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Mitigation of Prostitution in the Carita Beach Tourist Area, Pandeglang Regency

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Abstract

Exploring human life in society is always an interesting endeavor due to the various dynamics that occur between individuals, between individuals and groups, and between groups within society. Within these dynamics, there are various kinds of actions carried out by each individual that are not in line with mutually agreed norms. An example of reprehensible behavior that is generally condemned by society is prostitution. The rise of prostitution also occurs in Pandeglang Regency, which is a tourist area. Therefore, through this article, the author explores how mitigation efforts must be carried out to eliminate erroneous behavior from a small portion of the community or individuals through empirical-sociological research methods based on data collected in the form of primary data obtained directly from the main source. The legal approach to prostitution in the Carita beach tourist area faces a number of relatively complex obstacles. Various realities of life will influence a person, causing them to ignore or put aside their conscience and faith and fall into very practical life judgments based on instinct. To reduce prostitution, the leadership and staff of the Carita Police need to improve coordination and collaboration with various components of society to reduce personnel constraints and operational costs.

Keywords: Mitigation, Prostitution, Tourism, Pandeglang

1. Introduction

Exploring human life in society is always an intriguing endeavor due to the various dynamics that occur between individuals, between individuals and groups, and between groups within society. These dynamics have certain consequences, some positive because they benefit communal life in society, and others negative because they only benefit certain individuals or groups while simultaneously causing friction, friction, and conflicts that sometimes persist over time. These dynamics impact the aspect of order that is essential in every interaction within society, and at certain levels, they have disrupted the balance (equilibrium) of various interests that had been harmoniously intertwined in the life of a society, ultimately disturbing and offending the sense of justice within that society itself.

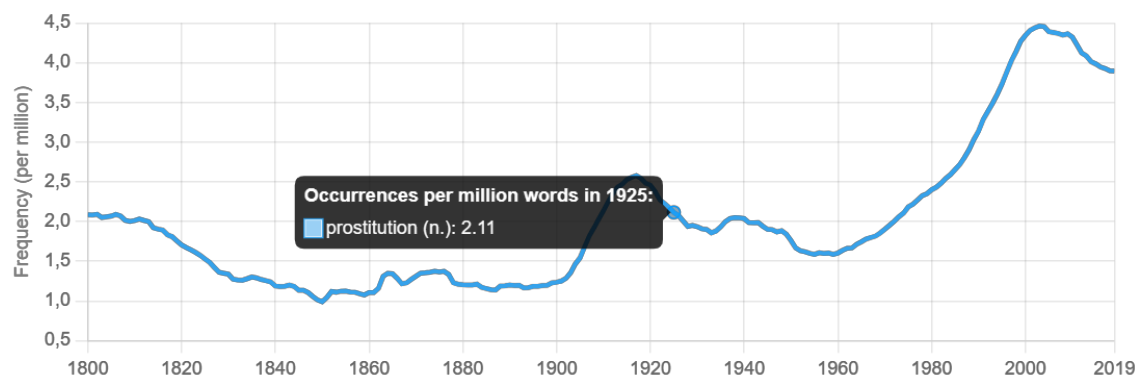
It cannot be denied that every individual and group within society always has interests that are not always in line with the common interests of the entire community, where these various interests are often related to the fulfillment of basic needs such as clothing, food, and shelter, as well as non-material needs such as self-respect, honor, safety, and so on.

In every society, there are certain attitudes and behaviors that are categorized as reprehensible because, collectively, these attitudes and behaviors are deemed as such based on the consideration that they do not meet the agreed-upon standards of values. These standards may be the result of reflections on the long-standing practices of community leaders, certain customs, or regulations imposed by the -authorities in regulating the continuity of community life.

There is no uniform human behavior because human cultural behavior differs from one another due to differences in place and environment, history and origin, spirit and soul, intellect and way of thinking, as well as the culture and religion they adhere to (Hadikusuma, 2006). Human actions are categorized as crimes because legal regulations impose sanctions as a consequence of such actions (Ashiddiqie & Safa'at, 2014). Various problems arise in human social interactions due to being trapped in materialism and neglecting religious teachings, ethics, and morals. Today, economic needs are very dominant, but in reality, human social interactions are centered on issues of character and spirituality (Abustan, 2020).

An example of reprehensible behavior that is generally condemned by society is prostitution, which has existed since ancient times in various parts of the world. Terminologically, it comes from the Latin word *prostituere*, which means to allow oneself to commit adultery, engage in debauchery, sexual abuse, and fornication (Siregar, 2019). In short, prostitution can be described as the exchange of sexual relations for money or gifts as a commercial transaction (T & V, 2025).

From a historical perspective, from the early 19th century to the early 21st century, prostitution has shown a dynamic ebb and flow with a steadily increasing trend, as shown in the following graph.



Nationally in Indonesia, prostitution has become an industry that began during the Dutch colonial era and continued into the independence era. Although no similar data is available, BPS data from 2024 shows which provinces have the most prostitution locations. Social, economic, and policy factors are reflected in the fact that these locations are greatly influenced by the social situation. The survey results indicate West Java (Jabar) as the province with the highest number of PSK locations. In addition to West Java, East Java ranks second with 70 locations, Central Java (55 locations), North Sumatra (37), East Kalimantan (28), South Sumatra (28), West Kalimantan (25), Riau: 25 locations, Banten: 21 locations, North Maluku: 18 locations, Central Sulawesi (18), Central Kalimantan (17), Lampung (16), Riau Islands (14), and West Sumatra (13) (Abdurrahman, 2017). According to a study by Endang Sedyaningsih (1999), women who engage in sex work are influenced by environmental and economic factors, which are the primary determinants (NWI, na).

On December 28, 2008, Antara News reported that 14 children involved in prostitution who often operated at the Carita Beach Hotel were arrested by the police for disturbing the public and disrupting public order. Many female sex workers engaged in prostitution around Carita Beach charged rates of Rp. 200,000 to Rp. 300,000. They were residents of Pandeglang District, Lebak District, and Cilegon City, aged around 20 years old. Additionally, five men were also apprehended. All of this was done because prostitution is highly likely to cause social diseases and disrupt public safety and order. Among them, some admitted to working as sex workers because they were abandoned by their husbands and had to support two children still attending elementary school (Antara, 2008). As

a comparison, on September 15, 2015, a joint team of SATPOL PP, TNI, and Serang Police conducted a raid in the Anyer beach tourism area, successfully apprehending thirty women suspected of being sex workers at a karaoke venue (Firo, 2015). Even by 2023, the police had managed to arrest two men who committed an indecent act by forcing a middle school student in Pandeglang to drink alcohol so they could sell him (Kokasih & Haris, 2023).

According to the World Population Review 2024, Indonesia ranks 75th in the world in terms of crime rates. This is a classic example of crime related to economic issues. For example, in Pandeglang, there is a shop that offers prostitution services to tourists visiting Citra Beach. The rates offered vary widely, ranging from Rp. 400,000 to Rp. 600,000, depending on the agreement and other factors. This practice is supported by the warung owner, who acts as an intermediary between the women and the interested tourists (Fatoni & Novriadji, 2023). On the other hand, the community in Pandeglang Regency opposes the existence of such establishments, as they are considered to violate regulations since these places lack environmental permits and only have restaurant licenses. The Chairman of the MUI in Carita supports the closure of these establishments, as they contravene the norms of the community (Nipal, 2025).

The existence of prostitution has many negative impacts due to various aspects of the practice, including the following:

1. In terms of education, prostitution causes demoralization;
2. In terms of society, prostitution is considered a disease in society;
3. Religious aspect: Indonesia is a country where society lives by religious values, and prostitution is forbidden by all religions recognized by the state;
4. Health aspect: prostitution is a cause of dangerous infectious diseases such as HIV/AIDS (KPAI, 2015).

To maintain village security, every village, including Sukanagara Village, has one Bhabinkamtibmas (BHABIN) member who is on duty every day. These Bhabinkamtibmas members are not only responsible for maintaining security but also for educating the community about crime prevention. One area particularly vulnerable to criminal activity is the coastal region, where criminal incidents often involve perpetrators from outside the village. Bhabinkamtibmas plays a crucial role in reducing the risk of crime by providing education and preventive approaches to residents. Additionally, there are several social issues that require attention, such as family disputes that sometimes escalate into conflicts. Although these conflicts do not fall under the category of serious crimes, they still require proper resolution to maintain social harmony within the village. The outreach efforts conducted by Bhabinkamtibmas also include resolving these internal conflicts to ensure that the security situation in Sukanagara Village remains conducive and that relations between residents remain harmonious.

2. Research Method

This article uses an empirical-sociological research method based on data collected in the form of primary data obtained directly from the main source, namely interview results, as well as secondary data covering official documents in the form of laws and regulations, books, and research results. Through the data collected, both primary and secondary, data elimination was carried out to produce important information used in writing this article.

3. Research Outcome and Discussion

3.1. Factors Hindering Law Enforcement Efforts Related to Prostitution in the Carita Beach Tourist Area

Based on interview results, it is known that, in general, the crime rate in the Carita Beach Tourism Area is relatively low because security conditions over the past three years have been fairly stable and conducive. The most common type of crime is motorcycle theft, but these cases occur more frequently within the village than outside it. This situation indicates that, although the area is relatively safe, the risk of crime still exists, particularly from perpetrators coming from outside the village¹. Meanwhile, based on observations, it was found that prostitution in

¹ Interview with Bhabinkamtibmas desa Sukanagara and Kawoyang, 25 October 2024

the Carita Beach Tourism Area occurs covertly but is quite widespread and requires careful scrutiny to uncover its indications. They rarely appear openly because they generally blend in with tourists, except in nightlife venues such as karaoke bars and others, where their presence can be easily detected with the naked eye.

Referring to the opinions of Philippe Nonet and Philip Selznick (1978), who stated that responsive law should encourage more dynamic legal instruments for social regulation and social change to address public concerns about various phenomena that violate social order. Society needs changes to the relevant laws because prostitution, both conventional and online, is not in line with religious norms, morality, and decency in society (Sangadji, 2016).

In every society, there are always established norms of behavior, and if these norms are violated, the state has the right to punish or impose penalties (criminal law) or what is known as *strafrecht* (criminal law), which focuses on the act (*daadstrafrecht*) of legal behavior committed by humans and is formulated in a legal regulation, as a consequence of the application of the principle of legality (Ariman & Raghieb, 2015).

The legal approach to prostitution in the Carita beach resort area faces a number of relatively complex obstacles because, in terms of formal jurisdiction, the applicable positive law is very liberal in spirit and heavily influenced by Western thinking, as both the old and new Criminal Codes only impose penalties on organizers (pimps), allowing freelance or non-pimped sex workers to operate freely despite such actions being deemed highly reprehensible under religious law, customary law, and Sundanese customary law. Meanwhile, Pandeglang Regency Regulation No. 12 of 2007, which amends Regulation No. 16 of 2003, regulates violations of morality, Alcoholic Beverages, Gambling, and the Abuse of Narcotics, Psychotropic Substances, and Addictive Substances, prostitution is only categorized as a violation of morality, so the assessment of whether prostitution is good or bad depends on the conscience of the perpetrator. As is well known, in matters of morality, the standard is good moral intent, which exists only in those who have not committed or have very few sins and mistakes, so that their conscience/ heart of the person concerned is still functioning properly. However, various realities of life will affect a person, causing them to ignore or set aside their conscience and faith and fall into a very practical assessment of life based on instinct.

When humans prioritize practical considerations and are driven by their instincts or impulses while neglecting their rationality, conscience, and faith solely for survival, the human side as God's creatures with a special status is eroded, and only the animalistic side emerges. It cannot be denied that scientifically, humans are conceptualized as *homo sapiens* (animals), but this concept has been fully accepted by the Sundanese and other ethnic groups in the Indonesian archipelago, known for their religious-magical way of thinking.

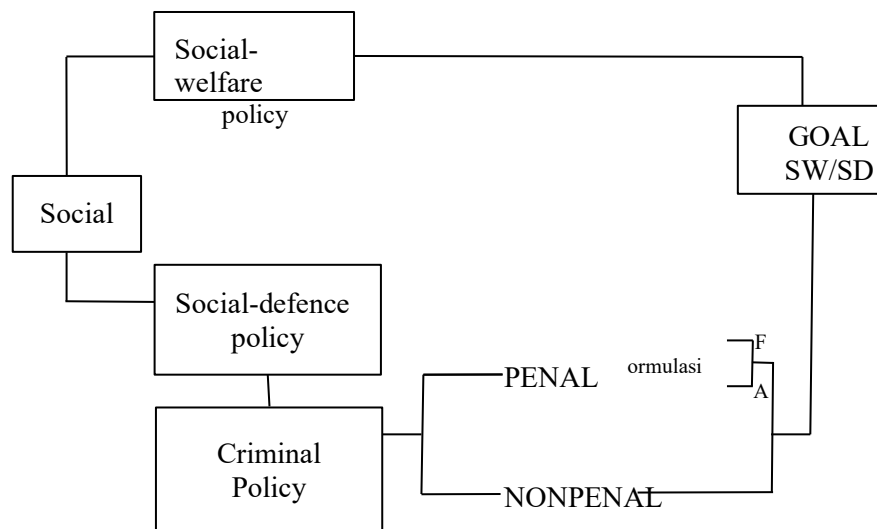
Based on Soerjono Soekanto's perspective, there are at least five factors influencing the enforcement of law: legal factors, law enforcement agencies, facilities and infrastructure, society, and culture. It can be argued that the primary obstacles in enforcing the law against prostitution in the Carita coastal tourist area are legal factors and cultural factors. This situation requires careful consideration based on the intention to maintain harmony in the environment, as existing positive legal norms do not align with moral and religious norms.

In the past, before the FPI was designated as a banned organization, activists frequently conducted sweeps targeting prostitution around Carita Beach, using Islamic religious norms as their basis. On one hand, these actions were effective in reducing prostitution levels in the area compared to the Anyer beach area. However, such actions cannot be fully tolerated as they were carried out unilaterally and without legal authority. If left unchecked, this could undermine the state's authority as the sole entity legally authorized to use force.

Prostitution has weakened the social order, yet no serious efforts have been made to eradicate it. Currently, prostitution is covered by Article 296 of the Criminal Code, which threatens imprisonment for anyone whose occupation and habits deliberately facilitate indecent acts by others with a third party. There are no specific regulations to prosecute people who use prostitution services. According to Philippe Nonet and Philip Selznick, responsive laws should address public concerns, especially since prostitution violates social norms and religious values in Indonesia. Article 296 is seen as a preventive measure for those providing prostitution services, though preventive efforts should also target those using such services and the services themselves. The public needs to

recognize that prostitution has negative consequences and no positive effects whatsoever. However, it is important to remember that individuals working in this field are also subjects of the law whose rights must be protected. They require guidance and rehabilitation, and the government is responsible for ensuring their well-being to prevent such actions from recurring (Siregar, 2019).

According to Barda Nawawi, this can be illustrated in the following diagram.



The above requires an integrated approach so that a balance can be achieved between penal and non-penal measures, which are complementary in nature, as penal measures are more repressive and require costly infrastructure support. On the other hand, non-penal measures are considered the most strategic because they are preventive in nature. Legislative policies are considered the most strategic, so any weaknesses or errors can hinder efforts to prevent and combat crime at the application and enforcement stages (Arief, 2008).

The Criminal Justice System (SPP) is the implementation of Criminal Policy, which is essentially the Criminal Law Enforcement System (SPHS) aimed at combating crime. Its concrete manifestation is the Indonesian National Police (POLRI), which is internationally recognized by the United Nations as an important component in combating crime (5th UN Congress report/1975). Nationally, the Indonesian National Police (POLRI) through Article 1 paragraph (1) of the Criminal Code (KUHP) states that “Investigators are officials of the Indonesian National Police or certain civil servants who are given special authority by law to conduct investigations.” and Article 1(8) of the Police Law states, “An investigator is a police officer of the Republic of Indonesia who is authorized by law to conduct investigations” (Arief, 2008).

Currently, in the old Criminal Code (KUHP) that is still in use, it does not criminalize those who engage in prostitution but rather those who facilitate prostitution. The provisions of this regulation are contained in Article 296 of the KUHP, which states, “Anyone who intentionally causes or facilitates indecent acts by one person with another, and makes it a livelihood or habit, shall be punished with imprisonment for a maximum of one year and four months or a fine of up to fifteen thousand rupiah.” This provision clearly targets those who organize prostitution (indecent acts), while those who engage in prostitution (indecent acts) are not subject to criminal penalties. Article 506 of the KUHP also focuses on prosecuting those who provide facilities or venues for prostitution activities, commonly known as pimps. The wording of this article is as follows: “Any person who derives profit from the indecent acts of a woman and makes it a source of income shall be punished with imprisonment for a maximum of one year.”

Looking at the new Criminal Code currently in place, namely Law No. 1 of 2023, which will be implemented in 2026, a new article referring to prostitution activities, Article 421, states: “If the criminal act referred to in Article 419 or Article 420 is committed as a habit or to derive profit as a livelihood, the penalty may be increased by one-third (1/3).” However, once again, the regulations still target service providers rather than the services themselves.

In the previous article, Article 411 on adultery, Paragraph (1) states: “Any person who engages in sexual intercourse with someone who is not their spouse shall be punished for adultery with imprisonment for a maximum of 1 (one) year or a fine of up to Category II.” However, the element “with a person who is not their spouse” implies that one of the parties involved in the sexual intercourse due to prostitution must already have a spouse. Furthermore, this article is a complaint article that requires a complaint to be filed first before it can be considered a criminal offense. Therefore, the authority to file a complaint lies with the spouse or parents, and as long as there is no complaint regarding prostitution, the parties cannot be punished (Tamba, 2023).

It is worth noting the view of Abdul Fickar Hadjar, a criminal law expert at Trisakti University, that the prostitution article is based on a commercial relationship pattern in order to prosecute both the users and providers of prostitution services, as prostitution contradicts religious values and the Pancasila principles because women involved in prostitution do so unwillingly, as victims of violence who are marginalized and thus enter the world of prostitution (Astuti, 2025). This perspective deserves full attention from all segments of society, particularly law enforcement agencies, local government officials, the military, religious leaders, and community figures, as prostitution places women who should be honored in a humiliating position and treats them as commodities or animals.

To a certain extent, the involvement of many parties in the law enforcement process can be seen as a distraction (Abdullah, 2018). However, the reality and needs on the ground due to limited personnel and budget in the police force have led police leaders at the regional level, from the Provincial Police to the Sector Police, to implement community policing programs to build networks in law enforcement efforts, such as police partners, informants, so that the various external limitations faced by police officers on the ground can be addressed in such a way as to carry out law enforcement efforts—whether preventive, persuasive, or repressive by involving various community components from the village level up to the provincial level. Therefore, it is inevitable that Bhabinkamtibmas officers need to coordinate intensively with TNI personnel assigned as Babinsa in specific villages or neighborhoods. Additionally, Babinsa personnel need to maintain good communication with religious and community leaders in the relevant area so that their duties can be carried out more efficiently and effectively. Given the development of technology and information that has made community life increasingly complex, Bhabinkamtibmas officers need to engage more closely with the younger generation, particularly high school students, Islamic boarding schools, and religious groups such as mosque youth, church youth, Buddhist youth, and other religious groups so that various opportunities for criminal acts and prostitution can be quickly and systematically prevented, or at least anticipated in such a way as to minimize cases of prostitution.

There needs to be legal certainty that can support the eradication of prostitution, which has become a social ill, by referring to the important principle in criminal law, namely the principle of legality, where the law should clearly regulate this through specific rules. As a country governed by the rule of law, Indonesia also adheres to the principle of legality, which aims to provide legal certainty. This principle is one of two principles for imposing criminal penalties. The principle of legality must be applied to the actions (Rasjid, 2015) of the person concerned. However, it should be noted that criminal law provisions, particularly those related to immoral acts, including prostitution, not only emphasize the principle of legality in order to provide legal certainty but must also provide the principles of propriety and spirituality, which contain legal proportionality in achieving substantial justice and not just procedural justice.

In this regard, considering that the wording of the old and new Criminal Code is not significantly different, while the complexity of society has become increasingly materialistic, hedonistic, and consumeristic, a new phenomenon has emerged over the past few decades where sex workers operate independently without being under the control of a pimp and have spread among the younger generation by leveraging advancements in information technology, giving rise to online prostitution in major cities and even remote villages. Pimps can indeed be prosecuted under the human trafficking provisions of Article 10 in conjunction with Article 4 of Law No. 21 of 2007 on the Eradication of Human Trafficking Crimes and Law No. 35 of 2014 amending Law No. 23 of 2002 on Child Protection.

As we all know, prostitution has various backgrounds, including economic, cultural, educational, and environmental factors. Some also argue that prostitution is purely driven by economic factors (Yani & Ihsan, 2020). They take shortcuts to meet their basic needs or maintain a certain lifestyle, such as using branded goods, while disregarding the potential of reason and faith in navigating their lives as creatures of God endowed with reason and conscience in deciding the actions they will take. In truth, economic factors as a reason for engaging in prostitution are a cliché, reflecting a practical way of thinking in facing concrete situations, as “there are many paths to Rome,” where everything depends on each individual's life choices in pursuing hopes, desires, aspirations, and life goals, regardless of the circumstances they face.

If those involved in prostitution were willing to postpone their desires and needs for a short time and live a simple life, there are many types of work they could do, such as starting a small culinary business, becoming a domestic worker, a farm laborer/fisherman, or a middleman trader, even processing raw materials into semi-finished or finished goods, or becoming a scavenger of used items, plastic, cardboard, and so on, which have economic value to sell to collectors. It all comes down to the individual's conscience to choose among the available options as temporary work while waiting for better opportunities to develop and achieve prosperity in the future. According to data from an interview with Mr. Ade Saipullah, the number of criminal cases at the Carita Police Station from January 2024 to October 2024 totaled 25, with 14 cases resolved through Restorative Justice (RJ), (CL), and SP3, while 11 cases remain unsolved.²

Data from the Pandeglang District Statistics Agency (BPS) indicates a positive correlation between poverty levels and unemployment rates in Banten, particularly in Pandeglang, while crime rates have a negative correlation with the aforementioned BPS data, leading to an increase in crime and a backlog of cases. This data is supported by the statement from the Banten Police Chief that crime in Banten has been increasing in 2023, even stating that the time between crimes occurring could reach 1 hour, 3 minutes, and 4 seconds for one crime to occur (Rifa'i, 2023).

3.2. Mitigation Measures That Must Be Taken to Overcome Obstacles in Law Enforcement Efforts

As we all know, crime prevention and control need to be based on “criminal policy” as part of “social policy,” which includes “social welfare policy” and “social defense policy.” In this regard, the enforcement of criminal law in concerto or judicial/applicative policy requires the achievement of “Social Welfare” and “Social Defense.” This is significant because, sociologically speaking, crime arises in society with various backgrounds, including prostitution. Therefore, the collective interest of living together must continue to be pursued by law enforcement officials and the community itself.

In various situations, it is sometimes unavoidable that a group of people, driven by religious or community leaders, take repressive actions as an expression of concern and care for an event that has occurred in their environment. Responses to crime and its perpetrators can be categorized into two types: repressive reactions and preventive reactions. Repressive reactions aim to address crimes that have already occurred, while preventive reactions focus more on efforts to prevent crimes from recurring. Additionally, there is a difference between formal and informal reactions. Formal reactions are carried out by authorized parties in the form of legal sanctions against criminals, while informal reactions originate from the community through social supervision to enforce existing norms. Informal reactions typically occur within the community or surrounding environment, taking into account the form and location of the reaction (Edrisy, 2023).

Low crime rates mean that most issues can be resolved using Restorative Justice (RJ) if possible. The Carita Police always strive to use RJ if possible, explaining the ineffectiveness of taking cases to court due to several issues that will be faced, such as high costs, cases that do not really require a judge, and minor cases that are considered not yet worthy of being brought to court. Typically, the police will explain the consequences of the actions taken. Moreover, cases reported to the police usually have already gone through a peaceful resolution accepted by both parties involved.

² Interview with Ade Saipullah di Polres Carita on 25 October 2025

According to Aristotle, if there are no poor or rich people in a country, crime will be far from that country's life. This can be interpreted to mean that if a country only has prosperity, there will be no crime because all citizens are equal (Emilia & Eko, 2018). This view needs to be considered carefully, as the difference between the poor and the rich will always be found in every life that relies on efforts to meet basic needs, even in socialist-communist countries. In the traditional communities of the past, including in Banten, equality and conditions were carefully maintained, and this is evident in their houses and clothing, which can still be seen in the lives of the Baduy people. However, in more open societies, an individual's or group's economic achievements are influenced by numerous variables. Therefore, what must be maintained is the level of inequality between individuals or groups to prevent social jealousy among them.

The cliché excuse often given by sex workers is that they turned to prostitution because of economic problems, even though reality shows that this situation occurs because they took a shortcut in dealing with a reality called economic pressure or hardship. This is indeed highly subjective, as many others facing economic pressure or hardships choose very different paths and are willing to navigate the ups and downs of life, ultimately managing to escape poverty and achieve a prosperous life.

Given that Indonesia is a welfare state, all government officials from the village to the central level are required to dedicate themselves to improving the welfare of their citizens. Therefore, in addressing prostitution cases in the Carita coastal tourist area, all parties—including government officials, community leaders, religious leaders, and youth leaders, need to work together by prioritizing a prosperity approach so that extreme poverty can be prevented and prostitution can be stopped as early as possible, relying on religious teachings and Sundanese local wisdom that strongly emphasize togetherness and social responsibility towards fellow creatures of God.

Even though the formal legal framework tends to be liberal, while Pandeglang Regency Regulation No. 12 of 2007 has not classified prostitution as a severely reprehensible act as defined in religious law and Sundanese customary law, intellectuals, religious leaders, and community leaders can appeal to the Constitutional Court to uphold prostitution as reprehensible and prohibited by law so that the Pandeglang Regency and Banten Province governments can establish more stringent operational regulations regarding the handling of prostitution in the relevant areas.

Before this happens, all components of society and local governments, from the village level to the Banten provincial level, need to immediately mitigate the practice of prostitution, which has a very broad impact because it can destroy the foundations of family life and spread infectious diseases in society by organizing sympathetic, educational initiatives, and repressive operations to raise awareness among those involved in prostitution activities while also taking preemptive and preventive actions to prevent the emergence of new prostitution offenders among both teenagers and adults. This is particularly important given the advancement of information technology, which enables prostitution activities to be conducted online.

Mitigation is divided into two types: structural and non-structural. Structural mitigation involves efforts to minimize the impact using technology that provides physical tools. Non-structural mitigation, on the other hand, is carried out without using physical infrastructure, focusing instead on policy-making, regulations, education, and public awareness. Referring to the issue of prostitution that has spread in the Pandeglang area, it illustrates the weakness in the implementation of mitigation due to the insensitivity of law enforcement in addressing this issue, resulting in mitigation not being implemented consistently and responsibly.

4. Conclusion

Based on the above explanation, it can be argued that the Carita Police Station needs to take collaborative steps with the Carita sub-district Muspika (sub-district head and military commander) by taking into account the views of religious and community leaders, both directly and indirectly, to address prostitution in the Carita beach resort area by applying a preemptive, persuasive approach to sex workers and a repressive approach to pimps. The main challenges in enforcing the law against prostitution activities in the Carita coastal tourist area are legal and cultural factors, where shifts in societal values have led individuals to choose prostitution as a means of livelihood,

reflecting a mindset of breaking through/ shortcut to meet their livelihood needs or lifestyle. In this regard, the leadership and staff of the Carita Police Station need to enhance coordination and collaboration with various community components to mitigate personnel and operational cost constraints. It is necessary to enhance the role and functions of Bhabinkamtibmas and tourism police by involving scouts, student councils, youth groups, and religious groups: mosque youth and church youth in providing comfort and security for tourism activities so that immoral acts, including prostitution, can be prevented, or at least minimized.

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Appraisal of Digital Economy and Fintech in Nigeria: The Challenges

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Abstract

There has been tremendous and speedy advancement in technology and this has brought fundamental changes in the face of the digital economy and financial market. This has given rise to speedy execution of financial transactions and created opportunities for attraction of new customers. The presence of digital economy growth has exposed the flaws in the traditional market. The convenience nature of the digital market has made most people have preference over it to the traditional market system. Notwithstanding this, there became a need for its regulation, following the rules of the open free market on the one hand, and protecting both entire financial systems and individual users from possible risks arising from the development of new financial technologies. The Nigerian government has been unable to enact a precise law that will govern the digital economy and this has become a big problem because it has led to loss of revenue and tax evasion or avoidance. This paper focused on the challenges of digital economy, FinTech and lack of concise legal framework on digital economy. The study employed a doctrinal research methodology through document analysis of primary and secondary legal sources to examine the effect of digital economy and FinTech in Nigeria. Findings have revealed that there is now an improved law on taxation in Nigeria which accommodates digital services but still not sufficient to cover the existing and already identified challenges. The paper concluded that lack of concise legal framework would rob Nigeria of huge revenue. It therefore recommended the need for collaboration amongst the key sectors like Nigerian Revenue Service, Corporate Affairs Commission and banks as this would help to keep the data system updated and birth effective implementation of the existing tax law. It further recommended the adoption of the blockchain model and Application Programming Interface (API)-based data exchange mechanism which would assist the tax authorities to obtain actual information about transaction values, service types, and user identities. This will enable the tax authorities to have the data of all the transactions made whether the information was supplied to them by the online-vendors or not.

Keywords: Digital Economy, Artificial Intelligence, Cross border, e-Commerce and FinTech

1. Introduction

Tax payment is a civil obligation for every Nigerian citizen who earns income, profit or gain (Section 24, n.d., #). However, the swift growth and technological advancement which AI plays a key role has aided most taxpayers into indulging in tax evasion or avoidance especially on the account of leakage legislation. Consequent upon this, the presence of Artificial Intelligence (AI) technologies and acceptance of the way it operates has reset the digital market land space and affected traditional marketing systems and as well aided cross border transactions. AI can be used in the form of tax chatbots to help taxpayers understand their obligations automatically, automate tax reporting, and provide early warnings if there are discrepancies between transactions and taxation rules. AI can

also be used to build predictive systems capable of estimating potential tax revenue from the fintech sector within a certain period, enabling the government to formulate more responsive fiscal policies (Saruju & Hamid, 2024, #).

This has modified customer service by providing continuous support and strengthened users' experience. In addition, Financial Tech (FIN-TECH) has reformed the universal financial sector by bringing forth new solutions that heightens efficiency, accessibility and inclusion. In Nigeria, the FinTech industry has generated so much funds in the recent time making it the most funded tech sector in Africa (Saruju & Hamid, 2024, #). However, lack of adequate and efficient tax legislation on digital economy and FinTech operations has resulted in revenue losses, regulatory distrust, and posed a future danger to financial stability (Nwoye, 2023, #). The most significant threat to the taxation of digital financial services and the digital economy in Nigeria lies in an obsolete tax framework. This was revealed through the inception of FinTech companies (Folarin, 2019, #). The inability to have a concise legal framework has birthed an unclear legal foundation for taxing digital businesses. Statistically, this loophole has given rise to huge loss of revenue according to the Federal Inland Revenue Service (now Nigeria Revenue Service) with estimates indicating loss of billions of naira annually due to tax leakages in the digital economy (Folarin, 2019, #).

To curb this menace, the Nigerian government recently took a bold step in enacting strong fiscal legislative instruments, like Nigeria Tax Act (NTA) 2025 and Nigerian Tax Administration Act (NTAA) 2025 to address and accommodate taxing of digital transactions etc (Onwuka, 2025, #). The foundation of these legislative interventions has been the codification of the Significant Economic Presence (SEP) rule. This transformation has reformulated the traditional physical nexus requirement, legally empowering the Nigerian Revenue Service to tax non-resident digital entities, streaming platforms, and cross-border FinTech service providers generating revenue directly from Nigerian consumers. Furthermore, the 6% Digital Service Tax (DST) introduction on the turnover of foreign digital companies operating within the domestic market represents a targeted mechanism to reclaim lost revenues (Onwuka, 2025, #). In addition, the enforcement of a 7.5% Value Added Tax (VAT) on cross-border electronic transactions has speedily determined aspects of the digital consumption space, resulting in over ₦600 billion in compliance collections from global tech firms (Balogun, 2026, #). The incorporation of Electronic Money Transfer Levy (EMTL) into tax law has hugely aided in increasing our revenue. It has been revealed that the high volume of FinTech-facilitated agency banking and instant peer-to-peer transfers has recorded a historic surge of ₦360.29 billion between January and October 2025. This marks an exponential 110.8% growth from the ₦170.92 billion collected during the equivalent timeframe in 2024, indicating that while corporate profit shifting remains elusive, transaction-level consumption taxes are highly effective (Balogun, 2026, #). Notwithstanding this commending breakthrough, difficulty in enforcement posed as a gap that needs to be addressed because Nigeria has recorded billion dollars lost through transfer pricing, peer-to-peer cryptocurrency transactions, and the borderless nature of digital financial services (Okafor, 2025, #). This paper focused on examining the extant tax legislation in Nigeria to ascertain if it is in line with what is obtainable in developed countries.

1.1. Conceptual Clarification of Key Terms

Artificial Intelligence (AI) 'is the development of computer systems capable of performing tasks that historically required human intelligence. This encompasses processes like learning, reasoning, problem-solving, and understanding natural language. Rather than following static programming, AI systems analyze massive datasets to identify patterns and make decisions (Coursera, n.d., #).' Artificial intelligence is transforming taxation by systematizing adherence for businesses and improving predictive enforcement for governments. Tax professionals utilize the service of AI for real-time document processing and strategic forecasting, while revenue authorities deploy algorithms to audit targeted returns and detect phantom invoices (Intelligence, n.d., #). Artificial intelligence (AI) has the possibility of assisting with these tasks, but enforcement of use of AI for taxation must be done intelligently – as part of a wider reform agenda that aids in creating better data, clearer processes, and stronger accountability (Intelligence, n.d., #).

Digital Economy refers to the global network of economic activities, transactions, and commercial interactions powered by information and communications technology (ICT), the internet, and data. It marks the shift from traditional brick-and-mortar operations to highly connected, digital-first business models (Wikipedia, n.d.).

Fintech (Financial Technology) refers to the intersection of finance and technology, leveraging digital innovations to improve financial services (Bankole & Adetoro, 2022, #). It involves use of innovative software, algorithms and enhanced financial services. This replaces the traditional banking system by allowing consumers and businesses to digitally access and manage or transact their finances directly from smartphones and computers. In Nigeria, FinTech has expanded and been accepted due to speedy digital embracement, young population, and increased mobile penetration (Bankole & Adetoro, 2022, #). Fintech brings efficiency and convenience to financial transactions. Persons in rural areas currently have access to basic financial services without physically registering their presence at the bank. This is made possible through firms like Monie point, Opay, Paga etc through which mobile money services and digital wallets are created and made available. The presence of this technological advancement has aided in alleviating poverty as individuals who key into this now function comfortably in the formal economy. This has created many job opportunities and limited the number of job seekers amongst Nigerian graduates who currently work without depending on the government. Fintech has brought transformation in Nigeria's payments landscape through the spread of mobile money, Point of sale terminals, QR codes and digital wallets. Nigerian traditional banks depend heavily on collateral before a customer or individual would access the loan. However, the emergence of Fintech lowered this burden through employment of data-driven credit scoring algorithms to utilise alternative data like mobile phone usage, mode of spending and level of activity on social media in order to establish a credit profile. This has enabled some fintech companies to give instant loans with little or no collateral to individuals who would not have accessed it if it was through traditional banking.

1.2. Methodology

The study adopts doctrinal methodology. Primary sources include Constitutional Provisions, national statute, binding and non-binding International legal instruments. Secondary sources comprise peer-reviewed academic articles, and institutional policy documents. The study focused on the legal framework regulating the digital economy and FinTech in Nigeria. The study's principal limitation is lack of adequate legal framework that would shelter and protect present and future evasion of tax through digitalisation.

1.3. Legal Framework of Tax Obligation to Digital and Fintech Companies

The Bank & Other Financial Institutions Act 2020: This law provides for means upon which financial institution inclusive of fintech should be regulated. Section 130 of the Act defines fintech companies as Other Financial Institutions (OFI) and holds them to the strictest compliance. It provides thus:

‘any individual, body, association or group of persons; whether corporate or unincorporated other than the banks licensed under this Act, which carry on the business of a discount house, bureau de change, finance company, money brokerage, authorised buying of foreign exchange, International Money Transfer Services, mortgage refinance company, mortgage guarantee company, financial holding company or payment service providers regardless of whether such businesses are conducted digitally, virtually or electronically only and companies whose objects includes factoring, project financing, equipment leasing, debt administration, fund management, private ledger services, investment management, local purchases order financing and such other businesses as the bank may from time to time, designate regardless of whether such businesses are conducted digitally, virtually or electronically only.

Nigerian Data Protection Act 2023 (NDPA): This law provides for protection of data processing across several sectors. ‘The Act regulates personal data in Nigeria and replaces the Nigerian Data Protection Regulations (NDPR) 2019 and the NDPR Implementation Framework 2019 issued under the National Information Technology Development Agency (NITDA) Act. Section 40 of the Act provides for ‘obligation regarding personal data breaches and this finds shelter in section 37 of the Constitution (Constitution, n.d., #) which guarantees citizens' right of privacy’.

Nigeria Tax Act 2025: Section 151 (2) of the Act requires the non-resident suppliers of digital services to register for VAT, collect it from Nigerian customers, and remit it to the Nigeria Revenue Service (NRS). With this, e-commerce, streaming services, cloud computing, online advertising, and software subscriptions would be captured and placed into VAT net. More so, by virtue of section 158 of the Act, taxable persons are mandated to use electronic fiscal tools (like e-invoicing systems) for recording and reporting transactions, supporting the digital enforcement of taxes.

Furthermore, Section 34 of the Act ‘widens the scope of "chargeable assets" for Capital Gains Tax (CGT) purposes to include digital and virtual assets (such as cryptocurrencies, NFTs, intellectual property rights, and similar intangibles)’. Gains from the disposal of these assets are now taxable. In addition, Section 17(2) of the Act extended Nigeria's taxing rights to non-resident persons (NRPs) who derive profits from digital or intangible activities within Nigeria, even without a physical presence, by formalizing the Significant Economic Presence (SEP) rule.

Nigeria Tax Administration Act 2025: Sections 22 and 23 of the Act mandates the use of certified electronic fiscal systems (EFS) for real-time transaction reporting and data transmission to tax authorities. Section 25 provides for Virtual Asset Service Providers (VASPs). The Act mandates VASPs (e.g., crypto exchanges) to file tax returns and report significant transactions, with penalties for non-compliance. Section 71 (1) of the Act provides for the deployment of technology in tax administration including VAT operation in Nigeria. It provides thus,

‘A relevant tax authority may deploy any technology, including third party payment processing platform or computer application to collect or remit taxes due on the supply of digital services to any person in Nigeria, provided that nothing in this subsection shall be construed as empowering the tax authority of a state to collect tax from a non-resident or in respect of cross-border transactions’

To a reasonable extent, this law covered the digital economy and or market such as e-commerce, FinTech and digital service but however, not satisfactory for having not made provision on how to catch those that fail to comply with the tax duties and inspection for compliance through automated machine which will capture or catch only those that presented their records and or data. In the absence of this, there will always be loss of revenue from e-commerce.

1.4. Impact of Digital Economy and Fin-Tech in Nigeria Vis A Vis Challenges

The Nigerian digital economy has exceedingly developed as a result of boost in internet infiltration, innovative business models and smartphone adoption (Afolabi, n.d., #). Nigerians have cling to e-commerce due to its convenience and time saving nature as such became the most preferred choice (Adeniyi, n.d., #). One of the compelling aspects that reformed the digital economy is the advancement in technology through refined internet services and comprehensive adoption of smartphones (Asomadu, 2025, #).

Enriched network of internet and cheap smartphones led to a vast increase in the number of potential online shoppers (GSMA, 2020, #). Statistics revealed that mobile fiscal control which was one of the main factors for e-commerce development led to over 70% of online transactions happening on mobile devices (CBN, 2015, #). However, the Nigerian government imported guidelines to reform digital infrastructure, enhance cyber security, and promote a more inclusive and accessible digital economy (FMCD, 2019, #). One of the policies and or guidelines made for the growth of e-commerce includes the National Digital Economy Policy (NDEPS) (FMCD, 2019, #). The policy aims to increase digital literacy, improve digital infrastructure, and promote innovation (Umenweke, 2024, #). Report has shown that the advancement of the digital economy in Nigeria has led to an increase in new job opportunities with the sector employing over 100,000 people (NITDA, 2020, #). In ensuring the continuous effectiveness of this, it has been recommended by stakeholders the need to invest in digital infrastructure, enhancing cyber security measures, and developing effective regulatory frameworks (Umenweke, 2024, #). Nigeria's digital economy is expected to continue growing, driven by innovative business models and

increasing internet penetration (Kumar, 2020, #). Digital goods and services, including e-commerce, digital payments, and streaming services, have modified the way Nigerians relate with goods and services. The digital economy contributes significantly to its GDP, with: (i.) E-commerce growing at 20% annually.³²(ii.) Digital payments increasing by 50% in 2020.(iii) Nigeria's fintech sector attracting \$400 million in investments (CBN, 2020, #).

The acceptance of the digital economy in Nigeria has not existed without challenges. It includes infrastructure deficits, cyber security concerns, struggle to identify digital taxable transactions, difficulty in identifying taxable persons, lack of digital facilities (Sijabat, 2025, #), unclear and unharmonised regulatory frameworks (Umenweke, 2024, #) and jurisdictional issues.

1.4.1. *Challenges of Fintech in Nigeria*

The speedy development of FinTech in Nigeria has modified the country's fiscal and commercial landscape. Through innovations such as mobile banking, electronic payments, digital lending, cryptocurrency transactions, and online financial platforms. FinTech companies have enhanced financial inclusion, brought about cashless transactions, and contributed to economic development. Renowned companies like Flutterwave, Paystack, Moniepoint and Opay have persevered in broadening the sphere of digital financial services across Nigeria. However, despite the increasing relevance of FinTech activities yet the legal frameworks regulating FinTech taxation in Nigeria remain weak, and largely outdated (Chuku, 2024, #). Most of the extant tax laws in Nigeria were passed to govern traditional business systems and as such lacks capability to address the complexities that affect digital financial services, cross-border electronic transactions, virtual assets, and platform-based operations. Consequently, there has been unclarity in respect of the classification, assessment, and taxation of FinTech activities (CBN, 2020, #). As a result of this, there has been inconsistent tax administration, tax avoidance, regulatory overlaps, and incidences of multiple taxation affecting FinTech operators. In addition, regulatory institutions such as the Nigeria Revenue Service, the Central Bank of Nigeria, and the Securities and Exchange Commission have over time overlapped in exercising their functions and this has created compliance difficulties for FinTech companies (Falola & Peter, 2025, #).

Furthermore, the speedy growth of FinTech innovations has repeatedly outstrip legislative and institutional responses thereby exposing loopholes in tax enforcement and compliance mechanisms (Bielu, 2021, #). These challenges threaten government revenue generation, investor confidence, and the sustainable growth of the FinTech industry. According to Barake et al's (Barake et al., 2021, #), while trying to proffer solutions to FinTech challenges stated that 'countries with clear and flexible regulatory frameworks have managed to create an enabling environment for FinTech while ensuring compliance with tax obligations. Unfortunately, the analysis didn't capture Nigeria's complex tax structure, where multiple tax authorities impose overlapping levies on businesses.

Bring it home to Africa, Brummer and Yadav (Brummer & Yadav, 2017, #) while examining the challenges of taxing the digital economy in developing countries argued that 'African tax systems remain heavily reliant on traditional revenue sources such as corporate income tax and VAT, making them ill-equipped to handle the complexities of digital transactions.' More so, Nigerian scholars, Adeyemi and Adeyemi (Adeniyi, n.d., #) considered in their analysis the impact of the Finance Act 2020 on digital taxation. 'Their argument was that while the Act represents a significant step in bringing digital transactions into the tax net, its implementation has been fraught with challenges'. Though their position did not address the weakness of institutions which hinders effective tax enforcement but touches on legal issues on the subject matter affecting Nigeria. To give credence to this, Ozurumba and Charles referred to the NRS report. (Ozurumba & Charles, 2019, #) In the report on digital taxation in Nigeria, it acknowledges that the country loses billions of naira annually due to tax evasion in the digital economy. The report emphasizes the need for a coordinated approach to digital economy and FinTech taxation, including clearer guidelines and improved enforcement mechanisms'. Recently, measures have been put to place to address this anomaly (NRS Report, 2026, #). Another Nigerian scholar Nwoye made important contributions on the way forward (Nwoye, 2023, #). He queried 'who assesses the compliance burden of multiple taxations on Nigerian businesses. His argument was that the protruding tax regimes at federal, state, and local government

levels has created distrust and discourage investment. His findings are particularly relevant to the FinTech sector, where start-ups and small-scale digital service providers struggle to navigate complex tax regulations.’ The pseudonymous nature of cryptocurrency and blockchain transactions has made it difficult for tax authorities to track, assess, and enforce tax obligations properly.

1.5. Solution

According to Ayu, ‘the basic approach that can be executed is data integration between fintech service providers and the Directorate General of Taxes (DGT) system. With an Application Programming Interface (API)-based data exchange mechanism, the DGT can obtain actual information about transaction values, service types, and user identities.’ This unification or merging will limit avoidance of tax practices given that the data obtained was not based solely on voluntary reporting, but is directly recorded through digital technology channels that are strong to manipulate (Ayu & Wati, 2022, #). Increase in digital transactions which FinTech is inclusive has made usage of manual approach to monitor transactions to be inefficient. Solidifying usage of big data analytics in taxation would aim at fastening the processing of large volumes transactions, detect trends, patterns, or anomalies that indicate tax evasion or low compliance (Nketekete & Vasenska, n.d., #). This analytics is important in splitting fintech taxpayers based on their risk profiles, making it easier for the DGT to implement more targeted fiscal policies (Nketekete & M., 2021, #).

1.6. Conclusion

It is not news that advanced countries have been able to conquer cross-border FinTech and digital evasion through coordinated multilateral frameworks, real-time transaction reporting, and automated data-sharing. It was further defeated through replacement of outdated laws and making of physical-presence tax rules with digital oversight (OECD, n.d., #). All these in addition to the help of tax authorities aided in closing the loopholes that allowed multinational companies (MNEs) and high-net-worth individuals to hide assets or shift profits. Moreover, with the help of OECD Common Reporting Standard offshore financial data of countries being automatically shared, non-residents can no longer hide income in foreign countries. Advanced nations also expanded AEOI (Automatic Exchange of Financial Account Information) to include digital assets. This is to ensure that crypto exchanges report cross-border transactions that are done in a manner similar to traditional banking. In addition, the council of European/ OECD conventions allows tax authorities to conduct joint audits and recover foreign tax liabilities across almost up to 150 jurisdictions.

On the part of the digital economy, the evasion of tax through cross-border e-commerce evasion, and digital market evasion was laid to rest through Platform Liability Rule. This will help VAT to be remitted directly to the consumer country. Most importantly, Base Erosion and Profit Shifting (BEPS) played a key role. Advanced countries worked through the OECD/G20 Inclusive Framework to implement the 15-point BEPS plan. This eliminates treaty shopping and profit shifting to low tax jurisdictions (OECD, n.d., #).

