justice.”).

128. *H v. Secretary of State for the Home Department* (2018) EWHC 2191 (Admin).

129. *Id.*

130. *Id.*

131. See generally *Modern Slavery Act 2015*, c. 30, Explanatory Notes ¶ 203 (UK).

132. Kate Roberts, *Life after Trafficking: A gap in UK’s modern slavery efforts*, ANTI-TRAFFICKING REV. 164, 164–68 (2018).

Another problem that arises once a possible victim is identified is that many of the rights afforded to victims in England and Wales cannot be utilized, unless the individual is identified as a victim and, unofficially, if they act as a witness or cooperate with prosecution in a future criminal trial.¹³³ This in turn causes more problems when trying to convict traffickers and can also be grounds for attack on the victim's credibility.¹³⁴ Additionally, the MSA appoints the Salvation Army to be the agency for the victims' care contact and to manage the support of adult victims of modern slavery in England and Wales.¹³⁵ With only a single non-governmental agency being the "go-to" contact for most, if not all, of a victim's support, there is a substantially heavy burden placed on the Salvation Army, as more victims are identified; it is even harder to properly support the victims when the government continues to cut victim allowances (now 37 pounds per week).¹³⁶ In short, the MSA makes it more difficult for victims of trafficking once they are identified. The MSA's system is far more complex, confusing, and vague than Northern Ireland's approach, but suggestions have been made for improvement.

B. GRETA Urges Immediate Action for Certain Issues Within the Modern Slavery Act

The UK has come a long way from when it originally signed onto the Convention and joined the Directive, as it had no anti-trafficking instrument, legislation, or mechanism in place.¹³⁷ However, there is still a lot that GRETA urges the UK to take immediate action for, such as: the need to provide support and assistance to victims, improve identification and helping victims, enact a right to "recovery and reflection period," and provide more focus on reintegration and recovery of victims while still ensuring protection.¹³⁸

One major issue is that there is currently no definite referral and decision model to follow.¹³⁹ England and Wales' Home Office give their own guidelines to Competent Authorities and first responders, which *should* be used when making referrals to the NRM.¹⁴⁰ Additionally, the Salvation Army is in charge of the Government's Victim Care Contract that provides victims or concerned individuals with a free 24-hour confidential referral helpline to call.¹⁴¹ These

133. Tony Ward & Shahrzad Fouladvand, *Human Trafficking, Victim's Rights and Fair Trials*, 82 THE J. OF CRIM. L. 138, 144 (2018); Roberts, *supra* note 132, at 164–68 ("The committee found that the sudden removal of support helped to explain the low convictions of traffickers, since victims were not supported to disclose their abuse and to testify.").

134. Ward & Fouladvand, *supra* note 133, at 141.

135. Home Office, et. al., *supra* note 80.

136. Ionova, *supra* note 124.

137. Recommendation CP(2016)12, *supra* note 107, at ¶ 1 (highlighting that there is comprehensive legislation and a Commissioner in place since the 2012 GRETA review).

138. *Id.* at ¶ 2.

139. See United Kingdom Reply, *supra* note 7, at 21.

140. *Id.*

141. *Id.* at 22.

attempts are examples of how the UK claims it is adhering to Article 12 of the Convention and Article 11 of the Directive.¹⁴² Despite GRETA's calls for reform, the UK has stated it does in fact adhere to the necessary portions of the Convention.¹⁴³

The UK has pointed out that it complies with Article 13 of the Convention because victims receive an additional two weeks following the forty-five-day "reflection and recovery period" outlined in the NRM in order to move on from support.¹⁴⁴ In fact, the UK frequently uses the forty-five-day "reflection and recovery period" once a competent authority has made a "reasonable grounds" decision to argue against GRETA's numerous critiques.¹⁴⁵ The UK refers to the forty-five-day period again when urged to have a "recovery and reflection period" in all states within the UK.¹⁴⁶ The UK refers to the forty-five-day period once more when told that the state needs to ensure victims are offered protection and assistance outlined in Article 12(1) and (2) of the Convention during the "reflection and recovery period."¹⁴⁷ GRETA has urged the UK to improve the MSA, yet the UK defers and either claims that the state is already adhering to the Convention or makes mere empty promises.¹⁴⁸

C. Scholars Call Out the Faults of the National Referral Mechanism and the Modern Slavery Act

1. The NRM Causes Disparate Treatment Amongst Victims

The NRM was enacted over a decade ago and, despite its strides, there are still flaws within the practice of its combative efforts.¹⁴⁹ Specifically, there is a lack of resources which causes significant delays in the conclusive grounds decisions for potential victims.¹⁵⁰ Moreover, even when the NRM is followed, it is improperly followed or can result in inconsistent services through the support provided to victims of trafficking.¹⁵¹ One recurring scenario is that potential victims are placed with various agencies for assistance and support without concern as to

142. *See id.* at 25–26.

143. *See generally* Recommendation CP(2016)12, *supra* note 107.

144. Report submitted by the British authorities, *supra* note 108, at 1, 6; *see id.* at 1 (the UK claims to be reforming the NRM yet nothing has been done regarding this issue).

145. *See* Recommendation CP (2016)12, *supra* note 107, at 2–3.

146. *See* Report submitted by the British authorities, *supra* note 108, at 1, 6.

147. *Id.* at 7.

148. *See id.* at 6 (describing an instance where the UK claims it is adhering to the MSA: “[t]he UK has *pledged* to exercise section 50 under the Modern Slavery Act 2015, which grants the Secretary of State the power to pass regulations on identifying and supporting victims. This will enshrine the rights of victims in England and Wales in law.”) (emphasis added).

149. Alasdair Henderson, *Human trafficking: is our system for combating it fit for purpose?*, U.K. HUMAN RIGHTS BLOG (Sept. 28, 2018), <https://ukhumanrightsblog.com/2018/09/28/human-trafficking-is-our-system-for-combating-it-fit-for-purpose/>.

150. *Id.*

151. *Id.*

why or how the victims are trafficked.¹⁵² The NRM is something that both the MSA and Northern Ireland's Act rely on within their legislation; therefore, if the NRM cannot properly identify and support victims, then it is up to the states' statutes to fill the gap.

2. Outside Scholars Point Out the Gaps in the Modern Slavery Act

In addition to GRETA, other groups and scholars have mentioned the need for change in the MSA. Simply put, the "support" afforded to victims through the MSA is substandard and unclear, thus leaving victims vulnerable and prone to re-trafficking.¹⁵³ For instance, the low conviction rates of traffickers and the inability to eradicate the crime is partially explained by the sudden removal of support afforded to victims under the NRM and MSA framework.¹⁵⁴ Research discovered a number of flaws within the MSA's attempts to provide support to victims.¹⁵⁵ Agencies are able to determine whether someone is a victim or not, but there is no further concrete or extended support or shelter provided in many cases.¹⁵⁶ One explanation for the agencies' failure is that the MSA provides no outlined timeframe or standard of care for victims which in turn inhibits agencies' abilities to work as a more robust system.¹⁵⁷

Identifying and handling victims of trafficking can be difficult due to the nature of their experiences and the crime itself.¹⁵⁸ The system makes it even more difficult to assist victims, therefore, making it a vicious cycle. Prosecutors want to rely on the victims for their cases, but the rights afforded to victims generally cannot be utilized unless the person identifies themselves as a victim.¹⁵⁹ Additionally, support is unofficially not afforded to many victims unless they agree to be a witness or cooperate with the prosecution.¹⁶⁰ This arrangement — cooperation in exchange for support services — is ripe for attacks on the victim's credibility, which leads to re-victimization by the system.¹⁶¹ Furthermore, the MSA plays into the stereotypical idea of "trafficking" by focusing more on sexual exploitation and less on other forms of trafficking.¹⁶² "The final form of the Act(s) thus reflect[s] a substantial amount of unfinished business" and inconsistencies, therefore, leaving the state a prime target for exploitation by traffickers.¹⁶³

152. *Id.* (discussing an instance where a trafficking victim who was forced into prostitution was then placed into a home with 5 men by the local authority. She alleged that she was later raped by one of the men. Her background showed that she was very vulnerable but regardless her concerns were ignored by the competent authority).

153. See Gary Craig, *The UK's Modern Slavery Legislation: An Early Assessment of Progress*, 5 SOC. INCLUSION 16, 24 (2017).

