[Journal of Legislation](https://scholarship.law.nd.edu/jleg)

Volume 47 | Issue 2 Article 7

5-19-2021

The Corporate Transparency Act: A Step Toward Broken Shells

Brendan O'Leary

The Corporate Transparency Act: A Step Toward Broken Shells

Cover Page Footnote

The author is a candidate for Juris Doctor at the University of Notre Dame Law School, in the class of 2022. He has an undergraduate degree in Economics and Philosophy from Boston College, where he graduated in the class of 2018. The advice and consideration of Prof. Patrick Corrigan, Prof. Matthew Barrett, and Prof. Richard Garnett were incorporated into this Note. This Note is only possible through the support of the author's loved ones, friends, and the efforts of the many diligent editors of the Notre Dame Journal of Legislation.

THE CORPORATE TRANSPARENCY ACT: A STEP TOWARD BROKEN SHELLS

Brendan O'Leary. [*]

INTRODUCTION

In 2016, a large-scale investigation into international financial dealings revealed that over one–hundred celebrities, traffickers, world-renowned politicians, and other members of the global elite were diluting their wealth through hard-to-trace business deals in order to avoid detection.[1] This investigation revealed what came to be known as the "Panama Papers," a collection of documents that uncovered the dark underbelly of international schemes to accumulate wealth, through both legal and illegal means.[2] Major banks and law firms advised their clients wishing to keep anonymity and evade taxes to funnel their money into offshore shell accounts. These offshore accounts preserved clients' anonymity, regardless of whether the funds were obtained legally.[3] Investigators traced these implicated accounts to a wide variety of wealthy public figures, from Russian President Vladimir Putin to F.C. Barcelona captain Lionel Messi.[4] The hundreds of thousands of offshore entities contained in the leak, however, were unusually thin on people from one particular country: the United States.[5]

The likely reason for this discrepancy is simple: United States residents do not have to go abroad to foreign "tax havens" like the British Virgin Islands,

[*] The author is a candidate for Juris Doctor at the University of Notre Dame Law School, in the class of 2022. He has an undergraduate degree in Economics and Philosophy from Boston College, where he graduated in the class of 2018. The advice and consideration of Prof. Patrick Corrigan, Prof. Matthew Barrett, and Prof. Richard Garnett were incorporated into this Note. This Note is only possible through the support of the author's loved ones, friends, and the efforts of the many diligent editors of the *Notre Dame Journal of Legislation*.

[1] Will Fitzgibbon, *Panama Papers FAQ: All You Need to Know About The 2016 Investigation*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Aug. 21, 2019), https://www.icij.org/investigations/panama-papers/panama-papers-faq-all-you-need-to-know-about-the-2016-investigation/ [hereinafter *ICIJ FAQ*].

[2] *Key Findings*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://www.icij.org/investigations/panama-papers/#_ga=2.79829203.595559787.1600041228-1177832221.1600041228 (last visited Apr. 16, 2021) [hereinafter *ICIJ Key Findings*].

[3] *Id.*

[4] Liam Stack et al., *What are the Panama Papers?*, N.Y. TIMES (Apr. 4, 2016), https://www.nytimes.com/2016/04/05/world/panama-papers-explainer.html.

[5] *Panama Papers: Where are the Americans?*, BBC NEWS (Apr. 6, 2016), https://www.bbc.com/news/world-us-canada-35966612. *See also ICIJ Key Findings*, *supra* note 2.

Switzerland, or Panama when domestic tax havens are available.[6] States like Delaware are notorious for their corporation-friendly tax laws.[7] With "Delaware remain[ing] the home of the vast majority of top U.S. companies, including more than two thirds of the Fortune 500 and 80 [%] of all firms that go public," the consensus in the United States seems to be that Delaware is the go-to state for incorporation, due to its low tax rates and often corporation-friendly courts.[8] Thus, the fact that United States residents are not as likely to be caught in international money-laundering schemes does not necessarily indicate that they are not as likely to engage in money laundering or other suspect financial activity.

The investigative reporting that led to the release of the Panama Papers required the synthesis of over eleven-million documents, which leaked through an anonymous source.[9] Ideally, the extent to which the public is informed of the fact that world leaders are funneling money through suspect channels of the global economy should not be up to the prerogative of a whistleblower to reveal the information, considering whistleblowers must overcome threats of workplace retaliation, mistreatment, and termination.[10] The Panama Papers, which did not directly implicate the U.S. elite, sparked some federal lawmakers' concern about illicit financial activity inside U.S. borders. With the possibility of U.S. residents being involved in suspect financial activity within its own borders looming especially heavily, legislators eventually took action. On January 1, 2021, Congress passed the National Defense Authorization Act into law with a veto-proof majority.[11] Within the lengthy statute was the language of an Act Representative Carolyn Maloney of New York had been trying to pass for years. The "Corporate Transparency Act," a statute that mandates reporting requirements for corporations most likely to be used as shell corporations for potentially illicit activities, first introduced in 2009, had finally become law.[12] Beneficial owners of corporations covered under the Corporate Transparency Act ("CTA") would have to disclose basic personal information to the Financial Crimes Enforcement Network ("FinCEN").[13] Reporting this sort of information to law enforcement is necessary because "[v]ery few States require information about the beneficial owners of the corporations and limited liability

---

[6] Nicholas Shaxson, *Tackling Tax Havens*, INT'L MONETARY FUND (Sept. 2019), https://www.imf.org/external/pubs/ft/fandd/2019/09/tackling-global-tax-havens-shaxon.htm.

[7] Leslie Wayne, *How Delaware Thrives as a Corporate Tax Haven*, N.Y. TIMES (June 30, 2012), https://www.nytimes.com/2012/07/01/business/how-delaware-thrives-as-a-corporate-tax-haven.html. *See also Why Businesses Choose Delaware*, DELAWARE.GOV: DEL. CORP. L., https://corplaw.delaware.gov/why-businesses-choose-delaware/ (last visited Apr. 16, 2021).

[8] DEL. DIV. OF CORPS., 2019 ANNUAL REPORT STATISTICS (2009), https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2019-Annual-Report.pdf.

[9] *ICIJ FAQ*, *supra* note 1.

[10] *See generally*, David Nather, *The Price of Whistleblowing*, AXIOS (Nov. 11, 2019) https://www.axios.com/whistleblowers-personal-price-ukraine-ellsberg-snowden-45069990-0489-4b10-8e95-53bcd3786723.html.

[11] National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. (2021). The text of the Act, as introduced in 2019, will be used throughout the paper, as the language in the version of the bill that became law is substantially identical.