In view of the above, this paper recommended that Nigerian tax authorities should borrow a leaf from the advanced nation to enable them conquer digital tax evasion. Secondly, it is important that Nigeria joins OECD states so as to enable her to enjoy the protection made or put in place by OECD. Alternatively, it is suggested that Nigeria and all the African countries should form or create a strong body similar to OECD and adopt or incorporate its principle and standard as this will trim or eliminate such tax evasion among the concerned states.

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From Myers to Slaughter – An Argument over Separation of Powers or a Disguised Frontal Assault on the Administrative State: A Financial and Legal Analysis

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Abstract

This article argues that the Supreme Court's century-long arc of decisions on presidential removal power — from *Myers v. United States* (1926) through *Trump v. Slaughter* (2026) — represents not merely an evolving constitutional debate over separation of powers, but a sustained, ideologically coherent assault on the administrative state in service of entrenched business interests. The paper begins with an examination of the major cases in which the Court has ruled on the theory of the unitary executive, tracing the doctrinal line from *Myers v. United States* (1926) and *Humphrey's Executor* (1935) through *Seila Law* (2020) and *Collins v. Yellen* (2021), and finally through *Trump v. Slaughter* and *Trump v. Cook* in June of 2026. It then situates this constitutional evolution within two broader contexts: first, the legislative history and business-community opposition to landmark financial regulation — *Sarbanes-Oxley* (2002) and *Dodd-Frank* (2010) — and second, the long-term intellectual and institutional infrastructure built in response to Lewis Powell's 1971 memorandum to the U.S. Chamber of Commerce. The authors further examine the Supreme Court's curtailment of agency authority through the rejection of *Chevron deference*, the possible revival of the non-delegation doctrine, and the emergence of the major questions doctrine. The article concludes that the cumulative effect of these developments — expanding presidential control, contracting agency authority, and shifting interpretive power to the courts — has produced a fundamental realignment of American governance in favor of corporate interests, with potentially lasting consequences for economic regulation and democratic accountability.

Keywords: Separation of Powers, Administrative State, Unitary Executive, Sarbanes-Oxley, Dodd-Frank, Chevron Deference, Powell Memorandum, Major Questions Doctrine

1. Introduction

What is the *real* significance of the United States Supreme Court's century-long evolution in cases concerning presidential removal power? On one reading, these decisions constitute a good-faith effort to interpret Article II of the Constitution and resolve genuine ambiguities about the scope of executive authority over independent agencies. On another — and the authors argue more accurate — reading, they represent a sustained, ideologically driven campaign to dismantle the administrative state as it has developed since the New Deal, with the practical consequence of concentrating power in the President and the courts while reducing regulatory accountability to Congress and the public.

That argument gains force when the constitutional cases are set alongside two related developments: the corporate opposition to *Sarbanes-Oxley* (2002) and *Dodd-Frank* (2010), the two most significant pieces of financial regulation enacted in the last twenty-five years; and the half-century of institutional infrastructure built in direct response to Lewis Powell's 1971 memorandum to the U.S. Chamber of Commerce. These threads — constitutional, legislative, and ideological — are not parallel. They are convergent.

The Supreme Court's decisions in cases relating to presidential power, the separation of powers doctrine, delegation of powers by Congress to administrative agencies, and the explication of the "major questions doctrine" have all contributed to a fundamental rebalancing of power in the United States toward the courts and the executive, and away from Congress and the administrative agencies that have developed subject-matter expertise since the New Deal. Recent decisions, including the rejection of *Chevron* deference in *Loper Bright Enterprises v. Raimondo* (2024) and the decisions in *Trump v. Slaughter* and *Trump v. Cook* in June of 2026, have moved this rebalancing to a new stage. This paper examines what that means and where it leads.

2. The Theory of the Unitary Executive

The theory of the unitary executive is an explication of presidential power in the United States (Barber & Fleming, 2009). The theory focuses on the extent and nature of control the President may exercise over the executive branch relating to so-called "independent agencies" (Hunter & Shannon, 2025; see Legal Guide Team, 2026). In addition, the context of this controversy includes a significant policy debate about the nature of regulation of the American economy — a context that may have even greater import for the future.

Bednar (2025) framed the issue as follows:

"Presidential control is the power to direct administrative capacity toward the President's own policy objectives. Accordingly, presidential power vis-à-vis administrative policymaking has two necessary components: control and capacity. First, the President must have the ability to set the agency's policymaking agenda and direct the day-to-day activities of its leadership and career employees. Second, the agency needs a well-managed team of policymakers with expertise and experience in both the substantive policy area and the policymaking process."

The unitary executive theory as espoused by the Trump administration is based on the view that all executive power belongs to the President. The theory is grounded in Article II of the U.S. Constitution, which states: "The executive Power shall be vested in a President of the United States." Adherents to the theory argue that this means the President alone holds all executive authority and that every executive official ultimately answers to the President.

As a clear adjunct to the theory, the President should have full control over executive agencies, the power to remove executive officials at-will, and the authority to direct how laws are enforced. This view stands in sharp contrast with the idea of "independent agencies," which are designed to operate with some insulation and independence from presidential control (Breger & Edles, 2000; Corrigan & Revesz, 2016).

2.1. The Nature of the Theory

The theory of the unitary executive has three main variations (Sunstein & Vermeule, 2000; Shane, 2025). First, a *weak* unitary executive, under which the President supervises the executive; however, Congress may create independent agencies where members are protected from at-will removal. Second, the *strong* unitary executive, under which the President exerts direct control over all executive officers and independent agencies are constitutionally questionable. Third, the *maximalist* unitary executive, which recognizes that the President has broad, sometimes exclusive, authority in areas such as national security and that Congress's ability to limit presidential power is very restricted (see Lessig, 2025).

The theory is most relevant in policy discussions relating to presidential control over the Department of Justice, removal of agency heads (such as the Consumer Financial Protection Bureau or the Federal Trade Commission, and the President's issuance of Executive Orders (Lowande, 2014) — which are written policy directives with

much of the same effect as law, though not explicitly defined in the Constitution and which rest on historical practice, executive interpretation, and prior court decisions (Bomboy, 2025) as interpreted by the Chief Executive. The debate also implicates the meaning of presidential signing statements (Crouch, Rozell, & Sollenberger, 2013; Kelley, Marshall, & Watts, 2013) and the extent of presidential authority in national security and war powers matters (Kelley & Marshall, 2008).

Supporters of the unitary executive theory argue that the text of the Constitution gives the President full executive authority, ensures direct accountability, and prevents "bureaucratic drift" (Encyclo, 2026; Legal Clarity Team, 2026a) under which agencies deviate from their original mandates in ways that reflect the preferences of unelected officials rather than the elected President (Shepsle, 1992). Critics counter that the unitary executive theory risks excessive presidential power, that the Framers intended a system of checks and balances rather than centralized executive control, and that independent agencies protect against political interference while ensuring objective, fact or science-based decision-making (Brown, 2025; Barrow, 2025).

3. A Summary of the Major Cases Relating to the Unitary Executive Theory

The major cases may be summarized as follows:

- *Myers v. United States* (1926): The Court held that the President has exclusive authority to remove executive officers, striking down a law that required Senate approval for removal. *Myers* is the Court's earliest endorsement of a unitary executive theory (Hart, 1929).
- *Humphrey's Executor* (1935): The Court upheld Congress's ability to create independent agencies whose leaders could be protected from at-will removal, distinguishing between "purely executive" officers and officials with quasi-legislative or quasi-judicial functions. *Humphrey's Executor* set a foundational limit to the unitary executive theory.
- *Morrison v. Olson* (1988): The Court upheld the independent counsel statute, ruling that Congress could restrict the President's removal power if it did not "unduly interfere" with executive functions, rejecting the strong unitary executive theory. Justice Scalia's lone dissent in a 7-1 decision has become the constitutional underpinning of the modern unitary executive theory.
- *Free Enterprise Fund v. Public Company Accounting Oversight Board* (2010): The Court ruled that dual for-cause removal protections for Public Company Accounting and Oversight Board (PCAOB) members violated the separation of powers.
- *Seila Law v. Consumer Financial Protection Board* (CFPB) (2020): The Court struck down removal protections for the CFPB's single director, signaling a significant move toward validating the unitary executive theory.
- *Collins v. Yellen* (2021): The Court held that the structure of the Federal Housing Finance Agency violated the separation of powers doctrine, reinforcing its decision in *Seila Law*.
- *Trump v. Slaughter* (2026): The Court struck down the for-cause removal protections for FTC commissioners, effectively overruling *Humphrey's Executor* and completing the doctrinal arc begun in *Myers*.
- *Trump v. Cook* (2026): The Court created an exception for the Federal Reserve because of its "historical importance" in the U.S. economy.

These cases reflect the fact that the Supreme Court has been moving steadily toward recognizing the unitary executive as a constitutional postulate. The most recent decision in *Trump v. Slaughter* eliminates the last significant precedential protection for the traditional model of independent agency governance – with the exception of the Federal Reserve.

4. From Myers to Slaughter: A Detailed Analysis and Commentary

The series of important cases outlined above explicates the various approaches the United States Supreme Court has taken to issues surrounding the exercise of executive authority over "independent" agencies. While the common thread involves determining the nature and extent of presidential control, there is also a strong argument

that the powers of the agencies themselves — especially in relation to challenges to *Dodd-Frank* and *Sarbanes-Oxley* — represent the real target of the exercise of presidential authority.

4.1. *Myers v. United States* (1926)

Myers v. United States is a landmark decision of the United States Supreme Court that affirmed the President's exclusive constitutional power to remove an executive officer and held that Congress cannot constitutionally require Senate consent for such removals (see Hart, 1929).

The case involved the removal of Frank S. Myers, a first-class U.S. postmaster, by President Woodrow Wilson in 1920 without seeking Senate approval. The *Act of July 12, 1876* had provided that postmasters could be removed "by and with the advice and consent of the Senate." Myers sued in the Court of Claims for back pay, but the court dismissed the case on the ground of laches — that is, that Myers had delayed in asserting his rights (see Sheppard & Epstein, 2024). The Supreme Court reversed the decision of the Court of Claims, finding no such impermissible delay had occurred.

In an opinion written by Chief Justice Taft, who had also served as President of the United States, the Court held that the President's authority to remove executive officers is part of "the Executive power" granted by Article II, §1, and is not subject to Senate consent (see White, 2020). The Court ruled that Section 6 of the 1876 law, which tied removal to Senate consent, was unconstitutional because it effectively gave Congress a role in an executive function. Further, the "Take Care Clause" (Art. II, §2) of the Constitution (Yoo, 2025) limits Congress from participating in the exercise of the President's removal power and thus the 1876 law violated the "separation of powers" doctrine. Finally, Myers' actions, including petitions to the President and the United States Senate, and continued protests over his firing, were timely and did not bar his claim based on an improper delay.

Myers reinforced the incidental nature of the removal power to the appointment power under Article II; the executive's duty to "take care that the laws be faithfully executed," which includes the ability to remove officers; and the strict construction of Article II provisions, preventing Congress from expanding its role into executive functions.

Myers was the first case involving the President's removal power to invalidate a statute on grounds that it was in violation of separation of powers. As such, *Myers* established the precedent that the President's removal power is unencumbered unless Congress can show a clear constitutional basis for limiting it. In historical terms, *Myers* cemented the President's constitutional removal power over executive appointees based separation of powers,

4.2. *Humphrey's Executor v. United States* (1935): Does it Square With *Myers*?

Humphrey's Executor established Congress's constitutional authority to limit the President's power to remove certain federal agency officials (Carson, 2025).

William E. Humphrey had been appointed to a seven-year term as an FTC Commissioner by President Calvin Coolidge in 1925 and was reappointed by President Herbert Hoover in 1931. President Roosevelt asked for his resignation over policy disagreements (American Presidency Project, 2026). Humphrey refused to resign, and President Roosevelt fired him in 1933. The FTC Act allowed removal only for "inefficiency, neglect of duty, or malfeasance in office." Humphrey died in 1934, and his executor sued for back pay.

In a unanimous decision, the Supreme Court held that Congress could constitutionally limit the President's removal power for commissioners of independent agencies performing quasi-legislative or quasi-judicial functions. The Court determined that FTC commissioners were not "purely executive" officers subject to at-will removal but were instead members of an independent body created to aid both the legislative and judicial branches in carrying out their constitutional responsibilities (see Donahue, 2025). This distinction remained central to understanding the structure of modern federal agencies until it was challenged in connection with the passage of *Sarbanes-Oxley* in 2002.

4.3. *Morrison v. Olson* (1988)

After the Watergate scandal, Congress sought to prevent future abuses of power by creating a special process for investigating high-level executive branch officials (Legal Clarity Team, 2025). In *Morrison v. Olson*, the Court was asked whether the *Independent Counsel Act* violated the separation of powers by limiting the President's ability to remove an independent counsel. Shestack (1998) noted "since its inception, the Act and its special prosecutors have had both detractors and defenders," highlighting the disparate views on the Act's constitutionality.

Levin and Bean (1987) commented that "The primary impetus for the independent counsel statute was the Watergate scandal that engulfed the Nixon presidency." Congress had enacted the *Ethics in Government Act of 1978*, which allowed a special court, called the Special Division (a three-judge panel), created under the *Ethics in Government Act of 1978*, to appoint and oversee an independent counsel to investigate high-level executive officials (see Christy, 1998). "The statute was enacted into law on October 26, 1978, with a five year sunset provision. It was reauthorized on January 3, 1983, again with a five year sunset provision. The statute was again reauthorized on December 15, 1987" (Levin & Bean, 1987).

"The purpose of the act was to increase public confidence in the level of integrity of federal government officials, to deter conflicts of interest from arising, and to stop unethical person from entering public service. Generally, the act made provisions for the authority and functions of the Office of Government Ethics, and set up administrative provisions, rules and regulations, and appropriations to enforce federal government ethics" (Jrank.org, 2026).

Senator Carl Levin, who chaired the Senate Subcommittee on Oversight of Government Management, stated: "The federal statute establishing a system for independent counsels, address one of the most delicate tasks facing government: the investigating of the government's own top officials when they are suspected of criminal wrongdoing" (Levin & Bean, 1987).

The independent counsel could only be removed by the Attorney General for good cause, not at the President's discretion.

The case arose when the House Judiciary Committee accused Assistant Attorney General Theodore Olson (who later became the Solicitor General and who argued sixty-five cases before the Supreme Court on behalf of the United States) of withholding documents and giving false testimony before the Committee. An independent counsel, Alexia Morrison, was appointed to investigate the charge. Olson challenged the law's constitutionality (see Gilbert, 2018; Crovitz, 2024).

The Supreme Court by a vote of 7-1 upheld the *Independent Counsel Act* in a decision by Chief Justice Rehnquist. The Court held that the independent counsel was an "inferior officer" rather than a "principal officer," and that the good-cause removal restriction did not unduly interfere with the President's executive power. The Act did not "impermissibly undermine" the Executive Branch (Bybee & Samahon, 2006).

What became especially consequential, however, was Justice Scalia's lone dissenting opinion, in which he argued that all executive power is vested in the President and that prosecutorial power is inherently executive (see Nhan, 2016). Justice Scalia wrote in *Morrison*:

"What I do assert — and what the Constitution seems plainly to prescribe — is that the President must have control over all exercises of the executive power. That requires that he have plenary power to remove principal officers such as the independent counsel, but it does not require that he have plenary power to remove inferior officers."

Justice Scalia's dissent has grown in influence after the independent counsel system was allowed to expire in 1999, leading to the appointment of a series of "Special Prosecutors" one of whom, Kenn Starr, investigated former

President Bill Clinton (see Greenberg, 2022) and who ironically would later represent Donald Trump in his first impeachment trial before the United States Senate.

Henderson (2026) points to the importance of Justice Scalia's dissenting opinion in the current controversy in *Trump v. Slaughter*, as he notes: "This Scalia dissent may save Trump in heated Supreme Court battle."

5. The Tide Begins to Turn: Free Enterprise Fund v. Public Company Accounting Oversight Board (2010)

Two cases merit special attention and cannot be fully understood without placing them in their legislative context: *Free Enterprise Fund v. Public Company Accounting Board* and *Seila Law v. Consumer Financial Protection Bureau*. The issue of separation of powers intersects directly with a fundamental policy debate about the role of the federal government in regulating the American capital market — a debate that produced both *Sarbanes-Oxley* (2002) and *Dodd-Frank* (2010).

In *Free Enterprise Fund v. Public Company Accounting Oversight Board* (2010), the Supreme Court ruled that the "dual for-cause" removal protections for members of the PCAOB violated the Constitution's separation of powers. The case arose from the passage of *Sarbanes-Oxley* in 2002, which established the PCAOB to oversee the accounting industry, following a wave of corporate scandals — most notably Enron, WorldCom, and Tyco (Segal, 2026).

Under the statute, the PCAOB was comprised of members appointed by the Securities and Exchange Commission (SEC) (Kenton, 2006a). However, the SEC could remove PCAOB members only for "good cause," and the President could remove SEC commissioners only for similar reasons, creating a "dual layer" of protection against removal. The Free Enterprise Fund, a nonprofit advocacy organization aligned with "free-market principles," challenged the PCAOB's structure as a violation of the Appointments Clause and the separation of powers doctrine. The Free Enterprise Fund, a nonprofit organization, was created in January 2005 by Stephen Moore and other prominent members of the Club for Growth, including Arthur B. Laffer, the author of the controversial "Laffer Curve," and Mallory Factor. Arthur Laffer is an American economist who propounded the idea that lowering tax rates would result in higher government revenues (Bender, 1984). "His theory on taxes influenced U.S. economic policy in the 1980s, which during the presidency of Ronald Reagan (1981–89) became known as Reaganomics" (Editors of the Encyclopaedia Britannica, 2026). Factor is an American pharmaceutical executive, author, professor, and entrepreneur, best known as the founder and CEO of IntraBio Inc., a biopharmaceutical company based in Austin, Texas, which focused on developing novel therapies for rare and neurodegenerative diseases. Mallory Factor is also "the co-chairman and co-founder of the Monday Meeting, an influential meeting of economic conservatives, journalists and corporate leaders in New York City" (Gatestone Institute, 2026).

On June 28, 2010, the Supreme Court, in a 5-4 decision, ruled that the dual for-cause removal provisions were unconstitutional. Chief Justice Roberts, writing for the majority, emphasized that the Constitution vests executive power in the President, who must be able to hold executive officers accountable. The ruling clarified the limits of congressional authority in structuring federal agencies and reinforced the principle that the President must retain the power to remove executive officers.

5.1. The Legislative Context: Sarbanes-Oxley (2002)

To understand the significance of *Free Enterprise Fund*, it is necessary to review what *Sarbanes-Oxley* was designed to accomplish and why it provoked such concerted opposition from the financial community in the United States.

The flash-point for *Sarbanes-Oxley* was the wave of massive corporate accounting scandals in the early 2000s that shattered public trust in U.S. financial markets (see Hemphill, 2005).

Segal (2026) wrote: "The Act heightened the consequences for destroying, altering, or fabricating financial statements and for trying to defraud shareholders." The immediate catalysts were the collapses of Enron,

WorldCom, Tyco, and other major firms, exposing deep failures in corporate governance, auditing, and financial reporting. A brief review is in order.

5.1.1. Enron

The ForensisGroup (2026) noted:

“Enron Corporation’s collapse in 2001 became one of the most infamous corporate failures in U.S. history. Created in 1985 through the merger of Houston Natural Gas and InterNorth, Enron transformed from a utility business into a major trader of energy and other commodities, including electricity, broadband, and weather derivatives. Under CEO Jeffrey Skilling and CFO Andrew Fastow, the company used mark-to-market accounting and other complex financial methods to recognize projected future profits as current income, helping create the appearance of continued profitability even as important business ventures struggled.”

Enron’s collapse (Thomas, 2002) resulted from Enron hiding billions in debt through off-balance sheet entities. When the fraud was finally exposed, shares of Enron stock fell from over \$90 to pennies, triggering Enron’s bankruptcy, wiping out investors and leading to the loss of employment for 25,000 Enron employees, as well as \$2 billion in employee pension savings and \$1.2 billion in employee retirement funds (Boolchandani, 2025).

5.1.2. WorldCom

As noted by George (2021):

“In the late 1990’s and early 2000’s, the largest telecoms company was WorldCom, a long-distance and internet provider. WorldCom had grown throughout the 90’s through a series of poorly-managed acquisitions and mergers into a corporation of competing divisions, redundant services and products, and multiple billing systems—a chaotic environment perfect for fraud and corruption.”

WorldCom collapsed on July 21, 2002, when it filed for Chapter 11 bankruptcy protection — at the time, the largest corporate bankruptcy in U.S. history—involving more than \$100 billion in assets, caused by massive accounting fraud involving the improper capitalization of operating expenses, and overstating earnings by over \$11 billion. WorldCom also admitted to improperly accounting for more than \$3.8 billion in illegitimate expenses.

5.1.3. Tyco International

Tyco, which was founded in 1960, never filed for bankruptcy during its early-2000s scandal. Instead, Tyco went through a massive “leadership, legal, and accounting crisis” (Center for Ethical Organizational Cultures, 2026), but remained operational and solvent throughout, today providing “cyber-resilient systems.”

The Tyco scandal centered on fraud, undisclosed executive compensation, improper accounting practices, and related-party transactions committed by senior executives — especially CEO L. Dennis Kozlowski (for whom the business building at Seton Hall University was once named) and CFO Mark Swartz. Kozlowski and Swartz were charged and later convicted for misappropriating more than \$170 million and engaging in fraudulent stock sales (Cook & Shaw, 2005).

Perhaps more importantly, these scandals were the result of widespread accounting failures. Major accounting firms, most notably Arthur Andersen, were found to have compromised their independence by providing both consulting and auditing services, contributing to the creation of misleading financial statements (Dowell, 2022; Segal, 2026).

5.1.4. A Legislative Solution is Created

Sarbanes-Oxley (also known as *SOX*) was intended to restore corporate accountability and transparency in financial reporting of public companies. *SOX* created the PCAOB to regulate auditors and imposed criminal penalties for fraudulent financial activity (see Hemphill, 2005). Despite its roll in stabilizing markets, *SOX* was widely criticized by small-cap and emerging growth companies for imposing disproportionate compliance costs and expanded audit requirements, often costing companies millions of dollars per year and thousands of labor hours (see MIT Sloan Office of Communications, 2017).

These costs stem largely from Section 404 of the Act requiring internal control testing and expanded audit requirements (FriedFrank, 2004) requiring extensive documentation, testing, and oversight—all of which increases *operational friction* referring to the “*extra internal effort, time, coordination, and process complexity*” that companies must absorb in order to comply with *SOX*’s strict reporting, documentation, and internal-control requirements, diverting resources from innovation and growth and negatively affected profitability.

Criticisms were pointed and swift. Critics argued that the cost of compliance has been especially disproportionate on smaller public companies which face a heavier relative burden because they lack the internal compliance infrastructure of large corporations, imposing costs these smaller firms can least afford. Critics also pointed to reduced “initial public offering” (IPO) activity (see Reddy, Le, & Paul, 2021), companies staying “private” longer, a decline in the number of publicly traded firms, and a decline in public-market participation referring to the involvement of individuals, institutions, or entities in buying and selling financial instruments such as stocks, bonds, or other securities within a public (open) market.

There was “some truth” to these criticisms. Statistics indicated that IPO rates fell sharply for startups after *SOX*. Startups first financed in 1994 had a 26% IPO rate, while those first financed in 2000 had only 2%, and that low level has persisted. The number of publicly listed U.S. companies dropped from over 8,000 in 1996 to about 4,000 today, a decline partly attributed to *SOX*’s fixed compliance costs making public listing less attractive for smaller firms. Companies now stay private much longer. The median age of a venture-backed IPO rose from 4 years (1999) to 13.5 years by 2024 (see American Securities Association (ASA), 2025).

On the audit side, critics argued that *Sarbanes-Oxley* resulted in several clear “market distortions,” including a shrinking pool of auditors, increased specialization among auditors, and reduced availability of “Big Four” accounting firms [Deloitte, PwC (PricewaterhouseCoopers), EY (Ernst & Young), and KPMG who audit most public companies worldwide (Kenton 2026b)] working with nonprofits.

Stated American Securities Association President, Chris Iacovella: “Perhaps no other law or regulatory action in history has done more to disincentivize IPOs and weaken competitiveness of the U.S. capital markets than *Sarbanes-Oxley*” (American Securities Association, 2025).

5.2. *Seila Law LLC v. Consumer Financial Protection Bureau (2020): One Step Further*

In *Seila Law LLC v. CFPB*, the Supreme Court struck down the “for-cause” removal provision for the CFPB’s single director, ruling it violated the separation of powers, while leaving the agency itself intact, but significantly weakened and subject to continued attacks (see Chenoweth & DeGrandis, 2020).

The CFPB was created under the 2010 *Dodd-Frank Wall Street Reform and Consumer Protection Act* as an independent federal agency tasked with regulating consumer financial products. *Dodd-Frank* was designed to prevent another financial crisis by increasing financial stability, protecting consumers, and ending “too big to fail” massive government bailouts (Labonte, 2013).

As Barlas (2012) notes:

“Too Big to Fail” institutions are large, interconnected banks or nonbank financial firms whose failure could destabilize the entire system. *Dodd-Frank* subjects these firms to enhanced prudential” standards (stress tests, capital/liquidity rules). In addition, the Financial Stability Oversight Council (FSOC), established under *Dodd-Frank* can designate nonbank firms as

‘Systemically Important Financial Institutions’ (SIFIs) who “pose a threat to the financial stability of the U.S.”

Unlike most independent agencies, the CFPB was led by a single Director appointed by the President for a five year term, removable only for "inefficiency, neglect of duty, or malfeasance in office." This structure was designed to insulate the agency from political pressure. Critics argued the structure undermined the President's constitutional duty to ensure that laws are “faithfully executed.”

In 2017, the CFPB issued a civil investigative demand to Seila Law LLC, a California debt-relief law firm. Seila Law rejected the demand, arguing that the CFPB's structure was unconstitutional. On June 29, 2020, the Supreme Court issued a 5-4 decision holding that the for-cause removal clause was unconstitutional, that it weakened executive control, and that the CFPB's structure had "no foothold in history or tradition." The Court left the CFPB intact but made its Director removable at-will by the President. *Seila Law* marked a major shift in the balance of power between the executive branch and independent regulatory agencies and set a precedent for future challenges to agencies with similar removal protections.

6. The Legislative Context: Dodd-Frank (2010) and Its Role in the Broader Debate

The constitutional significance of *Seila Law* — and of the broader debate over the CFPB — cannot be understood in isolation from *Dodd-Frank* itself. To understand why this legislation became a target of such sustained opposition, it is necessary to understand the crisis that produced it, viewed from the background of a series of crises that engulfed several of the “giants” of the American economy: Bear Stearns, Lehman Brothers and AIG.

The immediate catalyst for Dodd-Frank was the collapse of Bear Stearns in 2008 and the broader financial crisis that followed. Bear Stearns was founded in 1923 as an equity trading company. Bear Stearns was heavily invested in mortgage-backed securities and collateralized debt obligations tied to subprime loans. Operating with extremely high leverage — reportedly 35.6 to 1 — the firm could not secure the liquidity (financing) to meet its obligations when investor confidence collapsed (Duca, 2026; Chen, 2026; Egan, 2018). In March 2008, the Federal Reserve Bank of New York provided an emergency loan to prevent the firm’s immediate collapse. Bear Stearns was ultimately sold to JPMorgan Chase at \$10 per share, far below its pre-crisis value of \$133.20 per share. In January of 2010, JPMorgan Chase ceased using the Bear Stearns name (de la Merced, 2008).

A second crisis enveloped AIG. American International Group (AIG) was self-described as a multinational insurance corporation that provides a wide range of services, including property and casualty insurance for individuals and businesses, life insurance and retirement products, and financial services across approximately seventy countries, with a focus on risk management solutions (Muse, 2025).

The near-collapse of AIG — which had insured trillions in mortgage-linked assets through credit default swaps but lacked the collateral to honor those guarantees — became the defining image of systemic risk in the crisis (Gethard, 2026). Total government support for AIG reached \$182.3 billion through a Securities Borrowing Facility in order to help AIG “unwind” its failing securities-lending program. Ultimately, the government exited with a \$22.7 billion profit, but the damage to the financial system was nearly irreparable (U.S. Department of the Treasury, 2012).

The collapse of Lehman Brothers, founded in 1850, on September 15, 2008, was the largest bankruptcy in U.S. history due to its heavy exposure to subprime mortgages and a lack of liquidity (Robinson, McDonald & Robinson, 2009).

Leifer (2014) noted “When the United States' housing market collapsed in 2008, it sent the country into its worst financial state since the Great Depression.” The *Dodd-Frank Wall Street Reform and Consumer Protection Act*, better known as *Dodd-Frank*, was sponsored by Senator Chris Dodd of Connecticut and the late Representative Barney Frank of Massachusetts (Wolfson, Crawford, Cooper, & Donnay, 2010), whose stated purpose was “to

restore responsibility and accountability in our financial system to give Americans confidence that there is a system in place that works for and protects them." Kim & Muldoon (2015) noted:

"The AIG, Bear Stearns, and Lehman Brothers failures were at the heart of this financial crisis. Like causes of other financial crises, the flawed financial system and the market overreaction (the irrational behavior of investors) to the failures of a few large financial institutions combined to trigger the most severe financial crisis since the 1930s."

Dodd-Frank created the Consumer Financial Protection Bureau (CFPB) to protect consumers from predatory lending and abusive financial practices (Arning, 2019); the Financial Stability Oversight Council (FSOC) to monitor systemic risks and identify critically important financial institutions (Kagan, 2025a); and the Orderly Liquidation Authority (OLA) to provide a framework for "winding down" failing large financial institutions without taxpayer bailouts (Deutsch & Daucher, 2001), the legal process used when a large, systematically important financial company is collapsing and normal bankruptcy proceedings would cause unacceptable economic damage to the larger economy. Under this process, the FDIC temporarily takes control, incumbent management is removed, and the firm is dismantled or liquidated in an orderly way. The FDIC acts as a "receiver" for failing banks and for nonbanks such as large broker-dealers, insurance companies, financial conglomerates, and other "systemically important firms" primarily engaged in financial activities such as:

- Asset management
- Financing
- Hedge funds operations
- Private equity management
- Payment and clearing

The Act also imposed the *Volcker Rule*, named for the Chair of the Federal Reserve, who served from 1979 to 1987, to limit banks from making speculative investments with depositor funds (Corporate Finance Institute, 2025; Chen, 2025); Ruddy & Boyle, 2014); required standardized derivatives to be traded on regulated exchanges and cleared through central clearinghouses (Mankad, Michailidis, & Kirilenko, 2019; created the Commodity Futures Trading Commission, 2026); strengthened Federal Reserve supervision of large banks; introduced "qualified mortgage" requirements and mortgage lending reforms; and provided important whistleblower protections in order to encourage reporting of securities and commodities law violations (Osborne, 2017). [See Appendix I for a description of derivatives and Appendix II for a description of qualified mortgages.]

Dodd-Frank had a major and immediate regulatory impact. Just as was the case concerning *Sarbanes-Oxley*, critics, however, argued that it imposed disproportionate compliance costs on smaller banks and community financial institutions, that its regulatory scope created uncertainty, and that it did not in fact reduce systemic risk as it was intended to do (Kim, 2015; Huang, 2018).

Critics also argued that the Act's regulatory scope overlapped numerous agencies, contained too many administrative rules, and that the Act's oversight mechanisms created uncertainty and slowed innovation. Perhaps most telling was the argument that *Dodd-Frank* further entrenched the dominance of the largest banks in the economy. Huang (2018) wrote: "I find no evidence to support the effectiveness of *Dodd-Frank* in reducing systemic risk in the U.S. financial system. Further improvements of the regulatory framework shaped by *Dodd-Frank* seem necessary, and banks' governance and risk culture also need more regulatory attention."

Criticisms were pointedly leveled against the *Volcker Rule*'s restrictions on proprietary trading which reduced market liquidity and limited banks' ability to manage risk "dynamically" through continuously *identifying, evaluating, and adjusting* responses to risks as financial conditions change, involving "real-time awareness" and dynamic adaptation rather than relying on periodic or static assessments reflected in *Dodd-Frank*'s bureaucratic and static approach.

The Act's requirements included "stress tests," a forward-looking, regulatory assessment that evaluates whether large U.S. banks have enough capital to keep lending during a severe economic downturn, which would demonstrate how a "hypothetical macroeconomic recession scenario would affect firm capital ratios" (Board of

Governors of the Federal Reserve Board, 2022; Ryznar, Sensenbrenner, & Jacobs, 2009). Under *Dodd-Frank*, “stress tests” are conducted annually by the Federal Reserve for major banking institutions—typically those with \$100 billion+ in assets. These major banking institutions must also publish their own company-run stress test results.

Dodd-Frank also required so-called “living wills” or Resolution Plans which are detailed, legally required plans that explains how a large financial institution could be safely wound down in bankruptcy—*without a taxpayer bailout*—if it were to fail. Banks and financial institutions with \$250 billion or more in total assets must submit “living wills” to both the Federal Reserve and the Federal Deposit Insurance Corporation (FDIC) who will review, critique, and may require changes to those proposed by the affected financial institutions (Board of Governors of the Federal Reserve Board, 2024).

Many of the criticisms of *Dodd-Frank* centered around the view that reporting mandates are too expensive to implement, thus reducing profitability and diverting resources from customer-facing activities (branch interactions, contact center support, disputed transaction and fraud handling, loan and mortgage servicing) and legitimate capital enhancements in the broader U.S. economy.

The “drum beat” of opposition and calls for “reform” began almost immediately after *Dodd-Frank* became law, including those offered by industry critics and the Trump administration.

6.1. Roll-Backs to Dodd-Frank: Mission Accomplished!

Several major provisions of *Dodd-Frank* have been rolled back—mainly as a result of the passage of 2018 *Economic Growth, Regulatory Relief, and Consumer Protection Act* (EGRRCPA) (see Tamny, 2026), enacted as part of President Trump’s “pro-growth and deregulation agenda” (Crews, Jr., 2025)—which significantly eased requirements for many banks. The rollbacks focused on stress testing, “too big to fail” oversight, and Volcker Rule compliance, especially for regional and community banks.

These revisions raised threshold for “Systemically Important Financial Institutions” (SIFIs). Originally, banks were subject to the strictest oversight at \$50 billion in assets. The 2018 law raised this to \$250 billion, immediately removing many regional banks from enhanced oversight (prudential) standards. As a result, fewer banks had to comply with heightened capital and liquidity rules, Federal Reserve supervisory stress tests, and mandatory resolution planning through “living wills.”

The asset threshold for mandatory company-run stress tests increased from \$10 billion to \$250 billion. As a result, many mid-sized banks no longer had to run annual stress tests or submit detailed capital plans or file annual resolution plans. Regulators also moved to a less frequent, tailored schedule for firms which remained subject to the rule. In addition, regulators adopted a conceptual “four-category framework” that applied rules based on a bank’s size, complexity, resilience to the regulatory environment, and possible impact of distress on the U.S. financial system, further reducing burdens for smaller and mid-sized institutions.

Changes introduced to the Volcker Rule, which had restricted “proprietary trading,” eased compliance for smaller banks and simplified requirements for others.

Importantly, Executive Orders signed by President Trump in 2026 during his second administration signaled further attempts to loosen mortgage-related rules—including Ability-to-Repay (ATR), Qualified Mortgage (QM), and TRID requirements which were designed to simplify mortgage disclosures and protect borrowers by ensuring transparency in loan terms, associated fees, and other costs (Atkinson, 2026)—particularly for community banks. These orders did not directly amend *Dodd-Frank* but directed regulators to consider the President’s proposed changes. In February 2026, the Fed voted to maintain the current requirements until 2027 when “new requirements will be calculated based on stress test models that take public feedback into consideration” (Board of Governors of the Federal Reserve Board, 2026).

7. Collins v. Yellen (2021): Another Step Toward the Demise of Humphrey's Executor

In 2008, following the collapse of the housing bubble, Congress created the Federal Housing Finance Agency (FHFA) to regulate Fannie Mae (created 1938) and Freddie Mac (created in 1970) — the two government-sponsored enterprises that backed most U.S. mortgages. [Even though they are technically shareholder-owned corporations, they are still under 18 years of federal conservatorship as of 2026, even though President Trump planned an IPO in late 2025—although that effort has stalled (Farberov, 2025); Rohr, 2026.]

Arthur (2009) found:

“The early 2000s saw a substantial shift in home mortgage lending practices. Rather than financing mortgages through deposits received from customers, banks increasingly financed mortgages through bond markets. This made it much easier to fund additional lending and resulted in a dramatic increase in non-government-backed mortgages, many of which were “subprime” loans to borrowers with poor credentials and “jumbo” loans that exceeded the limits on government-backed mortgages.”

The FHFA was led by a single Director, removable by the President only “for cause.”

Under agreements with the Treasury, Fannie Mae and Freddie Mac received capital in exchange for senior preferred shares and guaranteed dividends. A “Third Amendment” later replaced fixed-rate dividends with a variable formula requiring the companies to transfer nearly all net worth to the Treasury each quarter. Shareholders sued, arguing that the amendment exceeded the FHFA’s statutory authority and that the “for-cause” removal rule violated separation of powers.

The Supreme Court issued a two-part decision. The statutory claim relating to the transfer of assets to the Treasury was dismissed as a valid exercise of the legislative function. As to the constitutional challenge, the Court found the for-cause removal rule unconstitutional, citing its decision in *Seila Law*. The restriction undermined presidential control over the agency’s head and reduced executive accountability.

Collins reinforced the doctrinal trajectory running from *Seila Law* back to *Free Enterprise Fund*: The Court was systematically narrowing the constitutional space for the leadership of independent agency insulated from presidential removal.

8. Coming Full Circle: Trump v. Slaughter (2026)

On December 8, 2025, the United States Supreme Court heard oral arguments in *Trump v. Slaughter*, a case that asked the Court to directly revisit the constitutionality of statutory removal protections for FTC Commissioners previously upheld in *Humphrey’s Executor* (1935).

8.1. Lower Court History

In March 2025, President Trump fired two FTC Commissioners, Rebecca Slaughter and Alvaro Bedoya, both affiliated with the Democratic Party (Mansfield, 2025; Weissert & Rugaber, 2025). On March 27, Slaughter and Bedoya sued, alleging their removals were unlawful. On July 17, the U.S. District Court for the District of Columbia held that the removal of Slaughter was unlawful, reinstated her to her position, and enjoined the government from interfering with her duties, emphasizing that the for-cause removal protections under *Humphrey’s Executor* remained valid and binding. The Trump administration sought a stay, which the District Court denied. On September 2, the U.S. Court of Appeals for the District of Columbia Circuit denied the Department of Justice’s request to block Slaughter’s return to work, noting that the government was unlikely to succeed on the merits given that *Humphrey’s Executor* remained as controlling precedent.

8.2. The Supreme Court Weighs In

The Trump administration requested a stay of the reinstatement order. On September 8, Chief Justice Roberts granted a temporary administrative stay and referred the matter to the full Court. On September 22, the Supreme

Court granted the stay, issued a *writ of certiorari before judgment*, and set oral arguments for December. The three liberal justices — Kagan, Sotomayor, and Jackson — dissented from the issuance of the stay.

Observers at oral argument noted that the Court's conservative majority appeared to favor Trump's position and seemed poised to overrule or further weaken *Humphrey's Executor*. Chief Justice Roberts observed that the precedent had become "just a dried husk of whatever people used to think it was," noting that it addressed an agency with very little, if any, executive power (Kruzel & Chung, 2025). The liberal justices warned that overruling or weakening *Humphrey's Executor* could "give the President far more power than even kings or the Parliament of Great Britain at the time of the U.S. founding." Justice Jackson said: "So having a President come in and fire all the scientists, and the doctors, and the economists and the PhDs, and replacing them with loyalists and people who don't know anything is actually not in the best interest of the citizens of the United States."

8.3. *The Supreme Court's Decision: Embracing the Theory of the Unitary Executive*

The Supreme Court issued its much anticipated decision in *Trump v. Slaughter* on Monday, June 29, 2026, which many court observers considered as *the* test case defining the range and limits of presidential authority under the theory of the unitary executive for multi-member commissions or agencies. The opinion rested on Article II of the Constitution which vests *all* executive power in the President and relies on the same logic the Court had employed in *Seila Law* (2020) and *Collins v. Yellen* (2021), but now the ruling will be extended to multi-member commissions or agencies as well.

The Supreme Court concluded that *Humphrey's Executor* had become "unworkable," created confusion, and lacked historical grounding and upheld President Trump's removal of FTC Commissioner Rebecca Slaughter, even though no statutory grounds for a "for-cause" removal such as "inefficiency, neglect of duty, or malfeasance" were cited by President Trump for his action.

In an opinion written by Chief Justice Roberts, which was joined by Associate Justices Alito, Thomas, Kavanaugh, Gorsuch and Coney Barrett, the Court concluded that limits on firing officials who exercise executive power violate the Constitution's separation of powers and are therefore unconstitutional. The Roberts opinion contained a clear nod to the dissenting opinion of Justice Scalia in the 1988 case of *Morrison v. Olson*.

The majority concluded that because commissioners of independent agency enforce laws enacted by Congress, "including some created by Congress to serve as government watchdogs" (Cullen, 2026), they are executive officers, and the President must be able to remove them freely to ensure accountability to the President. The Chief Justice wrote that:

"the President must have the assistance of officers he can trust. Although it is up to the Senate to decide whether to confirm those with whom the President would prefer to work, neither Congress nor the courts may saddle him with those with whom he cannot work. Subordinates who exercise the President's power are subject to removal by him. Then, and only then, can they remain accountable to the President, and the President to the people."

The Chief Justice made it clear that any remaining force of the *Humphrey's Executor* is now overruled. The decision amounts to a major expansion of presidential control over more than two dozen independent agencies—such as the Federal Energy Regulatory Commission, Nuclear Regulatory Commission, the National Labor Relations Board and many others—whose leadership may now be subject to at-will presidential removal. The majority rejected the idea that a multi-member body is "less executive" than a single director. If an agency exercises executive power, its leaders must be removable at-will by the President. [See Appendix III for a listing of agencies which the Congress had designated as "independent regulatory agencies" whose leadership would be protected from "at will" firing.]

In a dissenting opinion read from the bench, Justice Sotomayor, joined by Justices Kagan and Jackson, emphasized that independent agencies were designed by Congress to serve the *public interest*, not those of the President. Justice

Sotomayor stressed that Congress intentionally designed agencies like the FTC to be accountable to the public, governed by expertise, not presidential loyalty or partisan politics (Parry, 2026).

Justice Sotomayor warned that the Court's embrace of the unitary executive theory "reshapes our government" and grants the President "far greater power than ever before," discarding a "democratic regime" built over ninety years, and in fact rewrites the Constitution's separation of powers, giving the President "unbridled authority" that neither the Constitution nor Congress intended.

The dissent further warned that the majority's ruling "distorts the structure of government" that the Congress had built in order to ensure independent, non-political regulation, and dangerously concentrates power in the presidency, potentially making Donald Trump the most powerful Chief Executive in our nation's history (see Stern, 2026).

In a clear rebuke to the majority, Justice Sotomayor argued the majority "upends its precedent, misconstrues our history, and sheds any pretense of judicial modesty." Justice Sotomayor argued the ruling creates a President who can purge regulators in independent agencies across the federal government (Parry, 2026).

Conversely, conservative attorney John Yoo applauded the Court's decision and commented (James, 2026):

"This decision is the, perhaps, the most important decision about the operation of the government since 1935... "No longer will there be an FTC, FCC," Yoo continued. "All those agencies were designed by Congress to be outside the president's control, and the court says clearly that is not consistent with the vesting by the Founders of the executive power only in the president and none of these other [branches]."

Interestingly, however, the Court said that the ruling applies to most independent agencies *with the exception of the Federal Reserve*.

8.4. *And Then Came Trump v. Cook*

In a separate opinion, also authored by the Chief Justice, the Supreme Court blocked President Trump from firing Federal Reserve Governor Lisa Cook, ruling 5–4 that Cook must remain in her position while litigation continues. The majority held that Federal Reserve Board members can only be removed "for cause" and that President Trump failed to provide the required due process (Blumenthal & Petersen, 2026) involving notice of any alleged misconduct and the opportunity for Cook to respond—making the President's attempted removal invalid—at least for now (see Howe, 2026).

The Court drew a "firm line" around the Federal Reserve, emphasizing its "long-standing tradition" of independence and Congress's explicit protections against politically motivated firings. As a result, the independence of the Federal Reserve was reaffirmed, with a limited "for cause" exception. The Court underscored that monetary policy must remain insulated from political pressure.

Stated the Chief Justice:

"To accept any one of these arguments would in effect transform the Federal Reserve's for-cause protection into at-will employment—an interpretive leap out of step with the statute Congress enacted and our Nation's tradition of central banking protected from political interference.

Commissioner Cook will remain in office, continuing to serve her fourteen-year term while lower courts determine whether President Trump has legitimate cause for her removal.

The dissenters in *Cook* included Justices Thomas, Alito (joined by Neil Gorsuch), and Amy Coney Barrett. They argued that the Court's ruling improperly restricted presidential removal power, broke with constitutional tradition, and created an impermissible barrier to executive authority.

Justice Thomas wrote the principal dissent, calling the majority's ruling "incorrect." Thomas argued that the Court had erred in upholding an injunction blocking a president from removing an executive officer the first time in U.S. history, framing the decision as a historic and improper constraint on presidential removal power by insulating a Fed governor from presidential removal with no basis in the constitution.

The dissent raised a broader concern that the Court was inconsistent in *limiting* executive authority in relation to the Fed, at the same time as the Court was *expanding* presidential removal power over other agencies. Justice Barrett, in a separate dissent indicated her disagreement with the majority's interpretation of the Federal Reserve Act's "for cause" removal protections, focusing on separation of powers concerns.

The views of three dissenters were in sharp contrast to the majority's emphasis on central bank independence and the need to prevent political interference in monetary policy, reflecting the dissenter's adherence to the *strong executive theory* described by Sunstein and Vermeule (2020).

9. Making Sense of the Confluence: The Powell Memorandum Provides A Context and Foundation

The doctrinal developments chronicled above did not occur in an ideological vacuum. A confidential memorandum written in 1971 by future Supreme Court Justice Lewis Powell proved providential for opponents of financial regulation and the administrative state, much as Justice Scalia's solitary dissent in *Morrison v. Olson* would serve as the constitutional roadmap for the unitary executive.

Justice Lewis Powell's 1971 memorandum, "*Attack on American Free Enterprise System*," (Powell, 1971), written for the U.S. Chamber of Commerce, is now credited with catalyzing a political, legal, and institutional movement that reshaped the environment in which administrative law developed—especially by strengthening corporate influence, expanding business-aligned legal advocacy, and contributing to the rise of deregulatory jurisprudence and legal scholarship (Giglio, 2020). The Powell Memo "electrified the Right, prompting a new breed of wealthy ultraconservatives to weaponize their philanthropic giving in order to fight a multifront war of influence over American political thought" (Giglio, 2020, quoting investigative journalist Jane Mayer).