154. Roberts, *supra* note 132, at 166 (explaining that victims are needed to disclose their abuse and testify in order to convict the traffickers).

155. See *id.*

156. *Id.* (outside agencies have been established to help victims make a life for themselves, such as Bright Future, which offers paid work for victims).

157. Ionova, *supra* note 124.

158. Ward & Fouladvand, *supra* note 133, at 143–44.

159. *Id.* at 144.

160. *Id.* (this is unofficial, but nonetheless, a pattern).

161. *Id.* at 141.

162. Craig, *supra* note 153, at 20.

163. *Id.* at 21.

IV. To Meet the International Law Obligations, the Modern Slavery Act Should Adopt Northern Ireland's Human Trafficking and Exploitation Act's Approach to Victim Treatment.

Although the MSA has been in force for four years, it is not measuring up to the expectations of its implementation.¹⁶⁴ The Act mainly raises awareness and does little to make actual changes.¹⁶⁵ The Anti-Trafficking Monitoring Group has stated that “[t]he Modern Slavery Act is significantly weaker than the respective Act[] in . . . Northern Ireland regarding support for adult victims. The . . . Northern Ireland Act[] include[s] all of the four key elements of the Trafficking Convention and Directive, and in some regards go beyond the minimum international standards.”¹⁶⁶ One must ask: what can be done to rectify this issue?

Human rights groups have stated that the best way to truly end human trafficking is to support victims so that they feel safe talking to the police and do not recidivate into the vicious cycle of trafficking.¹⁶⁷ However, this is difficult to implement when the MSA provides neither timeframes nor a standard of care for victims, which results in disparate treatment of vulnerable victims, thus making them prime for re-trafficking.¹⁶⁸ Conversely, § 18 of Northern Ireland's Act “sets out ‘minimum standards,’ which not only ensures that adequate funding is provided to meet the statutory commitments, but also that said commitments cannot be simply changed at the whim of a minister, or because of budgetary cuts, without full scrutiny and public debate.”¹⁶⁹

Support entitlements within Northern Ireland's Act also assist in ensuring victim protection, so much so that the Anti-Trafficking Monitoring Group has advocated for the MSA to include them as well.¹⁷⁰ More importantly, Northern Ireland provides all of the protections and rights for victims statutorily, therefore, enabling trafficking victims to have a legal claim to their rights — something the MSA fails to do.¹⁷¹ The UK is reluctant to adopt Northern Ireland's approach despite the constant cross-party recommendations for it.¹⁷² Instead, the UK rebuts the recommendation by stating that it already provides all the required resources elsewhere.¹⁷³ The UK's “sweeping everything under the rug” method for these issues will only stall the transnational progression of ridding the world of trafficking.

164. Ionova, *supra* note 124.

165. *Id.*

166. Beddoe & Brotherton, *supra* note 5, at 45.

167. Ionova, *supra* note 124.

168. Craig, *supra* note 153, at 24.

169. Haynes, *supra* note 76, at 19; Ionova, *supra* note 124 (the budgetary cuts by the UK government, specifically on the Salvation Army, has greatly harmed the victims).

170. Beddoe & Brotherton, *supra* note 5, at 9.

171. *Id.* at 46–47.

172. *Id.* at 47.

173. *Id.*; *see generally* Report submitted by the British authorities, *supra* note 108.

The amount of human trafficking victims is increasing throughout all of the UK.¹⁷⁴ The grand scale of this crime is no easy task for authorities to handle throughout the state and it is clear there is no “UK bright-line” definitive way to identify and treat victims of human trafficking.¹⁷⁵ Nevertheless, if the MSA conforms to a more definitive approach concerning victim identification and treatment, there would be a more uniform method for assisting victims.¹⁷⁶ Victims would not be turned away from reporting and could actually be helped because there would be statutory avenues for victims throughout all of the UK.¹⁷⁷

Conclusion

The UK government must remember that “the stakes are too high for victims of trafficking; it must be a higher priority to get this right.”¹⁷⁸ There is great call for the nations of the world to come together and combat against human trafficking—of all types. The issue becomes more pressing when the states within the same sovereign country contradict each other on the approach to eradicating this atrocity. Though the MSA and Northern Ireland’s Act stem from the same international instruments, each acts’ treatment of victims of human trafficking and upholding their rights could not be more polar opposite. This note has suggested that there are obvious issues within the MSA that far outweigh that of Northern Ireland’s. While little changes can be made, the easiest approach most aligned with international instruments is to adopt Northern Ireland’s method of victim identification and protection. Whatever path the UK decides to take it should be done swiftly and promptly to ensure more effective eradication efforts, as well as homogenous treatment of trafficking victims through the country as a whole.

174. See generally 2017 ANNUAL REPORT, *supra* note 2, at 4; *Trafficking and slavery worse than feared: former top NI cop*, *supra* note 1 (despite efforts done by all of the UK the epidemic is still increasing exponentially, but at least it has become more identifiable); *Record number of slavery victims referred in UK, says report*, *supra* note 2; *National Referral Mechanism Statistic Quarter 3 2018 – July to September*, *supra* note 3.

175. *Trafficking and slavery worse than feared: former top NI cop*, *supra* note 1.

176. *Id.*

177. See generally *id.*

178. Henderson, *supra* note 149.

CBF Industria De Gusa S/A v. AMCI Holdings

WL 3332492 (S.D.N.Y. July 25, 2019)

In an action seeking enforcement of a foreign arbitral award, the United States District Court for the Southern District of New York decided on motions relating to discovery of documents. In particular, Magistrate Judge James L. Scott, following the direction of the Second Circuit that the International Chamber of Commerce’s dismissal of fraud claims did not preclude plaintiffs from seeking discovery of documents relevant to New York state-law fraud claims, concluded that by sufficiently establishing “probable cause,” plaintiffs demonstrated that crime-fraud exception to the attorney-client privilege and the work product doctrine applied to both U.S. and foreign defendants’ communication with their attorneys.

I. Holding

Recently, in *CBF Industria De Gusa S/A v. AMCI Holdings*, the parties brought seven discovery motions before Magistrate Judge James L. Scott relating to the enforcement of an arbitral award. Magistrate Judge Scott held that the documents of the International Chamber of Commerce, a/k/a World Business Organization (“ICC-WBO”) proceedings, were outside the scope of discovery. However, plaintiffs were required to produce information related to the disputed agreement in these proceedings. Two of the plaintiffs’ motions pertaining to financial information and information held by defendants’ third-party service providers were granted. Furthermore, Judge Scott struck the defendants’ general objections. Finally, the court held that the crime-fraud exception to the attorney-client privilege and the work-product doctrine applied in relation to the communication between defendants and their outside counsel.

II. Background

Plaintiffs, CBF Industria de Gusa S/A (“CBF”), a group of Brazilian pig iron producers, sought to enforce an arbitral award of the ICC-WBO against defendants, a group of companies led by AMCI Holdings (“AMCI”), a U.S. company.¹ Initially, CBF filed for arbitration before the ICC-WBO against Steel Base Trade AG (“SBT”), a Swiss mining company.²

SBT was part of the AMCI group.³ Supervised by AMCI, CBF and SBT entered into contracts worth \$76 million to purchase and sell pig iron (the “Purchase Agreement”).⁴ However, after a decline in commodity prices in 2008, SBT began defaulting on its Purchase Agreement.⁵ On November 16, 2009, CBF requested arbitration proceedings against SBT at the ICC-

1. *CBF Industria de Gusa S/A v. AMCI Holdings, Inc.*, No. 13CV2581PKCJLC, 2019 WL 3332492 *1, at *3 (S.D.N.Y. July 25, 2019).

2. *Id.*

3. *Id.*

4. *Id.* at *4.