[12] Corporate Transparency Act of 2019, H.R. 2513, 116th Cong. (2019). A "shell company" is a "corporation that has no active business and usually exists only in name as a vehicle for another company's business operations." *Corporation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[13] H.R. 2513 § 3. Such basic personal information includes names, dates of birth, current addresses, and personal identification numbers. This information will be updated annually. The statute's definition of "beneficial owner" will be discussed in detail throughout this Note.

companies formed under their laws."[14] These reporting requirements and other provisions in the Act, however, will inevitably be manipulated from many angles in order to prevent the CTA from being enforced as intended, for various reasons.[15]

Some critics, wary of the idea of handing over more personal information to government agencies, worry about violations of privacy rights.[16] Government access to personal information means the data in question may be leaked or used for purposes other than the stated commitment of the CTA. Some individuals who operate anonymous shell companies within the United States surely have good-faith reasons to operate them as such, and some channels for obtaining relevant information on such corporations already exist.[17] Additionally, in 2019 the Trump administration voiced concerns over the strains the CTA would put on small businesses, as many of such businesses may not be exempt from the statute's disclosure requirements.[18] The White House was also concerned over the potential for the public to have broad access to beneficial owners' information, as well as discrepancies in the definition of "beneficial owners."[19]

This Note will address the most prominent challenges aimed at the CTA, including interpretation issues and constitutional challenges, and will argue why the Act likely will stand up to all scrutiny. Part I will explore the CTA in further depth and address its potential effects on corporate law in the United States. Part II will address statutory and procedural issues with the CTA, including issues with the statutory language (especially concerning the definition of "beneficial ownership"), potential judicial interpretations of the CTA, the burden the Act may place on small businesses, and possible problems with maintaining confidentiality. Part III will address the federal right to privacy and First Amendment issues and state why such challenges to the CTA's constitutionality likely will fail. Finally, this Note will conclude by summarizing the findings that the CTA, with some minor amendments, likely will withstand constitutional and interpretive scrutiny and become a crucial first step in exposing much undiscovered financial wrongdoing within the United States.

I. BACKGROUND

If you were taking a scenic stroll through downtown Wilmington, Delaware, you might pass by a small, unassuming brick building with no exceptional defining characteristics. This inconspicuous building, however, is one of the most notable in

[14] H.R. 2513 § 2.

[15] Such reasons are multitudinous, ranging from a genuine concern over the administrative costs being shifted onto small businesses and a concern over privacy and confidentiality of personal information, to a less genuine but certainly palpable concern over a client's potential corporate tax liability if tenuous shell corporation structures were uncovered.

[16] Anne Eberhardt, *The Controversy Surrounding the Corporate Transparency Act of 2019*, CORP. COMPLIANCE INSIGHTS (May 22, 2020), https://www.corporatecomplianceinsights.com/controversy-corporate-transparency-act-2019/.

[17] *Id.*

[18] OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, , STATEMENT OF ADMINISTRATION POLICY: H.R. 2513 — CORPORATE TRANSPARENCY ACT OF 2019, AS AMENDED BY MANAGER'S AMENDMENT (2019), https://www.trumpwhitehouse.archives.gov/wp-content/uploads/2019/10/SAP_HR-2513.pdf.

[19] *Id.*

all of Wilmington: the building is the corporate home of over 300,000 corporations.[20] This consolidation of incorporation is not too strange of an occurrence in Delaware, as over one-million business entities are incorporated in the state, even though their corporate headquarters are almost exclusively located elsewhere.[21] Such a concentration of corporate power in Delaware has led to many labelling the state as a tax haven.[22]

Delaware's reliance on its status as a tax haven has not necessarily improved the lives of Delaware residents: since the year 2000, Delaware's local economy has lagged behind the national economy in many important metrics.[23] From the turn of the century through 2016, Delaware's economy has only grown by 11.72%, compared to a 33.1% growth rate for the national economy, and Delaware's median inflation-adjusted household income has actually decreased by over $12,000 over that same time period.[24] While critics would contend that an economic slump could have occurred otherwise, and such a tax system has kept Delaware citizens from being worse off, all of the tax incentives being offered to corporations to incorporate in Delaware are not translating into relative material benefits for the people of the state. Corporate expenses in incorporation do contribute significantly toward Delaware's budget, however, as corporate taxes and fees account for 40% of the state's annual revenue.[25] Registration fees, however, likely do not make up for all of the taxes that other states miss out on. For example, Delaware does not tax intangible assets, so states that would otherwise be the place of incorporation for all of these Delaware-based corporations are missing out on ample tax revenue that they would normally be collecting from these corporations' intangible assets.[26] A potential point of greater concern is the extent to which powerful actors are using Delaware's business laws to shield not only their tax burdens, but also their identities.

Powerful actors may hide their identities within the corporate world through the use of "shell corporations." A shell corporation is a "corporation that has no active business and usually exists only in name as a vehicle for another company's business operations."[27] Without the CTA in place, such corporations would not be required to report the personal information of their beneficial owners to FinCEN. Under current state law, a simple certificate of incorporation is all that is necessary to incorporate

---

[20] Darren Weaver, *This Tiny Building in Wilmington, Delaware is Home to 300,000 Businesses*, BUS. INSIDER (Dec. 27, 2018, 11:10 AM), https://www.businessinsider.com/building-wilmington-delaware-largest-companies-ct-corporation-2017-4.

[21] *Id.* Corporate entities actually outnumber Delaware's population of natural persons. Under one million people live in Delaware. *QuickFacts: Delaware*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/DE (last visited Apr. 16, 2021).

[22] Alana Semuels, *Loose Tax Laws Aren't Delaware's Fault*, THE ATLANTIC (Oct. 5, 2016), https://www.theatlantic.com/business/archive/2016/10/dont-blame-delaware/502904/. *See also* Wayne, *supra* note 7.

[23] James L. Butkiewicz, *Feature: The Root Causes of Delaware's Fiscal Challenges*, 35 DEL. LAW. 8, 8 (Winter 2017–2018).

[24] *Id.* The one major economic statistic in Delaware's favor is the unemployment rate, which has stayed steadily below the national unemployment rate throughout the same period. *Id.*

[25] Ben Casselman & Allison McCann, *Where Your State Gets Its Money*, FIVETHIRTYEIGHT (Apr. 16, 2015, 4:03 PM), https://www.fivethirtyeight.com/features/where-your-state-gets-its-money/.

[26] Semuels, *supra* note 23. Other states may be losing up to $9.5 billion in tax revenue as a result of this practice. *Id.*

[27] *Shell Corporation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

one's business, making anonymity likely for beneficial owners at a low cost.[28] Such a process can take under twenty minutes to perform and cost only $200.[29] Once created, usually with a name and address far removed from the true owner, the shell corporation theoretically can hold all of the true owner's assets. Multiple corporations that own each other can be created, thereby creating the "shells" and hiding away large sums of money. Although many use this technique for more mundane legal purposes, such as limiting liability through the corporate veil or benefiting from obscure loopholes in the tax code, many others use such shell corporations to disguise more nefarious activities: trafficking, selling illicit drugs, and manipulating the tax code illegally.[30] Shell corporations hinder law enforcement and make it difficult to track down the source of funding for these activities, if they can be traced at all.[31] Without a way for a financial law enforcement agency to look into the true owners of these shell corporations, these illicit activities will continue to transpire without proper regulation.