Powell's memorandum warned that American business faced a "broad attack" from universities, media, and regulators. He identified the consumer activist Ralph Nader, author of *Unsafe at Any Speed*, as the chief antagonist. Powell urged American corporations to build long-term political, legal, and intellectual infrastructures to defend the free enterprise system. The Powell Memorandum is credited with creating the *intellectual blueprint* for the rise of the American conservative movement and the formation of a network of influential right-wing think tanks and lobbying organizations, such as the Business Roundtable, the Heritage Foundation, the Cato Institute, the Manhattan Institute for Policy Research, the Monday Meeting, the American Legislative Exchange Council (ALEC), and the Pacific Legal Foundation to challenge the "left" in American politics and the administrative state. Powell argued that "The most disquieting voices joining the chorus of criticism [of the free enterprise system] came from perfectly respectable elements of society: from the college campus, the pulpit, the media, the intellectual and literary journals, the arts and sciences, and from politicians." To counteract these "disquieting voices," Powell advocated "constant surveillance" of textbook and television content, as well as a purge of left-wing elements from influential positions in the media and in the academy. Powell also urged that business mount a direct challenge to government regulations that he believed strangled innovation and threatened free enterprise by instead encouraging "deregulatory politics," corporate legal activism, and judicial skepticism toward the administrative state (see Heer, 2024).

Although the memo was written before Powell joined the Supreme Court in January of 1972, its core thesis helped spur a mobilization of American business in the 1970s–1990s and the creation of the Federalist Society as a student organization in 1982 which propounded legal arguments in favor of the unitary executive (Monyak, 2024), reigning in of the administrative state, and for vigorous judicial review of regulations proposed by "out of control" federal agencies.

Over the next fifty years, “The Federalist Society... built a pipeline between law schools and top judgeships and influenced the selection of the past three Supreme Court justices” (Haq, 2024). At the same time, businesses mounted legal challenges to regulatory actions on several fronts, including: *Relentless, Inc. v. Department of Commerce* (2024), challenging the National Marine Fisheries Service; *SEC v. Jarkesy* (2024), holding that SEC use of in-house administrative law judges to impose civil penalties violates the Seventh Amendment right to a jury trial; *Axon Enterprise v. FTC* (2023), allowing litigants to challenge the constitutionality of agency enforcement proceedings in federal court without waiting for the agency process to conclude; and *Corner Post v. Board of Governors* (2024), holding that the statute of limitations for challenging agency rules begins when a plaintiff is first injured, not when the rule is issued. Each of these decisions was celebrated as a major win for expanding judicial oversight of agencies.

Powell himself, once a member of the Court, authored the controversial decision in *First National Bank of Boston v. Bellotti* (1978), which established the First Amendment rights of corporations to engage in political speech, particularly in relation to state ballot initiatives, strengthening business influence in the political arena (see Katz, 2009).

10. The Role of the United States Supreme Court

The Supreme Court has played a central role in the wider debate regarding the administrative state, rolling back the powers of agencies, and simultaneously enhancing the power of the President and the courts over administrative agencies once held to be independent. Three issues merit special attention.

10.1. Ending “Chevron Deference”

The Court dealt a significant blow to the authority of administrative agencies in overruling of *Chevron deference*, a legal doctrine from the 1984 Supreme Court case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*. Under *Chevron*, when Congress writes a law that is unclear or ambiguous, courts would generally defer to the agency's interpretation, on the premise that agencies possess technical expertise judges lack, and that Congress often intends agencies to “fill in gaps” in broad statutory language.

Courts followed a two-step analysis: (1) if the statute is clear and unambiguous, the congressional answer to deciding a question or controversy will control; (2) if the statute is ambiguous or unclear and the agency's interpretation of the statute is “reasonable,” courts will defer to the agency even if they might disagree with the agency's course of action or interpretation. For more than forty years, *Chevron* was a cornerstone of administrative law, influencing thousands of cases (Blumenthal, Charnas, Sandy, & Waxman, 2024).

In June 2024, the Supreme Court overruled *Chevron* in *Loper Bright Enterprises v. Raimondo*. The majority, written by Chief Justice Roberts, held that courts must exercise an *independent judgment* in interpreting a statute and cannot automatically defer to an agency interpretation simply because a law is ambiguous. Statutory ambiguity no longer triggers automatic deference by the court – judges will now decide what the law means. The majority found that *Chevron* had improperly shifted interpretive power from the judiciary to administrative agencies (Lewis, 2025).

10.2. The Possible Revival of the Non-Delegation Doctrine

The 1930s doctrine of non-delegation — limiting Congress's ability to delegate broad regulatory power to agencies — featured prominently in the anti-New Deal Supreme Court's decisions in *Panama Refining Co. v. Ryan* (1935) and *Schechter Poultry Corp. v. United States* (1935). In *Gundy v. United States* (2019), the Roberts Court upheld a delegation of authority under the *Sex Offender Registration and Notification Act*; however, Justices Gorsuch, Thomas, and Alito (and possibly Kavanaugh) signaled interest in revisiting the delegation question in future cases, suggesting that the non-delegation doctrine may yet be revived as a further check on agency power.

10.3. The Major Questions Doctrine

The Supreme Court has enunciated what has become known as the "major questions doctrine" (MQD), requiring clear congressional authorization before an agency can regulate issues of "major national importance" (Hunter & Shannon, 2026). If an agency intends to issue a rule on a question of "vast economic or political significance," it must point to clear, specific statutory language. General or vague statutory language is not sufficient. In the absence of such specific authority, the judiciary — particularly the Supreme Court — will decide what constitutes a "major question" based on factors such as economic impact, political and social significance, and the "novelty" of the issue.

The Court has invoked the MQD in several important cases:

- *FDA v. Brown & Williamson* (2000): The FDA could not regulate tobacco as a "drug" without clear congressional authorization.
- *West Virginia v. EPA* (2022): The EPA could not require a nationwide shift in electricity generation without explicit congressional approval.
- COVID-era cases (2021-2022): Courts struck down the federal eviction moratorium and the OSHA vaccine-or-test mandate on grounds that Congress had not clearly authorized those sweeping actions.
- *Learning Resources, Inc. v. Trump* (2026): The Supreme Court held that *International Emergency Economic Powers Act* (IEEPA) does not authorize the President to unilaterally set tariffs, vacating many of the tariffs implemented during the second Trump administration on grounds similar to the major questions doctrine, but this time applied to the presidency (see Farber, 2026).

As Farber (2026) has noted, the scope of the doctrine is "even more confused now than before" the tariff decision in *Learning Resources*, raising significant questions about the doctrine's future boundaries and applications."

11. Concluding Observations and Commentary

The Supreme Court's century-long arc of decisions from *Myers* to *Slaughter* is not, in the end, simply a chronology about the President's removal power. It is a story about who governs the American economy and on whose behalf. The individual decisions, viewed in isolation, can be characterized as good-faith interpretations of Article II. Viewed together — and in light of the Powell Memorandum, the sustained assault on *Sarbanes-Oxley* and *Dodd-Frank*, the overruling of *Chevron*, and the emergence of the major questions doctrine — they constitute a coherency: the systematic dismantling of the administrative state that had been constructed in response to the market failures of the twentieth century that trace back to the New Deal and which continued into the twenty-first century.

The doctrinal line drawn by Justice Scalia's lone dissent in *Morrison v. Olson* (1988) — then dismissed by the Court's 7-1 majority — became, within a generation, the constitutional majority position (see Gass, 2026). *Free Enterprise Fund*, *Seila Law*, *Collins*, and now *Trump v. Slaughter* have progressively eliminated the constitutional space for formerly independent agencies insulated from presidential control. At the same time, the overruling of *Chevron* has transferred interpretive authority from agencies to courts. And the major questions doctrine has erected a new structural barrier to ambitious agency regulation that did not exist even twenty years ago.

These developments have not occurred in a vacuum. The Powell Memorandum identified in 1971 that the real battle over free enterprise would be won or lost in the courts, in the law schools, and in the think tanks. The subsequent five decades saw the execution of that program with considerable success: the Federalist Society, the Heritage Foundation, the Cato Institute, and their counterparts provided the intellectual infrastructure; the courts provided the forum; and the unitary executive theory — dressed in constitutional language — provided the vehicle. What began as a dissent became doctrine.

There is a profound irony in the result. The argument for the unitary executive has consistently been made in the language of accountability: the President is the only nationally elected official, and therefore executive power must be concentrated in the presidency to ensure democratic responsibility. But the practical effect of *Trump v. Slaughter* is precisely the opposite. By placing the heads of the FTC, the NLRB, the FEC, and comparable agencies

at the President's pleasure, the decision subjects expert regulatory bodies to the policy preferences of whichever administration holds office. Agencies designed to be insulated from political interference — precisely so that they could apply expertise consistently across administrations — are now available as instruments of political control. The winners are not the public; they are the regulated interests who have long sought to neutralize regulatory agencies that represent constraints on their freedom of action.

The overruling of *Chevron* compounds this dynamic. Agencies now lack the interpretive authority they need to act decisively in technically complex areas — financial regulation, environmental protection, public health — and courts have been invited to second-guess decisions that require precisely the kind of expertise judges do not possess. The major questions doctrine adds a further constraint, requiring agencies to identify specific congressional authorization for significant regulatory initiatives in a Congress that has historically legislated broadly, delegating to agencies the task of working out the details. The combination is, as Beerman (2018) has observed, the equivalent of an "assault on the administrative state" conducted on several fronts simultaneously (Beerman, 2018).

The lessons learned from Enron, WorldCom, Bear Stearns, AIG, and Lehman Brothers and the near-collapse of the global financial system in 2008 have not disappeared, but they have faded. *Sarbanes-Oxley* and *Dodd-Frank* were enacted in direct response to those failures. Their regulatory burden was real, and legitimate criticisms exist about their scope and costs, particularly for smaller institutions. But the sustained effort to undermine them — through litigation, legislation, and executive action — has been driven less by measured cost-benefit analysis than by the ideological project that Lewis Powell articulated more than fifty years ago.

The cumulative effect of these developments — expanding presidential control over independent agencies, contracting agency interpretive authority, raising structural barriers to ambitious regulation, and subjecting agency decisions to heightened judicial scrutiny, coupled with *Trump v. United States* (2024) in which the Court determined that presidential immunity from criminal prosecution presumptively extends to all of a president's "official acts" — with absolute immunity for official acts within an exclusive presidential authority that Congress cannot regulate (Hunter, Shannon, & Lozada, 2024; Popli, 2024; Shaw, 2026) — represents a fundamental realignment of American governance. Congress is progressively displaced; administrative agencies are progressively constrained (see Hamberger, 2014); and power is redistributed to the President and, most directly, to the courts.

Beerman (2018) noted that this produces "judges rather than legislators determining the appropriate structure of government and the scope of federal power." Whether that serves the public interest — or whose public interest it serves — is a question whose consequences are now being written into the structure of the federal government itself, and which the next generation of students, scholars, and citizens will inherit.

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West Virginia v. Environmental Protection Agency (2022). 597 U.S. 697 (United States Supreme Court)

Appendix I – Derivatives

Major types of derivatives include futures (a contract to buy or sell something at a set price on a future date); options — a right (but not obligation) to buy or sell something at a set price; swaps — two parties exchange cash flows (e.g., fixed vs. floating interest rates); and forwards — similar to futures, but privately negotiated rather than traded on an exchange.

Derivatives contributed to the 2008 financial crisis by amplifying risk, hiding leverage, and creating a fragile web of interconnected exposures—especially through credit default swaps (CDSs) and mortgage-linked products like collateralized debt obligations or CDOs (see Tardi, 2025).

A CDO or a collateralized debt obligation is a financial product that “bundles together various types of debt instruments — such as corporate loans, bonds, credit card receivables, or mortgages — into a single pool, then slices that pool into tranches with different risk and return profiles” The value of a CDO comes from the cash flows generated by the underlying loans (Tardi, 2025).

Derivatives enabled an unsustainable credit boom especially in relation to “credit default swaps” (CDSs), which made it easier for financial institutions to expand their lending and take on more credit risk than they otherwise could, fueling the subprime mortgage bubble.

CDSs were originally meant to insure against default, but they were increasingly used to speculate on subprime mortgage performance, magnifying exposure across the system.

Derivatives linked banks, insurers, hedge funds, and other “special-purpose vehicles” that can create opaque, off-balance-sheet exposures. When the value of mortgage assets began to fall and mortgage defaults occurred, losses spread rapidly through this network. This interconnectedness meant that the failure of one major counterparty (such as AIG) threatened the entire system.

Mortgage-linked derivatives—especially CDOs and synthetic CDOs, which “unlike traditional CDOs which are backed by physical assets like mortgages or loans, synthetic CDOs derive their value and payment streams from premiums paid for CDS “insurance” on the possibility of default of a set of reference securities” (Manning, 2026)—allowed investors to make unlimited “bets” on the same underlying mortgages. CDO issuance exploded from \$20B in 2004 to over \$180B in 2007. Subprime and non-prime mortgages grew from 5% to 36% of CDO assets. When mortgage defaults rose, losses mounted through all of these highly leveraged structures (Kagan, 2025b).

Appendix II – Qualified Mortgages

Mortgage and lending reforms introduced “qualified mortgages and banned “yield-spread premiums.” [A yield spread premium (YSP) is a payment from a lender to a mortgage broker for originating a loan at an interest rate higher than the lender’s standard or “par” rate and requires lenders to verify borrowers’ ability to repay loans (Kenton, 2026c.)]

The Consumer Financial Protection Bureau (2025) defined a qualified mortgage as a home loan that meets federal standards designed to ensure borrowers can afford their mortgage payments and avoid risky loan features that can predictably lead to default by a mortgagee.

A qualified mortgage (QM) is a type of home loan that follows specific federal guidelines to protect borrowers from loans they may not be able to repay. It is incumbent on lenders to verify a borrower’s ability to repay by reviewing the applicant’s income, assets, employment, credit history, and monthly expenses. This is known as the “Ability-to-Repay” (ATR) rule.

Key Features of a qualified mortgage include:

- Stable loan structure: QM loans avoid risky features such as interest-only payments, negative amortization, and balloon payments in most cases;
- Term limits: The loan term generally cannot exceed 30 years, reducing long-term repayment risk;
- Debt-to-income ratio: Borrowers’ total monthly debts, including the mortgage, typically cannot exceed 43% of gross monthly income, ensuring the affordability of the mortgage; and
- Pricing limits: Points and fees charged for initiating the loan are capped, and the annual percentage rate (APR) cannot exceed a set threshold above the market’s average prime offer rate (APOR), keeping the loan “reasonably priced.”

Appendix III – Independent Regulatory Agencies

These are the agencies Congress formally designates as *independent regulatory agencies* — meaning they have rulemaking authority and whose leaders typically enjoyed removal protections before the Supreme Court’s decision in *United States v. Slaughter*. According to the Legal Clarity Team (2026b): “What sets them apart from ordinary executive departments is a combination of structural features designed to insulate expert decision-making from short-term political pressure: multi-member leadership, bipartisan balance requirements, fixed terms, and legal limits on the president’s power to fire agency heads.”

- Federal Reserve Board — Oversees monetary policy.
- Securities and Exchange Commission (SEC) — Regulates securities markets.
- Federal Trade Commission (FTC) — Antitrust & consumer protection.
- Federal Communications Commission (FCC) — Communications & broadcasting.
- National Labor Relations Board (NLRB) — Labor-management disputes.
- Commodity Futures Trading Commission (CFTC)
- Consumer Product Safety Commission (CPSC)
- Federal Deposit Insurance Corporation (FDIC)
- Federal Energy Regulatory Commission (FERC)
- Federal Housing Finance Agency (FHFA)
- Federal Maritime Commission (FMC)
- Nuclear Regulatory Commission (NRC)
- Consumer Financial Protection Bureau (CFPB)
- Federal Election Commission (FEC)
- National Transportation Safety Board (NTSB)
- Federal Mine Safety and Health Review Commission
- Occupational Safety and Health Review Commission
- Postal Regulatory Commission

(Paperwork Reduction Act. Title 44, Section 3502(5) of the U.S. Code (1995)).

According to the Legal Clarity Team (2026b), the following agencies are generally considered as the most important:

- Securities and Exchange Commission (SEC): Five commissioners serving five-year terms, no more than three from the same party. Oversees securities markets and enforces investor-protection laws.
- Federal Trade Commission (FTC): Five commissioners serving seven-year terms, no more than three from the same party. Enforces antitrust and consumer-protection rules.
- Federal Communications Commission (FCC): Five commissioners serving five-year terms with a three-member same-party cap. Regulates broadcasting, telecommunications, and spectrum allocation.
- National Labor Relations Board (NLRB): Five members serving five-year terms, with one seat expiring each year. Adjudicates disputes between private-sector employers and employees over union organizing and unfair labor practices.
- Board of Governors of the Federal Reserve System: Seven governors serving staggered fourteen-year terms. Directs monetary policy and supervises the banking system.

The Judicial Domestication of Rohingya Refugees in Bangladesh: Reconciling International Refugee Standards with National Legal Practice

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Abstract

This research decisively interrogates the juridical condition of Rohingya refugees in Bangladesh in the context of judicial domestication. This vital jurisprudential process elucidates how international norms relating to the rights of refugees are interpreted, adapted, and operationalized within domestic legal frameworks, even in the absence of formal treaty incorporation. Its significance is underscored by the need to examine how courts in non-signatory jurisdictions serve as critical sites of normative translation in a context with legislative gaps and executive ambiguity. This study addresses a notable gap in refugee law scholarship, where the judiciary's pivotal role as a norm-translating institution has often been overlooked in discussions on shaping refugee protection beyond mere legislative frameworks and executive policies. It rigorously assesses the extent to which Bangladeshi courts have reconciled international refugee standards with national legal practices through jurisprudence related to the Rohingya. Utilizing a doctrinal and jurisprudential methodology, this research analyzes constitutional principles, judicial decisions, international refugee and human rights instruments, and comparative jurisprudence, thereby illuminating patterns of judicial interactions with refugee protection norms. Findings reveal that Bangladeshi courts have, albeit inconsistently, engaged in selective judicial domestication by invoking constitutional guarantees, humanitarian principles, and persuasive international norms to address the protection deficits faced by the Rohingyas. However, this process is currently fragmented and constrained by sovereignty-centered security rationales and the lack of a dedicated refugee framework. The research asserts that judicial domestication represents an emergent jurisprudential pathway for aligning international standards with domestic legal practices. It substantially contributes to refugee law scholarship by proposing a court-centered theory of protection and offers valuable normative implications for judicial development, legal reform, and refugee governance in non-signatory states.

Keywords: Jurisprudential, Domestication, Normative, Judicial, Reconciliation

1. Introduction and Research Framework

1.1. Introduction

Everyday violence, poverty, and catastrophic weather disasters drive many people from their homes around the world, forcing them to embark on perilous journeys before reaching a safe sanctuary. Over the last few years, an unprecedented crisis has been escalating significantly. As a result, many people ultimately end up living in horrible conditions with the basic needs for their survival. The protracted displacement of the Rohingya into Bangladesh has generated one of the most legally complex and normatively contested refugee situations in contemporary South Asia. Within this context, the present research, *The Judicial Domestication of Rohingya Refugees in Bangladesh: Reconciling International Refugee Standards with National Legal Practice*, asserts that an effective understanding of refugee protection in Bangladesh transcends conventional treaty-ratification analysis. Instead, it necessitates an exploration of how international refugee norms are selectively internalized, translated, and operationalized through domestic jurisprudence. It is through this process that the concept of ‘judicial domestication’ emerges as an essential analytical lens.

The background of this study is rooted in the increasing tension between international refugee protection standards and the absence of a comprehensive domestic refugee regime in Bangladesh. Existing responses to the Rohingya crisis have largely been interpreted through humanitarian, political, or security perspective, often neglecting the judiciary’s critical role in reconciling international norms with municipal legal structures. Nevertheless, Bangladeshi courts have made significant contributions through constitutional interpretation, public interest litigation, human rights adjudication, and engagement with principles of customary international law. These actions have created an emerging jurisprudential space where refugee norms can be domesticated, despite formal non-incorporation. This raises a fundamental doctrinal question: how does a non-signatory state engage judicially with refugee norms absent formal legislative incorporation?

Despite the growing body of scholarship on Rohingya displacement and refugee governance, a critical gap remains in understanding the jurisprudential dimensions of refugee protection in Bangladesh. Studies in the existing literature have primarily scrutinized policy deficiencies, international burden-sharing, and humanitarian administration, and have overlooked the role of the judiciary as a crucial norm-translating institution. Even when courts are mentioned, they often lack a thorough examination within a coherent doctrinal framework that elucidates how international refugee standards attain normative relevance in domestic adjudication. This study decisively fills that gap by presenting judicial domestication as a pivotal jurisprudential process and critically exploring its protective potential within the Bangladeshi legal system.

The core research problem revolves around the disparity between international refugee standards and national legal practices, and whether this divergence can be harmonized through judicial interpretation. Specifically, this study investigates whether Bangladeshi jurisprudence can establish a meaningful legal framework for Rohingya protection, even in the absence of formal refugee legislation. It critically assesses whether courts merely echo executive restraint or actively contribute to a developing jurisprudence of refugee protection rooted in constitutionalism, human dignity, and international normative influence.

This research holds significant doctrinal and practical implications. Doctrinally, it advances refugee law scholarship by conceptualizing judicial domestication as a distinct method of norm internalization, clearly differentiated from incorporation, implementation, and judicial activism. Practically, it provides a strong jurisprudential foundation for enhancing protection discussions in Bangladesh through judicial avenues, particularly where legislative reform is limited. Furthermore, this study contributes to broader conversations about the role of domestic courts in non-signatory states and the potential for refugee protection beyond traditional treaty frameworks.

Methodologically, the research adopts a qualitative doctrinal approach, firmly grounded in jurisprudential and normative legal analysis. It employs rigorous doctrinal examination of constitutional provisions, judicial decisions,

statutory frameworks, international refugee instruments, customary principles, and relevant soft-law standards on Rohingya protection. The methodology is enriched by comparative and interpretive analysis to evaluate the interplay between international refugee norms and domestic legal reasoning. Data analysis is conducted through rigorous doctrinal content analysis and jurisprudential interpretation. Through critical doctrinal synthesis, this research evaluates the extent to which judicial reasoning reconciles, resists, or reconstructs international refugee standards within national legal practice.

The presentation of the contents of the thesis is structured accordingly. Chapter Two, *Judicial Domestication of Rohingya Refugee Norms in Bangladesh: A Rohingya Jurisprudential Potential Analysis*, lays the conceptual and jurisprudential groundwork for judicial domestication and assesses its protective possibilities within Bangladeshi jurisprudence. Chapter Three, *Reconciliation of International Refugee Standards with National Legal Practice*, scrutinizes the doctrinal interaction between international norms and national legal frameworks, considering the prospects and limitations of reconciliation. Chapter Four, *Towards a Jurisprudence of Rohingya Protection in Bangladesh*, synthesizes the findings and proposes a normative framework for an emergent Rohingya jurisprudence centered on judicial protection. Collectively, this study demonstrates that even within a non-signatory legal framework, the judiciary can serve as a vital arena for the domestication and advancement of refugee protection norms.

1.2. Objectives of the Study

- To analyze how Bangladeshi courts interpret, internalize, and apply international refugee protection standards, despite the absence of a dedicated refugee law framework, and to assess the jurisprudential potential of such norm translation.
- To evaluate the extent to which domestic legal practice reconciles international refugee obligations with constitutional principles, administrative responses, and national security concerns in shaping legal protection for Rohingya refugees in Bangladesh.
- To investigate doctrinal and jurisprudential gaps within existing Rohingya-related adjudication and assess whether judicial reasoning contributes to an emerging framework of refugee protection grounded in rights-based legal interpretation.
- To formulate a coherent jurisprudential model for strengthening Rohingya protection in Bangladesh through judicial domestication, reconciling international refugee standards with national legal practice, and advancing a principled trajectory toward refugee jurisprudence.

1.3. Research Methodology

This research is of a qualitative nature that focuses exclusively on secondary sources and employs doctrinal methodology characteristic of doctoral legal scholarship. It is grounded in a systematic analysis of primary legal materials, including the Constitution of Bangladesh and relevant judicial decisions, complemented by international legal instruments as normative reference points. Through a thematic and interpretive approach, the study examines how judicial reasoning reflects the implicit domestication of international standards within Bangladesh's constitutional framework. The research is analytical and aims to critically evaluate how a non-signatory state reconciles international refugee norms with domestic legal practice through judicial interpretation.

1.4. Literature Review

The protection of Rohingya refugees in Bangladesh reveals a compelling legal paradox: while the state is not a party to the 1951 Refugee Convention, it nonetheless engages in practices that reflect key elements of international refugee protection. As a non-signatory state, Bangladesh navigates a unique juridical space where refugee protection exists neither in formal codification nor in its absence. This literature review positions the concept of judicial domestication, a critical yet often overlooked mechanism of protection, as essential in understanding how international norms can be interpreted and integrated within domestic legal frameworks. It asserts that, despite the lack of formal treaty obligations, the judiciary in Bangladesh can harmonize international refugee standards with national legal practices through constitutional interpretation and rights-based adjudication.

Classical literature on refugee law, especially the works of Hathaway and Goodwin-Gill, establishes the 1951 Convention as the primary legal framework governing refugee protection. (Goodwin-Gill G. S., 2021) (Hathaway J. C., 2014). However, contemporary scholarship underscores that foundational principles, particularly the principle of non-refoulement, have evolved into norms of customary international law binding on all states, irrespective of treaty accession. (Allain, 2001) (Lauterpacht, 2003). Concurrently, human rights-based approaches have broadened the reach of refugee protection. The interpretations by the Human Rights Committee and the Committee Against Torture elucidate that state obligations under the ICCPR and CAT prohibit the return of individuals to situations where they face serious harm (Schabas, 2019) (Rodley, 2009).

For Bangladesh, this body of literature sets a definitive normative baseline: while not formally bound by the Refugee Convention, it operates within an international legal order that recognizes certain minimum standards of protection (UNHCR, 2007). The key question is not whether these norms apply, but rather how they are internalized within domestic legal practice. The framework of judicial domestication offers an insightful analytical lens for understanding the operationalization of international norms in non-signatory states. Drawing on Koh's theory of transnational legal process, judicial domestication refers to the interpretive incorporation of international standards through domestic adjudication (Koh, 1996) (Benvenisti, 1993). This transformative process does not necessitate formal legislative adoption; it occurs via judicial reasoning that aligns constitutional provisions with international principles. Jackson's concept of constitutional engagement reinforces this perspective, highlighting the crucial role of courts in bridging domestic and international legal realms (Jackson, 2010). Courts, in this context, serve as translators of norms, adeptly adapting international standards to suit local legal frameworks. Slaughter's examination of judicial networks, along with Deva's insights into human rights adjudication in Asia, further illustrate the ability of courts to engage with global norms in a non-binding yet profoundly influential manner (Slaughter, 2004). (Deva S. , 2013)

Applied to Bangladesh, this framework posits that the judiciary can act as a conduit for reconciling international refugee standards with domestic legal practices, even amidst the absence of formal treaty obligations. Judicial domestication thus emerges as a vital mechanism through which protection can be effectively articulated.

As noted by Islam and Ahmed, Refugee governance is decisively executive-driven, marked by ad hoc policies and administrative discretion (Ahmed I. , 2010). The designation of Rohingyas in Bangladesh as "Forcibly Displaced Myanmar Nationals" (FDMNs) strategically circumvents formal refugee recognition, thus limiting the direct applicability of international refugee law. (Mahmood et al., 2017). However, it is important to note that the Bangladeshi Constitution serves as a powerful source of protection. Articles 31 and 32 guarantee the right to legal protection and life, respectively, without being explicitly restricted to citizens. This opens significant possibilities for extending fundamental rights to non-citizens, including refugees (Hossain, 2010).

Hoque's analysis of judicial practice in Bangladesh indicates a "dualist but receptive" approach, where international norms, while not directly enforceable, serve as vital interpretive guides (Hoque, 2011). This doctrinal stance fosters judicial domestication, enabling courts to incorporate international standards indirectly through constitutional reasoning. Although literature specifically addressing Rohingya-related jurisprudence in Bangladesh is limited, existing studies reveal that courts have engaged with broader human rights principles in ways that resonate with international norms. For example, public interest litigation has allowed the judiciary to broaden the scope of fundamental rights, particularly in environmental and social justice contexts (Ahmed N. , 2010).

The case of Bangladesh Legal Aid and Services Trust (BLAST) v. Bangladesh, reported in 55 DLR (2003) 363, represents a significant development in public interest litigation within Bangladesh concerning arbitrary arrests, custodial torture, etc. The rulings rendered by the courts have invoked constitutional safeguards to uphold due process, thereby reinforcing the rule of law. Although such decisions may not explicitly reference refugee law, they reflect a steadfast commitment to principles such as human dignity and protection from harm, which are foundational to international refugee standards. This emerging judicial domestication demonstrates that while courts may not formally recognize refugee status or directly apply international conventions, they articulate protections that harmonize with global norms.

The literature clearly illustrates that the reconciliation of international refugee standards with Bangladesh's domestic legal practices primarily unfolds through informal and indirect mechanisms. This reconciliation is achieved through a blend of judicial interpretation and administrative accommodation. While the executive branch maintains control over refugee policy, the judiciary emerges as a crucial avenue for rights-based protection. Bangladesh's ability to align with international standards without formal accession is evident in the gradual evolution of judicial practice.

Despite these promising insights, there is a pressing need for more extensive scholarship that systematically analyzes how Bangladeshi courts engage with refugee-related issues at the doctrinal level. The concept of judicial domestication has yet to be explicitly applied to the Rohingya context, indicating a vital analytical gap. Furthermore, much of the existing literature tends to concentrate on policy and humanitarian dimensions, neglecting the judiciary's potential role in shaping legal norms. This research aims to fill those gaps by positioning judicial domestication as a central framework for understanding Rohingya protection in Bangladesh. Even as a non-signatory state, Bangladesh does not operate in a legal vacuum; its judiciary can reconcile international refugee standards with domestic constitutional principles, formulating a context-sensitive and normatively grounded form of protection.

In conclusion, Bangladesh's approach to Rohingya protection transcends a mere understanding through formal legal frameworks. While the lack of treaty accession and domestic legislation presents challenges, it does not hinder the emergence of judicial protections. Judicial domestication provides a compelling lens through which we can understand the internalization of international norms within domestic legal practices, enabling a non-signatory state to engage meaningfully with global standards. This study builds upon this understanding, aiming to articulate a coherent jurisprudence of Rohingya protection deeply rooted in the constitutional and judicial landscape of Bangladesh.

2. Judicial Domestication of Refugee Norm in Bangladesh: A Rohingya Jurisprudential Analysis

Despite not signing the 1951 Refugee Convention or its Protocol, Bangladesh has taken on the significant responsibility of hosting over a million Rohingya refugees. This chapter presents "judicial domestication" of international refugee norms as a critical mechanism of turning refugee-related international standards into effective domestic principles through the use of judicial interpretation and rights-based reasoning. Judicial domestication distinguishes itself from incorporation, implementation, and judicial activism, involving the adaptation of international standards to fit within domestic legal frameworks without explicit statutory enactment. This distinction is particularly pertinent in Bangladesh, where ongoing Rohingya protection issues demand judicial engagement amidst jurisdictional uncertainties and heightened executive securitization.

This chapter addresses two key questions: first, how does the judiciary in Bangladesh effectively domesticate international refugee norms to safeguard the rights of Rohingyas despite the absence of formal treaty ratification? Second, to what extent have judges integrated those principles, particularly through constitutional interpretation and the evolution of refugee jurisprudence, thus paving the way for a distinctive Rohingya jurisprudential framework?

2.1. Judicial Engagement with Rohingya Protection Norms

2.1.1 Rohingya Refugee Issues in Bangladesh and the Protection Controversies

Rohingya refugee influxes in Bangladesh started in the 1970s because of religious fanaticism, mandatory labor, land ejection, rape, and a variety of maltreatment by the Myanmar military administration. (Wiggers, 2002). The Government of Bangladesh has adopted several policies in response to the large inflow of Rohingyas from Myanmar, granting them access to basic rights and humanitarian aid. This initiative has prompted coordinated efforts across various government ministries and agencies, allocating a certain amount of land for new camp development in 2017. Consequently, national and international organizations, humanitarian agencies, and civil society organizations have promptly mobilized to support these endeavors. (Chowdhury A. R., 2019).

While previously registered Rohingyas maintained their refugee status, Rohingyas arrived in 2017 are classified by the Government as "Forcibly Displaced Myanmar Nationals" (FDMN) and governed by a recent policy framework that ensures their access to humanitarian services. However, the ongoing efforts to establish human rights assessments have shown limited progress in advancing their dignified life. This policy framework imposes constraints on their movements and denies them access to their rights, rendering them reliant solely on humanitarian assistance (Rahman, 2010). This situation may lead to increased involvement in illicit activities such as drug trafficking and terrorism.

Insufficient measures have been implemented to safeguard them from escalating violence, including murder, rape, coerced marriage, and other forms of abuse perpetrated by armed and criminal factions. The absence of a specific legal framework and implementation challenges present numerous challenges in enforcing their rights (Chowdhury M. A., 2018). Especially their lack of recognized legal status under domestic law places them in a precarious position, leaving them susceptible to rights infringements. Also, they are politically invisible, having no political representation, and are excluded from civic participation. Furthermore, the prospects for the Rohingya population in Bangladesh seem uncertain, as the government has recently proposed repatriating them to Myanmar as the sole resolution for refugee settlement (Mostofa, 2022).

2.1.2. Evolution of Juridical Response to Rohingyas in Bangladesh

The emergence of legal disputes related to the Rohingyas has decisively shifted the presence of refugees from a mere humanitarian concern to a complex landscape of juridical contestation. These disputes represent a systematic framework of legal conflicts that expose the shortcomings of the domestic legal order. The typological issues under debate —status disputes, challenges to deportation, access to fundamental rights, restrictions on movement, governance controversies within camps, and public interest litigation regarding humanitarian treatment collectively illustrate that the Rohingya question is intricately intertwined with persistent forms of legal contestation. This situation underscores the pressing need for judicial domestication, rooted in three intersecting deficits: **a normative deficit, a protection deficit, and a doctrinal deficit.**

- First, the typology of Rohingya-related disputes highlights a significant **normative deficit** within Bangladesh's legal framework. The absence of a comprehensive refugee law regime and Bangladesh's non-accession to the Refugee Convention create a state of normative incompleteness, leaving refugee-related claims without a solid juridical foundation. Consequently, disputes involving detention, non-refoulement, or access to socio-economic rights exist in a legal limbo without any clear rules as to how they are to be settled. This normative gap forces courts to become venues where refugee protection norms need to be adapted indirectly through constitutional and human rights reasoning.
- Connected to this is the **protection deficit**, which manifests as ongoing failures to realize rights for Rohingyas, despite the existence of broader constitutional and human rights guarantees. In this context, judicial intervention takes on a critical corrective role. This is especially evident in cases challenging arbitrary detention, resisting expulsion measures, or contesting restrictions incompatible with fundamental rights norms. Judicial domestication here serves as a mechanism for courts to navigate protection gaps by integrating international refugee and human rights principles into domestic adjudicative reasoning (Mollah A. H., 2014).
- The third dimension is the **doctrinal deficit**, characterized by the inadequacy of existing domestic legal categories to address the legal status of refugees. Traditional frameworks of immigration law, alienage regulation, and national security governance often fall short when confronted with claims rooted in forced displacement, statelessness, and international protection obligations. In this context, judicial domestication becomes a process of doctrinal adaptation, whereby courts craft innovative interpretive routes to engraft refugee protection concerns within domestic jurisprudence. Such innovations may occur through expansive constitutional interpretation, the persuasive application of international norms, the harmonization of domestic law with transnational principles, or in the re-conceptualisation of the refugee as a rights holder rather than mere administrative subject.

2.2 Theoretical and Jurisprudential Foundations of Judicial Domestication

- **Constitutionalization of Refugee Protection**

Constitutionalization as a form of judicial domestication represents a vital interpretive process through which constitutional guarantees are harnessed to integrate protection norms. In Bangladesh, this process is firmly based in the extensive interpretation of fundamental rights provisions, particularly the rights to equality before the law, protection of law, and personal liberty, along with the judicially recognized commitment to human dignity embedded in constitutional jurisprudence (Constitution of the People's Republic of Bangladesh, 1972, art. 27,31,32). Through these provisions, refugee protection claims can be reframed from mere immigration control issues into constitutional questions involving core rights. This interpretive shift is important to the process of judicial domestication in that it effectively operationalizes constitutional rights as avenues to bring norms concerning non-refoulement, humane and non-inhumane treatment, and due process into the domestic forum without actually having been enacted by legislation (Hathaway J. C., 2014).

Moreover, Bangladeshi courts have a history of embracing international human rights norms as persuasive interpretive aids in circumstances where domestic law is evasive or unclear. Within the context of Rohingya adjudication, this approach empowers courts to constitutionalize refugee protection by aligning domestic rights guarantees with more extensive international standards.

- **Doctrinal Innovation and Norm Adaptation**

A powerful technique of judicial domestication in Rohingya adjudication is the strategic application of doctrinal innovation and norm adaptation. This approach ensures that courts do not merely import international refugee principles into domestic law; they adeptly transform and localize these norms through context-sensitive judicial reasoning. In the Bangladeshi landscape, where refugee protection operates in a legislative void and under the constraints of a non-signatory legal framework, direct transplantation of international standards is not feasible. Instead, the process unfolds through robust doctrinal transformation, reconstituting external norms within indigenous constitutional and jurisprudential frameworks (Hathaway J. C., 2014).

This process exemplifies the effective localization of refugee standards through judicial reasoning. The shortcomings of conventional legal categories regarding "foreigners" or "undocumented migrants" compel courts to engage in doctrinal innovation, skilfully reconciling domestic constitutional commitments with humanitarian and refugee protection principles. (Chimni, 1998). Such localization embeds universal standards—such as non-refoulement, humane treatment, and procedural fairness within national jurisprudence, all tailored to align with Bangladesh's constitutional structure and institutional realities.

- **Public Interest Litigation and the Expansion of Protective Jurisprudence**

Amongst the various aspects of judicial domestication in Rohingya adjudication, Public Interest Litigation (PIL) appears to be a germane forum in such capacities from both procedural and jurisprudential perspectives. Under a legal regime where refugee rights are not recognized in the law, PIL is a valuable means by which to place constitutional or wider customary refugee rights into the court system. In a context where legislative recognition of refugee rights is lacking, PIL serves as a significant avenue for bringing broader constitutional and humanitarian claims before the judiciary. Its importance lies not only in broadening access to justice but also in empowering courts to translate widely recognized international protection principles into enforceable domestic rights. The Bangladeshi judiciary's expansive PIL jurisprudence has consistently facilitated engagement with marginalized groups through liberalized standing, epistolary jurisdiction, and rights-oriented interpretation (*Farooque v. Bangladesh*, 1996) (*Bangladesh National Women Lawyers Association v. Government of Bangladesh*, 2008).

In the Rohingya context, this procedural flexibility fosters advocacy-driven litigation concerning crucial issues such as humanitarian treatment, non-refoulement concerns, and access to essential rights. Here, refugee-related claims are framed not solely as individual grievances but as significant structural rights questions that engage constitutional commitments to dignity, liberty, and legal protection. This broader framing is central to judicial

domestication, allowing for the effective internalization of international principles and human rights norms through constitutional adjudication.

Unlike traditional adjudication, limited to declaratory relief, PIL empowers courts to issue continuing mandamus, policy directives, monitoring orders, and remedial guidelines aimed at tackling systemic protection deficits. In the context of refugee-related claims, such remedies serve not merely to resolve disputes but actively reshape governance practices that affect displaced populations. This expansive remedial approach marks a significant advancement in protective jurisprudence and highlights the judiciary's crucial role in law development and the protection of vulnerable groups.

2.3 Strengthening Rohingya Protection through Judicial Domestication

This chapter interrogates the juridical processes through which international refugee norms may be internalized within the domestic legal framework of Bangladesh, with particular reference to the Rohingya context. The chapter delves into the relationship between the executive branch and the judiciary, clarifying how courts have sometimes supported restrictive state practices while at other times standing against them. It assesses the potential for judicial engagement to embed fundamental international principles into the country's legal system. Ultimately, it argues for the importance of judicial domestication as a means to enhance refugee protection in Bangladesh, especially where robust legislative reforms are absent.

- **Towards a Rights-Based Rohingya Jurisdiction**

To effectively strengthen Rohingya protection, it is imperative that the judiciary unequivocally affirms the applicability of fundamental rights to all individuals within its territory. This decisive action will dismantle the outdated doctrine that currently limits Rohingya access to vital judicial remedies. The interpretive expansion of Articles 31 and 32 will create a robust pathway for enforcing essential standards of protection, including personal liberty and access to justice (Hoque, 2011). Furthermore, courts must adopt a purposive interpretive methodology that seamlessly integrates customary international law principles into domestic legality. Additionally, procedural innovations, particularly the expansion of public interest litigation (PIL), should be leveraged to dismantle barriers related to standing and representation.

- **Prospects for Transformative Judicial Engagement**

The transformative power of judicial domestication lies in its ability to recalibrate the dynamics between state sovereignty and human rights protection. In case of the Rohingyas, the judiciary must transcend mere formalistic deference and engage in rigorous constitutional scrutiny of executive measures.

By applying a robust proportionality analysis, courts will be equipped to critically evaluate the legality of restrictions imposed on Rohingya individuals—particularly those that hinder mobility or access to justice. Current administrative practices that enforce limitations on providing rights reflect a regulatory approach that prioritizes state control over individual rights, necessitating an intensified level of judicial review (Ibrahim, 2025).

Ultimately, transformative judicial engagement involves integrating refugee protection into Bangladesh's constitutional identity. By aligning domestic jurisprudence with evolving international human rights norms, the judiciary will serve as a powerful counterbalance to administrative exceptionalism. Such a paradigm shift will not only improve the security of Rohingya refugees but also fortify the rule of law and uphold the universality of fundamental rights within the Bangladeshi legal framework.

3. Reconciling International Refugee Standards with National Legal Practice

This chapter critically analyzes the discrepancies between international refugee law standards and Bangladesh's domestic practices, with a particular focus on the Rohingya context. Using a doctrinal approach, it examines comparative normative foundations and reveals protection gaps present in the current jurisprudence. By

delineating inconsistencies between international obligations and national responses, the chapter highlights both structural and practical deficiencies in legal protection. Furthermore, it assesses judicial reasoning and trends that could promote alignment between these frameworks. Ultimately, the chapter proposes specific legal and institutional reforms to enhance protection mechanisms and address contextual challenges in Bangladesh.

3.1. Doctrinal Dimensions of Rohingya Jurisprudence: Comparative Normative Foundations and Protection Gaps

3.1.1. Comparative Normative Foundations

- **Core International Refugee Standards**

The core standards of international refugee protection are firmly anchored in the 1951 Convention Relating to the Status of Refugees and its complementary 1967 Protocol. Together, these documents establish the authoritative framework of contemporary refugee law. Central to this framework is the principle of non-refoulement, which bars all people from being sent back to areas where they are likely to be persecuted, and this principle has attained the status of customary international law. The Convention articulates a high standard of rights-based regime with a commitment to access to asylum procedures, legal identity, freedom of movement, and basic socio-economic rights and entitlements like education and employment. (Convention Relating to the Status of Refugees, 1951, art. 16, 22–28, 31–34)

Broadly, these treaty commitments are supported by other international human rights documents, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which safeguard the rights of people, regardless of their legal status or citizenship. Moreover, UNHCR has a central role in the development of soft-law guidelines and supervision procedures. These standards, taken together, signify a dynamic jurisprudence that integrates refugee protection into the larger framework of international human rights law (Goodwin-Gill G. S., 2021).

- **Bangladesh's Domestic Legal Framework on Refugee Protection**

In contrast to the structured obligations envisaged under international refugee law, Bangladesh relies on an assemblage of constitutional guarantees, statutory provisions, and executive practices that collectively give rise to a de facto protection regime (Islam, 2013). The Constitution enshrines fundamental rights, including the right to life, equality before the law, and protection against arbitrary detention. (Constitution of the People's Republic of Bangladesh, 1972, art. 27,31,32). Although certain rights are confined to citizens, judicial interpretation has, occasionally, extended their applicability to non-citizens, including Rohingya-refugees, reflecting a degree of normative convergence with international human rights standards. (*BLAST v. Bangladesh*, 2003). The domestic legal regime does not, however, explicitly acknowledge refugee status, rights or entitlements when compared to the core principles of international refugee law. This leads to the legal identification of refugees as "foreigners" and thus makes it more difficult to create a rights-based protection system, in line with expectations by the international community (Foreigners Act, 1946).

In practice, executive measures have assumed a central role in addressing refugee situations, particularly concerning the Rohingya influx. These measures have facilitated humanitarian assistance, temporary shelter, and controlled movements. Such actions reflect some degree of working functionality of international humanitarian values, such as refoulement, but are also policy-driven and discretionary. The lack of a formal Asylum determination procedure further emphasizes the differences with the international standards, which require regularized procedures for evaluating protection claims (Human Rights Watch, 2023). The judiciary has, at times, acted as an important intermediary in bridging these normative gaps by invoking constitutional and international legal norms. Nevertheless, in the absence of legislative incorporation, such interventions remain limited in scope and systemic impact. In general, domestic mechanisms in Bangladesh can be characterized as a continuation of pragmatic accommodation, which, to some extent, represents the international standards while lacking full legal and institutional adherence.

- **Comparative Assessment: Obligations and De Facto Practices**

A comparative evaluation of international refugee standards and Bangladesh's domestic legal and policy framework reveals a complex relationship between normative obligations and state practice. While Bangladesh hasn't ratified key international refugee instruments, the large-scale admission of Rohingya refugees and the restraint from engaging in forcible refoulement demonstrate a strong, albeit unarticulated, recognition of essential humanitarian obligations. These practices reflect adherence to customary international law and signify a noteworthy convergence in state behavior.

However, this alignment remains precarious due to its lack of a formal legal framework. Unlike the international standards, which require asylum processes and institutionalised protection commitment, the path to asylum in Bangladesh is largely an executive-driven, discretionary one. The absence of a codified asylum system represents a significant departure from internationally accepted norms regarding refugee status determination and procedural fairness.

Additionally, socio-economic rights are limited, with restrictions on freedom of movement, employment, and education, hindering a robust rights-based protection regime, thus leading to dependency and marginalization. (Human Watch, 2019). Consequently, Bangladesh's framework reflects pragmatic humanitarian accommodation, influenced by political and resource factors, rather than a legally entrenched system aligned with international norms (Amnesty International, 2023). Although selective compliance is evident in its practices, the lack of formal legal incorporation and institutional coherence reveals a significant gap between de facto measures and de jure obligations within the international refugee protection regime.

3.1.2. Mapping the Protection Gap: Doctrinal Inconsistencies and Practical Deficits

- **Absence of Formal Legal Recognition of Refugee Status**

A significant doctrinal inconsistency in Bangladesh's refugee governance framework lies in the lack of formal legal recognition of refugee status. The Rohingya have been designated the "Forcibly Displaced Myanmar Nationals" (FDMNs), which lacks legal basis or enforceable rights amongst the expatriates living in the camps. This classification fundamentally contradicts international refugee law, which establishes legal status determination as the basis for attributing rights (Goodwin-Gill G. S., 2021). The absence of a comprehensive domestic legal framework for refugee recognition creates not only normative ambiguity but also limits the implementation of essential international principles. As a result, the protection regime operates in a structurally informal manner, highlighting a deliberate evasion of legal obligations rather than a simple legislative oversight.