5. *Id.*

WBO as a result of failed negotiations.⁶ Two weeks later, SBT agreed to transfer its assets and liabilities to Prime Carbon, another European company from the AMCI group (the “Transfer Agreement”).⁷ In early 2010, after SBT informed all suppliers except CBF of this transfer, Prime Carbon began trading pig iron.⁸ CBF found out about Prime Carbon’s activities and obtained a statement from the SBT representative that they were not evading their obligations under the arbitration proceeding.⁹ On April 29, 2010, SBT filed for bankruptcy in Switzerland.¹⁰ The SBT bankruptcy administrator informed the ICC-WBO that the company lacked the sources to participate in the arbitration.¹¹ CBF requested that the ICC-WBO “recognize the existence of fraudulent acts [undertaken by SBT]”.¹²

On November 9, 2010, the ICC-WBO rendered an award in favor of CBF in the amount of \$48 million plus interest, costs, and fees but dismissed fraud allegations against SBT.¹³ Unable to collect the award, CBF initiated the current proceedings in the United States District Court for the Southern District of New York to enforce the award against the AMCI group, including Prime Carbon, and individuals allegedly controlling these companies as successors and alter egos of SBT, and to recover on state-law fraud claims.¹⁴ Defendants moved to dismiss on the grounds that (1) the United States court is not the proper forum; (2) the action is a mere effort to modify the ICC-WBO award; and (3) the ICC-WBO’s dismissal of the fraud claims precludes plaintiffs from alleging fraud claims under New York law.¹⁵ The court granted defendants’ motion to dismiss and the plaintiffs appealed to the Second Circuit.¹⁶

On appeal, the Second Circuit found that (1) defendants’ motion to dismiss should have been based on one of the five exclusive conditions for refusing enforcement of foreign arbitration awards under Article V of the New York Convention; (2) the only question was whether defendants could be found liable as an alter-ego of SBT; and (3) plaintiffs should have an opportunity to conduct discovery with respect to state-law fraud claims.¹⁷ On remand, defendants moved to dismiss based on Article V.¹⁸ However, the court denied this motion because plaintiffs sufficiently alleged facts to pierce SBT’s corporate veil and reach defendants as SBT’s alter-ego.¹⁹

6. *Id.*

7. *Id.* at *5.

8. *Id.*

9. *Id.* at *5–6.

10. *Id.* at *6.

11. *Id.*

12. *Id.*

13. *Id.* at *7.

14. *Id.*

15. *Id.* at *8.

16. *Id.*

17. *Id.* The official name of the New York Convention is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

18. *Id.*

19. *Id.* at *9.

During discovery, the defendants brought three motions to compel document production relating to the Purchase Agreement and the underlying transactions, to compel foreign document production, and to defer to the Swiss discovery motions.²⁰ Plaintiffs filed two motions to compel defendants to produce U.S. and European documents, one motion to overrule defendants' general objections to plaintiffs' discovery request and one motion to compel production of the internal communication between defendants and their counsel under the crime-fraud exception to the attorney-client privilege and work product doctrine.²¹ Although several motions concerned documents in Switzerland, the Court does not hold jurisdiction over these documents.²² Thus, the Court limited its ruling on these motions to a declaration of right.²³

III. Discussion

A. Defendants' Motions to Compel Document Production

Parties can only request documents during discovery that are relevant to claims and defenses brought in the proceedings.²⁴ The relevant documents concept "encompass[es] any matter that bears on, or that reasonably could lead to other matter that could bear on any party's claim or defense."²⁵ The party seeking discovery bears the burden to demonstrate its relevance.²⁶

1. Documents Relating to the Purchase Agreement and Underlying Transactions

The court granted defendants' motion for discovery and limited the scope to the state-law fraud claims.²⁷ The court denied plaintiffs' argument that litigating the underlying documents would necessarily entail a collateral attack on the ICC-WBO award, noting that the claims under the current proceedings were distinguished from the action before the ICC-WBO to the extent of state-law fraud claims.²⁸

20. *Id.*

21. *Id.* at *10–14.

22. Switzerland is the country where SBT was incorporated and where it filed for bankruptcy. *Id.*

23. *Id.* at *16.

24. *Id.*

25. *Henry v. Morgan's Hotel Grp., Inc.*, No. 15-CV-1789 (ER) (JLC), 2016 WL 303114, at *3 (S.D.N.Y. Jan. 25, 2016) (quoting *State Farm Mut. Auto. Ins. Co. v. Fayda*, No 1-CV-9792 (WHP) (JCF), 2015 WL 7871037, at *2 (S.D.N.Y. Dec. 3, 2015)).

26. *Citizens Union of City of New York v. Att'y Gen. of N.Y.*, 269 F. Supp. 3d 124, 139 (S.D.N.Y. 2017).

27. *Id.* at *21.

28. *Id.* at *19–22.

The court reasoned that these documents were relevant to demonstrating (1) that SBT owed no liability to CBF under the Purchase Agreement, thus, there was no fraudulent intent to avoid liability; and (2) defendants' affirmative defenses, "includ[ing] setoff, offset, deduction, and recoupment."²⁹ Nevertheless, the court denied defendants' motion to the extent that it sought plaintiffs' internal communication relating to the Purchase Agreement.³⁰

2. Foreign Documents

The court denied both motions to compel production of documents relating to the bankruptcy proceedings and to the plaintiffs' Swiss action allegedly commenced after the ICC-WBO award and later abandoned.³¹ First, the bankruptcy proceedings were public and any documents held by the plaintiffs in these proceedings were irrelevant for defendants' contention that "plaintiffs had a full and fair opportunity to raise and prove their alter ego and fraud claims in the ICC-WBO arbitration."³² Second, defendants offered no authority to support their argument that plaintiffs should have brought the Swiss action earlier and used it in the ICC-WBO arbitration.³³

B. Plaintiffs' Motions to Compel Document Production and Strike General Objections

The court identified five overarching contentions in the plaintiffs' motions to compel document production and to strike general objections.³⁴ The plaintiffs contended that (1) defendants' general objections did not specifically concern all information requested, thereby violating Federal Rules of Civil Procedure; (2) the financial documents produced by defendants did not properly address plaintiffs' request for information relating to their alter ego and fraud claims; (3) defendants held control over third-party service providers, which did not adhere to the document production request; (4) defendants' contribution to the discovery process was not transparent as demonstrated by plaintiffs' "specific examples of defendants' deficient production;" and (5) defendants should be precluded from producing any evidence that the Transfer Agreement was the result of an arm's-length negotiation once they failed to do so.³⁵

1. Motion to Strike General Objections

General objections may be upheld only when they apply to every response to the discovery request.³⁶ Therefore, the court disagreed with plaintiffs' contention that general objections are "always" inappropriate and unpersuasive.³⁷

29. *Id.* at *21–22.

30. *Id.*

31. *Id.*

32. *Id.* at *25.

33. *Id.* at *28.

34. *Id.* at *17–55.

35. *Id.* at *17–55.

36. *Fischer v. Forrest*, No. 14-CV-1304 (PAE) (AJP), 2017 WL 773694, at *1 (S.D.N.Y. Feb. 28, 2017).

37. *CBF*, 2019 WL 3332492, at *30–31.

The court found that defendants' objection was inappropriate because the general objection that plaintiffs' requests concerned privileged material did not apply to every response.³⁸ Thus, the court ordered defendants to withdraw their general objections, to specify their objections to specific discovery requests, and to provide a timeline for document production.³⁹

2. Motion to Compel Financial Documents

While "documents concerning payables and receivables" do not demonstrate certain elements of alter ego, like "intermingling of funds" or "payment or guarantee of the corporation's debts by the dominating entity," corporate bank records "will frequently be relevant."⁴⁰ Moreover, individual financial records are relevant to demonstrating "dominion and control."⁴¹

Here, plaintiffs requested financial documents to demonstrate their alter-ego contentions and state-law fraudulent transfer claims.⁴² The court directed defendants to provide all bank records in the U.S., and declared that plaintiffs were entitled to all bank records in Europe because the payable and receivable documents provided by defendants were insufficient to prove any of the elements.⁴³ Moreover, the court granted the plaintiffs' motion to compel financial documents production of the individual defendants.⁴⁴

3. Motion to Compel Document Production of Third-Party Service Providers

A responding party must produce requested documents that are in its possession or control.⁴⁵ The requested party may be required to produce documents that are not under its actual or physical control, if it has "access and the practical ability to possess" such documents.⁴⁶ The party seeking discovery carries the burden to prove that the requested party has the ability to obtain the documents sought by legal entitlement or by any other means.⁴⁷ A party holds the control over documents held by its outside counsel.⁴⁸

38. *Id.* at *31–32.

39. *Id.* at *32.