The Corporate Transparency Act aims to uncover the identities of the individuals taking advantage of these tax benefits and to expose any potential crimes committed under the guise of shifting corporate funds.[32] Proponents of the legislation claim that "[t]olerance of anonymous shell companies has long helped drug- and human-traffickers, organized crime groups and foreign kleptocrats launder their ill-gotten gains through the U.S. financial system."[33] Anyone considered a "beneficial owner" of an entity incorporating in the United States would be required to submit their name, address, and date of birth, as well as an identification number to link them to a document such as a driver's license or passport.[34] Anyone the federal financial authorities catch breaking this law, or aiding others in breaking it, may be held liable for civil and criminal charges, with the associated penalties totaling a maximum of a $10,000 fine and a two-year federal prison term.[35] With the CTA in place, federal authorities would be able to crack down on high-level financial crimes more effectively, holding those attempting to circumvent laws and regulations accountable. For example, an individual indicted for tax fraud only could have been indicted after a years-long federal investigation, prolonged by the difficulty federal authorities had in tracing the identities of perpetrators through shell corporations, associates' names, and fake addresses. In theory, the CTA would speed up this investigative process by requiring those who have the most to gain from perpetrating tax fraud—the beneficial owners of shell corporations—to report their identities to federal authorities preemptively. Because authorities' cases often go cold as soon as they need to deal with uncovering the true owners of multiple anonymous shell companies, federal

---

[28] Malia Wollan, *How to Set Up a Shell Company*, N.Y. TIMES MAG. (Nov. 7, 2019), https://www.nytimes.com/2019/11/07/magazine/how-to-set-up-a-shell-company.html.

[29] *Id.*

[30] *Id.*

[31] Will Fitzgibbon and Ben Hallman, *What is a tax haven? Offshore finance, explained*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Apr. 6, 2020), https://www.icij.org/investigations/panama-papers/what-is-a-tax-haven-offshore-finance-explained/.

[32] Corporate Transparency Act of 2019, H.R. 2513, 116th Cong. § 2 (2019).

[33] Jeanne Whalen, *Congress Bans Anonymous Shell Companies After Long Campaign by Anti-Corruption Groups*, WASH. POST (Dec. 11, 2020, 4:39 PM), https://www.washingtonpost.com/us-policy/2020/12/11/anonymous-shell-company-us-ban/.

[34] *Id.*

[35] *Id.*

authorities would welcome any aid to these investigations with minimal privacy invasion to the incorporating public.[36]

The CTA aims to achieve its stated goals primarily through requiring all registered corporations and limited liability companies to disclose their "beneficial owners" to FinCEN.[37] The CTA defines "beneficial owner" as:

> [A] natural person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise . . . exercises substantial control over a corporation or limited liability company; owns 25[%] or more of the equity interests of a corporation or limited liability company; or receives substantial economic benefits from the assets of a corporation or limited liability company.[38]

This broad definition of the Act's key term is bound to raise some challenges to any potential agency interpretation of the statute's definition. Typically, under the *Chevron* doctrine, when an agency's interpretation of an act of Congress is ambiguous, such as "substantial economic benefits" here, and where Congress remains silent on the issue, the agency's interpretation is controlling, so long as such an interpretation is reasonable.[39] Thus, in all likelihood, so long as *Chevron* deference remains the controlling doctrine, the Department of the Treasury's interpretation of the definition of "beneficial owner" and its scope will be the controlling interpretation, so long as the interpretation is sufficiently reasonable.[40] Although FinCEN has not had the opportunity to interpret this statute yet, FinCEN, through the authority of the Department of the Treasury, could then independently determine that individuals "receiv[ing] substantial economic benefits from the assets of a corporation" are a wide-reaching class of people, going beyond those who own over a quarter of a corporation's equity or those who exert control over the corporation, who would need to submit their information to FinCEN annually.[41] Such an interpretation would allow FinCEN to target a wider class of actors who could be effectively controlling shell corporations.

The term "beneficial owner," regardless of the broad scope the Department of the Treasury may implement in its interpretation, will at the very least require major stockholders and the boards of directors of these smaller, mostly privately held corporations to share their information with the law enforcement agency.[42] Such actors have kept their identities private for so long for important material reasons.[43]

---

[36] Morris Pearl, *Congress Just Passed the Most Important Anti-Corruption Reform in Decades, but Hardly Anyone Knows About It*, FORTUNE (Dec. 26, 2020, 11:00 AM), https://fortune.com/2020/12/26/ndaa-2021-shell-companies-corporate-transparency-act/.

[37] H.R. 2513 § 3. According to the Act, "[v]ery few States require information about the beneficial owners of the corporations and limited liability companies formed under their laws." H.R. 2513 § 2.

[38] H.R. 2513 § 3.

[39] Chevron v. Nat. Resources Def. Council, 467 U.S. 837, 843 (1984).

[40] *Id.*

[41] H.R. 2513.

[42] Major stockholders controlling over 25% of a corporation's stock would certainly fall into the definition's second category, while the board of directors most certainly exerts control over the corporation in a way that the definition's first category intends to cover. H.R. 2513 § 3. *See also* DEL. CODE ANN. tit. 8 §§ 141(a), 220(a)(1) (West, Westlaw through ch. 11 of the 151st Gen. Assembly).

[43] Jana Kasperkevic, *Forget Panama: It's Easier to Hide Your Money in the US Than Almost Anywhere*, THE GUARDIAN (Apr. 6, 2016, 7:00 AM), https://www.theguardian.com/us-news/2016/apr/06/panama-papers-

In the pre-CTA era, most state jurisdictions do not require any basic information on beneficial owners, so those who would benefit from a lack of reporting have flocked toward states that do not require disclosure.[44] Thus, these actors who would prefer to keep their identities as beneficial owners of anonymous shell companies private may challenge this definition and attempt to constrain the scope of the CTA's enforcement. They could do so along the lines of aforementioned *Chevron* deference, arguing that FinCEN's inclusion of them within the scope of the definition of "beneficial owner" is an unreasonable reading of the statute. This line of argument will not be inspected as thoroughly, as *Chevron* deference affords agencies considerable deference in interpretation of statutes, so long as the *Chevron* regime is prevailing in the judiciary.[45] For actors that fall clearly within the scope of the definition of "beneficial owner," they may argue that courts should interpret the language of the CTA more narrowly, or that the statute itself is unconstitutional.