- **Divergence between International Standards and Administrative Practice**

Bangladesh's administrative management of Rohingya refugees starkly contrasts with established international protection standards. International norms advocate for a rights-based approach that ensures access to education, livelihood, and dignity. Domestic uses, on the other hand, are mostly focused on securitization and humanitarian issues. The stringent restrictions on employment, mobility, and education underscore a regulatory framework driven by executive discretion rather than clear legal entitlements. Such context is witness to an extreme form of selective norm internalization, where humanitarian assistance is delivered without appropriate legal recognition of rights, resulting in a disjointed protection architecture (Milton et al., 2017).

- **Due Process Deficiencies and Status Determination Gaps**

A significant protection gap exists due to the lack of procedural safeguards in status determination processes. Bangladesh does not have a formal Refugee Status Determination (RSD) mechanism, which effectively denies Rohingya individuals their right to individualized assessment, appeal procedures, and judicial review. This glaring omission violates fundamental due process standards established in international human rights law. It thus

compounds the legal uncertainty that contributes to the dominance of executives and puts refugees under arbitrary administrative control, jeopardising the rule of law in the overall refugee governance framework (UNHCR., 2023).

- **Structural and Institutional Barriers to Norm Domestication**

A significant protection gap revolves around the structural and institutional challenges that hinder the domestication of international refugee norms. Lack of a specific legal framework, combined with an executive-centric governance system and limited judicial specialization, creates an ongoing process of normative inconsistency. Moreover, geopolitical sensitivities and resource limitations dictate Bangladesh's cautious legal stance. Consequently, these factors produce a partial compliance instead of an effective and coherent incursion of international standards into national legislation.

3.2. Judicial and Jurisprudential Pathways for Reconciling International and National Standards

- **The Judiciary as an Interpretive Institution**

The judiciary in Bangladesh functions as a critical interpretive authority that has the potential to reconcile normative frameworks. In light of the country's dualist legal structure, the courts have been found to tend to interpret domestic law in a manner consistent with the international obligations, especially in matters of fundamental rights (*Ershad v. Bangladesh*, 2001). This interpretive role enables the judiciary to address doctrinal inconsistencies without necessitating formal legislative incorporation, thereby fostering a constructive dialogue between international norms and domestic legal reasoning.

- **Constitutional Pathways for Internalization**

The Constitution of Bangladesh serves as a strong ground for integrating international refugee standards. Articles 31 and 32, which guarantee the right to life and personal liberty, have been interpreted broadly to include concepts of dignity, protection against arbitrary arrest, and humane treatment (*Bangladesh Legal Aid and Services Trust (BLAST) v. Bangladesh*, 2003). By adopting a rights-based interpretive approach, the judiciary is positioned to integrate fundamental refugee principles, such as non-refoulement and the prohibition of inhuman or degrading treatment, into constitutional guarantees. The approach is a good example of harmonious construction, in which domestic constitutional norms are aligned with international human rights standards. Consequently, courts are empowered to incorporate vital refugee protections within existing legal frameworks while remaining within the scope of their institutional mandate.

- **Reliance on Persuasive International and Comparative Jurisprudence**

In the absence of binding legislation specific to refugees, Bangladeshi courts have started adopting persuasive international and comparative jurisprudence in their decisions. This approach not only incorporates foreign judicial decisions and international human rights instruments as interpretative frameworks but also demonstrates a commitment to advancing judicial reasoning (Alam, 2006).

Such engagement significantly enhances doctrinal coherence and empowers courts to align their decisions with globally recognized standards, especially regarding non-refoulement and refugee protection. Moreover, this practice firmly positions Bangladeshi jurisprudence within a broader transnational legal discourse, which gives strength and legitimacy to judicial interventions in matters of refugees.

- **Judicial Domestication as a Transformative Method**

Judicial domestication serves as a central mechanism for transforming international refugee standards into enforceable domestic principles. In contrast to legislative incorporation, this process advances through doctrinal development, thereby embedding international norms within constitutional and administrative law frameworks (Chetail, 2014).

In the context of Bangladesh, judicial domestication holds particular significance due to the lack of a national refugee law. Through principled adjudication, the judiciary can effectively internalize protections for refugees, thereby transforming abstract international obligations into concrete legal entitlements. This process not only

addresses normative gaps but also promotes the development of a refugee-sensitive jurisprudence grounded in constitutional principles and human rights.

3.3. Toward a Harmonized Protection Framework: Addressing Gaps through Legal and Institutional Reform

3.3.1. Harmonization Model: Layered Norm Integration

- a) **Interpretive Incorporation by the Judiciary**- Bangladesh's higher judiciary, particularly the Supreme Court, should take an assertive interpretive approach towards the incorporation of international human rights standards on Rohingya refugees. By leveraging constitutional guarantees, which include the right to life and personal liberty, and interpreting them alongside international standards, the judiciary can align domestic law with global protection norms while still upholding national interests.
- b) **Executive and Quasi-Legislative Measures** – The executive branch should establish policies relating to refugees, including clear administrative guidelines and procedures within the Ministry of Home Affairs and the Refugee Relief and Repatriation Commissioner. Such measures should ensure access to basic services and protection from forced return, reflecting internationally recognized best practices through collaboration with organizations like UNHCR.
- c) **Incremental Legislative Reform** – Bangladesh can implement targeted legislative reforms in the absence of an overarching legislation to provide for the minimum level of protection to refugees. This means that provisions of the asylum procedure and basic rights should be incorporated into existing laws. These steps will provide flexibility in response to new needs and will pave the way for a more comprehensive national refugee protection system aligned with international norms.

3.3.2. Doctrinal and Institutional Responses to Protection Gaps

- a. **Judicial Construction of Refugee Rights** - Courts must establish a robust doctrine that unequivocally recognizes refugees as rights-bearing individuals. This move is essential to progress from a discretionary humanitarianism and to assert principled adjudication firmly rooted in constitutional norms.
- b. **Institutionalization of Status Determination** – The absence of a formal Refugee Status Determination (RSD) mechanism underscores the need for a formal executive body to guarantee fairness in the process and minimize arbitrariness in the exercise of executive decision-making.
- c. **Enhancing Access to Justice** – It is essential that refugees' access to legal assistance and procedural guarantees be expanded to effectively address the structural barriers within the judicial system.

3.3.3. Institutional Coordination in Refugee Governance

- a. **Inter-Branch Synergy** – Bangladesh needs to establish better coordination among the judiciary, executive agencies, and international partners such as UN agencies. Creating formal platforms or task forces will help ensure that legal interpretations and policies are aligned, ensuring refugee protection measures meet both domestic priorities and international standards while minimizing duplication and closing policy gaps.
- b. **Judicial Capacity Building** – Boosting judicial capacity through specialized training on international refugee and human rights law is crucial. Incorporating these topics into training programs will improve decision-making for Rohingya refugees, while collaboration with international experts will foster knowledge exchange and develop jurisprudence.
- c. **Administrative Modernization** – Bangladesh should develop centralized digitalized systems for refugee registration and the service system. A single database, accessible to relevant authorities, will enhance transparency and efficiency, while strengthening documentation processes, improving accountability, and

protecting refugee rights. Utilizing modern technology will also facilitate better coordination with humanitarian actors and improved governance.

4. Conclusion: Toward a Jurisprudence of Rohingya Protection in Bangladesh

4.1 Synthesis of Findings

The findings of the study demonstrate that the protection of Rohingya refugees in Bangladesh operates in a normative space with no formal treaty obligations but with active juridical engagements. In practice, the judiciary has managed to square the circle between the failure to incorporate fundamental principles of international refugee law, such as non-refoulement and humane treatment, and the resulting jurisprudence. This indirect incorporation of international norms enhances constitutional adjudication and allows the judiciary to evade the dualism and exercise its judicial function with finesse in the context of refugee policy.

The findings show selective engagement in judicial domestication in Bangladesh, with courts addressing fundamental rights violations, but did not establish a comprehensive legal status for Rohingya refugees. This leads to protection that may be of a more sporadic and case-by-case nature, which makes it difficult to form a jurisprudential system. Nevertheless, there is a clear evolution of jurisprudential adaptation, where international refugee standards are gradually moving towards the national legal consciousness via constitutional means.

Finally, the findings demonstrate that, even in the absence of a formal refugee law framework, Bangladesh has created a dynamic model of judicial domestication that helps in reconciling international standards and domestic realities through constitutional flexibility and judicial discretion. While limited in scope, it provides a sound basis for furthering the evolution of a rights-based jurisprudence for the protection of the Rohingyas in Bangladesh.

4.2. Contribution of the Research

First, this study makes a theoretical contribution by developing judicial domestication as a useful analytical lens for analyzing the degree of commitment non-signatory states demonstrate towards international refugee norms, rather than merely relying on either a compliance or a non-compliance dichotomy.

Second, the study contributes to the jurisprudence of the Rohingya by systematically examining how the Bangladeshi courts have been at the forefront of shaping the protection discourse. It places the judiciary not only as a passive player, but as an active agency of normative change.

Third, the study creates an important connection between international legal theory and domestic judicial practice, demonstrating the potential and role of constitutional interpretation as a powerful vehicle for integrating refugee standards. In doing so, it asserts that meaningful refugee protection in Bangladesh is not bound by formal treaty accession, but is rather gradually developing in the principled engagement of the judiciary.

4.3. Limitations of the Study

This research conducted is mostly doctrinal, with available case law that is limited in the context of Rohingya protection. The number of reported judicial decisions is not large enough to allow for general conclusions to be drawn regarding the uniformity of judicial perspectives in this area.

Moreover, the study has been light on the empirical viewpoints, such as the experiences of the Rohingya refugees or the practical implementation of judicial decisions. As a result, the results might not be the most comprehensive representation of the realities of this community at the ground level.

Further, this analysis is based on a Bangladesh-centric approach. While this focus allows for in-depth analysis, it may limit the scope for comparative insights with other jurisdictions confronting similar refugee challenges.

4.4 Recommendations for Future Jurisprudential Development

The advancement of a robust Rohingya jurisprudence demands deliberate and coordinated reforms across judicial, legislative, institutional, and policy sectors. The following recommendations are essential:

A. Judicial Recommendations

- (a) Establish Precedential Consistency – Higher courts should articulate clear doctrinal standards governing refugee protection and establish authoritative precedents for lower courts in constitutional interpretation, thereby offering guidance to lower courts and uniformity in adjudication. This is not only consistent with current judicial practices but also enhances doctrinal consistency.
- (b) Embrace Refugee -Judicial reasoning must include a comprehensive vulnerability analysis, ensuring that refugee status significantly informs the interpretation of rights and remedies.
- (c) Enhance Judicial Review of Executive Action - Courts should closely review administrative action that affects Rohingya refugees, especially if it involves deportation, detention, or movement restrictions that impact fundamental rights. It is a way that is effective in reconciling executive discretion with legal responsibility.

B. Legislative Recommendations

- (a) Enact a Refugee Protection Framework - Bangladesh should firmly set up a domestic law on refugee protection that includes the minimum standards for refugee protection, including the principle of non-refoulement, access to essential rights (health, education, limited livelihood), and regulation of the detention and movement of refugees, independent of its accession to the 1951 Convention.
- (b) Implement Refugee Status Determination (RSD) Procedures – Formal refugee status determination mechanisms will bring essential legal certainty and reduce the need for ad hoc administrative determination.
- (c) Incorporation of Procedural Safeguards - Legislation must ensure the refugees' right to be heard, to have legal counsel, to legal assistance, and to a procedure for review or appeal. These protections are essential to bring practice in line with international standards of due process.

C. Policy Recommendations

- (a) Transition to a Rights-Based Governance Model – Refugee management policies need to move beyond security-centric approaches towards rights & protection-based approaches. These policies should be effective in reconciling the legitimate interests of the State (security, border control) with binding humanitarian and human rights obligations.
- (b) Integration of International Standards into Administrative Guidelines - Executive agencies should adopt operational guidelines that reflect constitutional and international standards, like non-refoulement, humane treatment standards, and the ban on arbitrary detention.

D. Normative Recommendations

- (a) Reframe Humanitarianism as Legal Obligation – All government branches should treat refugee protection as a legal obligation rooted in dignity, rather than an act of 'humanitarianism' at the discretion of the government. Such dignity should be a guiding principle at all levels of refugee governance and adjudication.
- (b) Develop a National Refugee Jurisprudence - Bangladesh should position itself as one of the active actors in Global South refugee jurisprudence and articulate context-specific principles for use in the transnational discourse on refugee law, instead of having to import models from elsewhere.

E. Institutional Recommendations

- (a) Specialized Refugee Units or Tribunals – Establishing dedicated bodies within the administration or judiciary will ensure expertise and consistency in refugee matters.
- (b) Judicial and Administrative Training – Capacity-building trainings on international refugee law as a standard for judges, law enforcement, and policy makers should be focused.

(c) Data and Documentation Systems - Accurate and up-to-date registration and documentation of refugees is vital for effective protection and governance, and must be aligned with international standards.

4.5 Final Reflection

This study firmly concludes that the judicial domestication of the Rohingya protection in Bangladesh is a significant process despite the lack of a formal refugee law framework. At key moments, the Bangladeshi judiciary has, albeit cautiously, made use of some constitutional protections, which are broadly consistent with international refugee norms, including the right to life and due process. This practice demonstrates an implicit harmonization of norms, in which international norms are neither completely embodied nor rejected, but rather are selectively integrated into domestic legal reasoning. Therefore, this study argues that a more principled and structured articulation of judicial domestication is crucial for advancing a cohesive jurisprudence on Rohingya protection that effectively aligns Bangladesh's national interest with its legal humanitarian obligations towards Rohingyas under international law.

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Assessing Legal Certainty for Energy Accessibility in the Indonesian One Price Fuel Program through the Principle of Clarity of Purpose

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Abstract

The Indonesian One Price Fuel Program (OPFP) was introduced to reduce fuel price disparities and improve access to subsidized and assigned fuel in disadvantaged, frontier, and outermost regions in Indonesia. However, persistent distribution problems and reliance on informal fuel markets raise questions about whether the legal framework governing the program provides sufficient certainty to support energy accessibility. This article assesses the regulation of the OPFP through the principle of clarity of purpose under Article 5 of Indonesian Law No. 12 of 2011 on Law-Making, as amended. Using doctrinal legal research, the article applies an intra-legal assessment grounded in Indonesian positive law, particularly the clarity of purpose principle and the constitutional orientation of energy governance under Articles 33(2) and 33(3) of the Indonesian 1945 Constitution. The analysis shows that the Indonesian Ministry of Energy and Mineral Resources (MEMR) Regulation No. 36 of 2016 is generally aligned with the principle of clarity of purpose. Its objective is identifiable, connected to the public interest in energy accessibility, and designed to respond to the regulatory problem of unequal fuel access and distribution disparities in targeted regions. Nevertheless, the article does not claim to provide a complete assessment of legal certainty, as it focuses only on a single principle of good law-making. Rather, it concludes that the OPFP regulation provides sufficient clarity of purpose to support legal certainty regarding energy accessibility, while further assessment under other good law-making principles remains necessary.

Keywords: One Price Fuel Program, Clarity of Purpose, Legal Certainty, Energy Accessibility

1. Introduction

Indonesia is a country whose economy remains highly dependent on oil, as reflected in its substantial fuel consumption, which reached approximately 1.6 million barrels per day (CEIC, 2024). Beyond its primary use in transportation (Rahman et al., 2025), fuel also serves as a critical input for key economic sectors (Ritchie and Rosado, 2022), including transportation (Merforth et al., 2023), fisheries (Tyedmers et al., 2022), and mining (Cassoret, 2021). Consequently, fluctuations in fuel prices have a significant impact on the national economy (Goh et al., 2022). However, despite this heavy reliance, challenges persist in fuel distribution due to Indonesia's

geographical conditions (Nur & Hakim, 2022). Indonesia's complex topography—characterized by mountains and dispersed islands (Leinbach, 1975)—limits interregional connectivity and logistics, thereby constraining economic distribution (Montgomery, 2024). As a result, economic growth tends to concentrate in major cities and industrial hubs (Porter, 1998), while remote areas experience comparatively slower development (Jamal, 2017). These findings highlight that achieving energy accessibility is a key challenge that demands immediate attention, particularly in geographically marginalized regions (Alfian Hadi Saputra et al., 2025).

In order to address the occurred problem, Government of Indonesia (GOI) initially establishes the acceleration of One-Price Fuel Program (OPFP) which further, this regulation is governed in Indonesia's Ministry of Energy and Mineral Resources (MEMR) Regulation No. 36 of 2016 on Acceleration of the Nationwide Implementation of a One Price Policy for Certain Types of Fuel (JBT) and Special Assignment Fuel (JBKP)—particularly in Frontier, Outmost, and Disadvantaged areas (FOD) (MEMR, 2016). The objective of this regulation is to ensure the availability, smooth distribution, and uniform fuel subsidy prices across all regions of the Republic of Indonesia (Adam & Hartono, 2025), regardless of geographical location and distribution-related factors (MEMR, 2016). OPFP is carried out through the assignment of business entities, which are designated by the Downstream Oil and Gas Regulatory (BPH Migas), to distribute JBT and JBKP to end consumers via Appointed Gas Station (SPBU Penerima Penugasan) acting as an extension of the assigned business entities (BPH Migas, 2024). These business entities are required to distribute both JBT and JBKP at GOI-determined retail prices in GOI-designated locations (MEMR, 2016), regardless of the transportation and logistics costs (Milwan et al., 2020).

According to the provisions of Indonesian MEMR Regulation No. 36 of 2016, one of the intended objectives is to ensure energy accessibility by designating the FOD Areas where gas stations shall be built by business entities (MEMR, 2016). Energy accessibility is a supporting aspect in achieving energy justice, which is further defined as the opportunity of those in a particular geographic location to access it and its associated services (Merforth et al., 2023). Limited access to energy resources or infrastructures might hamper the development and continue poverty in countries (Xia et al., 2023). Furthermore, Indonesian Law No. 30 of 2007 on energy also acknowledges the importance of energy accessibility in supporting national development as well as enhancing the national energy security (Indonesia, 2007). Ensuring energy accessibility in energy governance, including fuel, is significant for providing energy justice; its establishment requires institutionalise responsibility (Reddy, 2015).

As a result of the limited number of official distributors in FOD Areas, illegal reselling practices tend to increase, leaving communities with no viable alternative but to rely on informal retail kiosks to obtain subsidized fuel (Milwan et al., 2020). In practice, disparities in distribution and the prevalence of informal markets cause communities in FOD areas to pay higher prices than those officially set, as the absence of viable alternatives compels consumers to purchase fuel at elevated prices (Havranek et al., 2012). Consequently, the intended goals of availability, accessibility, and affordability under the OPFP framework cannot be fully realized (Adam & Hartono, 2025). Against this background, this study assesses whether the provisions of Indonesian MEMR Regulation No. 36 of 2016 clearly express the legal purpose of the OPFP and provide sufficient legal certainty to support energy accessibility in FOD areas.

This study focuses on the legal substance of the OPFP, particularly the norms and regulatory provisions that underlie the program's acceleration. The OPFP was established to address fuel distribution disparities in Indonesia and to support energy access for communities, especially in FOD areas (MEMR, 2016). However, the emergence of various issues in implementing the OPFP raises a legal question about whether the regulation governing the program reflects a sufficiently clear objective and provides adequate legal guidance to achieve its intended purpose.

Based on this background, this study asks: to what extent does the regulation of the OPFP reflect the principle of clarity of purpose under Article 5 of Indonesian Law No. 12 of 2011, as amended several times, most recently by Indonesian Law No. 1 of 2026 (as amended), and does it provide sufficient legal certainty to support energy accessibility? To answer this question, the article first clarifies the conceptual relationship between legal certainty, energy accessibility, and the principle of clarity of purpose. Second, it assesses the OPFP regulation through the principle of clarity of purpose, particularly by examining whether the regulation clearly states its objective

(Republic of Indonesia, 2011, elucidation of Article 5), connects that objective to energy accessibility as a constitutional public-interest aim (Republic of Indonesia, 2011, elucidation of Article 5), and is intended to solve problems (Indrati, 2007, pp. 35–36). Finally, it determines whether the OPFP regulation provides a sufficiently certain legal basis for supporting energy accessibility.

2. Method

This study uses doctrinal legal research with statutory and conceptual approaches. Doctrinal legal research is appropriate because this study focuses on identifying, interpreting, and systematizing the legal rules and principles governing the OPFP, rather than measuring the empirical effectiveness of the program in practice (Hutchinson & Duncan, 2012; Hutchinson, 2015). The statutory approach is used to examine the relevant legal instruments governing the OPFP, particularly Article 5 of Indonesian Law No. 12 of 2011 on Lawmaking, as amended by Indonesian Law No. 15 of 2019 and Indonesian Law No. 13 of 2022, and Regulation of the Indonesian Minister of Energy and Mineral Resources No. 36 of 2016 concerning the acceleration of the implementation of one price for certain types of fuel oil and special assignment fuel oil nationally. The conceptual approach is used to clarify the relationship between legal certainty, energy accessibility, and the principle of clarity of purpose.

This study also adopts an intra-legal assessment. Following Mackor's understanding of legal doctrine, the analysis does not assess the OPFP primarily through external economic, political, or administrative-effectiveness criteria. Instead, it assesses the OPFP regulation through criteria that are part of the Indonesian positive legal order itself, particularly the principle of clarity of purpose under Article 5 of Indonesian Law No. 12 of 2011 (as amended) and the constitutional orientation of energy governance under Article 33(2) and Article 33(3) of the Indonesian 1945 Constitution (Mackor, 2016). In this sense, the study evaluates whether the OPFP regulation is sufficiently clear within the Indonesian legal system, rather than judging the program's success as a matter of policy implementation.

The primary legal materials are collected from official legal sources. The *Badan Pemeriksa Keuangan* (BPK) Regulation Database is used to identify the OPFP's current normative framework, including its status, legal basis, and relevant regulatory materials. The Indonesian Constitutional Court database is used to identify decisions relevant to legal certainty, good law-making principles, and the constitutional meaning of state control over important branches of production and natural resources. Secondary materials, including books, journal articles, and policy-related literature, are used to support the conceptual explanation of legal certainty and energy accessibility.

The analysis is conducted qualitatively through legal interpretation. First, the study reconstructs the current normative framework of the OPFP by examining the relevant laws and regulations. Second, it operationalizes the principle of clarity of purpose into three guiding indicators. The first indicator asks whether the regulation clearly states the objective of the OPFP (Republic of Indonesia, 2011, elucidation of Article 5). The second indicator asks whether that objective is connected to energy accessibility as a constitutional public-interest aim, especially the state's responsibility over important branches of production affecting public livelihood and the use of natural resources for the greatest prosperity of the people under Article 33(2) and Article 33(3) of the Indonesian 1945 Constitution (Republic of Indonesia, 2011, elucidation of Article 5). The third indicator asks whether the regulation is intended to solve problems (Indrati, 2007, pp. 35–36).

Through this method, the study does not claim to measure the OPFP's actual success or failure in the field. Rather, it examines whether the legal design of the OPFP regulation clearly expresses its purpose and provides a sufficiently certain legal basis for supporting energy accessibility.

3. Results

In this section, the Indonesian OPFP framework is analyzed in three phases: (i) reconstructing the current normative framework of the OPFP and clarifying the conceptual relationship between legal certainty, energy accessibility, and the clarity of purpose principle under Article 5 of Indonesian Law No. 12 of 2011 (as amended);

(ii) assessing the OPFP regulation through the clarity of purpose principle; (iii) clarifying whether the OPFP regulation provides sufficient legal certainty to support energy accessibility.

3.1. The Conceptual Relationship between Legal Certainty, Energy Accessibility, and the Principle of Clarity of Purpose

This subsection delineates the conceptual relationship between legal certainty, energy accessibility, and the principle of clarity of purpose, illustrating how they function together within regulatory frameworks. First, we examine the theoretical underpinnings of legal certainty as articulated by various scholars, including how it ought to be applied in provisions. Secondly, we define the principle of clarity of purpose and assess how it can reinforce legal certainty within these frameworks. Thirdly and finally, we focus on synthesizing these concepts, demonstrating how clarity of purpose serves as the vital foundation for the legal certainty needed to enhance energy accessibility.

Legal certainty is a foundational principle of a robust legal system, ensuring that laws are clear, predictable, consistently applied, and established through valid legislative processes (Aditya, 2023). Scholars broadly agree that legal certainty guarantees that individuals, institutions, and the government adhere to their established rights and obligations (Parluhutan Sagala et al., 2025; Squintani & Rijswick, 2016). Legal certainty is also responsible for supporting the establishment of ideal rules of law; according to Gustav Radbruch, the main elements of a good law are legal certainty, justice, and benefits (Radbruch as cited in Supriyadi et al., 2025). Otto defines real legal certainty as the presence of clear, state-recognized laws that are consistently obeyed by the government, accepted by the public, impartially applied by independent judges, and concretely enforced through court decisions (Otto, 2012).

Furthermore, Indonesian Law No. 12 of 2011 (as amended) mandates that the establishment of regulations shall reflect the principles of legal order and legal certainty (Indonesia, 2011) and the provisions regulated must reflect legal certainty (Joi Phiau et al., 2025). Legal certainty ensures that all parties can predict the legal consequences of their actions (Aditya, 2023), thereby fostering social stability and public order (Shcherbanyuk et al., 2023). In a more specific context, this clear delineation of legal standing allows for the effective operation of fair energy access mechanisms, as stakeholders fully understand the scope of their authority and the extent of their responsibilities under the statutory mandate (Aditya, 2023). Accordingly, the existence of legal certainty within the regulatory framework demonstrates that the regulation is intentionally designed to address issues through a clear, consistent, and accountable legal mechanism.

Legal certainty, in Indonesian law-making regulation, is not achieved merely by drafting regulations in clear, unambiguous language; it also requires strict adherence to the formal principles of good law-making as stipulated in Indonesian Law No. 12 of 2011 (as amended) (Firial Tiara Efriliani, 2025). Article 5 Indonesian Law No. 12 of 2011 (as amended) defines the formal principle as follows: (a) clarity of purpose; (b) proper authority or institutional competence; (c) conformity between type, hierarchy, and content; (d) implementability; (e) effectiveness and efficiency; (f) clarity of formulation; and (g) transparency. The fulfillment of the good-lawmaking principle is a mandatory requirement for lawmakers in arranging laws and regulations because this principle is utilized as an indicator to measure whether the established regulation is formally valid (Harijanti, 2021).

This formal principle is a mandatory requirement that must be fulfilled to ensure that the enacted law is good and appropriate, and it also reflects legal certainty (Rosadi, 2010). Among the various indicators used to assess legal certainty in legislation, this study focuses on the principle of clarity of purpose. Clarity of purpose is important because a regulation can only effectively address a societal problem when its objectives are clearly formulated and capable of guiding its implementation (Putra, 2022). The clarity of purpose can be defined in three guiding indicators. According to the explanation of Article 5 of Indonesian Law No. 12 of 2011 (as amended), clarity of purpose means that every law and regulation must have a clearly defined objective to be achieved. This implies that the main purpose of the regulation must be clearly identifiable and understandable (Indrati, 2020). Furthermore, the second indicator is that laws and regulations must be established based on the 1945 Constitution;

therefore, their content must safeguard human rights, uphold the state ideology (Pancasila), and align with the public-interest aim (Republic of Indonesia, 2011, elucidation of Article 5). The third indicator is that, laws and regulations is intentionally established to solve problems (Indrati, 2007, pp. 35–36). This aligns with M.P. Jain's view that the formulating laws are sufficiently forward-looking to address problems (MP Jain as cited in Widiati, 2012).

The principles in assessing the legal certainty of a certain regulation are also used by the Constitutional Court (Rishan, 2021). The Constitutional Court also applies these principles when assessing the form of a regulation. To examine legal certainty, the Court requires not only adherence to the due process of lawmaking but also an evaluation of the quality and rationale for the regulation's establishment (Rubenfeld, 2025). These elements can be further assessed through Article 5 of Indonesian Law No. 12 of 2011 (as amended) (Rishan, 2021). Consequently, if a regulation fails to pass the formal review conducted by the Constitutional Court—which utilizes Article 5 of Indonesian Law No. 12 of 2011 (as amended) as one of the bases of assessment—the regulation may be declared void (Rishan, 2021). Therefore, it can be understood that failing to fulfil even one of these principles may render the regulation invalid and without legally binding force (Rishan, 2021).

Energy Accessibility is defined as a principle which highlights the necessity of providing universal access to modern, affordable, and reliable energy to eradicate poverty and support sustainable development in developing nations (Heffron et al., 2018). Thus, energy accessibility is a fundamental aspect in promoting equitable and fair welfare and prosperity of the people, as stipulated in Article 3 letter f Indonesian Law No. 30 of 2007 (Indonesia, 2007), particularly in FOD areas (Putri Sipahutar et al., 2022). Moreover, it is widely known that communities in the FOD areas face abundant challenges related to energy access (Alfian Hadi Saputra et al., 2025). This condition leads to other issues, including high transportation costs, limited economic activity, and hindered access to essential public services in education and healthcare (Acheampong et al., 2021).

In this regard, access to fuel, which is one type of energy resource, remains crucial since it can be utilized for transportation and other economic activities (Cassoret, 2021). Thus, Indonesian Law No. 22 of 2001, as amended several times, most recently by Indonesian Law No. 1 of 2026 (as amended) on ONG acknowledges that fuel is a vital commodity and that it affects the livelihoods of many people (Indonesia, 2001). Consequently, pursuant to Article 33 (2) and (3) of the Indonesian 1945 Constitution, the state has the power to control and regulate fuel governance to promote the greatest prosperity of the people (Pinilih & Chairunnisa, 2019). Therefore, given the vital importance of energy accessibility in enhancing community welfare and eradicating poverty, particularly in FOD areas, as access to fuel is crucial to driving local economies. Therefore, as mandated by the constitution, the state is responsible for ensuring energy accessibility—specifically through accessible fuel—to achieve the greatest prosperity for the people.

Based on the discussion above, legal certainty, energy accessibility, and the principle of clarity of purpose are conceptually connected. The legal certainty concept requires regulations to be clear, predictable, and capable of guiding the conduct of public authorities, regulated actors, and affected communities. In the context of energy accessibility, this certainty becomes important because access to fuel is not merely a technical distribution issue, but also relates to the state's constitutional responsibility under Article 33(2) and Article 33(3) of the 1945 Constitution. Therefore, the principle of clarity of purpose provides analytical lens for assessing whether the OPFP regulation clearly identifies its objective, connects that objective to energy accessibility from the constitutional values as a public-interest aim, and is designed to address the identified regulatory problem of unequal fuel access and distribution disparity. On this basis, the next subsection applies these guiding indicators to assess the OPFP through the principle of clarity of purpose.

3.2. Assessing the Indonesian One Price Fuel Program Regulation through the Principle of Clarity of Purpose

Building on the discussion in Section 3.1, this subsection examines the fulfillment of the principle of Clarity of Purpose in MEMR Regulation No. 36 of 2016 concerning the One Price Fuel Program. This assessment is crucial to determine whether the regulation was enacted with clearly defined objectives and was intended to achieve that

objectives. Furthermore, the analysis is carried out using the guiding indicators previously identified in Section 3.1.

It is widely recognized that low-income households in FOD areas are the most affected by rising energy prices, primarily due to difficulties in fuel transportation (Cassoret, 2021). Several previous studies have highlighted the challenge of distributing energy, especially in regions classified as FOD. These challenges are largely associated with high logistical and transportation costs, which significantly disrupt the distribution process (Cassoret, 2021). A study by (Sambodo and Novandra, 2019) found that high transportation-related fuel prices in rural Indonesia are significantly correlated with the number of poor households (Sambodo and Novandra, 2019). Similarly, (Persyn et al., 2022) argue that transportation costs are influenced by geographical characteristics, with costs in core-periphery structures being higher than those in central regions. Access to energy, especially in FOD Areas, requires significant effort, reflecting the unequal distribution of access to energy, especially fuel (Alfian Hadi Saputra et al., 2025).

Therefore, in 2016, Indonesia's former President formally introduced a fuel-related policy aimed at ensuring the availability, smooth distribution, and uniform retail prices of Certain Types of Fuel (*Jenis Bahan Bakar Tertentu—JBT*) and Special Assignment Fuel Types (*Jenis Bahan Bakar Khusus Penugasan—JBKP*) across all regions of Indonesia, which is implemented in Indonesian MEMR Regulation No. 36 of 2016. According to the objectives, the implementation of OPFP helps to provide fuel availability, smooth distribution, and affordability (DEN, 2022) toward energy, especially for communities in the FOD areas (Alfian Hadi Saputra et al., 2025).

Table 1: Examination of the Regulation's Objectives

Objectives	Description
Fuel Availability	the ability to ensure the availability and distribution of government-designated fuel throughout the territory of Indonesia. (Indonesian Law No. 22 of 2001 (as amended))
Smoothly Distribution	distribute fuel in remote areas and regions where market mechanisms are not yet functioning effectively, thereby supporting equitable fuel access across the country. (Indonesian Law No. 22 of 2001 (as amended))
Price Uniformity	Ensuring that fuel cost considering the financial capacity of the state, the purchasing power of the public, and/or the real economic and social conditions of the public. (Presidential Regulation No. 191 of 2004 (as amended))

OPFP regulation is a form of state responsibility in fuel control because it governs how the intended objectives can be achieved. Article 33 (2) of the Indonesian 1945 Constitution imposes a mandatory constitutional obligation on the State to control branches of production that are vital to the State and affect the livelihoods of the people (Indonesia, 1945). As discussed previously, fuel is a strategic and vital commodity, thereby necessitating State responsibility and control (Zain, 2017). Furthermore, Article 33 (3) of the Indonesian 1945 Constitution mandates that such control be exercised in a manner that promotes the greatest possible prosperity of the people (Indonesia, 1945). According to Indonesian Constitutional Court Decision No. 001-021-022/PUU-I/2003, form of state control may be exercised through the enactment of laws and regulations (Ritonga et al., 2021). Considering this interpretation, the establishment of Indonesian MEMR Regulation No. 36 of 2016 constitutes an implementation of the state's constitutional mandate under Articles 33(2) and 33 (3) of the Indonesian 1945 Constitution.

This implementation of this mandatory enacted in the provisions of Indonesian MEMR No. 36 of 2016. The obligation that must be implemented by the related institutions based on the regulation is as follows:

- a. The Obligation of Designated Business Entities to Ensure the Availability of Distributor (Fuel Station) in Designated FOD Location by Indonesian MEMR if there is no distributor available in the area.

- b. The Business Entities shall apply the same price for the distributor established in the designated location.
- c. The Business Entities shall give the highest margin fee to the distributor.
- d. BPH Migas is responsible for supervising the implementation of the OPFP and enforcing sanctions where violations occur.

To enhance energy accessibility, Indonesian MEMR No. 36 of 2016 further governs implementation through regulatory measures that require business entities to pay higher-margin fees to distributors (MEMR, 2016). Since distribution costs in FOD areas are significantly higher, higher-margin fees are intended to offset these costs and enhance investment attractiveness (Hidayat & Mulyono, 2025). To further strengthen the implementation of the OPFP, Indonesian MEMR Regulation No. 36 of 2016 also provides for sanctions against business entities that fail to fulfil these obligations (MEMR, 2016). These sanctions are enforced by BPH Migas, acting as the regulator and supervisor of the downstream oil and gas sector (MEMR, 2016).

Ultimately, this sub section will assess the fulfillment of the principle of clarity of purpose in the establishment of Indonesian MEMR Regulation No. 36 of 2016. To assess the clarity of purpose within the regulation, the guiding indicators as stated in section 3.1. will be applied. Therefore, the clarity of purpose in the MEMR Regulation No. 36 of 2016 will be exercised as follows:

3.2.1. The Objectives to be achieved are explicitly stated in the regulation

As previously stated, Indonesian Ministerial Regulations are an integral part of the hierarchy of laws and regulations under the regime of Indonesian Law No. 12 of 2011 (as amended). Consequently, their formation must adhere to the provisions set forth in the *Law a quo*. According to Appendix II of the *Law a quo*, it is mandatory for legislation to include a preamble (*considerans*).

The preamble serves as a concise description of the fundamental thoughts that constitute the considerations and reasons for establishing a regulation (Indonesia, 2011). In accordance with legislative theory, the principle of clarity of purpose is manifested within this preamble and the explanatory sections of the law. As noted by Luky Djani (2005:45), this clarity serves as a vital guide for stakeholders, ensuring they can easily discern the lawmaker's original intent during the law's implementation. In this context, the clarity of purpose has been explicitly stipulated in the considerations, as further observed in Table 1 below regarding Fuel Availability, Smooth Distribution, and Price Uniformity.

3.2.2. The Objectives Aligned with the 1945 Constitution and Aiming for Public Interest

Pursuant to Article 33(2) and (3) of the 1945 Constitution, the control of natural resources by the state must be carried out in a manner that ensures their optimal utilization for the greatest prosperity of the people (Rachman, 2016). This principle forms the constitutional basis for the state's authority, exercised through the Government of Indonesia (GOI), to control natural resources, including fossil fuels. Such authority is reflected in five dimensions of state control, namely policy formulation (*beleid*), regulation (*regelendaad*), administration (*bestuursdaad*), management (*beheersdaad*), and supervision (*toezichthoudendaad*), as articulated by the Constitutional Court (CC) of Indonesia in Decision No. 001-021-022/PUU-I/2003. Indonesian Law No. 22 of 2001 on Oil and Gas affirms that oil and natural gas are strategic, non-renewable natural resources controlled by the state and constitute vital commodities for the national economy, whose management must aim to maximize public welfare. Therefore, according to the constitution, the objective of the state's authority over fuel is to achieve people's welfare.

As previously stated, access to energy significantly affects basic and essential needs (Thorbecke, 2025), thus necessitating government intervention to improve fuel accessibility (Alfian Hadi Saputra et al., 2025). Therefore, this section will analyze how the provisions stipulated in Indonesian MEMR Regulation No. 36 of 2016 may contribute to improving public welfare.

Table 2: Analysis of the Provisions in Indonesian MEMR Regulation No. 36 of 2016

No.	Articles	Content	Description of Efforts to Improve Public Welfare
1.	Article 3	The distributor of Fuel Subsidy who distribute the fuel in designated FOD areas shall not be subject to distribution costs. w	The elimination of distribution costs will increase distributors' profitability even when selling at the same price in FOD areas. This policy is expected to support the business viability of distributors, thereby ensuring the availability of subsidized fuel in FOD regions.(Adam & Hartono, 2025).
2.	Article 4	BPH Migas shall give new designation to the designated business entities to establish fuel distribution in designated FOD areas.	The new assignment obligation is a measure to support the availability of fuel distribution infrastructure, thereby improving the supply of subsidized fuel in FOD areas in order to reduce disparities in energy infrastructure. (Sandee, 2016)
3.	Article 5	BPH Migas assigns Business Entities the obligation to supply and fuel subsidy at designated locations, including developing necessary infrastructure proportionally, while applying retail prices which are set by the Indonesian MEMR.	The obligation to apply uniform pricing is expected to reduce logistics and transportation costs, thereby improving people's purchasing power. (Abdulrahman, 2023).
4.	Article 7	To foster the distribution of fuel subsidy in designated FOD areas, Business Entities shall apply higher margin fee to the distributors which operate in those FOD Areas.	This serves as an incentive for distributors operating in FOD areas. This effort is one form of support in ensuring the availability of subsidized fuel (Triatmodjo et al., 2025).
5.	Article 9	BPH Migas imposes sanctions on Business Entities receiving assignments if they fail to fulfill their obligations in supporting the acceleration of the OPFP.	This provision ensures that the implementation of the OPFP program can be carried out smoothly. (Nelson, 2025).

Based on the table, the stipulated provisions align with the constitutional objective and public interest of achieving public welfare through the distribution and supply of the OPFP. Furthermore, the provisions explicitly govern the establishment and implementation of energy accessibility.

3.2.3. The Establishment of the Regulation is Intended to Solve Problems

As stipulated in its preamble, Indonesian MEMR Regulation No. 36 of 2016 was enacted to ensure fuel availability, facilitate smooth distribution, and achieve price uniformity, particularly for communities residing in Frontier, Outermost, and Disadvantaged (FOD) Areas. Therefore, it is necessary to examine whether there were actual problems that required regulatory intervention as part of the Government of Indonesia's responsibility to achieve the objectives stipulated in the regulation. To identify the empirical issues that necessitated such intervention, this section examines challenges related to energy governance, particularly those concerning access to energy.

Indonesia's vast archipelagic geography has historically contributed to significant disparities in fuel prices across regions (Sandee, 2016). Previous studies have demonstrated that the distribution of energy, particularly to areas classified as FOD Areas, remains highly challenging. Consequently, difficulties in ensuring energy accessibility continue to persist. For example, Tempo.com reported on the challenges faced by Indonesian fishermen in

accessing subsidized fuel (Tempo, 2026), despite the fact that, as discussed in Section 3.1, fuel plays a significant role in supporting their welfare. Furthermore, the fuel distribution process in Papua, Maluku, and Kalimantan faces numerous obstacles, including unpredictable weather conditions, difficult terrain, shallow rivers, and limited infrastructure, all of which contribute to fuel shortages (Halim, et.al., 2023). These conditions demonstrate the need for effective policy solutions, considering that access to energy constitutes a fundamental prerequisite for achieving the greatest prosperity of the people.

According to these circumstances, the objectives stipulated in Indonesian MEMR Regulation No. 36 of 2016 are relevant to addressing the problems associated with energy governance and energy accessibility. The regulation clearly assigns responsibilities to key institutions, including distributors, business entities, and BPH Migas, in supporting the achievement of energy accessibility. Therefore, this guiding indicator of the principle of Clarity of Purpose can be considered fulfilled.

In conclusion, Indonesian MEMR Regulation No. 36 of 2016 has upheld the principle of clarity of purpose by explicitly setting out the objective of ensuring the availability and equitable distribution of fuel across Indonesian regions, particularly in FOD Areas. Accordingly, the presence of a clear purpose in Indonesian MEMR Regulation No. 36 of 2016 supports the realization of legal certainty by providing a predictable and coherent legal framework. Furthermore, based on these findings, an assessment will be conducted to determine whether legal certainty under the Indonesian OPFP has improved access to energy in FOD Areas.

3.3. Assessing Legal Certainty for Energy Accessibility in the Indonesian One Price Fuel Program

Building upon the evaluation in the preceding section, this subsection assesses how the fulfillment of the clarity of purpose principle within Indonesian MEMR Regulation No. 36 of 2016 translates into substantive legal certainty. While Section 3.2 established the fulfillment of the clarity of purpose of Indonesian MEMR Regulation No. 36 of 2016, this section analyzes whether that the clarity of purpose principle reflected in the Indonesian MEMR Regulation No. 36 of 2016 has created clear, predictable, and consistent legal norms for achieving energy accessibility. It is widely recognized that the law serves as a comprehensive framework for maintaining societal order, resolving conflicts, and proactively driving societal transformation through social engineering (Al Kautsar & Muhammad, 2022). Therefore, it is imperative to determine whether Indonesian MEMR Regulation No. 36 of 2016 reflects legal certainty and is intended to enhance energy accessibility.

Section 3.1 previously defined that legal certainty is a foundational principle of a robust legal system characterized by clear, predictable, and validly established laws that are consistently obeyed and impartially enforced, thereby enabling all stakeholders to anticipate the legal consequences of their actions and fostering overall social stability. Furthermore, section 3.1. also explains that legal certainty is not merely achieved by using unambiguous language; it requires strict adherence to good law-making principles mandated by Article 5 of Indonesian Law No. 12 of 2011 (as amended). While not the sole determinant, the principle of clarity of purpose is a foundational requisite for achieving substantive legal certainty (Rishan, 2021). In this regard, the clarity of purpose embodied in the regulation also contributes to the realization of legal certainty, as it provides clear objectives and obligations for all relevant stakeholders involved in achieving the intended goals in the distribution and allocation of fuel, as assessed in Table 3.

According to Section 3.2, the regulation provides highly predictable guidance for the key stakeholders operating within the downstream oil and gas sector. Legal certainty ensures that all parties can accurately predict the legal consequences of their actions, fostering operational stability (Aditya, 2023). For the government, specifically BPH Migas, the regulation provides a clear legal basis for assigning distributors, supervising, and enforcing administrative sanctions against non-compliant entities. For designated business entities, it sets explicit, predictable obligations regarding where to build infrastructure in FOD areas and mandates payment of higher-margin fees to offset elevated distribution costs. Furthermore, for the affected communities in remote regions, it guarantees a legally protected right to access subsidized fuel at uniform prices, shielding them from the severe price disparities caused by informal markets and geographic constraints.

The OPFP regulation establishes a sufficiently robust legal framework to support the constitutional mandates of Article 33(2) and (3) of the 1945 Constitution. Under Article 33(2), the state holds a mandatory obligation to control branches of production that are vital to public livelihood; because fuel is a highly strategic commodity, its governance necessitates direct state intervention through the regulatory function (*regelendaad*). Furthermore, the regulation's core objective of ensuring energy accessibility directly reflects the mandate of Article 33(3), which dictates that state control must be exercised to achieve the greatest possible prosperity for the people. Because access to energy is a fundamental prerequisite for economic sustainability and national development, the OPFP regulation effectively operationalizes these constitutional public-interest aims into binding legal obligations.

Despite this foundational clarity, certain operational ambiguities and enforcement challenges persist, which could potentially threaten comprehensive legal certainty in practice. While the regulation establishes clear overarching duties, gaps remain regarding the execution and accountability of "smooth distribution" when faced with insurmountable geographical limitations (Milwan et al., 2020). Empirical evidence also shows that in several regions of Indonesia—outside Java and Bali—fuel prices can reach up to Indonesian Rupiah 100,000 (IDR) per liter (Ichsan et al., 2021). Furthermore, distribution challenges are frequently observed in regions such as Maluku, where longer delivery times and higher transportation costs from depots to distributors contribute to elevated fuel prices (Sari et al., 2020). This is evidence that, although the regulation has provided legal certainty, implementation remains severely hindered by infrastructural and geographical barriers, demonstrating a significant gap between formal regulatory intent and empirical reality.

The Indonesian MEMR Regulation on the Acceleration of the OPFP has fulfilled the formal principle of clarity of purpose as stipulated in Article 5, letter a, of Indonesian Law No. 12 of 2011 (as amended). Accordingly, the fulfillment of legal certainty, as reflected through the clarity of purpose embodied in the regulation, demonstrates that the regulation was indeed specifically designed to address and resolve the issue of energy accessibility within the OPFP framework.

4. Conclusion

This study examined whether Indonesian MEMR Regulation No. 36 of 2016 on the Acceleration of the One-Price Fuel Program (OPFP) provides legal certainty to ensure energy accessibility in Indonesia's Frontier, Outermost, and Disadvantaged (FOD) areas by assessing its compliance with the principle of clarity of purpose under Article 5 of Indonesian Law No. 12 of 2011 (as amended). The study found that clarity of purpose serves as one of the foundations in ensuring legal certainty. Legal certainty functions as a guide of state action and ensure the fulfilment energy accessibility. Furthermore, MEMR Regulation No. 36 of 2016 fulfils the principle of clarity of purpose because its objectives are explicitly stated, aligned with the constitutional mandate to promote public welfare, and the establishment is intended to solve problems. Consequently, the regulation is specifically designed to support energy accessibility by providing legal certainty through the principle of clarity of purpose, thereby facilitating the implementation of the One Price Fuel Program in FOD areas.