40. *Int'l Council of Shopping Ctrs. Trustees of Inc. v. Info Quarter, LLC*, No. 17-CV-5526 (AJN), 2018 WL 4284279, at *4 (S.D.N.Y. Sept. 7, 2018); *Mosaic & Terrazzo Welfare, Pension, Annuity & Vacation Funds v. High Performance Floors, Inc.*, 233 F. Supp. 3d 329, 341 (E.D.N.Y. 2017).

41. *McLeod v. Gen. VisionServs., Inc.*, No. 13-CV-6824 (VSB), 2018 WL 3745662, at *11 (S.D.N.Y. Aug. 6, 2018).

42. CBF, 2019 WL 3332492, at *36.

43. *Id.*

44. *Id.* at *39.

45. Fed. R. Civ. P. 34; *Coventry Capital US LLC v. EEA Life Settlements, Inc.*, 329 F.R.D. 508, 514 (S.D.N.Y. 2019).

46. *In re Lozano*, 392 B.R. 48, 54 (Bankr. S.D.N.Y. 2008).

47. *Coventry Capital*, 329 F.R.D., at *508.

48. *Gross v. Zwirn*, 296 F.R.D. 224, 230 (S.D.N.Y. 2013).

Therefore, the court held that (1) information and documents of two providers requested by plaintiffs were irrelevant because they related to 10-year old valuation and fairness opinions; (2) defendants had practical ability to obtain documents from a management and accounting because of the more extensive relationship between them; and (3) defendants must obtain the relevant documents from their outside counsels.⁴⁹

4. “Discovery on Discovery”

When a party is seeking discovery that is collateral to relevant issues, it is required to provide an “adequate factual basis to justify the discovery.”⁵⁰ Here, the court agreed with plaintiffs and held that defendants obstructed the discovery process by refusing to provide the data sources and search terms.⁵¹ Plaintiffs identified specific inconsistencies in the information provided by defendants. Thus, the court directed defendants to disclose their discovery methodology.⁵²

5. Motion to Preclude from Providing Additional Information

A party is precluded from providing evidence if they ignore court instructions.⁵³ Here, the court denied plaintiffs’ motion to preclude defendants from providing additional evidence relating to the Transfer Agreement because defendants did not ignore court instructions.⁵⁴ Defendants merely failed to answer plaintiffs’ request to produce evidence indicating that the Transfer Agreement was a product of “true arm’s-length negotiations.”⁵⁵

C. The Crime-Fraud Exception

The final motion concerned internal communications between defendants and their counsel. Plaintiffs contended that SBT’s counsel and defendants communicated about the Transfer Agreement as a way to avoid obligations under plaintiffs’ ICC-WBO arbitration proceedings against SBT.⁵⁶ The counsel was involved in the Transfer Agreement arrangement and the transfer of assets and liabilities to Prime Carbon.⁵⁷ As the Transfer Agreement was used to defraud CBF and the ICC-WBO, plaintiffs alleged that the communication between defendants and their counsel about that Agreement should be excluded from the attorney-client privilege and work product doctrine.⁵⁸

49. *See generally* CBF, 2019 WL 3332492, at *39–50.

50. *Id.* at *50.

51. *Id.*

52. *Id.* at *52.

53. *Sentry Ins. A Mut. Co. v. Brand Mgmt., Inc.*, 295 F.R.D. 1, 8 (E.D.N.Y. 2013).

54. *Id.* at *55.

55. CBF, 2019 WL 3332492, at *53.

56. *Id.* at *58–59.

57. *Id.*

58. *Id.* at *55–65.

The court reaffirmed the crime-fraud exception to the attorney-client privilege and work-product doctrine.⁵⁹ In order for this exception to apply, the moving party has to demonstrate that (1) there is “probable cause” that the other party has committed fraud or a crime; and (2) the communications subjected to the exception have been committed in furtherance of this fraud or crime.⁶⁰ Probable cause is found when a prudent person reasonably believes that a client is communicating with his or her attorney to further a fraud or crime.⁶¹

Furthermore, under New York law, five elements are necessary to demonstrate fraud: (1) “misrepresentation of a material fact”; (2) the “falsity of that misrepresentation”; (3) “scienter, or intent to defraud”; (4) “reasonable reliance on that representation”; and (5) “damages caused by such a reliance.”⁶²

Here, SBT’s counsel sent a letter to plaintiffs stating that (i) SBT was not trying to avoid its responsibilities, (ii) the transfer of assets and liabilities was part of a required restructuring process, and (iii) they had not decided to dissolve and liquidate the business.⁶³ Plaintiffs provided five emails to demonstrate that there was probable cause that defendants committed fraud or a crime in relation to this letter.⁶⁴

The court found probable cause to believe false misrepresentation of material facts were made to defraud plaintiffs.⁶⁵ First, plaintiffs showed probable cause that defendants committed fraud.⁶⁶ The emails sufficiently suggested false representations and defendants’ intent to defraud plaintiffs.⁶⁷ Plaintiffs alleged that they relied upon these false representations and were deprived of relief because, when SBT filed for bankruptcy, they were unable “to recover the approximately \$48 million awarded by the ICC-WBO.”⁶⁸ The court rejected defendants’ argument that without the Transfer Agreement plaintiffs would have recovered much less because a prudent person would have more than a reasonable basis to suspect that defendants orchestrated the transfer to prevent plaintiffs from seeking recovery.⁶⁹

Second, the plaintiffs demonstrated that the communications were in furtherance of the fraud.⁷⁰ They referred to a statement of an attorney to the Swiss Tax administration that the

59. *In re Omnicom Grp., Inc. Sec. Litig.*, 233 F.R.D. 400, 404 (S.D.N.Y. 2006) (quoting *United States v. Jacobs*, 117 F.3d 82, 87 (2d Cir. 1997)).

60. *Id.*

61. *Kleeberg v. Eber*, No. 16-cv-9517 (LAK) (KHP), 2019 WL 2085412, at *11 (S.D.N.Y. May 13, 2019).

62. *Martin Hilti Family Tr. v. Knoedler Gallery, LLC*, No. 13-CV-0657 (PGG), 2019 WL 2024808 at *20 (S.D.N.Y. May 8, 2019) (quoting *Kottler v. Deutsche Bank AG*, 607 F. Supp. 2d 447, at *462 (S.D.N.Y. 2009)).

63. *Id.*

64. *Id.* at *60–61.

65. *Id.* at *63.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at *65.

70. *Id.*

objective of the transfer was to avoid the assets from falling under plaintiffs' award.⁷¹ Internal communications also confirmed that Prime Carbon was familiar with this risk.⁷² Accordingly, the court declared that plaintiffs were entitled to these documents withheld on privilege grounds under the crime-fraud exception.⁷³

IV. Conclusion

The District Court for the Southern District of New York handled five discovery motions involving a complex cross-border commercial litigation. Especially upon plaintiffs' showing that a prudent person holding a reasonable basis would believe that the objective of defendants' communication with their attorneys was to further a fraudulent scheme, Magistrate Judge Scott applied the crime-fraud exception to the attorney-client privilege and the work-product doctrine to the communications between defendants and their counsel. Interestingly, he concluded that plaintiffs were entitled to documents both from U.S. and European defendants, applying the crime-fraud exception extraterritorially.

Rob Heslenfeld

71. *Id.*

72. *Id.* at *66.

73. *Id.*

In re Picard

917 F.3d 85 (2d Cir. 2018)

The Second Circuit Court vacated the United States Bankruptcy Court for the Southern District of New York's decision to dismiss Irving H. Picard's case because (1) Picard could bring a claim under the Bankruptcy Code to have the alleged fraudulent transfers made by Madoff Investment Securities LLC avoided; (2) as a trustee, Picard had the ability to recover property from a transfer that has been avoided; (3) the initial transfer that Picard sought to have avoided was considered a domestic transfer and thus not barred by the presumption against extraterritoriality; and (4) since the initial transfer was domestic in nature, the United States had a greater interest in the matter than any foreign country, and Picard was not barred by international comity principles.