Analysis of whether the term "beneficial owner" encompasses certain classes of ownership in a corporation, as well as analysis of other significant textual interpretation issues, may be done through the use of certain canons of construction. A canon of construction is "a rule used in construing legal instruments, esp[ecially] contracts and statutes," or "a principle that guides the interpreter of a text."[46] Although canons of construction do not typically hold the weight of law, they are often used in any given judicial opinion to give the judge's point of view additional credence.[47] In the opinion of some scholars on the topic, such as Karl Llewelyn, both substantive and semantic canons are used to achieve policy outcomes, no matter what the user of the canon claims the true use of the canon is.[48] When engaging in statutory interpretation, certain canons are more likely to appear in judicial opinions on the topic than others, so those canons should be given additional weight in an analysis of how canons of construction will be used in interpreting the meaning of a statute such as the CTA.[49]

Canons of construction are traditionally broken down into two categories: semantic and substantive. Semantic canons of construction focus on the meaning of the words themselves, purportedly isolated from substantive outcomes of interpreting a word within a statute one way or another.[50] This interpretation "give[s] primacy to the… evidence about the way a reasonable person conversant with relevant social and linguistic practices would have used the words" in the statute.[51] Examples of semantic canons of construction that interpreting courts may use to understand the CTA include the canons of *ejusdem generis*, *expressio unius*, and *noscitur a sociis*.[52]

---

us-tax-havens-delaware("Shell companies have their uses; they can be used to buy land anonymously, for example, without tipping off the competition. To create an entity to protect future business rights, or a holding company for various businesses. They can also be used to, legally, make political contributions anonymously.").

[44] *Id.*

[45] *Chevron*, 467 U.S. at 843.

[46] *Canon of Construction*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[47] *See generally*, John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, (2006).

[48] *Id.* at 89 n.68 (2006).

[49] Jonathan R. Macey and Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 671 (1992).

[50] Manning, *supra* note 47, at 92.

[51] *Id.* at 91.

[52] *Id.* at 89–90 n.68, 90 n. 69.

Counter to semantic canons, substantive canons of construction tend to explicitly favor a specific policy outcome.[53] Substantive canons are effectively judicial stopgaps on political action, where judges use common law norms to restrict policymakers from reaching undesirable outcomes.[54] In doing so, judges are empowered to go "well beyond the four corners of the text to determine the often abstruse details of technical meaning."[55] Examples of substantive canons of construction that interpreting courts may use to understand the CTA include the canons of constitutional avoidance and absurdity avoidance.[56]

Judges with different ideological bends tend to prefer semantic canons over substantive canons, or vice versa, in order to further their opinion and give stronger authority to their position or point of view on their ruling.[57] More textualist judges will tend to prefer the semantic canons over substantive canons, under the belief that when a statute's text is clear, secondary factors like background knowledge, the lawmakers' intent, and policy determinations are all extraneous to a statute's clear meaning.[58] More purposivist judges believe "the converse is true: Even when clear contextual evidence of semantic usage exists, priority is accorded to (sufficiently powerful) contextual evidence of the policy considerations that apparently justified the statute."[59] Regardless of ideology, however, when engaging in statutory interpretation, judges are likely to use certain common canons of construction because of their relevance to the interpretation of the statute at hand.

The CTA also has procedural issues that need to be addressed. Such issues include the manner in which a small business may attempt to fall into one of the statute's exemptions from disclosure of beneficial ownership. Generally, an incorporated entity is exempt from all reporting requirements to federal financial authorities under the CTA if all of the three "business concerns" criteria are satisfied: the corporation has a physical presence within the U.S., the corporation employs more than twenty people, and the corporation's annual revenue is worth more than $5 million.[60] Such "business concerns" are defined as outside of the scope of the definition of a "corporation or limited liability company."[61] Through putting these caps on reporting, the drafters appear to have spared large U.S.-based corporations from filing information on beneficial ownership with FinCEN. However, many U.S.-based businesses do not meet these criteria and cannot fall squarely into any of the other available exemptions, including those for brokers, investment companies, insurance companies, public accounting firms, most public utility companies, and nonprofit corporations.[62] According to the National Federation of Independent

[53] *Id.* at 82, 83.

[54] *Id.*

[55] *Id.* at 83.

[56] *See generally*, Anita S. Krishnakumar, *Passive Avoidance*, 71 STAN. L. REV. 513 (2019).

[57] Charlie D. Stewart, *The Rhetorical Canons of Construction: New Textualism's Rhetoric Problem*, 116 MICH. L. REV. 1485, 1494 n.66 (2018).

[58] Manning, *supra* note 47, at 93.

[59] *Id.*

[60] Corporate Transparency Act of 2019, H.R. 2513, 116th Cong. § 3 (2019). *See also* Richard Hall, *US passes 'historic' anti-corruption law that effectively bans anonymous shell companies*, THE INDEP. (Jan. 1, 2021, 22:15), https://www.independent.co.uk/news/world/americas/us-passes-historic-anti-corruption-legislation-that-effectively-bans-anonymous-shell-companies-b1781380.html.

[61] H.R. 2513.

[62] *Id.*

Business ("NFIB"), a "voice of small business," the new reporting requirements are estimated to saddle "America's smallest businesses . . . with an additional 131.7 million hours of paperwork at a cost of $5.7 billion over the first 10 years."[63] Such a study likely takes into consideration the opportunity cost of lost profits while time is spent reporting data, in addition to the cost of hiring professionals to report such paperwork, as well as other net externalities. The Congressional Budget Office "anticipates the bill would generate approximately 25 million to 30 million new filings each year" to comply with the new reporting requirements.[64] The limited scope of the exemptions to the reporting requirements ensures that small businesses throughout the U.S. with nothing to hide, operating within the bounds of the financial laws and regulations, will nevertheless have to report their beneficial ownership information to the federal government.

The judiciary may take into consideration the practical concerns the procedural issues of the CTA pose, as well as both substantive and semantic canons of construction, when conducting a constitutional analysis of the CTA. One such constitutional challenge to the CTA posits that the reporting requirements violate the First Amendment rights of beneficial owners.[65] Such a constitutional argument rests upon the willingness of a deciding court to disregard stare decisis to a certain extent on First Amendment issues, because no major decision has explicitly paved the way for a court to overturn the CTA on these constitutional grounds.[66] Some notable dissents, however, may lend this point of contention potential lifelines. One such powerful dissent came from Justice Thurgood Marshall who said of the Bank Secrecy Act, "[s]urely the fact that some may use negotiable instruments for illegal purposes cannot justify the Government's running roughshod over the First Amendment rights of the hundreds of lawful yet controversial organizations . . . ."[67] Although this statement of dictum does not hold much precedential value, the First Amendment remains an important right in the corporate context. The CTA likely would offend the late Justice's sensibilities because the Act requires further disclosure of personal information from beneficial owners than the original Bank Secrecy Act. Justice Marshall likely would believe that the illicit actions of certain individuals and organizations could not justify the legal use of anonymity from otherwise upstanding United States residents.[68] In *California Bankers Association v. Shultz*, though, the majority found that the Bank Secrecy Act, which the CTA amends, did not violate First Amendment rights because it stopped short of requiring disclosure of personal information of an organization's members and contributors.[69] The CTA does require reporting of major actors within organizations to federal authorities, so some freedom

[63] *The Corporate Transparency Act of 2019 Passes US House*, NAT'L FED'N OF INDEP. BUS., (Oct. 25, 2019), https://www.nfib.com/content/nfib-in-my-state/grassroots/the-corporate-transparency-act-of-2019-passes-us-house/. This does not account for all of the additional revenue that the enforcement of the CTA would bring, which would be returned to the public.