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From Law to Reality: Institutional and Resource Barriers to Correctional Reform in Nigeria

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Abstract

The Nigerian Correctional Service Act, 2019, enacted to replace the obsolete Prisons Act and introduce rehabilitative, non-custodial corrections aligned with international human rights standards, has failed to achieve its progressive objectives more than six years after its enactment. This article undertakes a doctrinal comparative analysis of the Nigerian and United Kingdom correctional legal frameworks, arguing that the persistent failures of overcrowding (60% above capacity with 67% awaiting trial), corruption, rights violations, and the near-complete non-implementation of non-custodial measures are directly attributable to institutional, resource, political, cultural, and systemic barriers that impede the translation of legislative intent into practical reality, rather than merely resource constraints. Adopting a doctrinal legal research methodology, the article analyses statutes, case law, reports, and secondary literature, drawing comparative insights from the United Kingdom. The major finding is that the implementation gap is rooted in chronic underfunding, institutional resistance to change, corruption, legislative fragmentation, cultural attitudes, and political indifference, all of which are exacerbated by drafting deficiencies in the NCS Act. The article recommends fundamental legislative redrafting to convert duties into rights and exhaustive definition of non-custodial measures, establishment of an independent inspectorate, ombudsman, and sentencing council, increased budgetary allocation, and the development of community engagement frameworks for restorative justice programmes.

Keywords: Correctional Reform, Implementation Gap, Institutional Barriers, Nigerian Correctional Service Act 2019, Non-Custodial Measures, United Kingdom Comparative Law

1. Introduction

The global criminal justice discourse has witnessed a paradigmatic shift from retributive justice, which emphasises punishment and incapacitation, to restorative and rehabilitative justice, which focuses on reformation, reintegration, and the reduction of recidivism (Garland, 2001). This shift is reflected in various international instruments, including the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson

Mandela Rules), the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules), and the Bangkok Rules for the treatment of female prisoners. These instruments collectively underscore the principle that imprisonment should be a measure of last resort and that non-custodial measures should be preferred where appropriate (Mandela Rule, 2015 & Tokyo Rule 1990). Nigeria, as a signatory to these international instruments and a member of the United Nations, has been under increasing pressure to align its correctional system with international human rights standards (Duru, 2018). For over four decades, the Nigerian correctional system was governed by the Prisons Act, Cap P29, Laws of the Federation of Nigeria, 2004, which was originally enacted in 1972 (Ezeilo, et al., 2020). This legislation was fundamentally oriented towards punitive custody rather than correctional rehabilitation. Its primary focus was the secure detention of persons charged with or convicted of criminal offences, with minimal attention to reformation, rehabilitation, or the rights of inmates (Obioha, 2011). The inadequacies of the Prisons Act became increasingly apparent over time. Nigerian prisons, now called custodial centres, became notorious for severe overcrowding and widespread human rights violations. As at 2018, the Port Harcourt prison, built in 1918 and designed to shelter 800 inmates, accommodated approximately 5,000 inmates, while the Kirikiri Maximum Prison in Lagos, built to hold 956 inmates, housed over 2,600 (Agede, et al., 2019). These conditions attracted sustained criticisms from human rights organisations, the National Human Rights Commission, and the Nigerian judiciary.

In response to these challenges, the Nigerian government enacted the Nigerian Correctional Service Act, 2019 (the NCS Act), which was signed into law on 14 August 2019 (NCS Act, 2019). The Act repealed the Prisons Act and introduced a new legal framework for the administration of corrections in Nigeria. The Explanatory Memorandum to the Act identifies its objectives as including ensuring compliance with international human rights standards; providing an enabling platform for the implementation of non-custodial measures; enhancing the focus on corrections and the promotion of reformation, rehabilitation, and reintegration of offenders; and establishing mechanisms to address the high number of persons awaiting trial. One of the most significant innovations of the NCS Act is the establishment of the Nigerian Non-Custodial Service, which is responsible for the administration of non-custodial measures including community service, probation, parole, and restorative justice measures (NCS Act, 2019). This represents a fundamental departure from the punitive orientation of the repealed Prisons Act and aligns Nigeria with contemporary international best practices in correctional administration.

Notwithstanding the progressive objectives of the NCS Act, 2019, the Nigerian correctional system continues to be plagued by challenges that the Act was designed to address. As at April 2025, Nigeria's custodial centres housed a total of 79,555 inmates against a designed capacity of approximately 50,000, representing an overcrowding rate of nearly 60 per cent (Ayenigba, et al., 2023). More significantly, approximately 52,937 individuals (67 per cent) of this population are awaiting trial, many for periods exceeding the constitutionally mandated limits. The persistence of these challenges, more than six years after the enactment of the NCS Act, raises fundamental questions about the effectiveness of the legislation. If the Act was designed to address overcrowding, promote rehabilitation, and protect the rights of inmates, why have these problems persisted? Why have non-custodial measures, which the Act recognises as alternatives to imprisonment, remained virtually non-existent in practice? Why has there been no significant improvement in the conditions of custodial centres or in the treatment of inmates?

This article posits that the answer to these questions lies in the institutional, resource, political, and cultural barriers that impede the translation of legislative intent into practical reality. While the drafting deficiencies of the NCS Act have been extensively critiqued elsewhere (Aaron, et al., 2026), this article focuses on the broader contextual factors that operate independently of and beyond the legislative framework. It is argued that the implementation failure of the NCS Act is attributable to a combination of inadequate funding, institutional resistance to change, systemic corruption, legislative fragmentation, cultural attitudes, and political indifference. These barriers, individually and collectively, prevent the Act's progressive provisions from being realised on the ground.

This article adopts a doctrinal legal research methodology, which involves the critical analysis of legal texts, including statutes, case law, and international instruments (Hutchinson, et al., 2012). The primary sources examined include the Constitution of the Federal Republic of Nigeria, 1999; the Nigerian Correctional Service Act, 2019; the Administration of Criminal Justice Act, 2015; the Prisons Act, Cap P29 LFN 2004 (repealed); and the Borstal Institutions and Remand Centres Act. The comparative analysis focuses on the United Kingdom,

specifically the legal framework for corrections in England and Wales, with references to Scotland and Northern Ireland where relevant. The UK sources examined include the Prison Act 1952, the Criminal Justice Act 2003, the Sentencing Act 2020, the Human Rights Act 1998, the Prison Rules 1999, and relevant case law and official publications from the Ministry of Justice, HM Inspectorate of Prisons, and the Prison Reform Trust. The choice of the United Kingdom as a comparator is justified because Nigeria and the United Kingdom share a common legal heritage, with Nigeria having inherited the English common law system through colonialism. Also, the UK has undergone similar challenges of overcrowding, recidivism, and correctional reform, offering valuable lessons from both successes and failures. Furthermore, the UK's correctional legal framework is widely regarded as a model of legislative drafting precision and structured discretion (Livingstone, et al., 2015).

Following this introduction, the article proceeds with section 2 providing conceptual clarification of key terms and establishes the theoretical framework for the research. Section 3 examines the legal framework for corrections in Nigeria. Section 4 maps the implementation gap, presenting statistical evidence of the disconnect between legislative intent and practical outcomes. Section 5 analyses the institutional and resource barriers to reform. Section 6 examines systemic and contextual barriers, while section 7 presents recommendations and concludes with a summary of the argument.

2. Conceptual Clarification and Theoretical Framework

An analysis of correctional reform implementation requires precision in foundational concepts and a robust theoretical lens through which to understand the barriers examined in this article. This section clarifies key recurrent concepts and articulates an integrated theoretical framework drawing from classical and modern legal and criminological theories.

2.1. Conceptual Clarification

Four concepts recur throughout this article and require precise definition to avoid ambiguity and ensure analytical coherence.

2.1.1. Correctional Reform

Refers to the process of legislative, institutional, and operational changes aimed at transforming correctional systems from punitive incarceration models to rehabilitative, rights-respecting frameworks that promote decongestion, reintegration, and the reduction of recidivism (Ashworth, 2015). In the Nigerian context, correctional reform encompasses the shift from the Prisons Act to the NCS Act 2019, including the introduction of non-custodial measures and the reorientation of correctional philosophy.

2.1.2. Implementation Gap

Denotes the disconnect between legislative intent and practical outcomes, the distance between what the law promises and what is actually delivered on the ground (Hill, et al., 2014). This concept captures the central problem examined in this article. Why the progressive provisions of the NCS Act have not translated into improved correctional conditions. Implementation gaps arise from multiple factors, including resource constraints, institutional capacity deficits, political indifference, and cultural resistance (Sabatier, 1986).

2.1.3. Institutional Capacity

Refers to the ability of organisations to effectively implement policies and achieve their statutory objectives (Wilson, 1968). Key indicators include adequate staffing, appropriate training, functional infrastructure, sufficient funding, effective leadership, and organisational culture aligned with statutory mandates (Feeley, 1979). The Nigerian Correctional Service's institutional capacity is central to understanding why the NCS Act's provisions remain largely unimplemented.

2.1.4. Non-Custodial Measures

Are sanctions imposed on convicted offenders that do not involve deprivation of liberty through imprisonment (UN Standard Minimum Rules, 1990). These include community service orders, probation supervision, suspended sentences, parole, restorative justice programmes, and electronic monitoring (Oaihimire, et al., 2023). The policy rationale for non-custodial measures rests on multiple pillars: reducing prison overcrowding, avoiding the criminogenic effects of imprisonment, lowering financial costs, and promoting rehabilitation and reintegration within the community (Ashworth, 2015).

2.2. Theoretical Framework

This article adopts an integrated theoretical framework drawing from **Institutional Theory**, **Penal Populism**, **Rule of Law Theory**, and **Natural Law Theory**. Each theory illuminates a distinct dimension of the implementation gap examined in this article.

Institutional Theory, as applied to criminal justice by scholars such as Malcolm Feeley and James Q Wilson, posits that the effectiveness of any legislation depends not only on its content but on the institutional structures, resources, cultures, and accountability mechanisms that govern its implementation (Feeley, 1979). The discussions around *path dependence* describing how institutions develop routines and cultures that persist even after the legal framework changes is a key insight from this theory relevant to this article. The *principal-agent problems* explaining the implementation drift arising from the delegation of implementation authority to administrative agencies that may have different incentives, is another key insight (Sabatier, 1986). The insight from *accountability gaps* explains the persistence of challenges to being the result of a legislation that creates no oversight mechanisms (Livingstone, et al., 2015). Applying these key insights from the institutional theory to the NCS Act explains why non-custodial measures remain virtually non-existent.

Penal Populism, developed by criminologists Anthony Bottoms and John Pratt, refers to the tendency of politicians and policymakers to adopt punitive criminal justice policies in response to public demands for harsh punishment, often ignoring evidence-based reforms such as rehabilitation or non-custodial alternatives (Bottoms, 1995). Pratt argues that in late modern societies, crime has become intensely politicised, with governments competing to demonstrate ‘toughness’ on crime to secure electoral advantage (Pratt, 2007). This dynamic produces legislation that prioritises retribution over reformation, symbolism over effectiveness, and public opinion over expert knowledge (Bottoms, 1995). Applying penal populism to Nigeria explains several observed phenomena. Despite the NCS Act's rehabilitative objectives, courts continue to impose custodial sentences even where non-custodial alternatives exist, reflecting a judicial culture influenced by punitive public sentiment. Politicians allocate minimal resources to correctional reform because there are no electoral rewards for ‘being soft on prisoners’ (Obioha, 2011). The Act's drafting deficiencies, particularly its vague, aspirational language, may themselves be a product of penal populism, allowing legislators to claim reform while maintaining the status quo (Pratt, 2007).

Natural Law Theory, traced to Aristotle, Thomas Aquinas, and John Locke, posits that law must embody moral principles derived from reason, justice, and the inherent dignity of the human person (Locke, et al., 1689, 1920, & 1988). According to natural law, a positive legal rule that is fundamentally unjust or contrary to human dignity may lack the moral quality of law. Applying natural law theory to correctional legislation requires that any statute governing the deprivation of liberty must respect the inherent dignity of incarcerated persons. The Nelson Mandela Rules, which Nigeria has incorporated by reference into the NCS Act, embody natural law principles by mandating that ‘all prisoners shall be treated with the respect due to their inherent dignity and value as human beings. (Mandela Rule, 2015)’ The NCS Act's deficiencies, particularly its framing of inmate entitlements as administrative duties rather than enforceable rights, represent a failure to recognise the inherent moral status of prisoners. The absence of remedies for torture, degrading treatment, or denial of healthcare means that positive law fails to protect the fundamental moral interests of incarcerated persons, undermining the law's claim to moral legitimacy (Amnesty International, 2022).

3. The Legal Framework for Corrections in Nigeria

The legal framework for corrections in Nigeria consists of multiple sources, including the Constitution of the Federal Republic of Nigeria, 1999 (as altered), the Nigerian Correctional Service Act, 2019, the Administration of Criminal Justice Act, 2015, the Borstal Institutions and Remand Centres Act, and international instruments such as the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). Together, these instruments form the legal architecture within which Nigeria's correctional system operates. This section examines each of these sources in turn, providing the foundation for the analysis of implementation barriers that follows in subsequent sections.

3.1. The Constitutional Framework

The Constitution of the Federal Republic of Nigeria, 1999 (CFRN) is the grundnorm from which every other law derives its validity within the Nigerian legal system (6 NWLR (Pt 764) 542 [2002]). Section 1(1) of the CFRN declares that the Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria. Section 1(3) further provides that any other law that is inconsistent with the provisions of the CFRN shall, to the extent of its inconsistency, be void.

Three constitutional provisions are particularly relevant to correctional administration. Section 34 guarantees the right to dignity of the human person, providing that every individual is entitled to respect for the dignity of his person, and accordingly no person shall be subject to torture or to inhuman or degrading treatment; no person shall be held in slavery or servitude; and no person shall be required to perform forced or compulsory labour (CFRN, 1999). Subsection (2) qualifies that 'forced or compulsory labour' does not include any labour required in consequence of the sentence or order of a court. The Supreme Court has held that the prohibition against torture and inhuman or degrading treatment is absolute and admits no exception (*Kalu V. State*, 1998). In *Odigie v State*, the Court affirmed that any form of torture or degrading treatment violates Section 34 and is unconstitutional regardless of the circumstances (7 NWLR (Pt 1565) [2017]).

Section 35 guarantees the right to personal liberty, providing that every person shall be entitled to his personal liberty and no person shall be deprived of such liberty except in certain specified circumstances. These exceptions include the execution of the sentence or order of a court in respect of a criminal offence for which an individual has been found guilty, and detention for the purpose of bringing a person before a court upon reasonable suspicion of having committed an offence (CFRN, 1999). Critically, Section 35(4) provides that a person arrested or detained upon reasonable suspicion of having committed an offence shall be taken before a court of law within a reasonable time, and failure to try a detained person within two months (or three months for those released on bail) entitles the person to release. Despite these constitutional guarantees, the majority of inmates in Nigerian correctional centres (approximately 67%) are persons awaiting trial, many for periods exceeding the constitutional limits (Ayenigba, et al., 2023).

Section 36 guarantees the right to fair hearing and embodies the principle of legality. Section 36(8) provides that no person shall be held to be guilty of a criminal offence for any act or omission that did not, at the time it took place, constitute an offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed. Section 36(12) further provides that a person shall not be convicted of a criminal offence unless that offence is defined and the penalty prescribed in a written law. The Supreme Court has affirmed in *Egba v State* that a court cannot impose a sentence not provided for by the law creating the offence (*Egba v The State*, 2025). This principle raises fundamental questions about the constitutionality of non-custodial measures under the NCS Act and ACJA, as the substantive penal codes (Criminal Code and Penal Code) do not provide for such sentences (Criminal Code Act, 2004).

Furthermore, the Fifth Alteration Act, 2023, transferred legislative competence over correctional services from the exclusive legislative list to the concurrent list, enabling States to legislate on correctional matters (CFRN, 2023). Presently, States may legislate on matters relating to correctional service, the establishment of correctional and custodial sentences, and the establishment of an authority for the management of State correctional centres and

custodial facilities. Nonetheless, the relationship between federal and State legislation is unclear, and the mechanisms for ensuring consistency and coordination have not been established (Jaja, 2024).

3.2. The Nigerian Correctional Service Act, 2019

The NCS Act repealed the Prisons Act, which had been in force for forty-seven years and had become obsolete. The Explanatory Memorandum to the Act narrates that the Act is enacted to address issues that are not covered under the repealed Act and provide clear rules setting out the obligations of the Nigerian Correctional Service and the rights of inmates (NCS Act, 2019). The Act establishes the Nigerian Correctional Service (NCS) as consisting of the Custodial Service and the Non-Custodial Service.

The objectives of the Act are set out in Section 2(1) as follows: to ensure compliance with international human rights standards and good correctional practices; to provide an enabling platform for the implementation of non-custodial measures; to enhance the focus on corrections and the promotion of reformation, rehabilitation and reintegration of offenders; and to establish institutional, systemic and sustainable mechanisms to address the high number of persons awaiting trial (NCS Act, 2019).

3.1.1. The Custodial Service

The functions of the Custodial Service are enumerated in Section 10 of the Act and include taking custody of all persons legally interned; providing safe, secure and humane custody for inmates; conveying remand persons to and from courts; identifying the existence and causes of anti-social behaviours of inmates; conducting risk and needs assessment aimed at developing appropriate correctional treatment methods for reformation, rehabilitation and reintegration. Administering borstal and related institutions; providing support to facilitate the speedy disposal of cases of persons awaiting trial; and performing other functions as may be required to further the general goals of the Service, also forms part of the statutory functions of the Custodial Service (NCS Act, 2019).

To facilitate reformation, the Correctional Service is required to provide opportunities for education, vocational training, and modern farming techniques (NCS Act, 2019). The Service is equally required to take adequate steps to ensure the prevention of torture, inhumane and degrading treatment, and sexual and non-sexual violence and bullying of inmates (NCS Act, 2019). As a marked departure from the colonial policy of using inmates for cheap labour, the Act declares that inmates shall not be held in slavery or servitude, and labour carried out by inmates shall not be of an afflictive nature or for the personal benefit of any correctional officer (NCS Act, 2019).

Given the high number of awaiting trial detainees, the Act mandates the Correctional Service to liaise with the heads of justice institutions and relevant agencies to review and eradicate causes of high numbers of pre-trial detainees (NCS Act, 2019). The Act also seeks to improve the medical welfare of inmates through the provision of quality and quantitative food and the promotion of hygiene and sanitary conditions (NCS Act, 2019). The NCS Act incorporates the United Nations Minimum Standards for the Treatment of Inmates by reference, requiring that government provide funds for the feeding of inmates at a rate and ration to be reviewed periodically after every five years (NCS Act, 2019).

The Act made provisions relating to the special needs of women and juvenile offenders in custody. Section 34 requires separate facilities for women and the provision of all necessary facilities to address the special medical and nutritional needs of women, including pregnant women, nursing mothers, and babies in custody. Section 35 mandates that young offenders shall not be kept in an adult custodial facility or mixed with adults, and requires the Service to establish separate male and female borstal training institutions for juvenile offenders. However, implementation of these provisions has been hindered by significant drawbacks, including funding constraints and the prior exclusive legislative competence of the federal government (Ezeilo, et al., 2020).

3.1.2. The Non-Custodial Service

The Nigerian Non-Custodial Service (NNCS) is responsible for the administration of non-custodial measures under the Act. Section 37(1) provides that non-custodial measures include community service, probation, parole, restorative justice measures, and any other non-custodial measure assigned to the Correctional Service by a court of competent jurisdiction. The Act establishes the National Technical Committee on Non-Custodial Measures to coordinate and implement the non-custodial measures with other relevant agencies; monitor and propose measures for effective operation; receive and consider complaints from offenders, victims and affected communities; and perform any other function required for proper implementation (NCS Act, 2019). Similar Committees are to be established at the State level.

The Act mandates the Controller-General to make regulations relating to each of the non-custodial measures specified under the Act (NCS Act, 2019). The administration of parole, probation, community services, and restorative justice are all to be under the control and direction of the Controller-General. The funding of non-custodial measures is to be provided by the proceeds in the Fund established under the Act (NCS Act, 2019). However, the Act provides only a skeletal framework for non-custodial measures without substantive content, and no regulations have been made under Section 39.

3.2. The Administration of Criminal Justice Act, 2015

The Administration of Criminal Justice Act, 2015 (ACJA) was enacted to regulate the administration of criminal justice institutions, facilitate speedy dispensation of justice, ensure adequate protection of society from crimes, and promote the protection of the rights and interests of suspects, defendants, and victims of offences (ACJA, 2015). The Act is elaborately divided into 49 Parts, with each Part detailing provisions related to the administration of criminal justice.

Parts 44 and 45 of the ACJA make detailed provisions covering probation, parole, suspended sentences, and community services. Section 455(1) defines probation as an arrangement where a defendant against whom a charge has been proved and who is convicted is released under the supervision of a person of the same sex called a probation officer. Further provisions regulate the duties of a probation officer, the variation of the terms of probation, and the procedure where the terms of probation are flouted (ACJA, 2015).

Section 460(1) provides that regardless of any provision in a law creating an offence, the Court may, where it considers appropriate, order that a sentence imposed on a convict be suspended with or without conditions. On community service, Section 461 empowers a court to sentence a convict to perform community service in the convict's community or such other place subject to any condition the Court may consider appropriate to impose. Several problems arise with these provisions. First, they confer wide discretionary powers on courts without adequate guidance, potentially violating the principle of legality (Okeke, et al., 2024). Second, the provisions do not provide practical guides for the exercise of judicial discretion (Umenekwe, et al., 2023). Third, there is significant conflict and overlap between the ACJA and the NCS Act. The ACJA empowers Chief Judges to establish Community Service Centres, while the NCS Act assigns community service to the Non-Custodial Service. The relationship between the two statutes is nowhere addressed, creating legal uncertainty and implementation paralysis.

3.3. The Borstal Institutions and Remand Centres Act

The Borstal Institutions and Remand Centres Act, Cap B11 LFN 2004, empowers the Minister responsible for borstal institutions and remand centres to establish a remand centre to be a place for the detention of persons between the ages of sixteen years and twenty-one years while awaiting trial for offences or to serve terms of prison sentences (Borstal Institutional and Remand Centres Act, 2004). A borstal institution differs from a remand centre as it seeks to offer such training and instruction as will facilitate the reformation of young offenders and the prevention of crime (BIRC Act, 20). The idea of establishing remand centres and borstal institutions includes preventing the mixing of young offenders with adult criminals.

However, the establishment, administration, and funding of remand centres and borstal institutions by the Federal Government greatly suffered prior to the passage of the Fifth Alteration Act, 2023. As an establishment, the remand centres and borstal institutions are less effective, lacking the facilities and conditions to effectively reform and train young offenders (James, 2013). The unfortunate effect is that young offenders are often mixed with adults and treated like adults in prisons, with several incidences of violation of the young offender's rights (Iosemi, 2018). Many are convicted and jailed without making contact with a social worker or getting the opportunity to be heard. Some end up becoming more notorious after being mixed with adult offenders. Even with devolution of legislative competence, the shortcomings and challenges prevalent under the Nigerian Criminal Justice Administration relating to juvenile offenders have yet to generate the response that urgent reform requires.

3.3. The United Nations Nelson Mandela Rules

The United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) offer a general consensus of contemporary thought and the essential pillars of the most adequate systems, specifying what are generally accepted as being good principles and practice in the management of prisoners and the administration of prisons. The inclusion of these principles under the legal framework for corrections in Nigeria is to offer minimum standards, a benchmark for the treatment of offenders.

It is a cardinal principle that all prisoners shall be treated with sufficient respect for the dignity of the human person, protecting prisoners against torture, inhuman, and other cruel and degrading treatments (Mandela Rules, 2015). The application of this rule does not admit any exception or justification for derogation. The Rules also require separation of prisoners according to categories so that men and women, juvenile offenders and adults, and convicts and persons awaiting trial are separated. The Rules require provision of accommodation meeting all requirements of health, adequate water and other articles necessary for health and cleanliness, and adequate food with nutritional value (Mandela Rules, 2015).

The Mandela Rules made extensive detailed provisions on healthcare service delivery as the responsibility of the State to be enjoyed by prisoners at the same standards available to the community, provided free of charge (Mandela Rules, 2015). Although the NCS Act stipulates the establishment of a health clinic in every custodial correctional centre, these provisions are not strictly adhered to because the NCS fails to ensure the adequate provision of healthcare services delivery (Ogunyemi, 2022). Due to funding constraints, some correctional centres do not have clinics, and those that have are often understaffed and unequipped, with inmates being required to buy their drugs and medications out of pocket.

4. The Implementation Gap - Mapping the Disconnect

The NCS Act 2019 represents a comprehensive legislative framework for correctional reform, yet its implementation has been partial, uneven, and largely ineffective. The NCS Act embodies a clear legislative intent to transform Nigeria's correctional system from a punitive model to a rehabilitative one. The Explanatory Memorandum identifies the Act's purposes as ensuring compliance with international human rights standards, providing a platform for non-custodial measures, enhancing focus on rehabilitation, and addressing the high number of awaiting trial persons. Yet more than six years after its enactment, these purposes remain largely unrealised. This section maps the implementation gap across multiple dimensions, providing the empirical foundation for the analysis of institutional and resource barriers that follows in subsequent sections.

4.1. Statistical Overview of Correctional Outcomes

The most visible manifestation of the implementation gap is the persistent overcrowding of Nigeria's custodial centres. As at April 2025, Nigeria's custodial centres housed a total of 79,555 inmates against a designed capacity of approximately 50,000, representing an overcrowding rate of nearly 60 per cent (Ayenigba, et al., 2023). More significantly, approximately 52,937 individuals (67 per cent) of this population are awaiting trial, many for periods

exceeding the constitutionally mandated limits. These figures represent not merely statistical abstractions but human beings confined in conditions of extreme deprivation, often for years, without having been convicted of any crime.

The distribution of overcrowding varies across facilities, but conditions are uniformly dire in the most congested centres. The Kirikiri Maximum Security Custodial Centre in Lagos, designed for 800 inmates, regularly holds over 3,000 (Awopetu, 2014). The Kano Central Custodial Centre operates at more than three times its design capacity. In these facilities, inmates sleep in shifts, share inadequate sanitary facilities, and lack access to basic healthcare and nutrition. The concentration of pre-trial detainees is particularly troubling given that the CFRN guarantees the right to personal liberty and requires that any person arrested or detained be brought before a court within a reasonable time. Section 35(4) further provides that failure to try a detained person within two months (or three months for those released on bail) entitles the person to release. Yet these constitutional provisions remain largely unenforced, with thousands of detainees held for months and years without trial (Adeyanju, 2023).

4.2. Non-Implementation of Non-Custodial Measures

The most striking implementation failure is the near-complete absence of non-custodial measures in practice. The Act establishes the Non-Custodial Service and lists community service, probation, parole, and restorative justice as measures to be administered (NCS Act, 2019). It also empowers the Controller-General to make regulations for each measure (NCS Act, 2019). Yet no such regulations have been made, and the Non-Custodial Service remains largely non-functional. Community service, which the Act requires the Service to ‘establish and maintain a system for the administration of,’ is virtually non-existent (NCS Act, 2019). Courts rarely impose community service orders, and where they do, there is no infrastructure to supervise them (Umenekwe, 2024). Offenders sentenced to community service are left unsupervised, defeating the purpose of the sentence and undermining public confidence in non-custodial alternatives.

Similarly, the parole framework remains entirely undeveloped. The NCS Act creates a parole system in principle, but no regulations have been made to bring it into operation. Inmates eligible for parole have no mechanism to apply, no criteria to meet, and no process to follow. The parole provisions are, for practical purposes, a dead letter.

4.3. Failure to Make Subsidiary Legislation

The NCS Act's excessive reliance on subsidiary legislation has resulted in a situation where core elements of the legislative framework remain uncreated. Sections 13, 16, 21, 36, and 39 all empower the making of regulations or standing orders, yet many of these have not been made. The Controller-General is empowered to make regulations for each of the non-custodial measures, but no such regulations have been made. The entire framework for non-custodial measures, which the Act recognises in principle but does not elaborate, remains entirely undeveloped. The power of the Controller-General to make regulations for the maintenance of discipline and good order in custodial centres, including regulations relating to the award of punishment for offences against discipline, has not been exercised. The disciplinary regime that governs inmates' daily lives operates without statutory foundation, governed by informal practices and outdated standing orders rather than by law (Adebayo, 2013).

The Act's conferral of regulation-making powers without time limits, without reporting requirements, without any mechanism to compel their exercise, and without consequences for non-exercise denotes that the powers are permissive, not mandatory.

4.4. Weak Monitoring and Oversight Mechanisms

The implementation gap is perpetuated by the absence of effective monitoring and oversight mechanisms. The NCS Act creates no body with responsibility for overseeing implementation, no reporting requirements that would reveal implementation failures, and no mechanisms for holding implementing authorities accountable. The

requirement of the Act for the Controller-General to prepare annual reports on the activities of the Service without specific content requirements and obligation to publish or lay reports before the National Assembly is a deficiency in legislative design (NCS Act, 2019). Reports prepared under this provision have been irregular, incomplete, and inaccessible. No systematic information on implementation status is available to Parliament, the public, or civil society.

The Nigerian Correctional Service Board is merely conferred with advisory functions, but the Board has no oversight or investigative powers (NCS Act, 2019). It cannot monitor implementation, investigate failures, or require the Service to account for its performance. No independent body has statutory responsibility for monitoring implementation of the NCS Act. The National Human Rights Commission has documented implementation failures, but it lacks the mandate and resources to provide systematic oversight (NHRC, 2021). Civil society organisations have attempted to fill the gap, but their efforts are limited by lack of access, resources, and enforcement power (PRAWA, 2021).

5. Institutional and Resource Barriers to Correctional Reform in Nigeria

The implementation gap identified in the preceding section is not merely a consequence of administrative failure or poor planning. It is rooted in deeper institutional and resource barriers that systematically prevent the translation of legislative intent into practical reality. This section examines three interrelated barriers. They are; inadequate funding and resource constraints, institutional resistance to change, and corruption and the absence of accountability mechanisms.

5.1. Inadequate Funding and Resource Constraints

Chronic underfunding is the most persistent and debilitating challenge facing Nigeria's correctional system. Despite the progressive aspirations of the NCS Act, the gap between legislative promise and fiscal reality remains vast. Annual budgetary allocations to the Nigerian Correctional Service consistently fall below operational requirements, with capital expenditure particularly neglected (Obioha, 2011). The consequence is a system perpetually in crisis mode, struggling to meet basic needs rather than advancing the rehabilitative objectives the Act proclaims.

Comparative data illustrate the severity of underfunding. While the United Kingdom allocates approximately £48,000 per prisoner annually, Nigeria's per capita expenditure on inmates is a small fraction of this amount (NCS Report, 2024). The disparity reflects not merely differences in economic capacity but fundamental differences in priority, as correctional services in Nigeria are consistently relegated to the margins of national budgetary consideration (Adebayo, 2013). Underfunding has resulted in severely dilapidated physical infrastructure across Nigeria's custodial centres. Most facilities were constructed during the colonial era and have received minimal maintenance or upgrading since (Aliyu, et al., 2017). The structural decay manifests in overcrowded cells, inadequate sanitation, poor ventilation, unreliable water supply, and frequent breakdown of essential services (Awopetu, 2014).

The resource crisis extends to human capital. The Nigerian Correctional Service operates with a significant shortage of personnel relative to the inmate population. The officer-to-inmate ratio falls far below international standards, with some custodial centres operating at less than 50% of required staffing levels (NCS Strategic Plan, 2021). This shortage undermines security, limits the capacity to provide programmes and services, and places enormous strain on existing officers. This is further compounded by inadequate training and poor staff welfare. Correctional officers receive limited training, particularly in rehabilitative approaches, and are often ill-equipped to implement the Act's reformatory philosophy. Low salaries, poor working conditions, and limited career progression opportunities contribute to low morale and high turnover, further eroding institutional capacity (Obioha, 2011).

The rehabilitative aspirations of the NCS Act are rendered largely aspirational by the absence of facilities and programmes necessary to give them effect. Where facilities exist, they are often ill-equipped or lack trained instructors (Sunday, 2024). Vocational training programmes, where available, typically focus on low-skilled trades with limited economic relevance, undermining the objective of equipping inmates for gainful employment upon release. Psychological counselling and mental health services, critical for addressing the underlying causes of offending, are severely limited or entirely absent.

The resource crisis, while primarily a matter of fiscal allocation, is enabled and exacerbated by specific drafting deficiencies. The Act's welfare provisions are framed as administrative duties rather than enforceable rights, and they lack the specificity necessary to create measurable standards against which performance can be assessed and judicially enforced. The Act mandates 'qualitative and quantitative food' and 'hygiene, cleanliness, and sanitary conditions' without defining these terms or establishing minimum standards (NCS Act, 2019). These vague provisions mean that even if resources were available, there would be no statutory standards against which to measure whether they were being adequately deployed. More fundamentally, the absence of clear, enforceable standards means that the Executive faces no legal compulsion to allocate resources sufficient to meet the Act's objectives.

5.2. Institutional Resistance to Change

Legislative reform, no matter how progressive, cannot succeed without corresponding changes in institutional culture and practice. The NCS Act represents a fundamental shift in correctional philosophy from punitive incarceration to rehabilitative corrections. However, the institutional culture of the Nigerian correctional system, shaped by decades of operation under the punitive Prisons Act regime, has proven remarkably resistant to this legislative mandate.

The Nigerian Correctional Service inherited an administrative culture deeply rooted in the punitive philosophy of the repealed Prisons Act. For over forty-seven years, the system operated on principles of custody, control, and punishment, with rehabilitation occupying a marginal role (Ahire, 1995). This legacy persists in administrative practices, routines, and assumptions, creating profound inertia against the transformative objectives of the NCS Act.

Staff attitudes present a significant barrier. Correctional officers, recruited and trained under the old regime, often view their role through a punitive lens, seeing themselves as custodians and disciplinarians rather than as agents of rehabilitation. Studies reveal widespread scepticism toward rehabilitative approaches, with many officers regarding rehabilitation as unrealistic or even inappropriate (Adebayo, 2013). This punitive orientation manifests in daily interactions with inmates through verbal abuse, physical mistreatment, arbitrary exercise of discretion, and indifference to inmate welfare. Training curricula continue to emphasise security and control over rehabilitative skills, reinforcing rather than challenging these attitudes (Ulo, 2019).

The punitive mind-set is embedded in the organisational structure and reward systems of the Service. Promotion and career advancement have historically been tied to performance in security and custodial functions, not to achievements in rehabilitation or inmate welfare (Obioha, 2011). Officers who maintain strict discipline, prevent escapes, and control inmates through authoritarian means are rewarded, while those who invest in rehabilitative work receive no comparable recognition.

5.3. Corruption and Absence of Accountability

Corruption within Nigeria's correctional system represents a fundamental obstacle to the achievement of the NCS Act's reform objectives. The Act's progressive aspirations are systematically undermined by corrupt practices that pervade custodial centres across the country.

Corruption among correctional officers is widespread and takes multiple forms. Officers routinely demand bribes from inmates for access to basic entitlements such as food, healthcare, communication with family, and legal representation (PRAWA, 2021). Inmates who can pay receive preferential treatment while those who cannot are neglected or subjected to additional hardships. This practice fundamentally undermines the principle of equal treatment before the law and converts statutory entitlements into commodities available only to those with resources (Araromi, 2025). A 2021 study by the Prisoners' Rehabilitation and Welfare Action (PRAWA) documented extensive corruption in Nigerian custodial centres, with inmates reporting paying bribes for placement in better cells, for access to medical attention, for permission to receive visitors, and even for food that meets minimum nutritional standards (PRAWA, 2021).

Beyond individual corruption, the correctional service suffers from systemic mismanagement of funds and resources. Budgetary allocations intended for inmate welfare, facility maintenance, and rehabilitation programmes are frequently diverted, misapplied, or simply not released (Obioha, 2011). The Act establishes the Nigerian Correctional Service Fund but creates no mechanism for parliamentary oversight of expenditure, no requirement for independent audit, and no transparency obligations that would enable public scrutiny of how Fund resources are used. The Controller-General is required to prepare annual reports, but the provision makes no specific content requirements and creates no obligation to publish or lay reports before the National Assembly (NCS Act, 2019).

6. Systemic and Contextual Barriers to Correctional Reform

Beyond institutional and resource constraints, correctional reform in Nigeria is impeded by broader systemic and contextual barriers. This section examines five such barriers: persistent overcrowding, violation of inmates' rights, legislative fragmentation, cultural and societal factors, and political challenges. Each barrier is analysed with explicit reference to its connection to the implementation gap.

6.1. Persistent Overcrowding

The excessive use of pre-trial detention is the primary driver. Courts routinely remand suspects for minor offences without adequate scrutiny of whether detention is necessary. Several factors contribute including police and prosecutors frequently oppose bail; courts lack confidence in alternatives to detention; many suspects cannot afford legal representation (Ayenigba, et al., 2023). Judicial delays compound the problem. Cases take years to progress, with detainees remaining in custody throughout. The ACJA 2015 established time limits to address these delays, but these provisions remain poorly enforced (Eyongndi, 2021). The NCS Act creates no mechanisms to address systemic delays, merely requiring the Service to 'provide support to facilitate speedy disposal' without powers to compel action (NCS Act, 2019).

Overcrowding fundamentally undermines rehabilitation. In facilities operating at two or three times capacity, conditions necessary for rehabilitation are impossible to achieve (Awopetu, 2014).

6.2. Violation of Inmates' Rights

Despite constitutional prohibitions and the NCS Act's explicit requirements, widespread rights violations continue (CFRN, 1999). A 2023 NHRC report documented torture including beatings, prolonged restraint, denial of food, "pointing" (forced standing), and punitive isolation (PRAWA, 2021). Living conditions fall below human dignity with the absence of nutritionally adequate food, sufficient sanitation, and trained medical staff.

6.3. Legislative Fragmentation and Poor Integration

Nigeria's criminal justice system is deeply fragmented. Police, prosecutors, courts, and correctional services operate in silos with limited coordination (Alemika, 2011). The police make arrest and bail decisions that directly

affect correctional populations, but the NCS Act creates no mechanisms for engaging with police practices. Similarly, prosecutors and courts operate without reference to correctional implications (Eyongndi, 2021).

The most significant coordination failure is the absence of integration between the NCS Act and the ACJA 2015. The ACJA contains detailed provisions on bail, plea bargaining, and non-custodial sentencing (ACJA, 2015). Yet the NCS Act makes no reference to these provisions. The relationship between the two statutes is unaddressed, creating legal uncertainty (Oaihimire, et al., 2023).

The Fifth Alteration Act, 2023, transferred legislative competence over correctional services to the concurrent list, enabling States to legislate on correctional matters. This creates new coordination challenges. The mechanisms for ensuring consistency have not been established. The NCS Act contains no provisions addressing these challenges as no minimum standards, and no information-sharing mechanisms, were provided.

6.4. Cultural and Societal Factors

Nigerian society holds strongly punitive attitudes toward crime. Public discourse emphasises punishment and retribution, with rehabilitation occupying a marginal position. These attitudes constrain policymakers' willingness to invest in rehabilitation and courts' willingness to impose non-custodial sentences (Okeke, et al., 2024). The punitive orientation has deep roots from traditional justice systems involved harsh punishments; colonial criminal justice reinforced punitive approaches; contemporary media amplifies demands for harsh punishment (Ahire, 1995).

Stigmatisation of ex-convicts is profound. Individuals with criminal records face discrimination in employment, housing, and social relationships, undermining reintegration (Monehin, 2021). The NCS Act creates no mechanisms for post-release support, no provisions for reducing stigma, and no framework for engaging employers and communities.

Community resistance to non-custodial measures is significant. Communities resist offenders serving community sentences because they perceive non-custodial sentences as inadequate (Okeke, et al., 2024). The NCS Act creates no framework for community engagement.

6.5. Political and Policy Challenges

Successive administrations have demonstrated limited genuine commitment to implementation (Okoro, 2020). This manifests in inadequate budgetary allocations, political rather than meritocratic appointments, and abandoned policy initiatives. Political indifference reflects broader patterns as institutions serving marginalised populations receive scant political attention because they offer few political rewards (Adebayo, 2013).

Policy discontinuity is significant. Changes in political leadership bring wholesale shifts in policy direction (Oyebode, 2005). Implementation has been uneven, with periods of activity followed by neglect (Okoro, 2020). The Act contains no provisions to ensure continuity because there is no long-term strategy, or independent institutions with stable mandates (Oyebode, 2005).

7. Recommendations and Conclusion

Based on the foregoing analysis, the following recommendations are offered:

7.1. Recommendations

1. Establish an independent oversight body (modelled on HM Inspectorate of Prisons) with statutory power to inspect all custodial centres unannounced, investigate conditions, publish public reports, and compel responses from correctional authorities.
2. Create a Prisons and Probation Ombudsman to investigate complaints from inmates and deaths in custody, with power to make binding recommendations and require responses.
3. Establish a Sentencing Council to issue binding sentencing guidelines that integrate non-custodial measures, structure judicial discretion, and promote consistency.
4. Increase budgetary allocation to the Nigerian Correctional Service to meet minimum international standards for accommodation, food, healthcare, and rehabilitation programmes, with ring-fenced funding for non-custodial services.
5. Invest in recruitment, training, and welfare of correctional officers, with mandatory training on the NCS Act's provisions, rehabilitative philosophy, human rights standards, and de-escalation techniques.
6. Restructure career progression to reward achievements in rehabilitation and inmate welfare equally with security and custodial performance.
7. Deploy electronic monitoring technologies for non-custodial supervision, including GPS tracking for curfew requirements and virtual reporting systems.
8. Harmonise the NCS Act and ACJA 2015 through a coordinating amendment designating the Non-Custodial Service as the sole agency responsible for community service supervision, and establishing a statutory inter-agency coordination committee.
9. Develop a federal-state coordination framework establishing minimum standards for State correctional legislation, information-sharing protocols, and mechanisms for resolving inter-jurisdictional conflicts.
10. Develop community engagement protocols for restorative justice programmes in partnership with local governments, civil society organisations, and traditional institutions.

7.2. Conclusion

This article has examined the institutional, resource, political, cultural, and systemic barriers that impede correctional reform in Nigeria. Despite the progressive objectives of the NCS Act 2019, more than six years after its enactment, the Nigerian correctional system continues to be plagued by overcrowding, rights violations, corruption, and the non-implementation of non-custodial measures. The foregoing analysis demonstrated that these failures are not merely a consequence of resource constraints or administrative shortcomings. They are rooted in deeper institutional and systemic barriers such as chronic underfunding, institutional resistance to change, corruption, legislative fragmentation, cultural attitudes, and political indifference. These barriers, individually and collectively, prevent the translation of legislative intent into practical reality. The Act provides a vision of reform but not the operational framework necessary to realise it.

The NCS Act 2019 represents a progressive policy aspiration. But aspiration without implementation remains precisely that, aspiration. Unless Nigeria addresses the institutional, resource, political, cultural, and systemic barriers examined in this article, correctional reform will continue to fail, inmates' rights will remain unprotected, and custodial centres will remain sites of suffering rather than rehabilitation. The law is necessary, but it is not sufficient. The journey from law to reality requires institutional capacity, political will, adequate resources, and societal support all of which remain critically deficient in Nigeria's correctional landscape.

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Jurisdictional Conflicts in Petroleum Free Zones: Comparative Lessons from Nigeria, Ghana and Tanzania

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Abstract

Nigeria's free trade zone regime, designed to attract foreign direct investment and promote export-oriented industrialisation, is currently undermined by a protracted jurisdictional conflict between the Nigerian Midstream and Downstream Petroleum Regulatory Authority (NMDPRA) and the Oil and Gas Free Zones Authority (OGFZA) over regulatory authority over petroleum operations within the Dangote Industries Free Zone. This dispute has resulted in conflicting vessel clearances, duplicative compliance costs, confusion among security agencies, and significant risks to national energy security and investor confidence. This paper aims to: (i) examine the legal and institutional frameworks governing free zones in Nigeria, Ghana, and Tanzania; (ii) analyse the causes and consequences of Nigeria's NMDPRA-OGFZA jurisdictional conflict; (iii) evaluate Ghana's unified free zone model (GFZA) and Tanzania's centralised EPZ/SEZ model as comparative case studies; and (iv) draw practical lessons for resolving Nigeria's regulatory fragmentation. The paper adopts a doctrinal legal research methodology, combining statutory interpretation of enabling laws (PIA 2021, OGFZA Act 1996, Ghana's Free Zone Act 1995, Tanzania's EPZA Act) with comparative institutional analysis. The paper finds that Ghana's unified model, which integrates oil and gas regulation through a dedicated Oil and Gas Department within GFZA established under the Petroleum (Local Content and Local Participation) Regulations 2013, eliminates jurisdictional ambiguity through institutional integration and formalised collaboration with sector regulators. Tanzania's centralised EPZA model demonstrates the operational benefits of a single licensing regime, one-stop service centre, and transparent investor charters. In contrast, Nigeria's fragmented approach characterised by the coexistence of NEPZA, OGFZA, and NMDPRA without statutory proper coordination creates overlapping mandates, adversarial inter-agency relations, and regulatory uncertainty. The paper recommends that Nigeria adopt legislative amendments to either: (i) integrate OGFZA into a unified free zone authority with a dedicated oil and gas department, following Ghana's model; or (ii) amend the PIA to expressly include free zones within NMDPRA's exclusive jurisdiction, supported by statutory coordination mechanisms.

Keywords: Free Trade Zones, Jurisdictional Conflict, Regulatory Fragmentation, Energy Security, Investment Promotion

1. Introduction

Free Trade Zones (FTZs) and Special Economic Zones (SEZs) have emerged as critical instruments for economic transformation across the developing world, offering targeted incentives to attract foreign direct investment, promote export-oriented industrialisation, and generate employment (Farole, 2011). As of 2023, more than 230 zones have been established in 43 African countries, and they remain central to many countries' industrialisation strategies (Amodu, 2018). Evidence demonstrates SEZs' power to catalyse foreign direct investment, export growth, and local spillovers when well designed, though outcomes vary substantially across contexts (Laws of the Federation of Nigeria 2004).

Nigeria, as Africa's largest economy and leading oil producer, has embraced the free zone model as a strategic vehicle for economic diversification and industrial development. The Nigeria Export Processing Zones Authority (NEPZA), established under the Nigeria Export Processing Zones Act (Cap N107, Laws of the Federation of Nigeria 2004), serves as the apex regulatory body for the Free Zone scheme in Nigeria with responsibility for the promotion, development, and regulation of all Special Economic Zones in the country (Laws of the Federation of Nigeria 2004). NEPZA emerged as the principal supervisory authority for most free zones, with its role extending beyond investment promotion to include licensing, operational supervision, enterprise registration, and coordination of regulatory activity within designated zones.

Recognising the unique operational characteristics of the oil and gas sector, including large-scale infrastructure requirements, complex logistics, and significant capital intensity, the Federal Government established a dedicated regulatory authority for oil and gas free zones. The Oil and Gas Free Zones Authority (OGFZA) was established by the Oil and Gas Export Free Zones Act No. 8 of 29 March 1996 to regulate and manage Nigeria's oil and gas export free trade zones, commencing regulatory operations in Onne, Rivers State, in 2000. OGFZA developed as a specialised regulator for oil-and-gas-related free zones under a sector-specific mandate tailored to petroleum servicing, offshore support operations, and energy infrastructure activities. This institutional arrangement created a dual regulatory structure: NEPZA overseeing general free zones and OGFZA exercising authority over oil and gas-specific zones.