I. Holding

Recently in *In re Picard*,¹ the Second Circuit vacated the United States Bankruptcy Court for the Southern District of New York's decision to dismiss Irving H. Picard's ("Appellant") claim under the Bankruptcy Code. First, the court held that § 548(a)(1)(A) of the Bankruptcy Code allowed Appellant to avoid Bernard L. Madoff Investment Securities LLC's ("Madoff Securities") alleged fraudulent transfer of billions of dollars to foreign investors.² Second, the court held that once a transfer is deemed avoidable, an Appellant could recover the value of transferred property, for the benefit of the estate from any immediate or mediate transferee of such initial transferee under § 550(a) of the Bankruptcy Code.³ Third, the court held that the presumption against extraterritoriality did not bar Appellant's claim because the proper focus of the analysis should have been on the initial transfer, not the subsequent transfer between foreign investors and feeder funds.⁴ The court reasoned that the initial transfer is the proper focus because it is where the alleged fraud occurred, which gave rise to the Appellant's ability to avoid the transfer.⁵ Fourth, the court held that the Appellant's claim was not barred under international comity grounds because the United States' interest in applying its laws outweighed any foreign state interest.⁶

II. Facts and Procedure

On December 15, 2008, the Securities Investment Protection Corporation petitioned the United States District Court for the Southern District of New York for a protective order placing Madoff Securities into liquidation.⁷ Prior to this petition, Bernard Madoff ("Madoff") had

1. *In re Picard*, 917 F.3d 85 (2d Cir. 2018).

2. *Id.* at 95.

3. *Id.*

4. *Id.* at 100.

5. *Id.*

6. *Id.* at 105.

7. *Id.* at 92.

used his investment firm, Madoff Securities, to create a Ponzi scheme.⁸ Madoff Securities persuaded investors to buy investment funds by promising unreasonable returns.⁹ Madoff then took the money and allocated it to his JPMorgan Chase checking account in New York instead of investing it.¹⁰ Then, he used the money he received from other investors to pay investors who wanted to withdraw their funds.¹¹ In 2008, his Ponzi scheme crumbled.¹²

The Southern District court granted the protective order and Appellant was appointed as trustee.¹³ At the time, Madoff Securities had several direct investors including feeder funds.¹⁴ Those feeder funds gathered money from several investors and placed them into Madoff's "master fund."¹⁵ Three foreign feeder fund networks were included in the feeder fund that invested in Madoff: Fairfield Greenwich Group ("Fairfield") in the British Virgin Islands; The Kingate Funds ("Kingate") in the British Virgin Islands; and The Harley International (Cayman) Limited Fund ("Harley") in the Cayman Islands.¹⁶ These feeder funds invested a substantial amount of their assets into Madoff Securities.¹⁷ During the commencement of the action, these foreign feeder funds were in liquidation proceedings in their respective countries.¹⁸

A feeder fund withdraws money from the master fund.¹⁹ To withdraw money, an investor must inform the feeder fund, which would then request withdrawal from the master fund.²⁰ The initial transfer is the requested money that the Madoff Securities' master fund transfers to the feeder fund.²¹ After the initial transfer, there is the subsequent transfer, where the feeder fund receives the money and transfers it to its investor.²² However, the money that the investors and feeder funds received was from the JPMorgan Chase account because Madoff Securities never invested the money it received from the feeder funds.²³

Appellant sued the foreign subsequent transferees ("Appellees"), the investors in the feeder fund, under § 550(a)(2) of the Bankruptcy Code to recover the property the Appellees received from Madoff Securities through the feeder funds.²⁴ Appellant contended that the initial transfer

8. *Id.* at 91–92.

9. *Id.* at 92.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 93.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

was voidable under § 548(a)(1)(A) of the Bankruptcy Code because it was fraudulent.²⁵ The United States District Court for the Southern District withdrew reference to the bankruptcy court to determine whether Appellant could recover the property under § 550(a)(2) of the Bankruptcy Code.²⁶ Judge Rakoff held that the Appellant could not recover because his action was barred under the presumption against extraterritoriality as well as under international comity principles.²⁷ Then, the District Court remanded the case to the bankruptcy court.²⁸

On remand, the United States Bankruptcy Court for the Southern District of New York dismissed Appellant's claims.²⁹ First, it dismissed the claims against Appellees who invested in the three foreign feeder funds on international comity grounds.³⁰ The court found that the United States had no interest in regulating the relationship between the foreign feeder funds and investors.³¹ Also, the court found that the United States' interest was not as great as the foreign nation's interest.³² Second, the bankruptcy court dismissed Appellant's claims against the other Appellees under the presumption against extraterritoriality because the Appellant did not demonstrate sufficient facts showing a domestic relationship between Appellant's claims and the transfers.³³

III. Discussion

A. Trustee's Claim Arises under § 548(a)(1)(A) and § 550(a) of the Bankruptcy Code

Appellant brought this claim seeking recovery of the property that Madoff transferred to Appellees.³⁴ Under § 548(a)(1)(A), a transfer may be avoided by the trustee if the debtor made the transfer "voluntary or involuntarily . . . to hinder, delay, or defraud any entity to which the debtor was or became . . . indebted."³⁵ Once a trustee avoids a transfer, § 550(a)(2) of the Bankruptcy Code allows the trustee to "recover, for the benefit of the estate, the property transferred, from . . . any immediate or mediate transferee of such initial transferee."³⁶

25. *Id.*

26. *Id.*

27. *Id.* at 94.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 95.

35. 11 U.S.C. § 548(a)(1)(A).

36. 11 U.S.C. § 550(a)(2).

B. The Presumption Against Extraterritoriality

1. Legal Standard

The Supreme Court in *RJR Nabisco, Inc. v. European Comity.*, stated that as a canon of statutory construction, the presumption of extraterritoriality is used to prevent “international discord that can result when U.S. law is applied to conduct in foreign countries.”³⁷ The presumption of extraterritoriality provides that “[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to only have domestic application.”³⁸ To determine whether a case involves domestic application of the law, the court must look to the statute’s “focus.”³⁹ In *WesternGeco LLC v. ION Geophysical Corp.*, the Supreme Court reasoned that a statute’s focus is “the object of solicitude which can include the conduct it seeks to regulate as well as the parties and interests it seeks to protect or vindicate.”⁴⁰ Additionally, a statute is not analyzed by itself, but instead “if the statutory provision at issue works in tandem with other provisions, it must be assessed in concert with those provisions.”⁴¹

2. Determining the Focus of § 550(a)

Here, Judge Wesley reviewed the lower court’s application of the presumption against extraterritoriality *de novo*.⁴² To recover property under § 550(a), a trustee must avoid the transfer under relevant Bankruptcy provisions including § 548(a)(1)(A).⁴³ In applying the reasoning of *WesternGeco*, the court held that the focus of § 550(a) must be determined by looking at both § 550(a) and § 548(a)(1)(A) because they work “in tandem.”⁴⁴

To determine the focus of § 550(a), the court looked at the conduct that the bankruptcy provision regulates.⁴⁵ The lower court held that recovery under § 550(a)(2) regulates the subsequent transfer of property.⁴⁶ However, the Second Circuit disagreed and held that § 550(a)(2) helps execute the policy of § 548(a)(1)(A), and is thus a “utility provision.”⁴⁷ Section 550(a)(2)

37. *RJR Nabisco, Inc. v. Eur. Cmty.*, 136 S. Ct. 2090, 2100 (2016).

38. *Id.*

39. *Id.*

40. *WesternGeco LLC v. ION Geophysical Corp.*, 791 F.3d 1340, 1343 (Fed. Cir. 2015).

41. *Id.*

42. *In re Picard*, 917 F.3d at 96.

43. *Id.* at 97.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 98.

works with § 548(a)(1)(A) by helping trace the fraudulent transfer back to the initial transferee.⁴⁸ As a result, recovery under § 550(a) serves to allow the statute to achieve its regulatory goal.⁴⁹ The statute is trying to regulate the fraudulent act from the initial transfer.⁵⁰ In applying *WesternGeco*, the court held that the focus of § 550(a) is the initial conduct because the statute is trying to regulate the fraudulent transfer.⁵¹

3. Madoff's Initial Transfer Constitutes A Domestic Activity

The lower court adopted a balancing test and “weighed the location of the account from and to which the subsequent transfer was made, and the location or residence of the subsequent transferor and transferee.”⁵² On appeal, the Second Circuit rejected the balancing test.⁵³ Instead, it held that the conduct relevant to the statute’s focus is not the receipt of the property, but rather its fraudulent transfer.⁵⁴ By focusing on the fraudulent transfer, the court held that “when a domestic debtor commits fraud by transferring property from a U.S. bank account, the conduct that § 550(a) regulates takes place in the United States.”⁵⁵ Here, the property that Madoff was transferring to the Appellees was from a U.S. bank account.⁵⁶ As a result, the conduct was a domestic activity and domestic applications of the statute were involved.⁵⁷ The court refused to consider the transferee’s receipt of property because it would “open a loophole” and prevent recovery.⁵⁸

C. International Comity

1. Legal Standard

The principle of international comity has two applications.⁵⁹ First, it is applied as a “pre-scriptive comity” and answers a statutory construction question.⁶⁰ Under this application, the dissent in *Hartford Fire Insurance Co. v. California* posed that the issue is whether “a court [should] presume that Congress, out of respect for foreign sovereigns, limit the application of domestic law on a given set of facts.” [sic]⁶¹ The second application relies on “adjudicative comity,” where international comity principles are viewed as “discretionary acts of deference.”⁶²

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 99.