[64] CONG. BUDGET OFF., COST ESTIMATE, AT A GLANCE: H.R. 2513, CORPORATE TRANSPARENCY ACT OF 2019 (2019), https://www.cbo.gov/system/files/2019-09/hr-2513.pdf.

[65] *See generally* California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974).

[66] *Id.*

[67] *Shultz*, 416 U.S. at 99.

[68] *Id.* at 98.

[69] *Id.* at 55–56.

of association concerns that Justice Rehnquist, who wrote the majority opinion in *Shultz*, skirted in his opinion may be in play.

One other constitutional challenge to the CTA could come through the federal right to privacy. Such a federal right to privacy is not explicitly embedded in the text of the Constitution, but its roots have been implied through a mixture of the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.[70] However, this constitutional right has not been interpreted very expansively; many government agencies collect extensive information from private citizens and corporations, and no landmark case has curbed the federal government's ability to do so significantly.[71] Federal statutes such as the Patriot Act, National Security Act, and the existing Bank Secrecy Act provide the government inroads into personal and corporate information, with a similar tradeoff of greater law enforcement capacity and public accountability.[72] Thus, the courts will have to call into question the very existence and extent of the federal government's surveillance state to overturn the CTA on federal right to privacy grounds.

The stated purpose of the CTA suggests that the disclosure of private information would "prevent wrongdoers from exploiting United States corporations and limited liability companies for criminal gain, to assist law enforcement in detecting, preventing, and punishing terrorism, money laundering, and other misconduct involving United States corporations and limited liability companies . . . ."[73] Although this noble purpose could possibly be accomplished through the enforcement of the CTA, the statute should be constructed in a way so as to clearly establish who specifically within a corporate body must report their information to federal officials, avoiding any ambivalence. Such clarity would ensure that the CTA casts a narrower net to capture the proper beneficial owners that Congress intended, and does not implicate small businesses without compliance departments or ready access to attorneys. Additionally, construing the statute so that the constitutional rights of the beneficial owners and the corporation at-large are sufficiently protected will guarantee that the CTA will operate as intended, without courts impeding its purpose.

II. STATUTORY AND PROCEDURAL CONCERNS

The CTA will face many potential roadblocks before the Department of the Treasury is scheduled to enforce its provisions on January 1, 2023. This Part will address the primary concerns of lawmakers, agencies, and judges. These roadblocks concern three major areas: definitions, statutory interpretation, and procedural issues. Each roadblock underwent vigorous and lively debate in committee.[74] Yet, only a few options remain available to ensure that the CTA will not endure judicial challenges, apart from any potential constitutional concerns. The term "beneficial

---

[70] 13 CAL. JUR. CONST. L. § 213 (3d ed., Feb. 2021).

[71] Sara Morrison, *The Senate voted to let the government keep surveilling your online life without a warrant*, VOX (May 14, 2020, 4:46 PM), https://www.vox.com/recode/2020/5/13/21257481/wyden-freedom-patriot-act-amendment-mcconnell.

[72] *See generally*, John T. Soma, et al., *Balance of Privacy vs. Security: A Historical Perspective of the USA Patriot Act*, 31 RUTGERS COMPUTER & TECH. L. J. 285 (2015).

[73] Corporate Transparency Act of 2019, H.R. 2513, 116th Cong. (2019).

[74] H.R. REP NO. 116-227, at 18 (2019).

owner," which is central in determining the scope of the statute's applicability, needs clarification. As far as statutory interpretation issues are concerned, the principal problems tackled in this section will be a discussion on how agencies and courts are likely to construe the CTA, focusing the analysis on the use of popular canons of construction. Finally, this Part will discuss potential fixes to procedural issues related to the administration of the statute. These fixes will include how to avoid over- and under-inclusiveness to alleviate compliance strains on small businesses and how to properly maintain confidentiality through the necessary disclosure.

A. DEFINITION OF "BENEFICIAL OWNER"

Although the definition of "beneficial owner" will not impact the CTA's constitutional permissibility, a clear definition of this term ensures that the CTA will be enforced as broadly as necessary to expose potential corporate wrongdoing.[75] Its definition, as referenced in Part I, begins with a limit in the scope of the category to "natural persons," meaning that the beneficial owner cannot be another corporate entity disguising the ownership stake.[76] The definition is further limited to the class of natural persons who "directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise . . . exercises substantial control over a corporation or limited liability company . . . ."[77] Obviously, this phrase has the potential to be interpreted broadly. Including "directly or indirectly" means that a beneficial owner does not even have to directly exercise substantial control over a corporation to be considered a beneficial owner; indirect control would suffice.[78] The list of ways in which such controls may be exhibited, however, may be construed to limit the scope of so-called "indirect" control. The list, although, of "any contract, arrangement, understanding, relationship, or otherwise," may also be interpreted broadly.[79] Two textual or semantic canons of construction—*ejusdem generis* and *expressio unius*—may shed light on how courts and agencies likely will construe the list.

Both aforementioned canons of construction are commonly used in statutory interpretation. The list of ways for beneficial owners to exercise control over a corporation or limited liability company ("LLC") ends with "or otherwise," broadening the ways in which one who exerts loose, or indirect, control over a corporation or LLC is defined beyond the explicitly mentioned ways.[80] *Ejusdem generis* holds that "when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed."[81] Thus, the "or otherwise" needs to be understood in the context of the rest of the list: "any contract, arrangement, understanding, relationship."[82] "[O]r

[75] *Id.* § 3 .

[76] *Id.* "Natural person" has traditionally meant a legal person, simply put, "a human being." *Person*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[77] H.R. 2513.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Ejusdem Generis*, BLACK'S LAW DICTIONARY (11th ed. 2019). The term's literal translation from Latin means, "of the same kind or class." *Id.*

[82] H.R. 2513 § 3.

otherwise" must then be interpreted as denoting any type of explicit corporate relationship not listed, from one as formal as a "contract," such as a paid position in management, to one as informal as an "understanding," such as acting as an advisor to the board of directors. Hence, *ejusdem generis* demonstrates that the covered scope of the corporate relationship may not be broad. The phrase "or otherwise" cannot be construed in a vacuum, and the term's use is not as broad as it may seem initially, since the canon restricts its scope significantly.