This development has generated significant inter-agency rivalry and legislative duplicity, creating an institutional framework characterised by overlapping mandates, conflicting directives, and regulatory uncertainty (Punch, 2024). The current fragmentation directly contravenes the spirit and recommendations of the Stephen Oronsaye-led Presidential Committee on Restructuring and Rationalisation of Federal Government Parastatals, Commissions and Agencies, which submitted its 800-page report in April 2012 (Presidential Committee Report, 2012). The Oronsaye Report identified "overlapping agencies, causing wastage in expenditure" and recommended that 263 statutory agencies be reduced to 161, with 38 agencies scrapped, 52 merged, and 14 reverted to departments in various ministries (Naija News, 2025). The committee's central objective was to eliminate duplication of functions, reduce waste and inefficiency, improve service delivery, and enhance accountability and transparency.

Furthermore, the persistence of separate regulatory authorities for petroleum-related free zone activities runs counter to the policy direction articulated by the Presidential Committee on Implementation of the Oronsaye Report, chaired by the Secretary to the Government of the Federation and comprising the Attorney-General of the Federation, the Head of the Civil Service, and other senior officials (Tribune Online, 2024). The Special Adviser to the President on Policy Coordination, Hadiza Bala Usman, who serves as a member of the implementation committee, has emphasised the administration's commitment to eliminating institutional fragmentation and ensuring that "the necessary restructuring and legislative amendments" are enacted to actualise the Oronsaye recommendations (The Guardian, 2025). Bala Usman has also chaired a separate committee to harmonise sectoral policies, acknowledging that "the lack of interrelationship and coherence across policies governing different sectors" has been a major challenge in policy formulation and implementation.

The NMDPRA-OGFZA jurisdictional conflict thus represents precisely the type of institutional duplication and regulatory inefficiency that the Oronsaye reforms were designed to eliminate. The coexistence of two agencies exercising overlapping authority over petroleum operations within free zones, with one established under a sector-

specific law predating the comprehensive petroleum industry reform by 25 years, demonstrates the urgent need for legislative clarity and institutional rationalisation in line with the federal government's cost-cutting and efficiency agenda (Senate Committee, 2026).

The enactment of the Petroleum Industry Act (PIA) 2021 fundamentally restructured Nigeria's petroleum regulatory landscape. Section 29(3) of the PIA establishes the Nigerian Midstream and Downstream Petroleum Regulatory Authority (NMDPRA) as the sole agency of the Federal Government responsible for the technical and commercial regulation of midstream and downstream petroleum operations in Nigeria (PIA, 2021). Section 309 further provides that where any other enactment is inconsistent with the PIA, the provisions of the PIA shall prevail (PIA, 2021). However, the PIA does not expressly mention free zones, free trade zones, or export processing zones, neither including nor excluding them from NMDPRA's regulatory jurisdiction. This legislative silence has created a fertile ground for jurisdictional contestation. Legal scholarship has long observed that Nigeria's free zones are "uniquely designed and applied legal cum policy enclaves whose legislative and regulatory regime are still riddled with needless ambiguities" (The Punch, et al., 2026).

The jurisdictional ambiguity arising from the coexistence of the PIA 2021 and the OGFZA Act 1996 has precipitated a protracted regulatory conflict between NMDPRA and OGFZA over the importation of feedstocks and intermediate feedstocks into, and the exportation of petroleum products from, the Dangote Industries Free Zone in Ibeju-Lekki, Lagos (Fagbemi, 2026). NMDPRA has declared that petroleum companies operating in free zones, export processing zones, and other designated areas remain fully subject to the provisions of the Petroleum Industry Act 2021 and regulations issued thereunder. The authority has further clarified that its regulatory mandate extends to all midstream and downstream petroleum activities throughout Nigeria, including the continental shelf, territorial waters, exclusive economic zone, free zones, export processing zones, industrial zones, and any other designated areas.

Conversely, OGFZA maintains that activities within free zones fall under its statutory mandate pursuant to the OGFZA Act 1996, and has issued vessel clearances and approvals for petroleum operations within the Dangote Industries Free Zone. The resulting regulatory overlap has produced conflicting directives, generated operational uncertainty for investors, created compliance challenges for operators, and raised concerns among security and enforcement agencies regarding the appropriate regulatory approvals to recognise. The practical market practice has been that midstream and downstream operators in the oil and gas free zones obtain both the NMDPRA permits alongside their OGFZA licences.

2. Nigeria's Free Zone Legal and Institutional Framework

2.1 Historical Evolution of Nigeria's Free Zone Regime

The genesis of Nigeria's free zone programme can be traced to the promulgation of the Nigeria Export Processing Zones Act, which established the legal and institutional architecture for attracting foreign direct investment, stimulating export-oriented production, and reducing the economy's dependence on crude oil exports (COMCEC, 2018). The scheme was conceived as a vehicle for offering fiscal inducements, duty-free admission of capital equipment and raw materials, foreign exchange flexibility, and simplified administrative processes to enterprises operating within designated geographical enclaves (OGFZA, 2026).

The Nigeria Export Processing Zones Act serves as the principal legislation governing the free zone programme, vesting in the Nigeria Export Processing Zones Authority (NEPZA) the mandate for licensing, monitoring, and regulating the Free Zones Scheme (Akabogu, 2023). The Act contemplates that a zone may be operated and managed by a public, private, or hybrid entity under the supervision and with the approval of NEPZA. The statutory framework establishes NEPZA as the apex regulatory body with overarching authority over free zone operations across the country.

The oil and gas sector, characterised by substantial capital outlays, complex logistical networks, and strategic importance, warranted the creation of a specialised regulatory agency. Accordingly, the Oil and Gas Export Free Zones Act No. 8 of 29 March 1996 established the Oil and Gas Free Zones Authority (OGFZA) pursuant to Section 2 of the Act, tasking it with the regulation and management of Nigeria's oil and gas export free trade zones (OGFZA Act, 2026). The Authority commenced regulatory activities in Onne, Rivers State, in 2000. The Onne Oil and Gas Free Zone became the first such zone; subsequent oil and gas free zones emerged through public-private partnerships involving the Federal Government and private sector entities.

The establishment of parallel regulatory authorities has engendered inter-agency rivalry and legislative duplication, producing an institutional landscape marked by overlapping mandates, contradictory directives, and regulatory unpredictability (Nigerian Petroleum Industry, 2022). This fragmentation stands in direct opposition to the recommendations of the Stephen Oronsaye-led Presidential Committee on Restructuring and Rationalisation of Federal Government Parastatals, Commissions and Agencies, which submitted its comprehensive report in April 2012. The Oronsaye Report documented "overlapping agencies, causing wastage in expenditure" and proposed the reduction of 263 statutory agencies to 161, with 38 agencies abolished, 52 consolidated, and 14 returned to departmental status within ministries. The committee's overarching objective was the elimination of functional duplication, reduction of waste and inefficiency, enhancement of service delivery, and strengthening of accountability and transparency (Oronsaye, 2012).

Stakeholders have persistently advocated for the implementation of the Oronsaye Committee's recommendation to consolidate the two regulatory authorities in the interest of the scheme and the nation, observing that "this is the only way to sustain investors' confidence in the scheme and the country".

2.2 Nigeria Export Processing Zones Authority (NEPZA)

NEPZA functions as the primary supervisory authority for the majority of free zones established under the Nigeria Export Processing Zones Act. Its mandate encompasses investment promotion, licensing, operational oversight, enterprise registration, and coordination of regulatory activities within designated zones. NEPZA's regulatory purview extends primarily to manufacturing, trading, logistics, and export-oriented enterprises operating within geographically defined free zones across diverse economic sectors (Jimoh, 2020).

Under the Act, NEPZA is empowered to grant licences for any approved activity in an export processing zone to individuals or businesses, and such licensing constitutes registration for the purposes of company registration within an EPZ. A licensed enterprise is exempt from compliance with the rules of local incorporation in Nigeria governed by the Companies and Allied Matters Act, as the NEPZA licence serves as evidence of a company's registration in an EPZ (NEPZA, 2026).

NEPZA's regulatory framework encompasses several categories of free zone status: Free Trade Zone (FTZ), Export Processing Zone (EPZ), Export Processing Farm (EPF), Science and Technology Park (S&TP), and Special Economic Zone (SEZ). The Authority is charged with promoting investment into these zones, vetting applications for operation within the free zones, monitoring enterprises, and supervising all activities within the zones.

Section 18(1) of the NEPZA Act confers upon approved enterprises within the zones various incentives, including: exemption from legislative provisions relating to taxes, levies, duties and foreign exchange regulations; repatriation of foreign capital investment with capital appreciation; remittance of profits and dividends earned by foreign investors; and no import or export licence requirements. Additionally, free zone enterprises benefit from up to 100 per cent foreign ownership of business, rent-free land during construction, and the ability to employ foreign managers and qualified personnel.

The enactment of the Nigeria Tax Act, 2025 marks a significant departure from the traditional fiscal regime governing Free Trade Zones in Nigeria. Whereas section 18(1) of the Nigeria Export Processing Zones Act and the corresponding provisions of the Oil and Gas Export Free Zone Act historically conferred broad exemptions from taxes, duties and foreign exchange regulations on approved enterprises, the Nigeria Tax Act, 2025 replaces this blanket exemption with a conditional, export-based incentive regime. Under the new framework, entitlement

to tax incentives is contingent upon compliance with statutory conditions, including export requirements, filing obligations and other tax administration measures (Nigeria Tax Act, 2025).

2.3 Oil and Gas Free Zones Authority (OGFZA)

OGFZA evolved as a specialised regulator for oil-and-gas-related free zones under a sector-specific mandate tailored to petroleum servicing, offshore support operations, and energy infrastructure activities. The Authority serves as the national regulatory agency overseeing the operation of oil and gas free trade zones. Its regulatory focus centres on businesses connected to upstream petroleum operations, including offshore logistics bases, fabrication yards, marine support services, and energy-related industrial facilities linked to Nigeria's oil and gas sector (OGFZA, 2026).

Pursuant to Section 2 of the OGFZ Act 1996, the Authority is responsible for operating and managing the Oil and Gas Free Zones (OGFZ Act, 1996). Section 5(1) of the Act assigns the Authority the following functions: the administration of the Authority and the management of the Export Free Zones; the grant of all requisite permits and licences to conduct approved enterprises within the Export Free Zones; the approval of development plans of the Authority and the Export Free Zones; the establishment of customs, police, immigration and similar posts in the Export Free Zones; the supervision and coordination of the functions of the various public and private sector organisations operating within the Export Free Zones; and the resolution of trade disputes between employers and employees in the Export Free Zones (OGFZ Act, 1996).

The Authority is mandated to license, regulate, supervise, manage, control and co-ordinate the activities of oil and gas free zones in the country; grant requisite permit and licence to all prospective investors wishing to do business within these zones; offer incentives to free zone enterprises; ensure that maximum free zone incentives and benefits are passed to free zone registered companies; and promote the free zones to investors (OGFZA, 2026).

The distinction between NEPZA and OGFZA is less about institutional hierarchy and more about regulatory orientation, with both authorities operating as parallel regulators within the broader FTZ framework. However, there have been longstanding concerns that OGFZA's enabling Act creates a duplicative regulatory structure. The Anti-Corruption and Research-Based Data Initiative (ARDI) has argued that "rather than add economic value, OGFZA had contributed to the bloated personnel cost while doing exactly the same thing NEPZA was established to do" (Syntegral Legal Practice, 2026).

The historical tension between the two authorities has been persistent. In 2016, OGFZA approached several zones licensed by NEPZA with the intention of regulating and taking over their operation based on its interpretation of its enabling Act (Agboluaje, 2016).

2.4 Nigerian Midstream and Downstream Petroleum Regulatory Authority (NMDPRA)

The Petroleum Industry Act (PIA) 2021 fundamentally restructured Nigeria's petroleum regulatory landscape (NMDPRA, 2026). Section 29 of the Act establishes the Nigerian Midstream and Downstream Petroleum Regulatory Authority (the Authority) with the responsibility to regulate the technical and commercial operations of the midstream and downstream operations in the petroleum industry, amongst other things as set out in section 32 of the Act. Section 29(3) specifically establishes the NMDPRA as the sole agency of the Federal Government responsible for the technical and commercial regulation of midstream and downstream petroleum operations in Nigeria (PIA, 2021).

Section 31(a) states that the objectives of the NMDPRA shall be to regulate midstream and downstream petroleum operations, including technical, commercial and operational activities, and ensure compliance with applicable laws and regulations governing midstream and downstream petroleum operations. Section 32 provides that the functions of the NMDPRA shall include regulating and monitoring petroleum liquids and natural gas import and export operations, granting licences, permits and authorisations, ensuring security of supply for petroleum products, regulating the supply, distribution, marketing and retail of petroleum products, issuing certificates of quality and

quantity to importers and exporters, and monitoring and ensuring the quality of petroleum products sold in Nigeria (PIA, 2021).

Section 48(1) of the PIA mandates any Government ministry, department or agency (MDA) exercising any power or function or taking any action, which may have direct impact on midstream or downstream petroleum operations, to consult with the NMDPRA prior to exercising such power or taking such action, and that MDA shall comply with the NMDPRA's decision in respect of that power, function or action. This section is critical as it requires OGFZA to consult NMDPRA before issuing any vessel clearances, regulations, or directives affecting petroleum operations (PIA, 2021).

Section 174(1) and (2) of the PIA states that except in accordance with an appropriate licence issued by the NMDPRA, a person shall not establish, construct or operate a terminal or other facility for the export, importation, storage, transportation, supply, distribution, or sale of petroleum liquids in Nigeria (PIA, 2021). Section 174(6) provides that holders of subsisting leases, licences or permits from other agencies (including OGFZA) engaged in midstream or downstream operations prior to the effective date were required to apply to NMDPRA for appropriate licences within 18 months from the effective date (i.e., by February 2023), and any such permits not renewed by NMDPRA automatically lapsed.

Section 197 provides that the Authority may, upon approval of an application and payment of prescribed fees, grant and issue a qualified person (such as a crude oil refiner) a wholesale petroleum liquids supply licence which authorises the supplier to sell and deliver petroleum liquids to bulk customers in Nigeria or for export. Section 317(9) reserves the power to grant import licences for petroleum products exclusively to the NMDPRA (PIA, 2021).

Section 309 of the PIA provides the supremacy clause: upon commencement of the PIA, where the provisions of any other enactment or law (except the Nigeria Oil and Gas Industry Content Development Act) are inconsistent with the PIA, the provisions of the PIA shall prevail, and the inconsistent provisions of the other enactment or law shall, to the extent of that inconsistency, be void in relation to matters provided for in the PIA. This is NMDPRA's strongest argument that the PIA supersedes the OGFZA Act 1996 on petroleum matters (PIA, 2021).

2.5 The Origins of the Jurisdictional Conflict

The jurisdictional conflict between NMDPRA and OGFZA stems from the coexistence of the PIA 2021 and the OGFZA Act 1996, neither of which expressly addresses the other's role in regulating petroleum operations within free zones. The PIA does not expressly mention free zones, free trade zones, or export processing zones, neither including nor excluding them from NMDPRA's regulatory jurisdiction. This legislative silence has created a fertile ground for jurisdictional contestation (NMDPRA, 2026). Legal scholarship has long observed that Nigeria's free zones are "uniquely designed and applied legal cum policy enclaves whose legislative and regulatory regime are still riddled with needless ambiguities".

The conflict has been exacerbated by OGFZA's historical ambition to expand its regulatory reach beyond the Onne zone to other oil and gas free zones established under NEPZA's regulatory framework (Agboluaje, 2016).

2.6 The Attorney-General of the Federation's Legal Opinion and the NMDPRA's Circular Clarifying Its Mandate

The Office of the Attorney-General of the Federation issued legal opinions interpreting sections 5(2) and 25 of the Oil and Gas Export Free Zone Act in favour of OGFZA's regulatory jurisdiction over oil and gas free zones. During its oversight proceedings in June 2020, however, the Senate Committee on Trade, Industry and Investment criticised those opinions—issued during the tenures of Attorney-General Michael Aondoakaa, SAN and Attorney-General Mohammed Bello Adoke, SAN, as "unjustifiable" and inconsistent with the legislative intention underlying the Act (Sariki, 2020).

More recently, Dangote Petroleum Refinery and Petrochemicals FZE instituted an action before the Federal High Court, Lagos, against the Attorney-General of the Federation, challenging the continued issuance and renewal of

petroleum product import licences by the Nigerian Midstream and Downstream Petroleum Regulatory Authority (NMDPRA). The suit invokes sections 317(8) and 317(9) of the Petroleum Industry Act, 2021, contending that import licences should only be granted where domestic refining capacity is insufficient. The Attorney-General of the Federation, Lateef Fagbemi, SAN, is defending the action on behalf of the Federal Government.

In May 2026, the NMDPRA issued a public notice warning that it would sanction any entity operating in the midstream and downstream oil and gas sectors without the required licences, permits, or authorisations (NMDPRA, 2026). The notice clarified that companies operating within free trade zones and export processing zones are not exempt from these regulations. The NMDPRA stated that its regulatory mandate "extends to all midstream and downstream petroleum activities and applies throughout the Federation of Nigeria, including the continental shelf, territorial waters, exclusive economic zone, free zones, export processing zones, industrial zones and any other designated areas".

The NMDPRA invoked Section 309 of the PIA, which states that in any conflict between the PIA and other laws, the provisions of the PIA will prevail. It further clarified that "the operation of any midstream or downstream petroleum facility within a free zone, export processing zone, or similar area does not exempt such facility and its operations from compliance with the provisions of the PIA and regulations". The authority concluded that any person engaging in midstream and downstream petroleum operations without an appropriate licence, permit, or authorisation from the NMDPRA shall be subject to sanctions in accordance with the relevant provisions of the PIA.

This renewed regulatory measure came at a time of significant tension in Nigeria's downstream sector, marked by a legal battle over the authority to issue import licences, and a reported clash between the NMDPRA and OGFZA over which agency has regulatory authority for petroleum operations within free zones, specifically citing the example of the Dangote Refinery.

3. Comparative Analysis: Ghana's Unified Free Zone Model

3.1 Establishment and Legal Framework of the Ghana Free Zones Authority

Ghana's free zone programme was established on 31 August 1995 through the promulgation of the Free Zone Act, 1995 (Act 504), which created the legal and institutional architecture for promoting economic development through the establishment of export processing zones. The Ghana Free Zones Authority (GFZA) was established as the regulatory body responsible for facilitating the setting up of free zones and regulating activities within those zones.

The GFZA is governed by a nine-member Board chaired by the Minister of Trade and Industry, with eight other members appointed by the President in consultation with the Council of State, including at least two women. The Board's functions, as enumerated in Section 3 of Act 504, include granting licences to applicants, assisting applicants by providing services for obtaining other relevant licences and permits, examining and recommending for approval agreements relating to free zone development, monitoring activities and performance of free zone developers and enterprises, ensuring compliance with the Act and other relevant laws, and registering and keeping records of programmes within free zones.

The GFZA was designed to improve the processing and manufacturing of goods through the formation of Export Processing Zones to boost commercial and service activities at sea and airport areas, and to make Ghana accessible to potential investors who have the freedom to use free zones as focal points to produce goods and services for foreign markets.

3.2 The Dedicated Oil and Gas Department: Institutional Innovation

A distinctive feature of Ghana's free zone regulatory model is the establishment of a dedicated Oil and Gas Department within the GFZA in 2019 (Free Zones Authority, 2019). The department was created in accordance

with the Petroleum (Local Content and Local Participation) Regulations 2013, L.I. 2204, which obligates players in the upstream petroleum sector to utilise the services of Ghanaian companies and individuals (Petroleum Regulations, 2013). The Oil and Gas Department is responsible for promoting participation of local and foreign sector companies in the Free Zones scheme.

The department serves a central coordinating function: it acts as a central wing for the activities of all oil and gas free zones enterprises by streamlining trade documentation and enhancing business processes, with the rationale of reducing costs, increasing efficiency, and projecting business results for all stakeholders in the Free Zones. The department facilitates Public-Private Partnership investments and joint ventures between foreign and indigenous companies in the oil and gas sector.

3.3 Collaboration Framework with Sector Regulators

A critical institutional feature of Ghana's model is the formalised collaboration between the GFZA Oil and Gas Department and other regulatory agencies. The department receives and processes applications from new or existing clients in the oil and gas industry intending to set up and operate in the Free Zones enclave, and assists clients with authorisation and licensing through collaboration with other government agencies. The department also conducts regular inspections of companies' premises to ensure compliance.

The Petroleum (Local Content and Local Participation) Regulations 2013 provide the substantive framework for local content requirements (Senoo, et al., 2018). The purpose of these Regulations includes promoting the maximisation of value-addition and job creation through the use of local expertise, goods and services, businesses and financing in the petroleum industry value chain; developing local capacities through education, skills transfer, technology transfer and research and development programmes; and creating petroleum and related supportive industries that will sustain economic development.

The Regulations mandate that a non-indigenous Ghanaian company which intends to provide goods or services in the petroleum sector shall incorporate a joint venture company with an indigenous Ghanaian company with at least ten percent equity participation. An indigenous Ghanaian company is defined as one that has at least 50 percent of its equity owned by a citizen of Ghana and has Ghanaian citizens holding at least 80 percent of executive and senior management positions and 100 percent of non-managerial and other positions.

3.4 Licensing Regime and Incentives

The GFZA operates a single licensing regime for free zone enterprises, with application processing expected to be completed within 28 working days. License categories include Developer, Manufacturing, Service, and Commercial, with varying fees: Developer license fee of US\$5,000 (renewal US\$4,000), Manufacturing enterprise fee of US\$3,000 (renewal US\$2,500), Service enterprise fee of US\$4,000 (renewal US\$3,000), and Commercial enterprise fee of US\$10,000 (renewal US\$5,000) (National Petroleum Authority Act, 2005).

The incentives offered to free zone enterprises include both monetary and non-monetary benefits. Monetary incentives include 100 percent exemption from payment of direct and indirect duties and levies on all imports for production and exports; 100 percent exemption from payment of income tax on profits for 10 years (which shall not exceed 8 percent thereafter); and total exemption from payment of withholding taxes on dividends arising out of free zone investments. The programme has contributed export revenue averaging USD 1.6 billion annually and created over 30,000 direct jobs and about 500,000 indirect jobs across sectors including agro-processing, textiles and garments, electronics, and logistics services.

Non-monetary incentives include no import licensing requirements, minimal customs formalities, 100 percent ownership of shares by any investor (foreign or national), no restrictions on repatriation of dividends or net profits, and permission to operate foreign currency accounts with banks in Ghana. At least 70 percent of annual production of goods and services must be exported, with up to 30 percent authorised for sale in the local market. Free zone investments are also guaranteed against nationalisation and expropriation.

Crucially, under Section 42(1) of the National Petroleum Authority Act, 2005 (Act 691), a licensed free zone developer or enterprise licensed under the Free Zone Act, 1995 (Act 504) shall, for purposes of refining and storage of petroleum products after licensing under the Act, be eligible to enjoy the same incentives offered by the Free Zone Board within the petroleum downstream industry as approved by the Board and specified in the licence (National Petroleum Authority Act, 2005). This provision ensures that petroleum companies in free zones benefit from the unified incentive regime without separate regulatory contestation.

3.5 Ghana's Approach to Free Zone Regulation in the Petroleum Sector

A comparison of Ghana's approach with Nigeria's fragmented model reveals several important distinctions: Ghana's model demonstrates that a unified free zone authority can effectively accommodate specialised petroleum sector regulation through internal departmental structures and formalised inter-agency collaboration, without creating a separate regulatory body for oil and gas free zones.

Jurisdiction	Free Zone Regulator	Oil & Gas Regulation	Sector Coordination	Licensing	Investor Certainty
Ghana	Single authority (GFZA)	Integrated within GFZA through a dedicated Oil and Gas Department	Collaborative through institutionalised arrangements with the Petroleum Commission, Ghana Ports and Harbours Authority (GPHA), and other agencies	Single GFZA licence	Clear and predictable regulatory pathway
Nigeria	Fragmented (NEPZA and OGFZA)	Separate free zone regulator (OGFZA) alongside the sector regulator (NMDPRA)	Fragmented and often adversarial, characterised by jurisdictional disputes and conflicting regulatory directives	Multiple approvals from different regulatory agencies	Regulatory uncertainty arising from overlapping statutory mandates

4. Comparative Analysis: Tanzania's Centralised Model

4.1 Establishment and Evolution of the Export Processing Zones Authority

Tanzania's free zone programme commenced with the enactment of the Export Processing Zones (EPZ) Act of 2002, which established the legal framework for promoting investment in the manufacturing sector primarily for export purposes, with the objective of promoting global competitiveness and ultimately boosting the country's economy. The Export Processing Zones Authority (EPZA) was established in 2006 following an amendment of the EPZ Act of 2002, to oversee the implementation of the EPZ programme (TISEZA, 2006).

In 2011, EPZA's responsibilities were expanded to enable the Authority to oversee the Special Economic Zones (SEZ) Programme, following the revision of the EPZ and SEZ laws of 2011, which made the EPZ part of the SEZ programme. The Special Economic Zones Act of 2006 was enacted to encourage investment in various sectors for domestic and foreign export. The implementation of the SEZ programme officially began in 2011 after the EPZ and SEZ laws were amended and the SEZ regulations were enacted (EPZA, 2002).

EPZA Board Composition: The EPZA Board reflected a multi-sectoral governance approach, comprising the Minister responsible for Industries as Chairman, the Attorney General, the Permanent Secretaries of the Ministries responsible for Finance, Energy, Water, and Local Authorities, the Executive Secretary of the Planning Commission, the Commissioner-General of the Tanzania Revenue Authority, the Commissioner of Lands, the Chairman of the Tanzania Private Sector Foundation, and the President of the Tanzania Chamber of Commerce, Industry, and Agriculture. The Director-General of EPZA served as Secretary of the Board (EPZA, 2002).

4.2 EPZA Functions and One-Stop Service Centre

EPZA was mandated to perform a comprehensive range of functions critical to the development and operation of EPZs and SEZs. These included acquiring land for investment and owning Special Economic Zones in Tanzania's mainland, developing EPZ and SEZ infrastructure, issuing EPZ and SEZ investment licences, providing business services to EPZ and SEZ investors before and after obtaining licences, and promoting investment opportunities within Special Economic Zones.

The Authority functioned as a One-Stop Service Centre for all prospective and existing investors. This meant that instead of navigating multiple government ministries, departments, and agencies for various permits, licences, and approvals, investors could initiate and process almost all requirements through a single point of contact (EPZA, 2002). The Authority facilitated investors in obtaining factory space or serviced land, company registration, administrative procedures for tax incentives, obtaining visas and work permits, and logistics for clearing and forwarding of merchandise at ports. The EPZA was mandated to issue EPZ and SEZ licences. Significantly, these licences were synonymous with the business licences issued by Local Government Authorities and other Regulatory Authorities. Once an investor obtained the SEZ licence, no other licence was required except for highly regulated industries such as food and drugs. This single-licence regime eliminated duplicative regulatory requirements and reduced compliance burdens for investors.

The EPZA's objectives included creating and expanding foreign exchange earnings, attracting transfer of new technology, promoting investment for export-led industrialisation, creating employment and developing skilled labour, fostering linkages of the local economy with the international market, promoting processing of local raw materials for export (value addition), and enhancing international competitiveness (Luhwago, 2025).

4.3 Incentives Under the EPZ Framework

Tanzania offered a comprehensive package of fiscal and operational incentives to investors in EPZs, designed to make the country competitive with other global investment destinations. These incentives included:

Fiscal Incentives: Investors operating in EPZs were granted a 10-year Corporate Tax holiday, with a 25% tax rate for the subsequent ten years. A 10-year withholding tax holiday on dividends to non-residents was also provided. Additionally, investors enjoyed duty and VAT exemption on raw materials, machinery, equipment and other inputs; stamp duty exemption; 100% investment deduction on capital expenditure within 20 years; and exemption from local government taxes and levies for goods and services produced or purchased in the EPZ.

Operational Incentives: EPZ investors benefited from exemption from foreign exchange controls or restrictions on operations within the EPZ; exemption from pre-shipment inspection requirements; on-site customs inspection of goods in lieu of off-port inspection; access to high-quality infrastructure; and provision of temporary visas at the point of entry for key technical, management, and training staff for up to 30 days. Investors were also allowed to sell up to 20-30% of total production into the domestic market, subject to applicable duties and taxes.

4.4 Challenges of the Fragmented Pre-2025 Framework

Despite the benefits of the EPZ programme, Tanzania's pre-2025 framework exhibited significant challenges arising from institutional fragmentation. The Export Processing Zones Authority (EPZA) was responsible for managing the SEZ programme. However, the Tanzania Investment Centre (TIC), established in 1997, operated as a one-stop-shop providing incentives for domestic and foreign investment into Tanzania. The National Development Centre (NDC) had a mandate to promote a resource-based industrialisation model encompassing agro-processing, industrial parks, and economic corridors. The Small Industries Development Organisation (SIDO) had a mandate to promote small-scale industries (UNCTAD Investment Policy Monitor, 2025).

This institutional landscape created significant areas of overlap between the packages of incentives offered by EPZA and those offered by TIC, NDC, and SIDO. These problems were clearly recognised by EPZA in its 2019-24 Strategic Plan, which noted that "in many cases, operations in SEZs are impacted by laws, regulations, guidelines and procedures other than those governing SEZs" (Charter Cities Institute, 2024). This resulted in

"notable challenges encountered during the implementation process" related to synchronising priorities among ministries, departments, and agencies, and in aligning the legal framework for development of SEZs. The plan called for "a single dedicated SEZ law that will harmonise all other laws at national and regional level" and result in "clarity, predictability and consistence of the law enforcement and will improve the attractiveness of the SEZ programs to investors" (TISEZA, 2025).

Research by the SOAS Anti-Corruption Evidence programme has further noted that the governance of Tanzania's Export Promotion Zones and Special Economic Zones was made difficult by regulatory inconsistencies, and that existing tax incentives created avenues for rent seeking (SOAS Anti-Corruption Evidence, 2025).

4.5 The 2025 Reform: Consolidation into TISEZA

On 1 July 2025, the United Republic of Tanzania adopted the Investment and Special Economic Zones Act (No. 6 of 2025), introducing significant reforms to the previous legal and institutional frameworks. (Investment and Special Economic Zones Act, 2025) The Act consolidated the functions of the Tanzania Investment Centre (TIC), previously established under the Tanzania Investment Act, 2022, and the Export Processing Zones Authority (EPZA), established under the Export Processing Zones Act, 2002 and the Special Economic Zones Act, 2006. This consolidation created the Tanzania Investment and Special Economic Zones Authority (TISEZA) as a single, unified apex body.

Key features of the reform included:

1. TISEZA was established as an autonomous entity with perpetual succession, serving as the principal agency for coordinating, promoting, facilitating and enabling investment in Tanzania, and acting as a one-stop centre for investors. The Authority was explicitly designed to be the first and primary point of contact for all investors interested in Tanzania. The consolidation eliminated previous overlaps in mandates and ensured that both general investments and those within special economic zones were handled under one unified authority.
2. The Act mandated the creation of an integrated electronic system to link all relevant authorities for licences, permits, approvals and consents. This technology-driven approach aimed to improve transparency and efficiency, ensuring timely support for manufacturers requiring precise coordination of multiple regulatory approvals.
3. The Act provided unified fiscal and non-fiscal incentives for licensed investors in special economic zones, such as exemptions from certain customs duties, value added tax (VAT), income tax and local government levies. The 2025 Act brought all such incentives under a single, harmonised regulatory framework, moving beyond the fragmented regime where the 2002 and 2006 Acts applied only to EPZ and SEZ operators.
4. TISEZA was empowered to establish special economic zones for priority sectors, including industrial parks, EPZs, free trade zones, free ports, tourism clusters, agricultural zones and science and technology parks Unlike the 2006 SEZ Act, which was limited in scope, and the 2002 and 2022 Acts, which lacked provisions for defining priority zones, the 2025 Act expanded and formalised the mandate for priority sector development.
5. The Act repealed the Tanzania Investment Act, 2022; the Export Processing Zones Act, 2002; and the Special Economic Zones Act, 2006, with transitional provisions for continuity. The earlier Acts functioned independently, leading to overlapping jurisdictions and fragmented institutional structures.

4.6 Lessons for Nigeria from Tanzania's Experience

Tanzania's journey from a fragmented regulatory framework to a consolidated, unified model offers several valuable lessons for Nigeria:

1. Institutional Consolidation Eliminates Overlapping Jurisdictions. Tanzania recognised that the coexistence of TIC, EPZA, and other agencies created "overlapping jurisdictions and fragmented institutional structures". The solution was the consolidation of these functions into a single authority,

TISEZA. This directly parallels Nigeria's situation where NEPZA, OGFZA, and NMDPRA operate with overlapping mandates over free zone and petroleum operations. Nigeria could consider consolidating NEPZA and OGFZA, or at minimum, establishing clear statutory coordination mechanisms.

2. **A Single License Regime Reduces Bureaucratic Burdens.** Under Tanzania's EPZA framework, the SEZ license was synonymous with business licences from other authorities, and no additional licences were required except for highly regulated industries. Nigeria's current requirement for OGFZA permits and NMDPRA licences creates duplicative compliance burdens for investors. A single licensing regime under a unified authority, with coordination with sector regulators for technical matters, would significantly enhance the ease of doing business.
3. **One-Stop Service Centres Enhance Investor Confidence.** Tanzania's EPZA functioned as a One-Stop Service Centre for all investment-related procedures, including company registration, visa and work permit processing, customs clearance, and tax incentive applications. Nigeria's fragmented approach undermines the "one-stop-shop" principle that is fundamental to the free zone concept. The consolidation of services under a single authority, as Ghana has done with GFZA and Tanzania has now achieved with TISEZA, would restore investor confidence.
4. **Recognising and Addressing Fragmentation is the First Step.** Tanzania explicitly acknowledged in its 2019-24 Strategic Plan that operations in SEZs were "impacted by laws, regulations, guidelines and procedures other than those governing SEZs". This honest recognition of regulatory inconsistency paved the way for comprehensive reform. Nigeria's Senate Committee has already acknowledged the problem through its June 2026 retreat; the next step is legislative action.
5. **Consolidation Must Be Comprehensive.** Tanzania's 2025 Act did not merely merge institutions; it repealed the fragmented legislation (TIC Act, EPZ Act, SEZ Act) and established a single, comprehensive legal framework. Nigeria should consider similarly repealing or substantially amending the OGFZA Act and clarifying the PIA's application to free zones, rather than merely attempting to coordinate between existing institutions.
6. **Strategic Investor Categories Enhance Targeted Development.** Tanzania introduced clear investment thresholds (USD 50,000 for local investors, USD 500,000 for foreign investors, with strategic investor status at USD 50 million and above) and negotiated incentives for strategic investments. Nigeria could develop similar differentiated incentives to attract priority investments in the petroleum sector.

5. Recommendations

5.1 Legislative Recommendations

5.1.1 Clarifying Amendment to the Petroleum Industry Act

The National Assembly should amend the Petroleum Industry Act to expressly include free zones within the NMDPRA's regulatory jurisdiction. This can be achieved by inserting a new section (e.g., Section 319) providing that the Authority's regulatory powers extend to all midstream and downstream petroleum operations conducted within any free zone, export processing zone, special economic zone, or any other designated area within the territorial boundaries of the Federal Republic of Nigeria. The amendment should further provide that nothing in the Oil and Gas Export Free Zones Act or any other enactment shall be construed to limit, exclude, or otherwise affect the Authority's jurisdiction over petroleum operations.

This legislative clarification would resolve the interpretive ambiguity that has generated the jurisdictional conflict, as the Petroleum Industry Act does not expressly mention free zones, neither including nor excluding them from NMDPRA's regulatory jurisdiction. The amendment would align with Section 309 of the PIA, which provides that where any other enactment is inconsistent with the PIA, the provisions of the PIA shall prevail.

5.1.2 Corresponding Amendment to the OGFZA Act

The OGFZA Act should be amended to expressly limit the Authority's mandate to free zone administration, including land allocation, infrastructure development, customs facilitation, and export incentives, while divesting

it of all powers related to the technical and commercial regulation of petroleum operations. This approach would allow OGFZA to concentrate on its core competence while eliminating the regulatory overlap that has generated inter-agency rivalry and legislative duplicity.

5.1.3 Express Repeal of Inconsistent Provisions

The National Assembly should amend Section 309 of the PIA to explicitly name the specific provisions of the OGFZA Act that are inconsistent and therefore void. This would remove any interpretive uncertainty about which provisions of the OGFZA Act survive the PIA. The repeal should specifically address Sections 5(2) and 8 of the OGFZA Act insofar as they confer regulatory authority over petroleum operations within free zones.

5.2 *Institutional Recommendations*

5.2.1 Consolidation into a Single Free Zone Authority

Following Tanzania's example, Nigeria should consider consolidating NEPZA and OGFZA into a single Nigeria Free Zones Authority. Tanzania's Investment and Special Economic Zones Act (No. 6 of 2025) consolidated the functions of the Tanzania Investment Centre and the Export Processing Zones Authority into the Tanzania Investment and Special Economic Zones Authority (TISEZA). The consolidation was driven by recognition that the earlier Acts functioned independently, leading to overlapping jurisdictions and fragmented institutional structures.

As the World Bank and other development institutions have observed, "The most common co-ordination problems exist in the implementation of the many elements of an SEZ programme" and require institutions with vastly different objectives and incentives to work toward a common goal. The creation of multiple, overlapping SEZ regimes, as seen in Nigeria with NEPZA and OGFZA, has led to "significant confusion and uncertainty on the part of investors".

5.2.2 Establishment of a Statutory Joint Technical Working Group

Pending the consolidation of the two authorities, the National Assembly should establish by statute a Joint Technical Working Group comprising representatives of NMDPRA, OGFZA, Nigeria Customs Service, Nigerian Navy, and the Ministry of Petroleum Resources. The Working Group should be mandated to: develop and maintain a Joint Vessel Clearance Protocol; establish a single window for import/export authorisations for free zone petroleum operations; and resolve operational disputes within a specified timeframe. This institutional mechanism would operationalise the consultation mandate under Section 48 of the PIA.

5.3 *Administrative Recommendations*

5.3.1 One-Stop Service Centre

Nigeria should adopt Tanzania's one-stop service centre model, which provides investors with a single point of contact for business setup, customs documentation, work permits, labour relations, and aftercare services. Tanzania's TISEZA operates a digitally integrated One-Stop Facilitation Centre that collocates over 15 government agencies, including the revenue authority, immigration services, and environmental regulators. This approach has been recognised as essential to protecting the "one-stop-shop" principle that guides successful free zones globally.

5.3.2 Transparent Investor Charter

The National Assembly should mandate the publication of a transparent investor charter specifying application timelines, fee structures, regulatory pathways, and dispute resolution mechanisms. As the OGFZA Managing Director has observed, "If Nigeria is to become Africa's foremost energy and industrial hub, Free Zone investors

must be allowed to enjoy the one-stop-shop principle which is being practiced in all successful Free Zones across the globe". Such charters would provide investors with the regulatory certainty needed to drive growth in the petroleum sector.

6. Conclusion

The jurisdictional conflict between the Nigerian Midstream and Downstream Petroleum Regulatory Authority (NMDPRA) and the Oil and Gas Free Zones Authority (OGFZA) represents a significant impediment to the effective regulation of petroleum operations within Nigeria's free zones. The conflict, centred on the importation of feedstocks and the exportation of petroleum products from the Dangote Industries Free Zone, has generated operational uncertainty, duplicative compliance costs, and risks to national energy security and investor confidence.

The comparative analysis of Ghana's unified free zone model and Tanzania's centralised model offers valuable lessons for Nigeria. Ghana's establishment of a dedicated Oil and Gas Department within the Ghana Free Zones Authority, which collaborates with sector regulators including the Petroleum Commission and National Petroleum Authority, demonstrates that institutional integration and formalised coordination can eliminate jurisdictional ambiguity. Tanzania's consolidation of its investment promotion and free zone functions into the Tanzania Investment and Special Economic Zones Authority (TISEZA) demonstrates the benefits of a single, unified authority in eliminating "overlapping jurisdictions and fragmented institutional structures".

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A Comprehensive View of Antitrust Law in the United States: “Sports, Big Tech and Franchising Contexts” Part I: A Primer on Antitrust

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Abstract

This article consists of two parts. Part I of this larger study is a comprehensive look at antitrust law in the United States, with a focus on the most important antitrust statutes, a detailed analysis of common antitrust violations, including price fixing, illegal market allocation, bid rigging, group boycotts, and monopolization. The article discusses antitrust enforcement under the Bush, Obama, Biden, and Trump Administrations as a prelude to answering a question: “Is antitrust law still relevant today?”

Keywords: Antitrust, Price Fixing, Market Allocation, Bid Rigging, Monopolization, Group Boycotts, Tying Arrangements

1. Introduction

Antitrust law can be described as the body of rules designed to protect and enhance competition and prevent businesses from gaining or abusing market power in ways that harm consumers, employees, or the competitive process itself (see Hunter, Shannon, & Amoroso, 2023). At its core, antitrust law targets practices such as price-fixing, market allocation, monopolization, and anticompetitive mergers. Antitrust analysis heavily relies on the definition of the market, market power, barriers to entry, and effects on the market from other anticompetitive conduct. Courts often apply the rule-of-reason, weighing procompetitive benefits (Newman, 2019) against anticompetitive harms of an alleged anticompetitive practice or restraint.

The overarching goal of antitrust law lies in preserving competitive markets, ultimately resulting in lower prices for consumers, providing better quality of goods and services, and more consumer choices. Hovenkamp (2026) writes that “The Supreme Court has stated the goals of the antitrust laws consistently since the Sherman Act was passed. Antitrust should bring us lower prices that are reasonably close to the competitive level, competitive rates of market output, and unrestrained innovation.”

Modern antitrust doctrine often highlights these goals through the “consumer welfare standard,” which evaluates whether conduct harms consumers or the competitive process. Ashton (2022) notes “The consumer welfare

standard has been the backbone of antitrust policy for over 40 years and provides a consistent basis for the enforcement of antitrust law.” However, Greenfield, Lange and Callan (2020) argue:

“Others argue that antitrust has a broader role to play in U.S. society; rather than focusing, as it now does, on anticompetitive conduct, these populists argue that antitrust should address a broad range of social ills, including wealth and income inequality, the influence of money in American politics, the erosion of privacy, and systemic threats posed by firms that are “too big to fail.””

That policy debate rages today.

Steinbaum and Stucke (2020) offer a “cautionary tale” relating to antitrust enforcement today, as they write:

“America’s failing antitrust system is, in large part, to blame for today’s market power problem. Lax antitrust law and enforcement have allowed troubling trends like corporate consolidation to remain unchallenged, further embedding our skewed economy. In highly concentrated markets, individuals have limited choice and little power to pick their price, quality, or provider for the goods and services they need; workers are met with powerful employers and have little agency to shop around or bargain for competitive wages and benefit; and suppliers can’t reach the market without paying powerful intermediaries or succumbing to acquisition.”

2. U.S. Antitrust Statutory Law

There are five federal statutes relevant in determining if there has been an antitrust violation. These include:

2.1. *The Sherman Act (1896)*

The Sherman Act of 1896 prohibits “every contract, combination, and conspiracy in restraint of trade” (Section 1); Section 2 bans “monopolization, attempts to monopolize, or conspiracies to monopolize” (see Stigler, 1985). Practices such as price-fixing, bid-rigging, and market division are *per se* illegal under the Sherman Act, meaning that such practices are illegal under all circumstances once the action or conduct is proven to have taken place. Other alleged restraints will ordinarily be judged by the rule-of-reason.

2.1.1. Penalties Under the Sherman Act

The Sherman Act imposes both criminal (Bial & Evans, 2024) and civil penalties. Violations—especially horizontal price-fixing between competitors, bid-rigging, and market allocation—can lead to felony charges, massive fines, and the award of treble damages (see Melamed, 2009). However, as Snyder and Sokol (2025) argue “Evidence in recent years points to a fraying of criminal antitrust enforcement. Aggregate criminal penalties have fallen dramatically, and a series of recent acquittals has reduced Department of Justice (DOJ) win rates in (Sherman Antitrust Act) Section 1 cases from previously stratospheric levels.”

Criminal penalties are enforced by the Department of Justice and apply to willful violations of Section 1 (illegal agreements) and Section 2 (monopolization) in such cases as price fixing or bid-rigging (Federal Trade Commission, 2026a).

Fines for violations of the Sherman Act may be imposed on corporations (up to \$100,000,000 per offense); on individuals (up to \$1,000,000); and may result in imprisonment under certain circumstances for a term up to 10 years in a federal prison.

Civil enforcement (by the Department of Justice or the Federal Trade Commission) can result in civil fines and penalties for illegal restraints or for monopolization; disgorgement of profits gained through anticompetitive conduct (Buggs, 2023); or the issuance of an injunction or other “behavioral remedies” (discussed below), designed to stop or prevent anticompetitive practices.

Both civil and criminal penalties may be imposed together, at the court's discretion.

Concerning the issue of the issuance of an injunction, Koob and Kazanoff (2004) write:

"A private plaintiff can also seek an injunction "against threatened loss or damage by a violation of the anti-trust laws" (section 16, Clayton Act). Unlike section 4, actual injury is not required in a section 16 proceeding; the threat of injury is sufficient. To obtain a preliminary injunction, a plaintiff typically must show all of the following: a likelihood of success on the merits; a threat of irreparable harm with no adequate remedy at law; [and] the granting of the injunction is in the public interest. Courts consider the last three factors in determining whether to issue a permanent injunction."

A unique feature of antitrust enforcement lies in the ability of an injured party to file a private lawsuit. Private plaintiffs—competitors, consumers, or other "injured parties"—can bring suit under the Sherman Act and recover treble damages (three times actual damages) (Wham, 1954; Hayes, 2026). Courts are also empowered to award attorney's fees to prevailing plaintiffs. However, as Kelly (1972, p. 1656) notes: "Although the "reasonable attorney's fee" provision plays a key role in this scheme, Congress has not established criteria for determining a reasonable fee. Trial courts, left to their own discretion, have applied many different theories of "reasonableness" when making fee determinations. Indeed, it seems there are almost as many notions of what is reasonable as there are judges."

2.2. *The Clayton Act (1914)*

Section 7 of the Clayton Act (1914) prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly" (Lande, Newman, & Slaughter, 2025). The Clayton Act targets specific practices likely to reduce competition, including certain anticompetitive mergers, exclusive dealing contracts, illegal tying arrangements, and predatory pricing. It also bars interlocking directorates between competing firms with sales of each firm exceeding \$1,000,000 (see Lemley & Van Loo, 2025). Unlike the Sherman Act, however, the Clayton Act explicitly excludes labor unions from antitrust scrutiny, protecting workers' rights to organize, termed the "statutory labor exemption."

Justice Harlan Stone in *Apex Hosiery v. Leader* (1940) commented on the importance of Section 6:

"Since the enactment of the declaration in Section 6 of the Clayton Act that the "labor of a human being is not a commodity or article of commerce . . . nor shall such [labor] organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws," it would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act."