52. *Id.*

53. *Id.*

54. *Id.* at 100.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (Scalia, J., dissenting).

62. *Picard*, 917 F.3d at 100.

Under this application, even if a statute applies, a court “should nonetheless abstain from exercising its jurisdiction in deference to a foreign nation’s courts that might be a more appropriate forum for adjudicating the manner.”⁶³

In *In re Maxwell*, the Second Circuit declined to decide whether these applications are “distinct doctrines.”⁶⁴ Despite the refusal to decide the relationship between the doctrines, the court held that “a true conflict between American law and that of a foreign jurisdiction” is needed to trigger international comity.⁶⁵ To determine the existence of a true conflict, the court must look at whether “compliance with the regulatory laws of both countries is impossible.”⁶⁶ The court established a choice-of-law test that “takes into account the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law.”⁶⁷

There are two important reasons for applying comity to bankruptcy proceedings.⁶⁸ First, deference to foreign insolvency proceedings allows the courts to “facilitate equitable, orderly, and systematic distribution of the debtor’s assets.”⁶⁹ In other words, when there is a pending insolvency proceeding in a foreign country related to the same manner, deference should be given to the foreign country to maintain order in the distribution of assets.⁷⁰ Second, comity is important in bankruptcy proceedings because Congress has “explicitly recognized” it while revising bankruptcy laws.⁷¹ In *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, the court held that it typically gives deference to foreign liquidation when “[t]he equitable and orderly distribution of a debtor’s property requires assembling all claims against the limited assets in a single proceeding.”⁷²

2. Analysis of International Comity

Here, the Second Circuit decided to treat the two applications of the doctrine as distinct, but related to each other.⁷³ The court decided to treat them differently because of the difference in the standard for review.⁷⁴ Prescriptive comity focuses on statutory interpretation and thus must be reviewed *de novo*.⁷⁵ On the other hand, adjudicative comity focuses on judicial discretion and is reviewed under abuse of discretion.⁷⁶ The court noted that the standards

63. *Id.* at 101.

64. *In re Maxwell*, 93 F.3d 1036, 1047 (2d Cir. 1996).

65. *Id.* at 1049.

66. *Id.* at 1050.

67. *Id.* at 1048.

68. *In re Picard*, 917 F.3d at 103.

69. *Id.*

70. *Id.*

71. *Id.*

72. *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 424 (2d Cir. 2005)

73. *Picard*, 917 F.3d at 101.

74. *Id.*

75. *Id.*

76. *Id.*

would be similar because if it were to apply *de novo* review, it would have to apply a more rigorous form of *de novo* review.⁷⁷ This is because it would be reviewing the court's decision to not exercise jurisdiction.⁷⁸

In the previous proceeding, the lower court focused on the "choice-of-law analysis" and whether domestic law applied.⁷⁹ This analysis falls under the prescriptive comity application.⁸⁰ For that reason, the Second Circuit reviewed the lower court's decision *de novo* and focused on statutory interpretation.⁸¹ The court noted that prescriptive comity is "simply a rule of construction" and that it "does not require clear evidence that a statute does not reach extraterritorial conduct."⁸²

In determining whether the principles of comity should be applied, the court looked at the initial transfer.⁸³ It noted that the lower court erred by focusing on the subsequent transfer and holding that the United States' interest was outweighed by the interest of the feeder fund's liquidations.⁸⁴ In applying the choice-of-law test, the Second Circuit noted that the "United States has a compelling interest in allowing domestic estates to recover fraudulently transferred property."⁸⁵ This is evident in § 550(a)(2), which suggests that Congress wanted the claims resolved in the United States.⁸⁶

However, in *In re Maxwell*, the court stated that foreign states have "at least some interest in adjudicating property disputes."⁸⁷ Here, the Second Circuit held that the foreign states did not have a compelling interest, where feeder funds were in liquidation proceedings.⁸⁸ This is because Appellant is tracing property while the feeder funds' liquidation is under its own documents.⁸⁹ Additionally, the Appellant was not seeking double recovery because it had not, and could not, become a foreign avoidance action.⁹⁰ The foreign country might be interested in giving the foreign feeder funds an ability to potentially recover as much of the same property as Appellant is recovering.⁹¹ However, the Second Circuit held this as not a strong interest

77. *Id.* at 102.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 103.

83. *Id.*

84. *Id.* at 105.

85. *Id.* at 103.

86. *Id.* at 105.

87. *In re Maxwell*, 93 F.3d 1036, 1052 (2d Cir. 1996).

88. *Picard*, 917 F.3d at 104.

89. *Id.*

90. *Id.*

91. *Id.*

because there is nothing in the Bankruptcy Code suggesting that Congress intended this interest to outweigh domestic interest.⁹² As a result, the United States' interest outweighs any foreign interest.⁹³

IV. Conclusion

The court clarified that in determining the focus of § 550(a) of the Bankruptcy Code, § 548(a)(1)(A) should also be considered. The recovery and avoidable provisions need to be considered because they are "in tandem." As a result, the proper focus in Appellant's claim was the initial transfer and not the subsequent transfer. By focusing on the subsequent transfer, the lower court erred in its application of the presumption against extraterritoriality and its application of the international comity principle. The Second Circuit vacated the lower court decision and held that the Appellant's claim was not barred since it was a domestic transfer and the United States' interest outweighed any foreign interest in applying its laws.

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92. *Id.* at 104–05.

93. *Id.* at 105.

Rukoro v. Federal Republic of Germany

363 F. Supp. 3d 436 (S.D.N.Y. Mar. 6, 2019)

The United States District Court for the Southern District of New York granted defendants' motion to dismiss and denied plaintiff's motion for leave to file a supplemental declaration or second amended complaint because the plaintiffs failed to allege sufficient facts to support subject matter jurisdiction for their claim under (1) the commercial activity exception to FSIA by not showing that the core component of their claim had direct effects in the United States; and (2) the takings exception to FSIA because, although they showed an exchange of expropriated property for property within the United States, they failed to show that the property was in the United States in connection with commercial activities.

I. Holding

Recently, in *Rukoro v. Federal Republic of Germany*,¹ the Federal District Court for the Southern District of New York granted Germany's motion to dismiss, and denied Rukoro's motion for leave to file a supplemental declaration or second amended complaint. The Court held that the Plaintiffs failed to allege facts supporting their argument under the commercial activity exception to FSIA because the commercial activities they alleged were not directly affected by the property expropriation and genocide at the heart of their claim.² The Court further held that the plaintiffs failed to allege facts supporting their argument under the takings exception of FSIA.³ Although the Court found that comingling profits from the expropriation of Plaintiffs' property with the German treasury, and subsequently using treasury funds to purchase property in the United States, was sufficient to show an exchange of expropriated property for property in the United States, the Plaintiffs failed to show that the property was in the United States in connection with German commercial activities.⁴

II. Facts and Procedure

The plaintiffs in this case are U.S. and non-U.S. citizens who are members of the Nama and Ovaherero indigenous peoples.⁵ From 1884 to 1903, German colonists arrived in the native territory of the Nama and Ovaherero people in modern day Namibia, then known as German South West Africa, and began to use violence and coercion to seize the land, livestock and other resources and property of the Ovaherero and Nama people.⁶ Consequently, many Ovaherero and Nama people were forced into debt and slavery.⁷ In 1904, under the leadership of military commander Adrien Dietrich Lothar von Trotha, German troops began a violent

1. *Rukoro v. Fed. Republic of Germany*, 363 F. Supp. 3d 436 (S.D.N.Y. 2019).