Next, the list of all the ways that a person may control a corporation to be construed as a beneficial owner include: "(i) exercis[ing] substantial control over a corporation or limited liability company; (ii) own[ing] 25% or more of the equity interests of a corporation or limited liability company; or (iii) receiv[ing] substantial economic benefits from the assets of a corporation or limited liability company."[83] Someone who does not fit directly into any of these explicit categories may be concerned that they will still have to report their information, as "indirectly" and "or otherwise" may indicate that additional categories are implied.[84] This interpretation is highly unlikely to be the prevailing explanation, as the textual canon of *expressio unius* provides otherwise. *Expressio unius* holds that "to express or include one thing implies the exclusion of the other, or of the alternative."[85] Thus, the express inclusion of three categories of ways that someone labeled as a beneficial owner may exercise control over a corporation or LLC means that those three avenues are the only ways that such control can be established for the actor to be considered a beneficial owner.

A textual analysis of the definition of "beneficial owner," then, reveals that the definition is not extensively broad.[86] The definition, however, may not capture every person that the statute intends to include, as those at the fringes of a corporation's leadership who will wish to remain anonymous will attempt to circumvent the definition to avoid detection. Such avoidance is all too likely, as the very people the CTA aims to be enforced against are those who are attempting to avoid disclosure in the first place. Therefore, the definition should be expanded to account for such bad-faith manipulation of positions in a simple way. Instead of "receives substantial economic benefits from the assets of a corporation or limited liability company," this category could be amended and expanded through excising the word "economic," in accordance with the "or otherwise" category from the first phrase of the definition.[87] This expansion of the definition would allow agencies to capture any corporate players who are acting as beneficial owners but attempt to skirt responsibility by arguing that any benefit they receive from the corporation is non-economic and thus outside the scope of the statute. This is not overly broad, as the inclusion of the second category, "owns 25% or more of the equity interests of a corporation or limited liability company," implies that anyone who owns less than

[83] *Id.*
[84] *Id.*
[85] *Expressio Unius*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[86] Comparatively, however, in securities law, beneficial ownership has been described as "the broadest term you can have." The term is treated so expansively in securities law in order "to discourage an insider from passing information to the holder of securities . . . if the insider benefits economically from those securities." 78 CONG. REC. S6556 (1934). *See also* Whiting v. Dow Chemical Co., 523 F.2d 680, 687 (2d Cir. 1975). Although the rationale for the use of the term in relation to corporations is not exactly the same, the use of potential economic benefits derived from ownership to broaden the term is insightful.
[87] H.R. 2513.

25% of a corporation or LLC's equity will be presumed not to be a beneficial owner, so long as they do not have any other substantial role in the company.[88]

Because courts likely would view the statute through a textual lens, anticipating these sorts of issues is key to writing a statute that is highly efficient and enforceable. Opponents of expanding the definition of "beneficial owner" would suggest that the definition is already overly broad and needs to be tightened to ensure that Congress does not allow enforcing agencies and reviewing courts too much latitude or discretion in determining who fits under the definition.[89] While this concern is well-founded, the expansion of the definition likely would lead to less frustration of the statute's purpose, since those seeking to avoid detection as beneficial owners would go to various lengths to avoid the disclosure of their personal details, since they have already gone to great lengths to avoid federal exposure. A narrow understanding of "beneficial owner" that allows bad actors to further obfuscate detection goes against the explicit purpose of the CTA: to "prevent wrongdoers from exploiting United States corporations and limited liability companies for criminal gain, to assist law enforcement in detecting, preventing, and punishing terrorism, money laundering, and other misconduct involving United States corporations and limited liability companies . . . ."[90]

B. STATUTORY INTERPRETATION

Because the way in which canons of construction likely will be used in interpreting the definition of "beneficial owner" has already been discussed thoroughly, the focus of this section will be on the use of statutory interpretation techniques to develop the meaning of the CTA broadly. Such analysis will also hedge on canons of construction, as well as the likely textualist analysis by the judiciary, in response to potential arguments.

The CTA states that "[e]ach applicant to form a corporation or limited liability company… shall file a report with FinCEN containing a list of the beneficial owners of the corporation or limited liability company that" includes the relevant personal identification information.[91] Then, to avoid the reporting requirement, some may incorporate their business entity as a non-corporation and non-limited liability company that may still incorporate. Corporations and limited liability companies are not the only corporate bodies available to those attempting to create a shell company, as other non-traditional corporate forms exist, such as close corporations, collapsible corporations, and small-business corporations.[92] All of the given examples, though, fall within the definition of "corporation" in *Black's Law Dictionary*.[93] Another subcategory of a corporation, though, is a limited liability company, defined as a "statutorily authorized business entity that is characterized by limited liability for and

[88] *Id.*
[89] H.R. REP NO. 116-227, at 41-42 (2019).
[90] *Id.*
[91] *Id.* Such relevant personal identification information includes the beneficial owner's full legal name, birthdate, current residential or business street address, and a unique non-expired identification number.
[92] *Corporation*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[93] *Id.*

management by its members and managers, and taxable as a partnership for federal income-tax purposes."[94]

In order to escape this requirement through this route, these individuals would have to demonstrate that their corporate organization falls outside of the intended corporations included within "corporations and limited liability companies." They may do so through demonstrating that an LLC is a subcategory of corporation, so its inclusion in the list indicates that other significant subcategories were intentionally left off the list, and thus, exempt from the reporting requirements. This line of argument would rely heavily on a judge's willingness to consider the *expressio unius* canon, which states that "to express or include one thing implies the exclusion of the other, or of the alternative."[95] If the judge were textualist, they may give this theory more credibility, because of its focus on the precise wording of the statutory language, although the semantic canon would still be scrutinized.[96] *Expressio unius* may also be used against this argument, as Section 5333(a)(3) of the Bank Secrecy Act lists explicitly the requirements for exemption from the reporting requirements.[97] Additionally, LLCs are so significant within the landscape of incorporation that they likely were added to the list to make their inclusion under the statute explicitly clear, regardless of the legislative history of the CTA.[98] Thus, even the most textualist judge would have a hard time allowing specific subsets of corporate forms (not explicitly listed in the statute like LLCs are) to avoid the CTA's beneficial ownership reporting requirements.