2.3. *The Federal Trade Commission Act (1914)*

The Federal Trade Commission Act (1914) bans "unfair methods of competition" (Rothman, 2018) and "unfair or deceptive acts or practices" (see Werden, 2024). Sherman Act violations also violate the Federal Trade Commission Act. The Federal Trade Commission, more commonly referred to as the FTC, undertakes actions to "stop and prevent unfair business practices that are likely to reduce competition and lead to higher prices, reduced quality or levels of service, or less innovation" (Federal Trade Commission, 2026b).

According to the website of Federal Trade Commission (2026b), "unfair methods of competition" may include the following:

- "Price fixing — Agreements among competitors to set prices rather than compete;
- Market allocation — Competitors dividing customers or territories to avoid competing;
- Bid rigging — Collusion to predetermine winners of competitive bidding processes;
- Group boycotts — Competitors collectively refusing to deal with a supplier or customer to suppress competition;

- Exclusionary exclusive-dealing contracts — Contracts that lock up key suppliers or customers to prevent rivals from competing;
- Monopolization — A dominant firm using unreasonable tactics to maintain or acquire monopoly power (e.g., blocking entry, coercive conduct);
- Unfair rebate schemes — Practices that distort pricing and exclude rivals, such as the insulin rebate practices challenged in FTC actions (Federal Trade Commission, 2022) ; and
- Restricting the right to repair — Using contractual or technological barriers to prevent independent repair markets” (see *Federal Trade Commission v. Deere & Company*, 2026).

2.4. The Robinson-Patman Act (1936)

The Robinson-Patman Act (1936) prohibits certain forms of price discrimination that harm competition and is designed to protect smaller businesses from the illegal actions of large corporations (see Holyoak & Mufarrige, 2026).

Examples include:

- Discriminatory wholesale pricing: Charging small retailers *drastically higher* prices for the same goods than large chains, without a legitimate cost justification. In *Federal Trade Commission v. Southern Glazer’s Wine and Spirits, LLC*. (2024), the FTC alleged that the distributor sold wine and spirits to small “mom-and-pop” stores at much higher prices than Costco, Kroger, and Total Wine for identical bottles, creating insurmountable competitive disadvantages (see also Kearns, 2025).
- Unequal access to discounts or rebates: Offering rebates, promotional allowances, or “back-end discounts” only to favored retailers. In *Glazer*, the FTC also argued that the distributor had allegedly deprived small retailers of rebates routinely offered to large chains in violation of Section 2(a) of the Act.
- Preferential promotional payments (Section 2(d)): Paying one retailer for advertising, shelf placement, marketing services, or promotional payments without offering the same support on *proportionally equal terms* to competing retailers (see *Federal Trade Commission v. PepsiCo, Inc.*, 2025).
- Providing special services or facilities to favored retailers (Section 2(e)): Giving one retailer free display racks, stocking services, marketing materials, or other sales-related support not offered equally to competitors (see Kearns, 2025).
- Tiered wholesale pricing without cost justification: Using a tiered price list that gives large retailers better prices *without* real cost-based reasons such as volume efficiencies (see *Federal Trade Commission v. Morton Salt Co.*, 1948).
- Favoring large retailers with exclusive rebates or promotional support: Manufacturers offering special pricing or rebates to Costco, Sam’s Club, or other “big-box chains” while charging higher prices to wholesalers serving convenience stores and small retailers (Brenner, 2026).

2.5. The Hart-Scott-Rodino Act (1976)

The Hart-Scott-Rodino Act (1976), as amended in 2001, requires pre-merger notification (Greco, 2016) for transactions above certain thresholds, so that the Department of Justice and the Federal Trade Commission can review prospective mergers to ensure they do not “substantially lessen competition” in the U.S. market.

Hart-Scott-Rodino gives antitrust agencies (the FTC and the Department of Justice) time to review transactions before they occur, allowing these agencies to assess potential anticompetitive effects, request additional information, or challenge or negotiate remedies, if necessary.

Pre-merger notification is required when a transaction meets specific “size-of-transaction” (currently \$119.5 million, rising to \$126.4 million in August of 2026) and “size-of-person thresholds” (Lubyansky, 2026). Parties

must file a *Hart-Scott-Rodino Form* with the FTC and DOJ, pay a filing fee, and wait for a statutory review period (usually 30 days) before closing on any merger.

Parties may not “close the deal” until both parties to the merger have filed the required documentation and the waiting period has expired or been terminated by the government.

3. Types of Antitrust Violations

Antitrust violations may be seen as either *horizontal*, that is, between competitors in the market or those involving any concerted action between firms operating at the same market level (e.g., retailer-to-retailer, manufacturer-to-manufacturer) (Legal Guide Team, 2026); or *vertical*, that is within a “marketing chain” or business organization. Vertical restraints are agreements between firms at different levels of the supply chain—such as between manufacturers and distributors, or between wholesalers and retailers (see generally Posner, 2005; Joseph, 2011). In the area of franchising, alleged violations may occur in the relationship between the franchisor and the franchisee. In the arena of sports, vertical restraints may occur within a league structure, between members of an athletic conference, or within the organizational structure of the NCAA (Hunter, Delle Donne, & Shannon, 2021; Karlan, 2025).

Common types of horizontal restraints (described in detail below) include:

- Price Fixing : Where competitors agree on prices or discounts;
- Bid Rigging: Where competitors coordinate bids to predetermine a “winning” bid;
- Market Allocation: Where firms divide territories, customers, or product lines;
- Output Restrictions: Where competitors agree to limit production in order to raise prices; or
- Group Boycotts: Where competitors collectively refuse to deal with a supplier or customer or other parties.

Common vertical restraints include resale price maintenance (minimum or maximum resale prices) (Mathewson & Winter, 1998); certain exclusive dealing contracts where a distributor agrees to carry only one supplier’s products (Gilbert, 2000); tying arrangements where a seller requires that in order to purchase product “A,” the buyer must also buy product “B”; territorial or customer restrictions imposed by manufacturers or franchisors; and non-price restrictions (e.g., service requirements, display standards).

4. Rules Used to Judge Alleged Antitrust Violations: An Overview

Courts employ two rules in order to evaluate possible antitrust violations: the *per se* rule and the “*rule-of-reason*” (see Bork, 1965). The *per se* rule involves conduct that is *automatically illegal* once the conduct or action is proven to have occurred. Horizontal agreements among competitors are far more likely to be judged as *per se* illegal. Under a *per se* analysis, courts do not examine market power, actual harm, any business justifications, or the procompetitive impact of an alleged antitrust violation. The law assumes the conduct is so predictably harmful such that further analysis is unnecessary. Classic *per se* violations include horizontal price fixing between competitors, bid rigging, market allocation, and some types of tying arrangements (although alleged illegal tying arrangements are generally subject to the *rule-of-reason*).

Under a *rule-of-reason* analysis, court will inquire whether the conduct *actually harms* competition. Vertical arrangements will usually be judged under a *rule-of-reason* analysis (Joseph, 2011). Courts will weigh the purpose of the alleged restraint, market power, market structure, any procompetitive effects, consumer impact, any business justifications, and the existence of any less restrictive alternatives. Today, the great majority of antitrust cases—especially those involving technology, vertical restraints, and tying—will utilize the *rule-of-reason* analysis. The application of the *rule-of-reason* is essentially a balancing test of harm vs. benefit of any alleged restraint.

5. Common Antitrust Violations: A Detailed Analysis

5.1. Price Fixing

In its most basic form, price fixing occurs when competitors agree on a price instead of competing in the market on the basis of price in order to “maintain or elevate price levels” (Nicole, 2024). What actions can amount to price fixing between competitors, termed as “horizontal price fixing”?

Price fixing results from any agreement among competitors—explicit, implicit, written, verbal, or inferred—to raise, lower, stabilize, peg, or otherwise control or set prices rather than letting market forces determine prices. The key element of price fixing lies in coordination among competitors in the market, not the specific price level.

Actions that amount to illegal price fixing involve:

- Setting uniform prices, where competitors agree on a fixed price, minimum price, maximum price, or price range for a product or service;
- Coordinating price changes, where competitors agree to raise prices together, end a “price war,” or “stabilize” prices;
- Using common pricing formulas, where competitors agree on algorithms (*In re Realpage, Inc., Rental Software Antitrust Litigation*, 2023), markups, or pricing methods instead of specific numbers (Brubaker, 2025);
- Standardizing terms of sale, where competitors agree on credit terms, discounts, rebates, trade-in allowances, or surcharges that affect price;
- Limiting or coordinating discounts, where competitors agree not to undercut each other or to maintain a minimum advertised price;
- Fixing purchase prices, where competing buyers agree on the maximum price they will pay for inputs (e.g., competing entities agree not to pay above a certain amount for supplies);
- Reducing output to raise prices, where competitors coordinate to limit production or supply so that prices will rise;
- Sharing markets or customers, where competitors divide territories or customers to avoid competing on price, a practice which indirectly fixes prices; and
- Cooperative price advertising, where competitors agree to advertise prices uniformly or restrict price advertising (see Bhattacharyya, 2025).

5.1.1. Predatory Pricing

Predatory pricing is an especially pernicious form of price fixing where a seller sets a price *below cost* to drive rivals out of the market, then raises prices with impunity. Kirkwood (2022) comments:

“Predatory pricing is an antitrust paradox. In concept, the conduct is plainly anticompetitive. A dominant firm cuts its price below its incremental costs, losing money on every additional sale, solely to injure a significant rival. The rival, unable to withstand the assault, exits the market or abandons its expansion plans, enabling the predator to raise its price to supracompetitive levels. This two-step maneuver – a price reduction followed by a larger or longer lasting price increase – enhances the dominant firm’s profits and reduces the welfare of consumers.”

Interestingly, Sharpes (2012) adds:

“Predatory pricing occupies a strange position in the antitrust laws. Normally, low prices are one of the major goals of antitrust law because they reflect competition and are generally beneficial to consumers. However, in some situations, the antitrust laws condemn prices that are too low as predatory: a company may be able to set prices arbitrarily low to gain monopoly power by excluding rivals or forcing them to acquiesce to its price leadership, and the company may then charge monopoly prices to the detriment of consumers.”

5.1.2. Vertical Price Fixing

Vertical price fixing, accomplished within a “marketing chain,” involve manufacturers, wholesalers, retails, and customers (Dobson & Waterson, 2007). In the area of franchising, vertical price fixing may occur between the

franchisor and the franchisee (Nadler, 2026). In the area of sports, vertical price fixing can occur within a league or conference structure or on the basis of rules established by the NCAA (*Smart et al. v. National Collegiate Athletic Association*, 2025). A typical example of vertical price fixing occurs when a manufacturer forces a retailer to sell at a set price or prohibits discounts through a practice termed “resale price maintenance,” or where a conference policy requires all teams in the conference to charge the same price for game tickets.

All actions within a marketing chain relating to prices do not automatically amount to illegal price fixing. Situations that do not amount to price fixing include where prices “match” because of normal market conditions or where competitors independently choose similar pricing without any agreement to do so.

5.1.3. Active Exhortation

In the area of franchising, the existence of “active exhortation,” resulting from extreme pressure tactics on the part of the franchisor, may warrant consideration under rules relating to price fixing, especially if raised by franchisees and framed as de facto resale price maintenance or coercive price coordination. Franchisors may use active exhortation in order to maintain brand consistency, improve franchisee performance, increase franchisee engagement and trust, drive systemwide growth, and ensure compliance with franchisor standards (Collier, 2023). Improper “active exhortation” in a franchise relationship generally occurs when a franchisor pushes, pressures, manipulates, or directs a franchisee to undertake actions that “cross the line” into coercive, intrusive, or de facto control over the franchisee’s independently owned business (see Cooley, 2025), effectively rendering the franchisee’s discretion relating to pricing illusory. At the same time, the franchisor may simultaneously warn the franchisee that “underpricing” will be treated as a breach of system standards. Evidence will often take the form of repeated phone calls, emails, required webinars, franchisor-sponsored advertising campaigns featuring franchise-wide “suggested” retail pricing, imposition of sanctions or contractual penalties, or mandatory attendance at promotional meetings organized by the franchisor where pricing is a main topic—rather than to quality or legitimate brand-standards violations. If these types of communications or actions are paired with threats of reduced territorial protection, denial of marketing funds, or heightened compliance audits for franchisees who discount prices or fail to follow pricing suggestions, a court could view this as a pattern of coercive price control rather “mere suggestion.”

Active exhortation is *not* inherently improper—franchisors can encourage compliance with brand standards, including cross-brand uniform pricing. Nadler (2026) notes that “Competition law permits a franchisor to fix prices for short-term promotions (generally two-six weeks) coordinated across the franchise network. If a franchisor wants to fix prices for short-term promotions, this right must be included in the franchise agreement.” It becomes improper when the franchisor’s conduct effectively controls the franchisee’s operations and undermines the franchisee’s independence.

In order to reduce antitrust risk, many franchisors qualify national price advertising with such phrases as “**At participating locations**” and maintain written policies affirming the franchisee’s ultimate right to set retail prices. However, these steps do not immunize a franchisor if its actual conduct contradicts the stated policy, although they are frequently cited as evidence of price autonomy.

In litigation, allegations of improper active exhortation often function as “plus factors” supporting an inference of coordinated pricing under the theory of conscious parallelism described below. Franchisee testimony about repeated pressure campaigns, internal email chains emphasizing “system-wide” price adherence, and documentation linking franchisee discipline to price deviations can all bolster a claim that what appears to be independent pricing is actually the product of coercive franchisor direction.

5.1.4. Conscious Parallelism

When products are similar in quality, price may become one of the most powerful differentiators. If other factors are not present, price matters more when quality is perceived to be equal. If two products are perceived by purchasers feel as interchangeable or where products are considered as “ordinary” or common, buyers will

naturally gravitate toward the cheaper option because the perceived risk is low and price often becomes the primary decision factor for consumers.

Vaska (1986, p. 508) noted that direct evidence of price fixing is often difficult to obtain, and “courts must often rely on indirect or circumstantial evidence of conspiracies to fix prices.” Conscious parallelism, a variant of price fixing, describes a situation where competitors adopt parallel or similar pricing, output levels, or other strategic decisions *with awareness of their rival’s conduct but without proof of an explicit agreement*. Courts recognize that such parallel behavior may be rational in concentrated markets, yet they remain alert to the possibility that “parallelism” masks tacit collusion.

Competitors often adopt parallel pricing in order to avoid price wars, or in order to match the pricing of a dominant competitor rather than to engage in competition based on pricing (Boyd, 2021), or in order to maintain a higher price than the market would otherwise dictate.

Similar or parallel pricing may become the object of judicial scrutiny when accompanied by certain “plus factors” (Leslie, 2021) such as sudden uniform pricing undertaken after a history of price independence. Commonly cited “plus factors” include:

- Sudden uniform price increases following a history of divergent pricing, especially where firms had previously undercut one another;
- Evidence that competitors exchanged sensitive price information, participated in closed-door meetings, or used trade associations as venues to coordinate future pricing strategies;
- Adoption of pricing that appears to be against individual self-interest absent coordination, such as matching a supracompetitive price that yields short-term customer losses; and
- Unusual market stability – long periods of identical pricing across competitors despite cost changes, “demand shocks” (sudden, unexpected events that causes a significant and often temporary increase or decrease in the demand for goods or services in an economy), or innovation that would spur price dispersion.

In order to make out a *prima facie* of conscious parallelism, courts will inquire about three factors: *common knowledge* of pricing among competitors; *motivation* to keep prices higher than independent pricing decisions would ordinarily dictate in the market; and *general uniformity* of prices within a narrow range, although there is no judicially recognized “range of uniform pricing” for conscious parallelism (*Williamson Oil Company, Inc., et al. v. Philip Morris USA, R.J. Reynolds, Tobacco Co., et al.*, 2003). When these factors are accompanied by credible “plus-factors,” parallelism can support an inference of a concerted price-fixing agreement.

In franchising, concerns about conscious parallelism often arise when multiple franchisees in a region adopt virtually identical prices shortly after attending franchisor-sponsored meetings or receiving coordinated “suggested pricing communications, even where the franchisor disclaims control over retail prices. In sports, parallel increases in ticket prices, streaming fees, or sponsorship rates across teams or conferences – especially where those entities share common revenue consultants or closed negotiating groups – may invite scrutiny under a conscious parallelism framework, although certain statutory exemptions can alter the analysis.

In both conscious parallelism and active exhortation cases, matching a dominant rival’s price or avoiding destructive price wars in an economic sense can be rational, particularly in markets with homogeneous products and high fixed costs. The challenge for antitrust enforcement lies in distinguishing lawful, independent adaptation to market realities from unlawful tacit coordination that artificially maintains supracompetitive prices and suppresses competition.

5.2. Illegal Market Allocation

Illegal market allocation refers to agreements among competing businesses to divide markets instead of competing in them (see Bona, 2024ba). Under Section 1 of the Sherman Act, these agreements are treated as *per se* illegal, meaning the government does not need to prove actual harm – the agreement itself is unlawful (Federal Trade

Commission, 2026c). Illegal market allocation can eliminate regional competition, prevent customer choice, remove competitive cross-product rivalry, suppress worker mobility, and corrupt the competitive bidding process.

Market allocation may take the form of:

- Territorial division or geographical boundaries — Competitors agree not to sell or solicit customers in each other's geographic areas, eliminating geographic competition;
- Customer allocation — Firms divide customers or customer types (e.g., one party will serve commercial clients, the other will serve residential clients), thus preventing customers from choosing among competitors;
- Product-line allocation — Competitors agree to limit themselves to certain product categories or agree not to compete across product lines (see Lopienski, 2026);
- Labor-market allocation — Employers agree not to hire or solicit each other's employees ("no-poaching" agreements) (Altman, Rumbaugh, Voter, & Warner, 2018); and
- Bid-rigging allocations — Competitors decide in advance who will "win" certain contracts or bids, often rotating winners, termed as allocation in procurement.

Common features of illegal market allocation may include secret agreements, informal understandings, or more formalized mutual promises not to encroach on each other's territory/customers.

Illegal market allocation is subject to criminal prosecution by the Department of Justice and may result in up to 10 years imprisonment and fines up to \$1 million for individuals and \$100 million for corporations, or twice the gain/loss from the offense. The action may result in civil enforcement by the Federal Trade Commission where treble damages are available to victims under the Clayton Act (Hayes, 2026).

Several recent cases merit attention. In *Rx Holding Co. v. CVS Pharmacy, Inc.* (2026), Rx filed a class action against CVS Pharmacy alleging that CVS had conspired with affiliated and third-party entities to restrain competition in the retail pharmacy market in violation of Section 1 of the Sherman Act. The complaint alleged that CVS leveraged its vertically integrated control over pharmacy benefit management, reimbursement, auditing, and drug distribution through CVS Caremark in coordination with McKesson and its affiliates (CVS's largest supplier of pharmaceuticals, amounting to \$50 billion per year) in order to target and eliminate independent pharmacy competitors by imposing abusive audits, cutting off reimbursement flows, and restricting access to drug supply. Plaintiffs argued that this conduct foreclosed competition, preserved CVS's dominant market position, and contributed to the collapse of independent pharmacies, reducing patient access and choice while maintaining "supracompetitive conditions" in the pharmacy market (see Parduhn, 2026; Federal Trade Commission, 2026d).

In a second case, *Altenar Techs. Ltd. v. Sportradar Grp.* (2026), Altenar Technologies filed suit against Sportradar alleging attempted monopolization and denial of essential facilities in markets for official sports data and "turnkey" sports betting technology platforms in violation of the Sherman Act (McCann, 2026). The complaint alleges that Sportradar had leveraged exclusive agreements with major sports leagues to control access to critical data and refused to supply that data to Altenar in the United States, while simultaneously entering the "downstream market" with its own competing turnkey platform in order to suppress competition, raising competitor's costs, all leading to reduced innovation, higher prices, and limited choice for sportsbooks and consumers in the U.S. sports betting market.

Franchisor-franchisee territorial agreements are generally considered as vertical restraints and will be judged under a rule-of-reason analysis. Franchisors *can* legally impose vertical territorial restrictions, including granting exclusive territories or a protected geographic area to a franchisee (Peer, 2026), imposing location density controls on the number of franchises in an area, deciding how many units may operate in a region, and by imposing "operational restrictions" relating to hours of operations, product lines, and other "marketing rules" pursuant to its "Quality Control" obligations (see Siebert, 2021; Choudhary & Batra, 2025). However, agreements between franchisors to divide territories, circumstances where individual franchisees divide territories, or where the franchisor who operates "company-owned" stores within the same territory imposes territorial restrictions on

franchisees may be considered as horizontal restraints between competitors and in most circumstances would be judged to be per se illegal.

In *Continental T.V., Inc. v. GTE Sylvania* (1977), involving a manufacturer who required franchisees to purchase its products only from approved locations, the United States Supreme Court held that location restrictions were not automatically illegal, but would be judged under the rule of reason. However, restrictions cannot result from entering into agreements with *competing franchisors* to divide markets which would then amount an illegal horizontal market allocation under Section 1 of the Sherman Act (see Anunobi, 2026). In *United States v. Topco Associates* (1972), the U.S. Supreme Court ruled that agreements in which cooperative associations (franchisee associations) who divided territories among its members were per se illegal because these actions were essentially horizontal in nature occurring between actual competitors in the market.

In *Palmer v. BRG of Georgia* (1990), in a case where two competing bar-review providers had agreed to divide the market, the United States Supreme Court held that this arrangement was per se illegal market allocation.

5.3. Illegal Bid Rigging

Illegal bid rigging is one of the most aggressively prosecuted forms of antitrust crime (Squire Patton Boggs, 2026). The Procurement Collusion Strike Force (PCSF) of the U.S. Department of Justice (2026) reports that “Since its founding, the PCSF has trained more than 46,000 agents and procurement officials; opened more than 195 investigations; obtained more than 75 guilty pleas and trial convictions; and secured more than \$70 million in fines and restitution.”

Under Section 1 of the Sherman Act, bid-rigging agreements among competitors are treated as per se illegal, meaning prosecutors are not required to prove harm to the market—only that the agreement existed. Bid rigging eliminates competition in procurement markets, inflates prices, and harms taxpayers and private buyers.

Bid rigging occurs when competitors collude to manipulate or predetermine the outcome of a bidding process with respect to government contracts (Talbot & Whiddon, 2025), procurement auctions, or a private tender which is a procurement process initiated by a private company or organization to select a service provider or supplier, typically involving a limited, invited group rather than open public competition (Nichols, 2023). As stated on the website Complete Tenders (2026), while “There is no legal requirement to publish private sector tenders on a central noticeboard or make the opportunity public,” bid rigging may still be illegal under certain circumstances.

Types of bid rigging include:

- Complementary (cover) bidding where losing bidders submit intentionally high or noncompetitive bids to “create the appearance of competition,” while ensuring that a chosen firm wins;
- Bid rotation where conspirators take turns being the winning bidder. Over time, each participant will win a share of the contracts subject to the bidding process;
- Bid suppression where one or more competitors agree not to bid at all, or to withdraw a bid, so another conspirator wins; or
- Subcontracting arrangements where a competitor agrees not to bid in exchange for being awarded a subcontract from the winning conspirator.

Bid rigging is a felony under antitrust law. Individuals face up to 10 years in prison and fines up to \$1 million upon conviction. A corporation that engages in bid rigging faces fines up to \$100 million, or twice the gain/loss from the conspiracy, and/or civil liability in the form of treble damages under the Clayton Act. Companies who engage in bid rigging on federal contracts may be barred from future government contracts (see Congressional Research Service, 2015).

An example of the seriousness with which the Department of Justice treats bid rigging cases, the Department brought suit against two individuals regarding fuel supply contracts (Quinn, 2025). On June 6, 2025, the Office of the Inspector General of the U.S. Department of Justice (2025) announced that the former owner of fuel truck supply companies had been sentenced to twelve months in prison and a \$20,000 fine for his role in various conspiracies to monopolize, rig bids, and allocate territories for fuel truck contracts over an eight year period. The

various companies had assisted the U.S. Forest Service's efforts to battle wildfires in Idaho and the mountain west.

Stated Assistant Attorney General Abigail Slater:

"This sentence sends a message that bid rigging—particularly bid rigging affecting federal agencies—will not be tolerated.... The Defendant's conspiracies struck at the heart of the competitive process. They damaged essential taxpayer-funded services critical to protecting the American public and its property from wildfires while profiting at the expense of American taxpayers. The Antitrust Division and its law enforcement partners will continue to ensure that individuals who cheat and deprive their communities of these essential services are incarcerated" (U.S. Department of Justice, 2025).

5.4. *Illegal Monopolization*

Not all monopolization is illegal. A natural monopoly may exist when one firm is the most efficient provider of goods or services in the market because the industry's cost structure makes competition impractical (see Carbonell-Nicolau, 2024; Posner, 2026). A natural monopoly may arise from "historic accident" or from the existence of superior products, innovation, effective advertising, reputation, or better management (see *National Reporting Company v. Alderson Reporting Company*, 1985). Traditional examples of natural monopolies include utilities and railroads.

Illegal monopolization under U.S. antitrust law refers to a single firm acquiring or maintaining monopoly power through exclusionary or anticompetitive conduct, rather than through any legitimate actions (U.S. Department of Justice (Office of Public Affairs), 2008).

Under Section 2 of the Sherman Act, monopolization, attempted monopolization, and conspiracy to monopolize are all prohibited.

In order to prove illegal monopolization, courts require two essential components:

- Monopoly power

A firm must possess "significant and durable" market power which involves the ability to raise prices or exclude competitors from the market over time. Courts often infer monopoly power from $\geq 70\%$ market share (see Bona, 2024a) (or in some cases, such as *United States v. Von's Grocery Co.* (1966), a much lower market share amounting to 9.7% of the Los Angeles grocery market), plus the existence of "substantial entry barriers" which may include:

- Structural barriers involving high startup costs, limited access to distribution channels, or geographic limitations;
- Strategic barriers based on established firms' brand loyalty, customer relationships, or networking effects that deter new entrants into the market;
- Legal/regulatory barriers: The existence of patents, trademarks, or licensing requirements that create *patent thickets*, which are defined as "a dense, overlapping set of patents in a specific technology area, creating a complex web of intellectual property rights that can make it difficult or costly for innovators to develop or commercialize new products without infringing on multiple patents or restrict market access" (US Law Explained, 2026). The website Patent Brief (2016) notes that "The term was coined by economist Carl Shapiro in 2001 to describe situations in which any company trying to commercialize a product must first license rights from dozens or hundreds of patent holders whose patents all read on overlapping aspects of the same technology";
- Economies of scale: Large firms can produce goods at lower costs, making it hard for smaller entrants to compete on price (Kenton, 2026); and
- Capital requirements involving significant "upfront" investment needed to operate in the market.

The FTC notes that monopoly power does not require a literal monopoly; it means “long-term ability to control price or exclude rivals” (see Bona, 2024a).

- Exclusionary conduct

The firm must have obtained or maintained its dominance in the market through improper means, and not through legitimate competition or “historical accident.” As Grimm (2008) notes: “Although many different kinds of conduct have been found to violate section 2, “[d]efining the contours of this element . . . has been one of the most vexing questions in antitrust law... The basic challenge lies in distinguishing between aggressive competition and anticompetitive, exclusionary conduct.”

As the U.S. Court of Appeals for the District of Columbia Circuit explained in *United States v. Microsoft Corp.* (2001):

“Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it.”

Examples of potential improper conduct include:

- Exclusive dealing that forecloses rivals from key suppliers or customers;
- Tying arrangements (forcing purchase of a second product); (described in detail in Part II of this study)
- Predatory pricing (pricing below cost to drive rivals out);
- Refusal to deal when used strategically to suppress competition; and
- Other conduct that excludes rivals through means *other than* “superior product, business acumen, or historic accident.”

Section 2 of the Sherman Act also prohibits attempts to monopolize as a distinct legal theory of liability (see *Spectrum Sports, Inc. v. McQuillen*, 1993). There are three elements of proof under Section 2 of the Sherman Act:

- “Dangerous probability of achieving monopoly power” (see *Savory Pie Guy, LLC v. Comtec Industries, Ltd.*, 2016);
- “Specific intent” to monopolize; and
- The existence of “overt exclusionary acts.”

Hammer (2026), quoting the Department of Justice, noted: “Antitrust remedies under Section 2 are generally designed to “terminate the defendant's unlawful conduct, prevent its recurrence, and re-establish the opportunity for competition in the affected market.” The Department of Justice and the Federal Trade Commission can bring civil or criminal actions, although criminal cases are rarely filed unless fraud can be proved. Other remedies include the issuance of an injunction, structural remedies (such as breaking up an entity or divestiture of a business asset or division) (Majumdar, 2021), behavioral restrictions, and damages (including treble damages in private suits).

The landmark case against AT&T (*United States v. American Telephone & Telegraph Co.*, 1984) stands out as the primary example of the imposition of structural remedies, resulting in the company’s divestiture of its local telephone companies, creating seven independent Regional Bell Operating Companies (RBOCs) — the entities popularly called the *Baby Bells*—which included:

- Ameritech
- Bell Atlantic
- BellSouth
- NYNEX
- Pacific Telesis
- Southwestern Bell and

- U.S. West (see Pollack, 1984; Robinson, 1986; Swanson, 2014).

The Law Digest Hub (2024) notes:

“Behavioral remedies in antitrust refer to regulatory measures designed to modify the conduct of firms to promote competition and prevent anti-competitive behavior. These remedies aim to address market dominance and ensure fair practices without necessitating structural changes like divestitures.”

“Commonly implemented behavioral remedies involve commitments that firms must adhere to, such as ensuring non-discriminatory access to essential facilities, establishing transparency in pricing, or altering restrictive contractual terms. They are often deemed less disruptive than structural remedies, allowing businesses to maintain their overall structure while addressing specific conduct issues.”

5.5. Group Boycotts or Concerted Refusals to Deal

An individual business or entity generally has discretion to choose with whom it wishes to deal. However, this individual decision-making can be transformed into an antitrust violation when it amounts to a group boycott or a “concerted refusal to deal” (Glazer, 2002). Hsieh (2024) states: “This concept, while rooted in the notion of business freedom, can pose antitrust concerns when a refusal harms competition or facilitates monopolization.” A group boycott or a concerted refusal to deal is an agreement among two or more independent businesses to collectively refuse to do business with a targeted firm, customer, supplier, individual, or other market participant. The key element is *coordination or collusion*, not unilateral choice or action, which would not ordinarily arise in a competitive market based on individual decision-making.

Under Section 1 of the Sherman Act, a group boycott can be judged to be per se illegal when competitors at the same level (horizontal agreement) use collective actions or exert untoward pressure on competitors to arrive at a decision. Courts presume that a group boycott is harmful without requiring detailed market analysis. However, a rule-of-reason analysis may be conducted when the action or conduct can be justified by a legitimate business reason (e.g., quality standards, safety) or where the courts employ a variant of the “business judgment rule,” a rule which was developed to protect corporate directors and officers from being held liable for decisions *as long as* those decisions were made in good faith, with “reasonable care,” and without any conflicts of interest (Lynch, 1981; Mantese & Fields, 2020; see also *Zapata v. Maldonado*, 1981).

In order to defend against the charge of an illegal group boycott against an individual, courts would look to such factors as business experience, financial ability, and moral character of the person claiming that he or she was the victim of an illegal boycott, especially as moral character relates to the element of “good will” in a business. When competitors (such as clubs in the NFL or schools within an athletic conference) refuse to deal with a prospective player, coach, business entity, or other personnel at all or only on certain restrictive terms, there may be an unlawful boycott, constituting a combination in restraint of trade, as was alleged by former NFL quarterback Colin Kaepernick in his grievance filed against the National Football League (Hunter & Shannon, 2019; Kinsey, Rhoads, & Thomas, 2020).

In the area of sports, the “playing ability of a player” would stand as a substitute for business experience or financial ability when a player alleges that he or she has been the victim of an illegal boycott. Kaepernick eventually agreed to settle his claim of an illegal group boycott against the NFL; however, the details of the settlement were sealed by mutual agreement of the parties without the NFL admitting to any illegal conduct (Robinson, 2019).

In a case relating to professional representation by an attorney, *FTC v. Superior Court Trial Lawyers Ass’n* (of the City of Los Angeles) (1990), trial lawyers collectively refused to take indigent defense cases until their fees were increased. The United States Supreme Court held that the actions amounted to a group boycott and were per se illegal because they were effected in an effort to raise prices of attorney services.

In the area of franchising, a review of relevant cases such as *360 Painting, LLC v. R. Sterling Enterprises, Inc.* (2024) (a franchisee was accused of underreporting sales and underpaying royalties), *EazyFoods Inc. v. 615241 Ontario Ltd.* (2026) (allegations that the franchisee had engaged in unauthorized closure of the restaurant and failed to meet disclosure obligations), and *Fetch! Pet Care, Inc. v. Atomic Pawz Inc.* (2026) (where the franchisee was accused of breach of contract, trademark infringement, and civil conspiracy) indicate circumstances where *franchisors* have refused to deal with a prospective franchisee, have moved to terminate or litigate against franchisees because of past conduct, or have barred individuals from re-entering the franchise system. A case of an illegal boycott might arise if a decision to terminate or refuse to deal is alleged to have been made by a group of franchisors or a franchise association rather than an individual franchisor.

6. Antitrust Enforcement Under the Bush, Obama, Biden and Trump Administrations

What is the current status of antitrust enforcement in the United States?

Balto (2016) commented that:

“The Bush Administration handled competition enforcement minimally if at all. Between 2001 and 2008, markets became more and more concentrated as companies merged without a problem. Risky mergers such as Whirlpool-Maytag were approved without so much as tacking on remedies. Rare litigation to block mergers was largely unsuccessful. During the Bush years, prices went up, quality went down, and consumers suffered. Facing no credible threat of enforcement, companies were restricted only by what the market would bear.”

Antitrust enforcement in the Obama Administration (2009–2017) may be characterized as *conventional* (see Shughart & Thomas, 2013). The Obama DOJ and FTC operated within the consumer-welfare standard, focusing on price effects and market efficiencies. The Obama Administration challenged several mergers, but rarely pursued monopolization cases. Enforcement was certainly more active than in the Bush era, but was still cautious and technocratic, avoiding structural remedies and preferring settlements to litigation.

The Trump Administration (2017–2021) (Trump I) was more assertive than was expected (Keenan, 2024) but was still constrained by traditional antitrust enforcement philosophy. Interestingly, the first Trump Administration did file major monopolization cases: the DOJ sued Google and the FTC sued Facebook for monopolization.

In addition, the Trump Administration challenged several mergers, including AT&T/Time Warner (vertical merger challenge) and Visa/Plaid, Peabody/Arch Coal, Evonik/PeroxyChem, Altria/JUUL, and Axon/VieVu.

Trump Administration officials such as Assistant Attorney General Makan Delrahim disfavored behavioral remedies, arguing antitrust is “law enforcement, not regulation” (U.S. Department of Justice, 2017). Yet, despite high profile actions, the Trump Administration did not employ the consumer-welfare standard as described by Greenfield, Lange and Callan (2020). It can thus be said that the Trump administration (Trump I) “did not fundamentally reshape antitrust policy.”

The Biden Administration (2021–2025) exhibited the most aggressive antitrust posture since the 1970s. Biden’s antitrust leadership team, composed of Lina Khan, Jonathan Kanter, and Tim Wu, explicitly rejected the consumer-welfare standard, and restored the “original aims” of antitrust law including harms to workers, small businesses, innovation, and market structure.

Major “Big Tech” lawsuits were filed against Google, Amazon, Meta, and Apple. The Biden Administration issued new merger guidelines emphasizing structural concerns and market concentration. After the Supreme Court limited the FTC’s authority to collect monetary penalties under the FTC Act in *AMG Capital Management v. FTC* (2021), the FTC increasingly relied on rulemaking as an enforcement tool.

The FTC engaged in aggressive rulemaking relating to junk fees, non-compete bans, illegal telemarketing, robocalls, and negative-option rules (referring to regulations that govern how companies can automatically enroll

consumers in services or subscriptions unless the consumer explicitly opts out), opting for litigation rather than entering into settlements (Dryer, Krawiec, Kelly, & Kerlin, 2024).

6.1. *Trump II*

Since returning to office in 2025, the Department of Justice and Federal Trade Commission pivoted toward a more “business-friendly” posture (Cooley, 2026). The Trump Administration has taken a strongly *deregulatory, anti-regulatory approach* to antitrust enforcement, focusing far more on eliminating *government-created barriers* to competition rather than on pursuing large private-sector mergers or monopolization cases (Abbott, 2025). The Trump Administration considers antitrust as a tool for dismantling regulations, not for policing or checking corporate market power, framing this as part of a “Golden Age of American economic prosperity” driven by deregulation.

The Trump Administration’s posture since 2025 centers on the belief that regulations—not corporate conduct—are the main source of anti-competitive harm, marking a significant shift from traditional antitrust enforcement, which typically targets mergers, monopolization, and anticompetitive business behavior.

In support of this change in perspective, President Trump issued Executive Order 14267 (April 2025), “*Reducing Anti-Competitive Regulatory Barriers*,” that directs agencies to identify and rescind regulations that create de facto or de jure monopolies, impose barriers to entry, limit competition, create burdensome licensing regimes, and distort markets through procurement rules. Going forward, the Trump administration mandated the rescission of ten regulations for every new regulation proposed by a regulatory agency. Lash (2026) comments that “President Trump’s business-friendly deregulatory moves have sparked a sharp increase in corporate merger activity over the first thirteen months of his second term.”

The DOJ and FTC have been tasked not primarily with investigating corporate conduct, but with reviewing federal and state regulations that allegedly stifle competition, focusing on regulatory barriers, not corporate conduct. In pursuit of this policy, the DOJ’s Antitrust Division launched the *Anticompetitive Regulations Task Force* in March of 2025 (Stein & O’Hollaren, 2025) to identify laws and rules that impede competition in sectors like housing, transportation, agriculture, healthcare, and energy.

By the end of 2025, the DOJ and the FTC had identified over 125 “anti-competitive regulations” for potential rescission or modification, framing this new policy as “freeing innovators and entrepreneurs” by removing government-created obstacles.

While generally retaining Biden Administration FTC merger guidelines (Smith, 2025), the Trump Administration’s (Trump II) merger policy has centered on making merger reviews faster, more predictable, and more open to negotiated remedies, while still pursuing select high-profile challenges, creating a more business-friendly environment for mergers. National security-sensitive industries, semiconductors, AI infrastructure, and health care remain priority areas for scrutiny.

Although the \$110 billion merger between Paramount-Warner Bros. was approved in June of 2026, the merger has been delayed until at least June 2027 due to ongoing antitrust lawsuits from 12 U.S. states and the Writers Guild of America alleging that the merger would reduce competition in theatrical, cable, and streaming markets (see Mullin, McCabe, & Hirsch, 2026).

In addition, the Trump Administration has employed federal antitrust authority to challenge state-level regulations, signaling a more aggressive federal role in preempting state rules deemed anti-competitive (see Goodman, Robinson, & Savrin, 2025).

Part II of this paper will discuss current issues relating to franchising, “Big Tech,” and sports in response to the question: “Is antitrust law still relevant today?”

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A Comprehensive View of Antitrust Law in the United States: “Sports, Big Tech and Franchising Contexts” Part II: Is Antitrust Law Still Relevant Today?

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Abstract

Part II of this larger study of antitrust law in the United States discusses whether antitrust law is still relevant by reviewing the implications of antitrust enforcement in the franchising, “big tech,” and sports contexts. The article provides a detailed look at the economics of these sectors of the American economy and highlights unique antitrust issues relating to each of these sectors. Focusing on “Big Tech,” the article highlights the major antitrust cases concerning Amazon, Google and Apple; focusing on franchising, the article highlights issues relating to illegal tie-ins; and focusing on athletics, the article reviews the history of antitrust litigation in professional and college sports and discusses various legislative solutions to the perceived “chaos” in college athletics, as well as addressing the implications of classifying college athletes as employees.

Keywords: Franchising, “Big Tech,” Sports Organizations, House Settlement, O’Bannon, Alston, Illegal Tying, Apple, Amazon, Google

1. Why Antitrust Law is Still Relevant: The Economic Record

Why are antitrust laws still central to the franchising, “Big Tech,” and sports sectors of the American economy? To paraphrase: “It’s all about the money.”

A closer look at the economics of these three sectors of the American economy will highlight the importance of gaining a competitive edge by implementing practices that might, at the same time, invite antitrust scrutiny.

1.1. The Franchise Sector

There is no doubt that franchising is a significant contributor to the national economy. Miller (2026) provides a close look at the U.S. franchise industry. According to Franchise Association projections for 2026 (International Franchise Association, 2025), the U.S. franchise sector will generate more than \$907.3 billion in economic output annually, which represents roughly 3% of GDP in the United States (Barragan, 2026).

There are approximately 832,000 individual franchise units operating across the United States, spanning more than three hundred distinct business categories, although concentration is heavily weighted toward food service, personal services, and business services.

Franchises employ an estimated 8.9 million workers directly, with total employment impact exceeding 13 million. Direct franchise employment is roughly comparable to employment in the entire U.S. manufacturing sector.

As a result, competition for customers continues to be fierce, as both franchisors and franchisees look for any “edge” that might improve their competitiveness, especially in industries that contain multiple participants. In these circumstances, it should be no surprise that the franchise sector continues to be the source of scrutiny concerning practices that indicate anticompetitive behavior such as illegal tying arrangements, division of markets, and allegations of price fixing

1.2. Professional Sports

A study of professional sports yields a similar perspective. In 2025, professional sports in the United States generated a combined revenue of about \$52.3 billion across the five major leagues — NFL, NBA, MLB, NHL, and MLS — making American sports the most lucrative ecosystem in global athletics (Liu, 2026).

In addition, women’s sports in the United States is experiencing a growth in popularity and exposure in the media, fueling increasing attendance at WNBA and NWSL games.

1.2.1. The NFL

The website, Doc’s Sports Service (2026), provides the most comprehensive look at finances in the NFL. In one sense, the NFL operates as a vertically integrated entity, and in another sense, the NFL is composed of individual teams competing for fans, ticket sales, television exposure, and sales of branded items.

The NFL stands out as the most powerful sports money-making machine in the United States. In 2025, the NFL surpassed \$14.5 billion in total revenues (Bachar, 2026). The main driver is its 11-year media rights package running through 2033 with CBS, FOX, NBC, ESPN/ABC, and Amazon, “projected to hit a stunning \$16 billion annually” (Whitfield, 2026). NFL franchises are collectively valued at around \$176 billion. A key feature of the NFL’s business model is the distribution of these revenues. In 2025, each of the league’s thirty-two franchises earned a record \$450 million in centrally shared income alone (Badenhausen, 2026), made possible by lucrative media rights packages.

The NFL’s dominance is bolstered by the revenues the NFL receives from advertising. Networks pay the NFL over \$2 billion per year in broadcast rights. In 2026, Super Bowl commercials sold for more than \$7 million per 30 second spot, with some reaching \$8 million (Suter, 2026). At the team level, the Dallas Cowboys are clearly the “poster boy” of profitability for the NFL, with an estimated \$1.2 billion in annual revenue and \$629 million in operating income.

Players are represented by the NFL Players Association (NFLPA). The current collective bargaining agreement was ratified in 2020 and extends through the 2030 season. The agreement included changes to league revenue distribution, increases in player benefits, and health and safety improvements. The agreement increased the regular season to 17 games played, while increasing active roster and practice squad limits.

1.2.2. The NBA

Amico (2025) provides an insight into NBA finances. The NBA has finalized a new 11-year media and streaming rights package with Disney (ABC/ESPN), NBCUniversal, and Amazon Prime Video worth approximately \$76–77 billion, tripling its previous deal (Adgate, 2025). The deal took effect during the 2025–26 season and dramatically increased the league’s media revenues and exposure.

Industry estimates showed that the NBA's 30 franchises collectively generated over \$14.5 billion in income in 2025, a sharp rise from pre-pandemic levels. The Golden State Warriors are the most valuable NBA franchise valued at \$10.8 billion, followed by the NY Knicks at \$10.1 billion, and the LA Lakers at \$10 billion, with the average NBA team valued at approximately \$5.5 billion in 2026 (Singh, 2026).

Players are represented by the National Basketball Players Association (NBPA). The term of the collective bargaining agreement began on July 1, 2023 and runs through June 30, 2030, for a total of seven seasons. The NBA and NBPA each have an option to terminate the CBA after its sixth season (i.e., on June 30, 2029) by notifying the other party on or before October 15, 2028 of their intention to do so.

1.2.3. MLB

Writing for Doc's Sports, Bruhn (2026) provides the most comprehensive look at MLB finances. MLB has experienced record growth, ending 2025 with an all-time record of \$12.5 billion in gross revenues. Advertising during the World Series remains especially lucrative, with 30-second time slots priced between \$500,000 and \$600,000 for the early games, and higher for games six or seven. Ozanian (2026) states that the average value of an MLB team stands at \$2.62 billion. The New York Yankees remain as the most valuable MLB franchise at \$8.5 to \$9.4 billion.

However, a key structural issue persists concerning the uncertain future of regional sports networks (RSNs) covering professional baseball. Following Diamond Sports' (formerly Bally Sports) restructuring, MLB is pushing toward centralizing local broadcast rights by 2028, which could reshape revenue distribution and viewing accessibility, possibly triggering renewed antitrust scrutiny relating to vertical price fixing. Other issues include expansion into international markets, additional franchise expansion in the United States, franchise relocation, and questions stemming from MLB's antitrust exemption found in *Federal Baseball Club v. National League* (1922), which has been described as an "anomaly" and "aberration," yet still recognized by American courts, although not in its once absolute form.

The players are represented by the MLB Players Association (MLBPA). Issues on the bargaining table are expected to include early career pay, competitive balance, housing, meals and travel allowances in the minor leagues, and questions relating to the league's luxury tax. The MLB collective bargaining agreement will expire at the end of the 2026 season, but neither side is expecting either a strike by players or a lock-out by team owners.

1.2.4. NHL

The National Hockey League *2024/25 Business Report* (Research and Markets, 2025a) contains detailed data analytics on NHL teams, stadiums, income, fan interests, and income from international broadcasts. NHL revenues exceeded \$7.5-\$8 billion for the 2025-2026 season — its highest ever — fueled by record attendance. The NHL's focus on sponsorship expansion and the sale of branded apparel through the internet also signals continued commercial growth and diversification but might invite scrutiny of practices relating to illegal tying and monopolization.

Players are represented by the NHL Players' Association (NHLPA). On July 10, 2020, the NHL and NHLPA announced the extension of the CBA through the 2025–26 NHL season. On June 27, 2025, the CBA was extended again through the 2029–30 NHL season and will now expire on September 15, 2030.

1.2.5. MLS

Among all the professional sports leagues, MLS has a unique "single-entity structure" (U.S. Department of Justice, 2022) where the league owns all teams centrally (see Research and Markets, 2026b). Total MLS revenues in 2025 were approximately \$2.872 billion, with team revenues standing at \$87-90 million. The average MLS salary is \$354,390. By way of comparison, salary averages in the NFL were \$2.7 million; in the NBA, \$9.7 million; in

MLB, \$4.9 million; and in the NHL, \$3.5 million. The average MLS team is worth \$767 million, a 6% increase from 2024, with gains concentrated among top clubs, with the bottom twelve franchises rising just 2% on average (Birnbaum, 2026).