2. *Id.* at 446.

3. *Id.* at 448.

4. *Id.* at 451–52.

5. *Id.* at 442.

6. *Id.*

7. *Id.*

campaign to exterminate the Ovaherero and Nama people.⁸ At one point, thousands of unarmed Ovaherero people gathered in a town to surrender to German forces, but were massacred by the Germans, with the survivors fleeing to the Omaheke Desert, where they died of starvation and thirst.⁹ In 1905, the surviving Ovaherero and Nama people were sent to concentration camps, where they were worked to death.¹⁰ Women and children were often raped and sexually abused in these camps.¹¹ Plaintiffs allege that, at one of these camps, the bodies of Ovaherero and Nama people were dissected and used for medical research, and that hundreds of Ovaherero and Nama people were murdered and decapitated to allow researchers who believed in the superiority of the white race to study their remains.¹² In 1985, the United Nations Economic and Social Council Commission on Human Rights classified these events as a genocide, and the German government recently entered into negotiations with Namibia regarding these events, but did not invite the plaintiffs to participate in the negotiations.¹³

The plaintiffs are seeking damages for genocide under the Alien Tort Statute, federal common law, and the law of nations; damages for conversion of property rights and unjust enrichment; an accounting; establishment of a constructive trust; declaratory relief recognizing them as "legitimate successors to sovereign nations;" and a declaration that excluding the plaintiffs from negotiations between Germany and Namibia is a violation of international law.¹⁴ Finally, the plaintiffs are seeking to enjoin Germany and Namibia from conducting negotiations without them.¹⁵

Plaintiffs allege that the Southern District of New York has jurisdiction to hear this case under the commercial activity and takings exceptions to the Foreign Sovereign Immunity Act.¹⁶ To support these claims, the plaintiffs allege that Ovaherero and Nama skulls and body parts used for experimentation by the Germans are currently in the American Museum of Natural History in New York City.¹⁷ Additionally, they allege that there is a copy of the "Blue Book," a record of the genocide from 1918, at the New York City Public Library, and that New York is a leading center for research and study of the Ovaherero and Nama genocide.¹⁸ They also allege that Germany profited from the actions it took against the Ovaherero and Nama people, and that this money was comingled with the treasury of Germany.¹⁹ The plaintiffs allege that these comingled funds were used to purchase four properties in New York City, that

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 443.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

are used in connection with Germany's commercial activities, including contractual obligations, and programs to develop American interest in the German culture with the goal of commercial growth.²⁰

III. Discussion

Under the FSIA, foreign states are presumptively immune from jurisdiction of US courts, unless a statutory exception to immunity applies.²¹ When the defendant presents prima facie evidence that it is a foreign sovereign, the burden shifts to the plaintiff to establish by a preponderance of the evidence that an exception under the FSIA allows US Courts to exercise jurisdiction over the foreign sovereign.²² If the claim does not fall under one of the FSIA exceptions, federal courts lack subject matter jurisdiction over the claim and personal jurisdiction over the defendant.²³ Germany, as a foreign sovereign, is immune under the FSIA, unless an exception applies, and the plaintiffs claim that the commercial activity exception and the takings exception apply, though they do not explicitly invoke the relevant statute for the commercial activity exception.²⁴

A. Commercial Activity Exception to FSIA

1. Legal Standards for the Commercial Activity Exception to FSIA

Under the commercial activity exception to the FSIA, a state shall not be immune in a case where the action is outside the United States in connection with a commercial activity of the foreign state, and that action causes a direct effect in the United States.²⁵ The first step in this analysis is to identify the action of the foreign state, which is the reason for the claim.²⁶ An action is "based upon" the conduct that is the foundation of the claim.²⁷ In *Argentina v. Weltover*, the Supreme Court held that an action is direct for purposes of the commercial activities exception "if it 'follows as an immediate consequence'" of the defendant's actions.²⁸ The Second Circuit has held that the effect is lacking immediacy, if it crucially depends on variables that are independent of the foreign state's conduct.²⁹

2. Analysis of the Commercial Activity Exception

The plaintiffs allege that the commercial activity exception applies because Germany's operation and construction of a railway in Namibia and Germany's "bone activities" are com-

20. *Id.* at 443–44.

21. *Id.* at 444 (citing 28 U.S.C. § 1604).

22. *Id.* (citing *Swama v. Al-Awadi*, 622 F.3d 123, 144 (2d Cir. 2010)).

23. *Id.* at 444 (citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983)).

24. *Id.*

25. *Id.* (citing 28 U.S.C. § 1605(a)(2)).

26. *Id.* (citing *Garb v. Republic of Poland*, 440 F.3d 579, 586 (2d Cir. 2006)).

27. *Id.* at 444–45.

28. *Id.* at 445 (quoting *Argentina v. Weltover*, 504 U.S. 607, 618 (1992)).

29. *Id.*

mercial in nature.³⁰ The Court, however, disagreed because the plaintiff's claims are not sufficiently based on the railway and the "bone activities" to satisfy the commercial activity exception in FSIA, regardless of whether these actions are actually commercial activities.³¹ The plaintiffs conceded at oral argument that the actions their complaint is based on are the taking of plaintiffs' land and livestock, and the genocide of the Ovaherero and Nama people, not the railway in Namibia, or Germany's "bone activities."³²

The plaintiffs also allege that Germany's actions had a "direct effect" in the United States because (1) members of the peoples harmed by the genocide currently live in the United States, (2) certain human remains collected by Germany are at the American Museum of Natural History in New York, (3) the New York Public Library has a copy of the "Blue Book," and (4) New York is a leading center for research on the genocide.³³ However, even assuming that the plaintiffs could show that Germany's actions were connected to a commercial activity, they failed to allege sufficient facts to prove the conduct caused direct effects in the United States.³⁴

First, the court held that some members of the class being located in the United States is insufficient to constitute a "direct effect."³⁵ The court also held that the New York Public Library having a copy of the "Blue Book," and New York's status as a leading research center on the genocide are insufficient because these things "bear no direct and immediate causal connection to Germany's actions in South West Africa."³⁶

The Court also held that the human remains at the American Museum of Natural History were insufficient because the transfer of those remains was not an immediate consequence of the actions that formed the basis of the plaintiffs' claims.³⁷ The remains were from the private collection of a German anthropologist, whose wife sold them to the American Museum of Natural History after her husband's death in 1924.³⁸ Because this transfer was from a private party, not from the German government, and happened ten years after the genocide, it depended on variables independent of Germany's conduct, making it insufficient to give the Court subject matter jurisdiction under the commercial activity exception.³⁹ Even if the remains had been transferred to the museum directly from the German government, the evidence offered by the Plaintiffs does not demonstrate that the museum's acquisition of the remains was a direct effect of the genocide and expropriation of the plaintiffs' property upon which the claims were based.⁴⁰

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 445–46.

37. *Id.* at 446.

38. *Id.*

39. *Id.*

40. *Id.*

The Court found that the plaintiffs' claims do not fall within the FSIA's commercial activity exception because they are based primarily on Germany's genocide of the Ovaherero and Nama people and its expropriation of their property.⁴¹ Furthermore, the plaintiffs failed to allege facts sufficient to support the claim that Germany's expropriation caused a direct effect in the United States.⁴²

B. Takings Exception to the FSIA

1. Legal Standard for the Takings Exception

The Takings Exception of the FSIA asserts that foreign states shall not have immunity from jurisdiction in cases where

rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.⁴³

In *Garb v. Republic of Poland*, the Second Circuit clarified that in order to establish subject matter jurisdiction under the takings exception of FSIA, the plaintiff must establish 4 elements:⁴⁴ (1) rights in property are at issue; (2) the property was taken; (3) the taking violated international law; and either (4)(a) the property is present in the US in connection with a commercial activity of the foreign state in the United States, or (4)(b) the property is owned or operated by a foreign state or an instrumentality of the foreign state that is engaged in commercial activity in the US.⁴⁵

2. Analysis of the Takings Exception

Under the Supreme Court's decision in *Venezuela v. Helmerich & Payne International Drilling Company*, a plaintiff must make more than a nonfrivolous argument that the FSIA takings exception's jurisdictional requirements are satisfied.⁴⁶ Germany argued, after *Helmerich*, that plaintiffs must demonstrate at the pleading stage that each element of the takings exception applies, while plaintiffs argued that *Helmerich* only requires the first three elements.⁴⁷

41. *Id.*

42. *Id.*

43. 28 U.S.C. § 1605(a)(3).