Judges may also be partial to an argument using the substantive canon of absurdity avoidance. The canon of absurdity avoidance holds that "a provision in a legal instrument may be either disregarded or judicially corrected as an error . . . if failing to do so would result in a disposition that no reasonable person could approve."[99] Some reasonable judges may believe that the exclusion of relatively minor subcategories of corporations—such as close and collapsible corporations—does not imply that they should be included in a relatively narrow list of exemptions. They may also argue that it frustrates the purpose of the statute, which is to turn over as much of a reasonable amount of information on the beneficial owners of anonymous shell corporations with potentially illicit holdings as possible. Others may argue that the excision of other corporate subcategories not explicitly stated in the CTA does not rise to the level of "absurdity," since some reasonable persons may disagree on the issue.[100] Judges likely would find that the latter argument is more convincing, as not explicitly listing specific corporate forms does not fall into the common understanding of "absurdity."

In another attempt to skirt the FinCEN filing requirements, a corporation may incorporate itself without immediately filing the annual report with FinCEN. Depending on whether the state of incorporation allows such an action and whether

[94] *Company*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[95] *Expressio Unius*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[96] Manning, *supra* note 47, at 89–90 n.68, 90 n. 69.

[97] H.R. 2513. The exemptions themselves and their implications will be discussed in greater detail *infra* Part I.C.

[98] Digging into the legislative history of the CTA, outside of the stated purpose of the Act from its text, will not be necessary, as many courts see this line of reasoning to be tenuous.

[99] *Absurdity Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[100] *Id.*

FinCEN's response time is quick enough, theoretically a shell company could be incorporated in a business-friendly state with a lax FinCEN reporting timeline instituted. Then, once FinCEN gets word of the noncompliance and notifies the corporation, the corporation could dissolve and reincorporate as a different entity with no visible ties to the original shell, eluding the authority for as long as FinCEN does not know of the noncompliance. Of course, this would take much more work than simple compliance, and may run afoul of federal law.[101] If some states allowed this sort of timeline, FinCEN likely would make the argument that the filing requirement precedes the ability to incorporate, while a business-friendly state would argue that the duty to monitor compliance rests upon FinCEN, not individual states.

Those attempting to skirt the registration requirement's argument rests on the court's willingness to leave states in control of the reporting timeline to FinCEN. The amount of leeway given to such a system where state incorporation precedes the CTA's mandated reporting likely would rely on how easily said system can be leveraged, and how frequent such leveraging occurs. To avoid arguments based on norms, procedure, and the intention of the lawmakers, a state's attempts to remain business-friendly may fare better with a highly textualist court. Such a state would argue that the reporting requirement—which mandates that "[e]ach applicant to form a corporation or limited liability company… shall file a report with FinCEN containing a list of the beneficial owners of the corporation or limited liability company that" includes the relevant personal identification information—is unclear as to when the report needs to be filed.[102] An especially textualist court would focus less on the intent of the drafting lawmakers and more on what the precise words of the statute mean in context.[103] In such a case, the court would first have to determine that the statutory language is unclear as to whether the incorporator needs to file with FinCEN before incorporation. Then, the court must determine that the most logical reading of the plain language of the text indicates that a report must be filed with FinCEN. All the while, the statute does not specify the timeline under which the report must be filed.

As for FinCEN's argument, they will contend that the plain text of the statute is not ambiguous: the text and it's the context clearly indicate that incorporators must file with FinCEN before incorporation. They will suggest that the use of the words "shall file" after "to form a corporation" implies that completing the FinCEN reporting requirements is a necessary condition to begin the incorporation process.[104] If the plain text is not enough, they may also argue that the stated purpose of the CTA is to collect as much information on incorporated entities as possible, and allowing certain corporations to take advantage of states with lax enforcement mechanisms frustrates this purpose.[105] Finally, if that is not enough to prevail, congressional intent can be added. FinCEN may argue that Congress clearly intended to require such information to be collected before incorporation. Any other outcome would be contrary to the intent of the drafters of the CTA. Their argument would continue,

---

[101] *See* 18 U.S.C. § 1956. If the shell companies were incorporated with the intention of circumventing the tax code or committing any other unlawful activities, federal money laundering charges would be applicable.

[102] H.R. 2513.

[103] Manning, *supra* note 47.

[104] H.R. 2513.

[105] *Id.* § 2.

stating that corporations and LLCs should reveal information on their beneficial owners in order to incorporate, irrespective of whether the state requires such information. Thus, under this line of argument, a court more sympathetic to purposivist reasoning would consider these arguments persuasive.[106] Regardless of how purposivist or textualist a specific reviewing court may be, FinCEN's argument seems to be more convincing. Allowing shell corporations to unincorporate sporadically to avoid detection and skirt the federal reporting requirements frustrates the purpose of the statute – which is to ensure that beneficial ownership information of such shell corporations is within the purview of the federal government.

A court's consideration of canons of construction and differing philosophies on statutory interpretation are likely to influence the impact of legislation, and the CTA is clearly no exception. A judge's reading of the statute can determine how states handle its registration requirements, and these interpretations have tangible effects on how anonymous shell corporations will continue to operate in the United States. The extent to which corporation-friendly states are willing to push FinCEN and the reporting boundaries remains to be seen, but the avenue to push such boundaries appears to be open.

C. PROCEDURAL ISSUES

The CTA allows for explicit exemptions from the reporting requirements of the Act. Such exemptions may lead to over- and under-representation of the targeted class on which the CTA attempts to focus—anonymous shell corporations—and inevitably will lead to procedural hurdles in enforcement. This section will tackle these exemptions and how courts likely will deal with parties that claim to fit into them.

Most small businesses in the U.S. will be captured by the CTA's annual reporting requirements, as they do not fit into any specific exemptions.[107] Because the reports to FinCEN are annual, the cost of filing these reports will be a yearly expense for non-exempt businesses. This added cost, then, will continue to affect the marginal profits of American businesses making under $5 million in annual revenue. These non-shell corporations mandated to report beneficial ownership are more likely to be struggling to make a profit than larger, exempted corporations for two reasons: they have less revenue and likely less capital. As such, such small corporations will try to limit the cost of these new reporting requirements. Thus, these small corporations will try any reasonable avenue possible to get out of spending precious time and money on compliance annually, such as hiring attorneys specializing in corporate organization to reorganize, or dissolving and reorganizing completely if the administrative costs are too steep for the business to remain profitable, although such extreme measures are unlikely.

Small businesses and other non-exempt entities may also be concerned about maintaining the confidentiality of their filings. Although the CTA states that "access to beneficial ownership information is limited to authorized users at a local, Tribal, State, or Federal law enforcement agency who have undergone appropriate training,

[106] Manning, *supra* note 47.
[107] Corporate Transparency Act of 2019, H.R. 2513, 116th Cong. § 3 (2019).