The 30 MLS franchises are collectively worth \$23 billion, including real estate and team-related businesses. It is no surprise that Inter Miami's local revenues surpassed \$200 million, boosted, no doubt, by Lionel Messi's impact and Inter Miami's first MLS Cup title (Hageman, 2025). As a positive indicator, seven MLS teams exceeded \$100 million in revenue, up from four in 2024, while several clubs including Vancouver, Montreal and Colorado generated only \$35 million to \$40 million in revenues.

MLS faces limited national media revenue compared to other leagues. Teams currently receive approximately \$5 million annually from the media deal with Apple after subtracting production costs, while NHL clubs average \$40 million from television agreements.

Because MLS operates as a single entity, MLS has largely escaped scrutiny and litigation relating to antitrust issues. Players in MLS are represented by a union, the MLS Players Association (MLSPA). The MLS Collective Bargaining Agreement expires on January 31, 2028.

Key issues facing MLS include the structure of the current salary-cap and unique “designated player rules,” a roster mechanism that allows each club to sign up to three players whose salaries exceed the league's maximum budget charge, while only a small, fixed portion of their pay counts against the salary cap (see Williams, 2025). The remaining portion of the salary is paid directly by the league's ownership. These rules helped MLS to bring in global stars like David Beckham and Lionel Messi without breaking its salary-budget system. Other issues involve higher minimum salaries, better housing allowances, contract buyouts and job security; standardized medical care across all clubs and stronger health-and-safety protocols; and anti-harassment protections through enforcement of professional conduct rules.

MLS hopes to translate the success of the 2026 World Cup into tangible increases in attendance and promotional sales.

1.2.6. Women's Professional Sports: The WNBA and the NWSL

Women's professional sports in the United States are dominated by the Women's National Basketball Association (WNBA) and the National Women's Soccer League (NWSL). WNBA teams are individually owned — but with strong NBA ties, in a hybrid ownership structure:

- 42% of the WNBA is owned collectively by the 30 NBA owners;
- 42% is owned by individual WNBA team owners;
- 16% is owned by a strategic investor group (Nike, Dell, Laurene Powell Jobs, etc.).

Many WNBA teams are owned by the same ownership groups that own NBA teams (e.g., Liberty/Nets, Fever/Pacers, Mystics/Wizards). Other teams have independent owners (e.g., Seattle Storm's ownership group, Mohegan Tribe for the Connecticut Sun). Expansion teams increasingly are awarded to NBA ownership groups because they provide facilities and infrastructure already in place.

NWSL teams are individually owned — via “investor-operators,” using a franchise investor-operator model, similar to MLS. Each team has an individual ownership group that owns a share of the league and also operates the team. However, player rights are held by individual teams. The league recently changed rules to allow private equity firms to take majority control of teams.

In 2024, U.S. women's professional sports generated an estimated \$1.28 billion in total revenue, marking the first time the sector surpassed the \$1 billion mark. Women's professional sports generated about \$2.35 billion in global revenue in 2025 (see Georgio, 2023).

Women's sports are now a multi-billion-dollar industry, growing 240% in four years. This growth is driven by rising attendance and fan engagement, stronger media deals, major sponsorship investment, expansion of professional leagues, and increased visibility of star athletes in both the WNBA (A'ja Wilson, Caitlin Clark, Breanna Stewart, Sabrina Ionescu, and Angel Reese) and the NWSL (Barbra Banda, Ashley Sanchez, Trinity Rodman, Temwa Chawinga, and Evelyn Ijeh).

Commercial revenues were \$696 million which include broadcast revenue of \$340 million from TV and streaming rights, sponsorships and matchday revenue of \$240 million from ticket sales, concessions, and merchandise sales stemming from record-setting attendance at NWSL and WNBA games.

Interestingly, McKinsey's 2025 analysis found that women's sports revenue grew 4.5 times faster than men's sports between 2022 and 2024, with women's sports still far from its full monetization potential (McKinsey & Company 2025). Data from individual sources indicate:

- WNBA: The league's revenue rose over 200% in 2024 compared to two years earlier, aided by a new 11-year media deal worth approximately \$2.2 billion starting in 2026;
- NWSL: Average attendance exceeded 11,000 for the first time in 2024, with total fans surpassing two million.

Players in the WNBA are represented by the Women's National Basketball Players Association (WNBPA). A CBA signed in 2020, covering salaries, maternity benefits, travel standards, revenue sharing, and marketing deals, runs through 2032. Players in the NWSL are represented by the NWSL Players Association (NWSLPA). The league is governed by first-ever CBA signed in 2022, covering minimum salaries, free agency, housing, parental leave, and safety protections. The CBA runs through December 31, 2030.

Women's professional athletics in the United States faces several potential antitrust issues including league structure, restrictions on labor markets, and media rights—issues not unlike those faced by men's sports—reflecting classic antitrust flashpoints restricting competition for labor.

1.2.7. The USFL-NFL Suit

Interestingly, NFL policies that may have invited antitrust scrutiny in the past have been largely resolved through the collective bargaining process (see *Mackay v. NFL*, 1976) or by the Congress granting specific exemptions from antitrust law to the NFL. One case, however, stands out as it posed a direct threat to the structure of the NFL.

In 1986, a challenge to the NFL was made by the fledgling United States Football League (USFL) (*US Football League v. National Football League*, 1986) in which the USFL claimed the NFL had willfully acquired and maintained monopoly power in professional football, conspired to exclude competition, and used its dominance to deny the USFL access to television broadcasting (Garber, 1986).

The case went to trial in 1986. After ten weeks of testimony, the jury found the NFL liable on the claim of actual monopolization under the Sherman Act, concluding the NFL had unlawfully maintained monopoly power in the relevant market and that this conduct had caused injury to the USFL; however, the jury awarded only nominal damages of \$1.00, trebled to \$3.00, citing minimal actual harm, effectively ending the controversy. (President Trump was one of the plaintiffs in the lawsuit as owner of the New Jersey Generals and was generally "credited" with the failure of the law suit and the eventual collapse of the USFL (Pearlman, 2018)).

1.3. College Athletics

Interestingly, with antitrust issues largely settled in professional sports, collegiate sports continue to be in the spotlight, with issues relating to revenue sharing, NILs, collectives, and potential unionization taking center stage.

Why are the stakes so high? Again, it is a matter of money. Revenues generated by college sports (see USA Today, 2026) provide fertile grounds for actions on the margin that may implicate antitrust law, as individual teams and conferences fight for dominance in ticket sales, promotions, collectives, and recruitment and retention of players.

Total revenues from college athletics in 2025 are estimated at \$22–\$25 billion, combining school-level revenues across Divisions I, II, and III with conference-level revenues.

Based on IRS filings, in fiscal year 2025, the Power 4 in college athletics conferences consisting of the Big Ten Conference, the Big 12 Conference, the Atlantic Coast Conference (ACC), and the Southeastern Conference (SEC) generated about \$4 billion in total revenue (Wilson, 2025).

- Big Ten — \$1.47 billion, the largest revenue figure in college sports history, driven by escalating media rights deals;
- SEC — \$1.11 billion, boosted by a major ESPN/ABC media contract;
- ACC — \$826.5 million, reaching record revenue due to expanded TV distribution and new member schools;
- Big 12 — \$610.9 million, with growth driven by conference expansion and media rights.

The University of Notre Dame is not a member of an athletic conference but has a contractual relationship with the ACC. Notre Dame's annual revenue from college football is estimated to be \$186.1 million, bolstered by its exclusive media partnership with NBC. The overall program value is estimated at \$1.85 billion, falling behind only Texas and Georgia (Trendsmark, 2026).

Group of Five conferences, consisting of the AAC, C-USA, MAC, Mountain West, and Sun Belt, operate at a much smaller scale, often with net operating losses.

Division I athletics (Power 4 + Group of Five) conferences generated \$4.02 billion in FY2025. School-level revenue for Power 4 institutions typically ranges from \$100 million–\$250 million each. Group of Five, consisting of 65 schools, generates median athletics revenue of \$25–\$35 million per school.

Division II athletics, consisting of approximately 300 schools, generates median athletics revenue of \$6–\$8 million. Division III Athletics, consisting of approximately 430 schools, show median athletics revenue of \$3–\$5 million.

The NCAA as an entity generated \$1.28 billion in FY2025, mostly from “March Madness” media rights (Ganguly, 2026). Is there any reason to question the NCAA's intense interest in legislation introduced in Congress that will significantly impact its role in intercollegiate athletics, and which will place further emphasis on revenue generation by individual schools seeking “top flight” athletes who will be attractive to fan bases and to regional, national, and perhaps international media in the future?

1.4. “Big Tech”

Official IRS filings on revenue and net income (Business Stats, 2026) for the four “Big Tech” giants featured in this study reveal:

- Apple total revenue: 416.2 billion; net income of 112 billion;
- Amazon total revenue: 716.92 billion; net income of 77.67 billion;
- Google total revenue: 402.85 billion; net income of 132.17 billion; and
- AT&T total revenue: 125.65 billion; net income of 21.95 billion.

In the “Big Tech” sector, cases discussed below will highlight practices relating to monopolization, illegal tying arrangements, improper division of markets, and other allegations of anticompetitive practices. These cases must also be viewed in the context of a highly competitive market which will no doubt only intensify in the age of AI and the enormous generation of revenues collectively by “Big Tech” companies which amounted to \$2.02 trillion in 2025.

In view of the economics of these sectors, how has the legal system addressed issues which have distinct implications for each of these economic sectors?

2. Antitrust Implications in Franchising

Allegations of antitrust violations have been well documented in the franchise relationship, but most especially with reference to allegations of illegal tying arrangements.

2.1. Tying Arrangements

An illegal tying arrangement occurs when a seller or lessor uses its market power over one product (the tying product) in order to force a buyer or lessee to also purchase or lease a second, separate product (the tied product) that may not be similarly desired (Bauer, 1980; Klein & Saft, 1985). Market power is a firm's ability to influence the price of a product or service by controlling supply, demand, or both, allowing it to set prices above marginal cost without losing customers.

Under Section 1 of the Sherman Act and Section 3 of the Clayton Act, there are four specific elements necessary to prove an illegal tie-in.

- *Two separate products* — The tying product and tied product must be distinct in the eyes of consumers. If a buyer or lessee would normally view the purchase or lease of the products as a separate choice, this element is met (*Times-Picayune Co. v. United States*, 1953).

In contrast, if the two products are not separate and are viewed as a single integrated product, there is no “tie” at all. For example, a smartphone is sold with an operating system. Since the two items are so integrated that consumers would not view them as distinct choices, one of the essential requirements of an illegal tie-in collapses. This is sometimes referred to as the “practically indistinguishable” defense to a charge of an illegal tie-in.

- *Conditioning the sale* — The seller forces or coerces a buyer or lessee to purchase or lease the tied product in order to obtain the tying product. This can be explicit (“You must buy X to get Y”) or subtle, and may be found in contract terms, technical restrictions, or through exerting economic pressure. If the buyer or lessee was not forced to purchase or lease the product that was the subject of the tie-in, or where alternatives exist, an illegal tie-in will generally not be found.
- *Market power in the tying product* — The seller must have sufficient market power in the tying product market to meaningfully compel the buyer's or lessee's choice. Market power can arise from monopoly status, the existence of a patent (see *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 2006), or brand dominance (*Northern Pacific Railroad v. United States*, 1958).
- *A “not-insubstantial amount” of commerce is affected* — The tie must impact a meaningful volume of sales in the tied product market. Courts do not require large numbers—just more than a “trivial” or *de minimis* amount. Tying will not be judged to be illegal where commerce is insufficiently affected; that is, where the volume of tied-product sales is too small to meet the legal threshold. If the alleged violator exhibits no real market power in the tying product, the tie will not be judged to be illegal on its face (*International Salt Company v. United States*, 1947).

If a defendant shows that the products are not distinct, the plaintiff's case would fail *before* reaching questions of coercion, market power, or foreclosure of competition. The “practically indistinguishable” defense is often the strongest defense in modern tying cases, especially in technology markets where product integration is common. For example, where a manufacturer requires the purchase of a proprietary ink cartridge along with the purchase of a printer, where the ink cartridge is essential to the printer's function, and consumers do not view alternatives as meaningful options, an illegal tie in will ordinarily not be found. An additional example may be found where a medical device is sold along with a required sterilization component, and the sterilization component is necessary for safe operation of the device, courts may treat them as one product and thus not an illegal tying arrangement (see Lee, 2025).

2.1.1. Possible Justifications for Otherwise Illegal Tying Arrangements

Under a modern approach, courts increasingly evaluate tying under the rule-of-reason, which allows a broader range of defenses relating to:

- *Consumer benefits* — Where the tie-in improves convenience, reliability, or user experience;
- *Innovation incentives* — Where the tie-in encourages investment in new technologies or ecosystems; or
- *Competitive neutrality* — Where the tie-in does not foreclose competitors from offering their products or services in any meaningful way.

There are several potential justifications that can be offered when a party is charged with an illegal tie-in (Patton, 1972) including:

- *Quality control* — The seller argues the tying arrangement ensures that the product works properly or safely, meeting legitimate “Quality Control” obligations of the franchisor (see *Susser v. Carvel*, 1954; Iacobucci, 2003; Siebert, 2021);
- There may be cases where “*the franchise is essentially the product*.” For example, the franchisee of a brand root beer franchise (A&W) or the franchisee of a specialized yogurt (TCBY) or ice cream franchise (Dairy Queen) may be required to purchase its root beer mix, yogurt mix, or ice cream from the franchisor on the grounds that the franchise is “essentially the product.” Another example occurs where a franchisee of a gasoline service-center franchise is required to purchase the brand gasoline of the franchisor and not from any other supplier (Blair & Lafontaine, 2010)—but probably not ancillary products such as tires, batteries, or windshield washer fluid;
- *Technical integration* — The products are designed to function together through the legitimate “integration of technologies” and separating them would potentially degrade performance or would be “practically or scientifically impossible” (see Crane, 2024);
- *Ensuring safety or regulatory compliance*—The tie is necessary to meet legal, health, safety, sanitation regulations, or standards. An example occurs where a franchisor in the automotive sector requires “certified parts” in maintenance of its products, or where the franchisor is able to demonstrate that a specific law, regulation, or government standard *requires* the franchisee to use the tied product or service and not “after-market parts” supplied by the franchisee or a third party (*Principe v. McDonald’s Corp.*, 1980; see also Bartoletti, 2025);
- *Preventing “free-riding”* — The franchisor claims that competitors could exploit its investment (e.g., in brand reputation or in research and development (R&D) expenses) unless customers use the tied product (Kidwell, Nygaard, & Silkoset, 2007);
- *Reducing transaction or manufacturing costs* — where “bundling” reduces costs or simplifies distribution in ways that benefit consumers (see Evans & Salinger, 2005).

3. “Big Tech” Applications

Several recent antitrust cases relating to “Big Tech” giants Google, Amazon, and Apple merit attention.

3.1. Google I

In *United States v. Google LLC* (Google I) (2025), Judge Amit Mehta rejected a request made by the Department of Justice to break up Google by selling Chrome or Android but instead imposed several *behavioral remedies* (described in Part I of this study) aimed at curbing Google’s “search monopoly,” barring Google’s exclusive

search-distribution deals, and ordering Google to share certain search data with competitors. Judge Mehta found, however, that the government's proposal to break up Google was an "overreach."

The decision by Judge Mehta contained:

- A ban on exclusive contracts: Google may no longer enter into or maintain exclusivity deals that make Google Search, Chrome, Assistant, or Gemini the default on devices;
- Restrictions on revenue-share agreements: Google cannot condition payments on multi-year placement of its apps or on blocking rival search engines or browsers. Annual contracts will continue to be permitted;
- Data-sharing requirements: Google must provide "qualified competitors" access to portions of its search index and user-interaction data (but not its advertising data);
- Limits on syndication access (referring to the ability of Google to distribute and share content or services across various platforms) for rivals concerning the ability of qualified competitors to connect to and ingest data from Google's search index and related systems. Competitors can buy Google's search and text-ads syndication services on standard "commercial terms" (see Ong, 2025);
- Transparency in ad auctions: Google must publicly disclose material changes to its ad-auction systems (a real-time, automated process in digital advertising where available ad impressions are bid on by multiple advertisers, and the highest (or most competitive) bid wins the right to display the ad) and the method used to decide the cost and placement of digital advertising on certain ad-networks; and
- Creation of a technical oversight committee: A committee will monitor Google's compliance for a period of six years, providing "technical expertise, ongoing monitoring, and enforcement support" (Knappenberger, 2026). The committee is comprised of thirteen members from Snow Flake, Kuber Matic, Huawei, Apple, Boeing, Ericsson, Google, Microsoft, Red Hat, Adobe, Defense Unicorn, and an independent engineer and author.

Judge Mehta's ruling signaled a judicial preference for behavioral remedies over structural breakups, which may be especially relevant in future litigation in "big tech" markets shaped by AI.

3.2. *Google II*

A second case involving Google, *United States et al. v. Google LLC* (2025) (Google II), which the Office of Public Affairs of the Department of Justice described as a "landmark victory in the ongoing fight to stop Google from monopolizing the digital public square" (U.S. Department of Justice, 2025), was presided over by Judge Leonie Brinkema. Judge Brinkema issued a finding that Google had attempted to monopolize ad-server and ad-exchange markets through self-preferencing and exclusionary control of ad-tech stack, which is the collection of interconnected software platforms, tools, and systems that advertisers, publishers, and agencies use to buy, sell, deliver, target, and measure digital advertising (see Moss, 2026).

Judge Brinkema found that Google's anticompetitive conduct had included improper strategic acquisitions, illegal product tying, improper exclusive dealing arrangements, and manipulative auctions practices that had disadvantaged competitors and had inflated costs for advertisers (see Doyle, Barlow & Mazard, 2025).

3.3. *Amazon*

In *Federal Trade Commission v. Amazon* (filed in 2023), the Federal Trade Commission and the attorneys general of seventeen states alleged that Amazon had illegally maintained monopoly power in two markets—its online "superstore" and its online marketplace services for sellers—through a set of interlocking, exclusionary tactics and contracts that punish discounting, coerce sellers, bias search results, and lock consumers into Amazon's ecosystem (an interconnected and interdependent network of diverse business entities). The FTC argued that the following "tactics" employed by Amazon violated Section 2 of the Sherman Act and Section 5 of the FTC Act through:

- Anti-discounting tactics punishing sellers who offer lower prices, thereby deterring competition and keeping prices artificially higher;

- Coercive seller fees charging “sky-high fees” and forcing sellers to use Amazon’s logistics (*Fulfillment by Amazon* or FBA), where sellers send inventory to a warehouse and Amazon handles storage, packing, shipping, customer service, and product returns in order to remain competitive;
- Biased search and “Buy Box” placement (the white box on the right-hand side of a product page where customers can see price, delivery details, quantity selector, and most importantly, the “Add to Cart” or “Buy Now” buttons), steering shoppers toward Amazon’s own products or to sellers who use their paid services;
- Blocking rivals from reaching critical scale preventing new or smaller competitors from attracting enough shoppers and sellers to challenge Amazon’s dominance; and
- Degrading service quality which worsens service for both shoppers and sellers without fear of losing business (see Hadero, 2023).

The FTC is seeking injunctive relief blocking Amazon’s exclusionary practices, both structural and behavioral remedies, and the restoration of competition in its superstore and online marketplace services. The case is ongoing in the U.S. District Court for the Western District of Washington.

3.4. Apple

In the antitrust case against Apple (*United States v. Apple Inc.*, 2024), filed in the United States District Court for the District of New Jersey on March 21, 2024, the Department of Justice and the attorneys general of fifteen states alleged that Apple illegally maintains monopoly power in the smartphone market—especially the segment they call “performance smartphones”—by using its “tight control” over the iPhone ecosystem in order to block technologies that would make it easier for consumers and developers to switch away from Apple to a competitor’s products.

Gorin (2024) explains the Apple ecosystem system as:

“an interconnected network of devices, software, and services centered around a smartphone, designed to provide seamless connectivity, synchronized data, and enhanced user experiences” through restrictions on app distribution, payments, and interoperability.”

The DOJ argues that Apple is not just competing aggressively—it is illegally preserving a monopoly by suppressing technologies that could weaken the iPhone’s dominance in the market, including super apps, cloud streaming, cross-platform messaging, smartwatch interoperability, and digital wallets that allow for storage of debit and credit card information.

In its defense, Apple argues that the smartphone market is already broad and highly competitive, and that restrictions are designed to protect user privacy and enhance security. The case is in active discovery, a phase that often lasts 1–2 years, and a trial is unlikely before 2027, at the earliest.

4. Antitrust Implications in Sports: A View of Antitrust Exemptions

Both professional and collegiate sports are entering a period of structural realignment and disruption driven by legal, economic, and technological forces.

Antitrust law has occupied a unique space in the history of American sports and is increasingly central to its governance. Professional leagues require cooperation across a variety of areas in order to produce a viable product, but practices relating to the media and allegations of collusion have invited antitrust scrutiny in the past under the Sherman Act.

4.1. Professional Sports

Today, professional sports navigate in a complex but relatively stable legal environment often shaped by specific antitrust exemptions granted by Congress. For example, the Sports Broadcasting Act of 1961 granted limited

antitrust immunity for the collective sale of broadcast rights; special provisions enacted as part of the U.S. Code at one time permitting certain “blackout rules” for televising home football games (15 U.S.C. Section 1292); or the limited exemption for professional football which allowed the merger of the AFL with the NFL prior to the 1970 season (15 U.S.C. Section 1291).

There are two other antitrust exemptions that apply in professional sports. The *statutory labor exemption* shields labor unions from antitrust scrutiny when labor organizations engage in collective bargaining with owners of sports franchises and engage in other organizing activities. The statutory labor exemption allows a union to negotiate over wages, hours, and working conditions without the union being treated as an illegal combination or a monopoly under antitrust statutes. However, the exemption does not protect conduct by a union that combines with a non-labor group, goes beyond legitimate labor objectives, or involves third parties outside of the collective bargaining relationship.

Labor agreements in professional sports also operate under the *non-statutory labor exemption*, a judicially created doctrine that originated in a series of U.S. Supreme Court decisions such as *United Mine Workers v. Pennington* (1965) and *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.* (1965). The non-statutory labor exemption shields an agreement collectively bargained between an employer and a union from antitrust attack (Pleasure, 2000). The doctrine ensures that policies favoring collective bargaining and negotiation take precedence over antitrust considerations.

Mackay v. NFL (1976) outlines the elements of the non-statutory labor exemption:

- *Existence of a valid labor relationship*: There must be a recognized labor-management relationship, typically evidenced by a collective bargaining agreement (CBA) or other formal bargaining process between employees and employers;
- The agreement must be the product of “good faith” collective bargaining and cannot be imposed unilaterally by management without such bargaining; and
- The alleged restraint must be *within the scope of the labor relationship and relate to the terms and conditions of employment with reference to “wages, hours, and working conditions.”*

Professional sports have relied heavily in the past on the non-statutory labor exemption to resolve issues such as the salary cap, the professional draft, rules relating to free-agency, roster size, and other restraints on player movement that might otherwise be considered as illegal restraints on trade, price-fixing, or improper restrictions on the labor market. Because these and other issues are negotiated with the player’s union and included in a collective bargaining agreement, they are protected from attack on antitrust grounds.

4.2. Antitrust in College Sports: A Brief Survey

Until the 1980s, college sports, and more specifically the NCAA, were historically insulated from antitrust scrutiny by the repeated rhetoric surrounding the bedrock tome of “amateurism” maintained by the NCAA (Hunter, Shannon, & Lozada, 2025a; 2025b).

Today, the NCAA faces intensified legal pressure, as commercialization permeates college athletics and college athletes vigorously assert economic rights in order to gain their “fair share” of revenues produced by their labor. Traditional justifications offered by the NCAA for preserving its antitrust exemption came crashing down as the United States Supreme Court announced that “The NCAA is not above the law” – the last line of the concurring opinion written by Justice Brett Kavanaugh in the Supreme Court decision in *NCAA v. Alston* (2020) (Hunter, Delle Donne, & Shannon, 2021).

For decades, the NCAA defended restrictions relating to compensation of athletes, athletic eligibility and other policies by invoking the principle of amateurism. A crack in the favored status of the NCAA, which had argued for blanket immunity from antitrust law, was first seen in the landmark decision in *NCAA v. Board of Regents of the University of Oklahoma* (1984), in which the U.S. Supreme Court ruled that the NCAA’s restrictive television rights plan for college football violated the Sherman and Clayton Acts, finding the plan to be an unreasonable

restraint of trade. However, while the Supreme Court may have struck down the NCAA's television plan as "unreasonable," at the same time the Court suggested in *dicta* that some rules based on the NCAA's defense of amateurism might be reasonable under certain circumstances and might be in fact procompetitive. These *dicta* became the foundation of arguments subsequently made by the NCAA in a series of cases in which the NCAA attempted to maintain its control over college athletics by arguing that its rules were immune from antitrust attack.

4.2.1. *O'Bannon* and *Alston* as "Game Changers"

Over the next decades, however, a series of cases have systematically dismantled the NCAA's insulation from the reaches of antitrust law. One case in particular would significantly alter the powers of the NCAA and call into question its core "amateurism" rationale: *O'Bannon v. NCAA* (2014).

"In 2008, Ed O'Bannon, a former student-athlete at UCLA, noticed that a character in a college basketball video game looked like him and wore his jersey number. O'Bannon had never provided his image or likeness, nor had he ever been compensated for its use. O'Bannon filed a class action lawsuit against the NCAA, challenging its restrictions on the commercial use of players' names, images, and likenesses ("NIL")."

In *O'Bannon v. NCAA* (2014), a suit initially filed in 2014, the District Court in California found that NCAA's rules restricting the compensation of college athletes beyond their athletic scholarships restrained trade in violation of Section 1 of the Sherman Antitrust Act. In an opinion by Judge Claudia Wilken, the District Court held that the NCAA's restrictions were anticompetitive vertical restraints. The Wilken's decision allowed schools to offer athletic scholarships up to the "full cost of attendance" and up to \$5,000 in deferred compensation, holding that restricting athletes' right to compensation for the use of their "name, image, and likeness" violated the Sherman Act. The NCAA appealed the decision of the District Court.

In the appellate case, *O'Bannon v. NCAA* (2015), the Ninth Circuit Court of Appeals affirmed that part of the decision that held that the NCAA's rules unlawfully restrained trade, but struck down the \$5,000 deferred-compensation remedy, holding that direct cash payments were inconsistent with preserving amateurism in college sports, which the Court found was a "worthwhile objective." Perhaps most importantly, *O'Bannon* established that NCAA rules were not exempt from antitrust scrutiny and would henceforth be evaluated under the rule-of-reason. In a second case, *NCAA v. Alston* (2021), the United States Supreme Court held that NCAA limits on education-related benefits for college athletes violated Section 1 of the Sherman Act. The Court unanimously affirmed lower-court findings that the NCAA's restrictions—covering benefits such as graduate-school scholarships, paid internships, computers, and tutoring—were unreasonable anticompetitive restraints in the market for the "labor" of student-athlete.

Applying a rule-of-reason analysis, the *Alston* Court concluded that the NCAA's restrictions were "patently and inexplicably stricter than necessary" to preserve amateurism in college athletics and to assure the continued demand for college sports. While the Court did *not* address broader compensation rules (such as "pay" for unrelated to education), it rejected the NCAA's request for a highly deferential standard amounting to a limited antitrust exemption and signaled once again that amateurism did not grant the NCAA blanket antitrust immunity. Justice Kavanaugh's concurring opinion in *Alston* signaled deep skepticism toward NCAA compensation restrictions, suggesting they resemble classic "wage-fixing" in clear violation of the Sherman Act.

As a result of *O'Bannon* and *Alston*, the introduction of "name, image, and likeness" (NIL) rights has transformed college sports. Athletes can now engage in a wide array of commercial deals with third parties "through endorsements, sponsorships, social media posts, and more" (see Pierce, 2026). Future attempts by the NCAA or athletic conferences to regulate NIL markets—especially by imposing restrictions on "recruiting inducements"—would no doubt face additional antitrust challenges if they appear to suppress competition among schools or athletes, unless a limited antitrust exemption were granted based on a new understanding of amateurism in college sports.

However, at the same time, the consolidation of power among major or “Power Conferences” through realignment continued to raise antitrust concerns related to market dominance, exclusive media contracts, and competitive imbalance.

4.3. *The House Settlement*

Maginnis (2026) provides the context to issues relating to compensation of college athletes as he writes: “Despite the amateurism principle, collegiate athletics are a multi-billion-dollar industry. In a record-breaking 2024, the NCAA reported nearly \$1.3 billion in revenue. After settling its balance sheets, the NCAA distributed \$961 million to its member schools across all athletic divisions.”

Perhaps the greatest factor in the changing landscape of college athletics was the settlement reached in *House v. NCAA* (2025), approved by Judge Claudie Wilken in June of 2025 (Cohen, 2025; College Sports Commission, 2026). Judge Wilken has emerged as the “key” judicial player in the major cases to have reached the courts thus far relating to NIL rights and compensation based on athletic performance.

The House Settlement consolidated three major antitrust cases, *House v. NCAA* (Arizona State swimmer), *Hubbard v. NCAA* (Oklahoma State football player), and *Carter v. NCAA* (Duke University football player), in which the various plaintiffs had argued that NCAA amateurism rules illegally restricted athletes from receiving a share of the revenues generated by their athletic performance (see McCann, 2023).

As a result of the House Settlement, schools may now pay athletes directly for school’s NIL licensing and revenue-sharing agreements — effectively ending the NCAA’s amateurism model. Athletes can receive direct compensation from their universities, payments which are often facilitated by booster-funded “collectives” or alumni-funded groups that pool resources to pay athletes for the use of their NIL rights. Since 2021, collectives have become a dominant source of NIL income, accounting for over 80% of the \$1.7 billion NIL market in 2024–25 (see Headley, 2025).

Each Division I school can choose to share up to 22% of its average revenue generated by media rights, ticket sales, and sponsorships with its athletes. The settlement provides for a Year 1 cap of ~\$20.5 million per school, rising to an estimated cap of ~\$21.3 million per school in 2026-2027. The cap will increase by 4% annually for three years before recalculation, creating a predictable, school-funded compensation model—at least for Division I athletes, mainly participating in college football and basketball.

Cohen (2025) notes:

“Because football and men’s basketball are the primary revenue drivers at most schools, and that money helps fund all the other sports, it stands to reason that the football and basketball players will get most of the money. But that is one of the most difficult calculations for the schools to make. There could be Title IX equity concerns as well.”

In order to compensate for past NCAA restrictions which had denied athletes compensation beyond their athletic scholarships, the NCAA and Power Five conferences will pay \$2.576 billion–\$2.78 billion in damages over a 10 year period to athletes who were previously barred from earning NIL income. This fund covers athletes who participated in college athletics from 2016–2024 across multiple sports—but mainly college football and basketball. Scholarship caps are replaced with roster limits (Jain, 2025), allowing schools to award a greater number of full or partial scholarships, potentially expanding access to athletic aid. Beginning in 2026-2027, college athletes would be granted a window of five years of eligibility to participate in college athletics—although details are yet to be finalized and are currently enmeshed in a number of lawsuits (Nettuno, 2026).

In order to avoid the appearance of “pay-for-play,” athletes must now report third-party NIL deals worth \$600 or more, and all NIL deals must be validated as “legitimate business transactions” via the NCAA’s “*NIL Go System*,” overseen by the College Sports Commission and operated by Deloitte (Kazimov, 2025). Any NIL deals that do not reflect “fair market value,” and any “pay-for-performance” contracts tied to stats or wins, as well as

any deals lacking a valid business purpose, will be “flagged” by the system as inappropriate. What will happen at that point is yet to be determined.

4.4. *Athletes as Employees? One More Issue on the Horizon*

An emergent question concerns whether college athletes should be classified as employees and thus eligible to form a union, a position vigorously opposed by the NCAA. Hudson (2014) provides a context to the issue of classifying college athletes as employees as he wrote:

“On March 26, 2014, the Chicago district of the National Labor Relations Board ruled that football players at Northwestern University were employees, not amateur athletes, and were able to vote on whether they should form a union. Led by former Wildcats quarterback Kain Colter and National College Players Association president Ramogi Huma, and backed by the United Steelworkers union, the newly formed College Athletes Players Association (CAPA) had successfully convinced NLRB regional director Peter Sung Ohr that college football players were primarily on campus to win football games, not for an education.”

However, the petition was rejected by the full NLRB in August of 2015 (Toporek, 2015). Interestingly, the Board at that time noted that its decision not to assert jurisdiction applied strictly to the unique facts of the case involving Northwestern University football players, who would have been the only athletes in the “Big Ten” to be represented by a union, not to a *theoretical petition* from all scholarship athletes participating in the NCAA’s ten recognized Division I Conference, encompassing 138 schools. The Board also said the decision “does not preclude a reconsideration of this issue in the future,” particularly “if the circumstances of Northwestern’s players or FBS football change such that the underpinnings of our conclusions regarding jurisdiction warrant reassessment.”

That “reassessment” took place six years later and was the basis of a Memorandum issued by NLRB General Counsel Jennifer Abruzzo on September 29, 2021, titled *Employee Status of College Athletes* (NLRB, 2021). The Abruzzo Memorandum found that certain “Players at Academic Institutions,” including college football and other student-athletes, are in fact employees under the National Labor Relations Act (NLRA) and thus are entitled to statutory labor protections, including the right to be represented by a labor union of their own choice and to engage in collective bargaining with their employers over matters of “wages, hours, and working conditions” unique in college athletics.

General Counsel Abruzzo, who was appointed to her position by former President Biden, concluded that athletes who perform services for their educational institutions in return for compensation in the form of an athletic scholarship and who are acting under institutional control are *statutory employees* under Section 2(3) of the National Labor Relations Act, which broadly defines “employee” with exceptions that did not specifically exclude college athletes. Interestingly, Abruzzo also rejected the term “student-athlete” as used by the NCAA, arguing that this terminology had been used strategically to deny workplace protections to college athletes. Instead, Abruzzo advocated for the use of the term “*Players at Academic Institutions*.”

The implications of the Abruzzo Memorandum were far reaching. If athletes were to be classified as employees, many NCAA rules could be treated as classic “wage-fixing agreements” and thus as impermissible restraints in the labor market in the absence of a collective bargaining agreement or a specific antitrust exemption.

The Abruzzo Memorandum, however, was rescinded in February of 2025 (NLRB, 2025) when the NLRB General Counsel William Cowan, appointed by President Trump, issued a subsequent Memorandum which rejected the central thesis that college athletes are employees. The Cowan Memorandum’s revised interpretation means that it is unlikely that a union representing college athletes teams would be certified by the NLRB in the foreseeable future, making it more difficult for college athletes to pursue unionization under the National Labor Relations Act or to resolve outstanding issues through collective bargaining.

4.5. *Possible Legislative Solutions*

Congress has since “entered the breach” of disputes in college athletics through the introduction of legislation, most prominently the SCORE Act (*Student Compensation and Opportunity through Rights and Endorsements Act*), introduced in July 2025 as H.R. 4312 by Rep. Gus Bilirakis, with bipartisan sponsors including Reps. Janelle Bynum, Brett Guthrie, Tim Walberg, and others; the *Student Athlete Fairness and Enforcement Act* (SAFE Act), introduced in September 2025 by Senators Maria Cantwell, Cory Booker, and Richard Blumenthal; and the *Protect College Sports Act of 2026*, bi-partisan legislation introduced by Sen. Maria Cantwell and Sen. Ted Cruz, with support from Sen. Eric Schmitt and Sen. Chris Coons (Williams, 2026).

The various proposals contain many similar provisions but differ on such important issues as considering athletes as employees or granting the NCAA either a limited or full antitrust exemption.

4.5.1. The SCORE Act

The SCORE Act is a bipartisan proposal aimed at creating a uniform national framework for college sports, particularly concerning NIL rights, protections for athletes, and assuring institutional accountability.

Key provisions of the Act include:

- NIL Standardization: Establishes a single national NIL rules framework for all NCAA institutions and governing bodies, replacing the current patchwork of state laws and NCAA regulations;
- Athlete protections include legal rights for athletes to enter NIL agreements and to hire agents to pursue legitimate NIL opportunities;
- Prohibits “pay-for-play” and predatory compensation schemes, masquerading as legitimate NIL deals;
- Provides student privacy protections and support for financial literacy and contract guidance for college athletes;
- Academic and Health Support: Mandates access to academic/career counseling and “robust mental health services,” covering medical expenses necessary to treat athletic injuries for a period of 3 years post-enrollment; and
- Protects scholarships regardless of injury to a player or any income earned from NIL activities.

The SCORE Act would create regulatory clarity relating to eligibility, transfer timelines, and compensation caps. The Act would require registration for agents representing college athletes in NIL negotiations and affirms student-athletes’ classification as non-employees. Further, the Act mandates public reporting of student fees used to fund athletics and prohibits top-revenue programs from using these fees for general costs of college athletics. The SCORE Act passed committee stages in both the House and Senate but was pulled from the House floor vote in December 2025, leaving its status in limbo.

4.5.2. The SAFE Act

The Safe Act would:

- Create a national NIL standard, preempting state NIL legislation;
- Create health and safety mandates in such areas as heat exertion rules, concussion protocols and asthma standards, and provide for 5 years of post-eligibility medical coverage for all college athletes;
- Provide scholarship protections with 10-year scholarship guarantees for the student athlete in order to complete degree requirements;
- Mandate agent regulation, providing for mandatory registration, and a 5% fee cap on NIL agent compensation;
- Provide for media rights reform, allowing schools and athletic conferences to negotiate media rights collectively without the prospect of the application of antitrust provisions by creating a “limited” antitrust exemption relating to issues considered in the legislation;
- Create transfer portal changes permitting athletes to transfer *twice* without sitting out a mandatory year; and

- Introduce limits on “pay-for-play” by requiring that NIL payments must be made for the legitimate use of an athlete’s NIL rights.

4.5.3. Protect College Sports Act of 2026

The Protect College Sports Act of 2026 has garnered the most attention and support in the Congress and the public. The Act is a bipartisan legislative effort designed to stabilize college athletics by establishing enforceable national rules, while preserving fair competition and protecting student-athletes. The bill attempts to restore order in college sports by codifying NIL rights, scholarship protections, and healthcare benefits for student-athletes and to rein in the “chaos” caused by unlimited transfers, “out-of-control” eligibility rules, and actions of predatory agents (see Wohlewend, 2026).

According to its sponsors, the Act would also:

- Preserve women’s and “Olympic sports” (Kuch, 2026) (those sports that are officially recognized and contested at the Summer and Winter Olympic Games, governed by international federations and organized into disciplines and events) by banning major college athletic programs from cutting women’s and Olympic sports programs (Sully, 2025), reducing roster spots (Murphy & Rothstein, 2024) or scholarships below 2024–2025 levels for a period nine years;
- Protect “traditional intercollegiate rivalries” and ensure a reasonable stream of TV revenues for the general benefit of college sports; and
- Restore a competitive balance in college athletics so that smaller programs can compete alongside the “blue bloods” of college sports.

Key provisions of the law relate to:

- NIL Rights: Enshrining in law athletes’ right to earn compensation for their name, image, and likeness, but with guardrails to prevent “pay-for-play” (Forde, 2024);
- Scholarship and Healthcare Protections: Making scholarship and healthcare benefits for student-athletes enforceable in law;
- Transfer and Eligibility Rules: Establishing limits on transfers and eligibility in order to reduce current “transfer chaos” caused in part by the “transfer portal” which Schrotenboer (2026) describes as “sucking life out of college sports”;
- Conference Stability: Proposals under review include capping Power Four conference sizes at 19–20 teams and creating a five-year window for schools seeking to join these conferences;
- Women’s and Olympic Sports Safeguards: Banning cuts to women’s and Olympic sport programs for nine years for schools with over \$80 million in athletics revenue; and
- Media Rights Pooling: Allowing conferences to pool media rights in order to increase revenue—effectively providing a limited exemption from antitrust scrutiny.

The Act passed the Senate Commerce Committee with bipartisan support (19–9) on June 18, 2026 (Williams, 2026). The Trump Administration has endorsed it, although the President had offered his own suggestions for reforms in Executive Order 14322 – “*Saving College Sports*” (July 24, 2025) and Executive Order 14400 – “*Urgent National Action to Save College Sports*” (April 3, 2026), which critics charged would actually *increase* the NCAA’s control over college athletes and athletic programs. The President also threatened to review federal government grants and contracts for colleges that do not comply with NCAA rules (Rinaldi, 2026).

Key opponents of the legislation initially included the SEC and Big Ten Conferences, who released a joint statement saying the bill “leaves critical issues unresolved” and could expand litigation rather than reduce it (Jain, 2026; Pells, 2026); Auburn University and University of Alabama, who issued a joint letter opposing the bill, arguing it fails to address the central challenges in college athletics and leaves key issues to the courts (Rauterkus,

2026); and the AFL-CIO, calling the legislation a return to “an old system of athlete exploitation,” reducing athletes’ transfer rights, and failing to grant college athletes employee status (Kelley, 2026).

Extensive negotiations took place between the legislation’s sponsors and representatives of the Big Ten and the SEC who finally reached an agreement on August 2, 2026 (Russo, 2027), sending the bill to the floor of the U.S. Senate. However, the fate of this legislation remains uncertain. Last minute opposition by the Congressional Black Caucus further dimmed the Act’s passage (Niles, 2026).

5. Conclusion: The Continuing, but Limited, Role of Antitrust

This article examined the continuing relevance of antitrust law in three economically important but institutionally distinct settings: franchising, Big Tech, and sports. The central conclusion is clear. Antitrust law remains an essential mechanism for protecting competition, restraining exclusionary conduct, and preventing powerful firms or coordinated entities from using market power to impose costs on consumers, workers, franchisees, athletes, advertisers, and smaller rivals. Its relevance has not diminished. Rather, contemporary disputes demonstrate that antitrust analysis has become more fact-dependent, more attentive to market structure and economic realities, and more intertwined with other legal regimes, particularly labor law, intellectual property law, consumer protection law, and sector-specific regulation.

In franchising, antitrust law continues to provide an important boundary between legitimate system-wide control and improper restraints on competition. Franchisors have substantial interests in preserving brand integrity, uniform quality, safety, and customer expectations. These interests may justify certain purchasing requirements, technical standards, and restrictions designed to prevent “free riding” or protect the value of the franchise system. Yet, the franchise relationship cannot serve as a vehicle for coercive tying, unlawful territorial allocation, resale price restraints, or other practices that needlessly foreclose competition in markets for goods and services that franchisees might otherwise obtain independently. The critical inquiry is not whether a franchisor exercises control, but whether the challenged restraint is reasonably related to legitimate operational needs and produces benefits that outweigh its competitive harms.

The Big Tech cases reveal a different but equally consequential application of antitrust law. Digital platforms may generate substantial consumer benefits through integrated products, ecosystem coordination, security protections, innovation, and low- or no-price services. At the same time, the scale, data advantages, default arrangements, network effects, and control over digital distribution channels held by major technology firms can enable exclusionary conduct that rivals find difficult to overcome. The litigation involving Google, Amazon, and Apple illustrates the modern challenge: courts and enforcement agencies must distinguish vigorous competition and legitimate product integration from conduct that unlawfully preserves monopoly power, raises rivals’ costs, restricts interoperability, or denies competitors meaningful access to customers and markets. The appropriate remedies must be carefully tailored. Overly intrusive intervention may discourage innovation, while weak behavioral commitments may leave the conditions that produced market dominance substantially unchanged.

Sports present an especially complex case because cooperation among competitors is often necessary to create the product itself. Teams must agree on rules, schedules, player eligibility, media arrangements, and competitive structures in order to produce a viable league. Accordingly, sports cannot be analyzed solely through the lens of ordinary commercial rivalry. Nevertheless, the need for cooperation does not create blanket immunity from the Sherman Act. Professional leagues remain subject to antitrust scrutiny except where statutory exemptions, judicially recognized doctrines, or collective bargaining protections apply. Statutory and nonstatutory labor exemptions are particularly significant because collectively bargained agreements can address salary caps, drafts, free agency, roster rules, and other employment conditions that otherwise might be characterized as restraints on trade.

College athletics is the setting in which the limits of the traditional amateurism model have become most evident. The progression from *NCAA v. Board of Regents of the University of Oklahoma* to *O’Bannon v. NCAA*, *NCAA v. Alston*, and the *House* settlement demonstrates that the NCAA and its member institutions cannot rely on

amateurism as a categorical defense to restrictions on athlete compensation. College athletes now participate in a system marked by NIL opportunities, direct institutional revenue sharing, booster-supported collectives, transfers, eligibility litigation, and increasing pressure to recognize the economic value of athletic labor.

These changes have made it increasingly difficult to maintain a regulatory structure that treats athletes as participants in a purely educational enterprise while institutions, conferences, broadcasters, and commercial partners derive enormous revenues from their performances.

Antitrust litigation has helped expose restraints that no longer fit the economic realities of major college sports. It is less clear, however, that antitrust litigation alone can produce a stable and equitable governance system. Courts are well suited to assess specific restraints, determine whether a challenged practice is unreasonable, and impose relief tailored to an established violation. Courts are less well positioned to construct a durable national framework for revenue sharing, athlete health and safety, transfer rules, Title IX compliance, scholarship protections, agent regulation, media rights, and the long-term viability of nonrevenue and Olympic sports. Those issues require institutional choices that extend beyond the traditional remedial function of antitrust law.

One possible path forward is collective bargaining. If college athletes attain employee status under applicable law or otherwise acquire a meaningful mechanism for collective representation, negotiations between athletes and institutions could address compensation, benefits, health care, working conditions, eligibility, transfers, and revenue sharing. Properly structured collective bargaining could also bring certain agreements within the protection of the nonstatutory labor exemption, reducing recurring antitrust exposure while giving athletes a direct voice in rules that govern their economic and athletic lives. Such a development would not eliminate difficult questions concerning the appropriate bargaining unit, the role of the NCAA and conferences, public-private institutional differences, and the preservation of broad-based athletic opportunities. It would, however, offer a more participatory alternative to a system governed principally by litigation and unilateral institutional rulemaking.

Congress may also choose to enact targeted legislation, but any statutory solution should be approached with caution. A national framework could reduce the uncertainty created by inconsistent state NIL laws and continuing litigation. Yet, a broad antitrust exemption for the NCAA, conferences, or institutions would risk reinstating the very forms of economic control that recent antitrust decisions have challenged. Any legislative protection should therefore be limited, transparent, and conditioned on meaningful athlete safeguards, including enforceable compensation rights, medical protections, academic support, due-process procedures, and protection against retaliation. Antitrust immunity should not become a substitute for accountability.

The broader lesson of this Article is that antitrust law remains relevant precisely because market power continues to evolve. In franchising, the question is whether control protects a legitimate brand or suppresses independent competition. In digital markets, the question is whether integration and innovation are being used to create consumer value or to entrench durable dominance. In sports, the question is whether necessary coordination serves the production of a competitive product or improperly restricts athlete compensation and mobility. The answers will vary by market, legal doctrine, and factual context. But the foundational antitrust principle remains constant: economic power must not be exercised in a manner that unreasonably denies others the opportunity to compete.

Accordingly, the question is not whether antitrust law is still relevant today. It plainly is. The more difficult and therefore important question is how antitrust law should operate alongside labor law, private ordering, judicial remedies, and carefully designed legislation in markets whose commercial structures increasingly blur the boundaries between cooperation and collusion, integration and exclusion, and innovation and entrenchment. The future of antitrust enforcement will depend on maintaining that distinction with doctrinal rigor, economic realism, and sustained attention to the interests of those most affected by concentrated economic power.

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