44. *Rukoro*, 363 F. Supp. 3d at 447.

45. *Id.*

46. *Id.*

47. *Id.*

However, *Helmerich* does not support the plaintiffs' contention and the reasoning in that case requires that the more than non-frivolous pleading standard apply to all four elements of the takings exception.⁴⁸

Even if plaintiffs had sufficiently alleged under the *Helmerich* standard that rights in property were taken from them in violation of international law, although not all of their claims necessarily involved rights in property, they fail to allege that it is present in connection with a German commercial activity.⁴⁹

a. Plaintiffs Sufficiently Alleged that Property Exchanged for the Expropriated Property is Present in the United States

Plaintiffs claimed that some of Germany's wealth can be traced from the property it took from the Ovaherero and Nama peoples in violation of international law.⁵⁰ Additionally, plaintiffs claimed that Germany's investments in New York City purchased using its wealth, constituted property exchanged for the property taken in violation of international law.⁵¹ Plaintiffs supported this assertion with the economist Stan V. Smith's declaration that it can reasonably be assumed that German revenues from German South West Africa went into Germany's general government funds, which were later used to purchase properties in New York.⁵² Germany contended that the plaintiffs cannot prove as a matter of law that their expropriated property is traceable to Germany's investments in New York properties.⁵³

The Court held that the allegations in the complaint were sufficient to make a *Helmerich* showing that property exchanged for the expropriated property is present in the United States.⁵⁴ Because Germany is asserting immunity under the FSIA, the Court found that it had the ultimate burden of proof, and because it did not dispute the facts in the amended complaint, the court assumed the plaintiffs' allegations as true, and made all reasonable inferences in their favor.⁵⁵ The Court concluded that the plaintiff's alleged facts were sufficient to support the Plaintiffs' claim that the proceeds of selling expropriated property were comingled in the German treasury, and used to purchase property in New York, though it also noted that further factual development could show these allegations to be false or unsupported.⁵⁶

Germany did not present any legal authority to support its position that it is impossible as a matter of law to trace funds expropriated over 100 years ago.⁵⁷

48. *Id.*

49. *Id.* at 448.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 448–49.

54. *Id.* at 449.

55. *Id.*

56. *Id.*

57. *Id.*

b. Plaintiffs Failed to Allege that Property in the United States is Present in Connection with German Commercial Activity

Next, Germany argued that even if the New York properties are property exchanged for expropriated property under the takings exception, Plaintiffs failed to show that these properties are present in the United States in connection with a German commercial activity in the United States.⁵⁸ The FSIA defines a foreign state's commercial activity in the United States as a "commercial activity carried on by such state and having substantial contacts with the United States."⁵⁹ The FSIA further defines a commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act," and asserts that the act's commercial character is determined by the nature of the act's course of conduct, not the act's purpose.⁶⁰ Courts have found that a state is engaging in a commercial activity, where it acts in the manner of a private player in the market.⁶¹ Plaintiffs argued that the German properties in New York are present in the United States in connection with (1) the performance and existence of contractual obligations relating to the properties, and (2) various programs to develop American interest in German culture, language, and people with the ultimate goal of commercial growth.⁶²

The court determined that Plaintiffs' first argument failed because it focused on activities incidental to the properties' operations rather than the properties' primary functions.⁶³ Although the contracts for construction, maintenance, insurance, and repair are the commercial aspects of property ownership, they do not bear a causal link to the purpose for which Germany holds and operates these property.⁶⁴ The parties acknowledged that the German properties in New York are used as private residences for German diplomats, and housed Germany's mission to the United Nations.⁶⁵ Further, these properties housed its consulate general and other entities engaged in propagating German culture.⁶⁶ However, the court found that holding contracts for restoration work on these properties is in connection with German commercial activities, and would make the scope of the FSIA takings exception too broad.⁶⁷ The Plaintiffs' interpretation here would render any foreign state amenable to suit under the takings exception simply because it has personnel who is housed, fed, or transported in the United States.⁶⁸ Plaintiffs' interpretation ignores the general rule that foreign states are presumptively immune from the United States courts' jurisdiction, and is therefore insufficient to establish subject matter jurisdiction under the takings exception.⁶⁹

58. *Id.*

59. 28 U.S.C. § 1603(d)–(e).

60. *Id.*

61. *Rukoro*, 363 F. Supp. 3d at 450.

62. *Id.* at 450–51.

63. *Id.* at 450.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

In support of their argument that the New York properties' involvement in cultural propagation makes them present in connection with a commercial activity, the Plaintiffs offered a statement of an attorney who claimed to have visited the properties and saw no indication of official state use.⁷⁰ However, the activities Germany uses the New York properties for are not concerned with buying and selling goods, manufacturing goods for the market or trade, or the ability to make a profit.⁷¹ Instead, the activities described in the amended complaint appear to be sovereign and diplomatic activities, not activities a private party uses to engage in commerce.⁷² Therefore, the Court found that the Plaintiffs did not properly allege that the properties are present in the United States in connection with a commercial activity, and that it does not have subject matter jurisdiction under the FSIA takings exception.⁷³

Because the Court does not have subject matter jurisdiction under the two FSIA exceptions alleged, the Court declined to address Germany's other arguments in favor of dismissal.⁷⁴

C. Plaintiffs' Motion for Leave to File a Supplemental Declaration or a Second Amended Complaint

On October 31, 2018, the Plaintiffs filed a motion seeking leave to file a supplemental declaration or a Second Amended Complaint that detailed additional facts, such as the history of the remains in the American Museum of Natural History.⁷⁵ The proposed Second Amended Complaint and the supplemental declaration offered substantially similar facts.⁷⁶

Under Federal Rule of Civil Procedure 15(a), leave to amend pleadings shall be freely given when it is required by justice, but it may be denied if the amendment (1) has been unduly delayed, (2) is made in bad faith or sought for dilatory purposes, (3) would prejudice the opposing party, or (4) would be futile.⁷⁷ Plaintiffs only referenced delays and difficulties in accessing information to justify why the facts alleged in the supplemental declaration were not included in the original amended complaint.⁷⁸ Because the initial complaint was filed on January 5, 2017, and oral argument on the motion to dismiss was held on July 31, 2018, the Court found that the Plaintiff's delay in filing this motion is prejudicial to Germany at this stage in the proceedings.⁷⁹

70. *Id.* at 451.

71. *Id.*

72. *Id.*

73. *Id.* at 452.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*; FED. R. CIV. P. 15(a).

78. *Rukoro*, 363 F. Supp. 3d at 452.

79. *Id.*

Even if the delay in filing this motion was not prejudicial to Germany, the Court would find it futile, as the additional facts are not substantially different from those in the original amended complaint and do not demonstrate sufficient evidence to give the Court subject matter jurisdiction over Germany under the FSIA exceptions.⁸⁰ Therefore the Court denied the Plaintiffs' motion for leave to file a supplemental declaration or a Second Amended Complaint.⁸¹

IV. Conclusion

The plaintiffs' contentions in this case allowed the Court to reaffirm the narrowness of the takings exception and the commercial activity exception to FSIA. The Court found that, in order to apply the commercial activity exception, plaintiffs must assert that the harm at the center of the claim must have a direct effect on commercial activities. The court then concluded that comingling profits from violations of international law with a state's general treasury and using those funds to purchase property in the United States is exchanging expropriated property for property in the United States. However, this connection with a commercial activity requirement of the takings exception does not include such far removed activities as operating government facilities in the United States within their definition of commercial activity. The court took a broad view of exchanging expropriated property in the United States but upheld the narrowness of the takings exception to FSIA by concluding that operating government buildings and cultural centers cannot constitute a commercial activity. In this case, the court acknowledged the widespread potential financial benefits of the atrocities committed by Germany against the Herero and Nama people, but upheld the narrowness of exceptions to the general rule that U.S. courts do not have jurisdiction over foreign sovereigns.

Heidi Simpson

80. *Id.* at 452–53.

81. *Id.*