… and that the identity of such authorized users is verified through appropriate mechanisms,"[108] some beneficial owners of small corporations will be concerned that the law could change to allow for a public record of the beneficial ownership information, as other countries already have such databases available to the public.[109] The CTA itself references the fact that "all twenty-eight countries in the European Union are required to have corporate registries that include beneficial ownership information."[110] Because such information is publicly available in Europe (a fact mentioned in the findings of the CTA), and the CTA passed with veto-proof bipartisan support in both the House of Representatives and Senate, a beneficial owner wary of privacy could deduce that the CTA may be amended in coming years to add an equivalent of such a registry. In that case, such beneficial owners would want assurances from the federal government that their information will not be made publicly available.

Because of these concerns about privacy and compliance costs, small businesses will likely attempt to fit into one of the specific exemptions, regardless of how clear such exemptions may be. Such corporations will have two years from the time the bill is passed into law—January 1, 2023—to do so.[111] The burden on companies without $5 million in revenue, twenty employees, and a physical presence in the U.S. would be difficult to avoid, since those requirements are explicitly clear. Therefore, small businesses would have to turn toward the other CTA exemptions. Beneficial owners may attempt to sell off part of their ownership share to a minor child of theirs, in trust to themselves, since minor beneficial owners of corporations or LLCs are exempt from FinCEN reporting requirements.[112] The only catch on this line of attack would be the fact that beneficial owners can be anyone who "exercises substantial control over a corporation or limited liability company," or "receives substantial economic benefits from the assets of a corporation."[113] Meaning, depending on how the Secretary of the Treasury, under whom FinCEN is run, drafts a rule that broadly defines "substantial economic benefits" and "substantial control," a beneficial owner that shifts control to a dependent minor will still be considered to "exercise[] substantial control over a corporation, " and thus, is *still* a beneficial owner.

The CTA does specify that such a rule should seek to "identify those natural persons who… exercise a dominant influence over such corporation."[114] Thus, depending on the rule that the Treasury will promulgate, failure to report such information could result in the civil and criminal punishment that the CTA expressly allows. This same reasoning applies to any other attempt to skirt responsibility through transferring "actual" ownership to another person, while the real beneficial owner still retains substantial influence over the corporation. Any other attempt to fit into an exemption likely would involve reincorporating, which in itself likely would involve filing with FinCEN as a prerequisite to incorporation.

[108] 31 U.S.C. § 5333(a)(5)(c)(III).
[109] H.R. 2513 § 3.
[110] *Id.* § 2.
[111] *Id.* § 3.
[112] *Id.*
[113] *Id.*
[114] *Id.*

The CTA may be amended in a few different ways to lessen the burden on small businesses and foreclose opportunities for corporations to "game" the system and avoid reporting information to the federal authorities. These amendments would still maintain the integrity and purpose of the CTA. First, the CTA could be amended to lower the revenue threshold to qualify for an exemption from $5 million to $1 million. In this case, many of the small businesses with a physical presence in the U.S. and more than twenty employees, but lower annual revenues will no longer have to file beneficial ownership information with FinCEN. This would lower the total cost on both ends, as FinCEN would not have to track down the information or enter it into any database annually, and the small businesses in question would not have to use precious time and money filing in the first place. The change would have little impact on the purpose of the CTA either, as an anonymous shell corporation employing over twenty people, maintaining a physical presence in the United States, and making annual revenue of between $1 million and $5 million seems unlikely, since that level of presence would be difficult to maintain. If it were apparent, however, that many anonymous shell corporations commonly reported over $1 million in annual revenue, such a change would not be advisable.[115]

Next, the CTA could be amended to lessen the possibility that beneficial ownership information will be available to the public, in order to quell the fears of small business owners and bolster good-faith compliance with the reporting requirements. To do so, the statutory language could be amended to clearly state under the privacy provision, that the government may audit the use of beneficial ownership information semiannually, rather than annually.[116] Increasing audit frequency would further ensure that all information requested by non-federal authorities is used for legitimate enforcement purposes. As such, the privacy of such beneficial owners' information would not be in jeopardy. The limitations provision may also be amended to remove "intelligence" from the clause that mandates, "[b]eneficial ownership information provided to a local, Tribal, State, or Federal law enforcement agency under this paragraph may only be used for law enforcement, national security, or intelligence purposes."[117] Removal of "intelligence" would limit the scope of the potentially broad term. The Department of the Treasury could rule that any non-national security and non-law enforcement reason for which the agency wants to investigate a beneficial owner could fall into the intelligence category, because the term is so vague.[118] Removal of "intelligence" would not only focus the efforts of FinCEN but also give those beneficial owners required to turn over information additional solace. Fortunately for beneficial owners, the language of the statute could not be clearer. The burden to "ensure" that access to beneficial ownership information is limited to the correct actors, falls squarely on FinCEN, with no other federal agencies given unfettered access to the database.[119]

---

[115] If anonymous shell corporations were able to maintain such an economic presence in the U.S. economy, the revenue ceiling should be raised to account for any such gaps that would be present.

[116] H.R. 2513 § 3.

[117] *Id.*

[118] For example, the rest of the Bank Secrecy Act references "intelligence," without defining it, but most commonly uses the word in relation to national security and homeland security agencies. *See generally*, 31 U.S.C. § 5311.

[119] H.R. 2513 § 3.

The procedural issues with the CTA indicate that the Act could be amended slightly to lessen the burden on non-shell corporations that comply with new federal regulations without giving away too much of their personal information. Otherwise, the CTA must balance the risks of requiring such a widespread national filing requirement with the privacy concerns of beneficial owners and the likelihood that shell corporations will attempt to bypass such regulations.

III. CONSTITUTIONAL CONCERNS

The premise of the CTA may offend the sensibilities of some who are highly concerned with the individual constitutional liberties guaranteed by the Bill of Rights. Although challenges to the CTA's constitutionality remain unlikely to succeed, an analysis of potential arguments will address the areas where amendments to the CTA lessen the burden on beneficial owners of small businesses and maintain the privacy rights of all beneficial owners.

A. FREEDOM OF ASSOCIATION

The CTA raises an issue regarding the First Amendment, specifically the freedom of association. Under the CTA, any beneficial owner of a covered entity would be required to publicize their role in the organization to FinCEN, under whose discretion their information is kept. Some beneficial owners may believe the Act infringes upon their freedom of association, as situations may exist where an individual's association with a group, such as a corporation, can only be expressed if such membership is done anonymously.

The freedom of association is an implied, peripheral First Amendment right contained within the freedom of speech.[120] Since *National Advancement of Colored People v. Alabama*, the freedom of association has been recognized widely as an integral part of the First Amendment.[121] Such speech here is expressive association, where an individual has a right "to associate with others, without undue government interference, for the purpose of engaging in activities protected by the First Amendment, such as … assembly."[122] Thus, to demonstrate that the CTA's beneficial ownership requirement is infringing upon a beneficial owner's freedom of association, the beneficial owner must show that they are engaging in an activity protected by the First Amendment. Further, a beneficial owner must demonstrate that the reporting requirement is an undue government interference with such an activity.

When considering a similar question, the Supreme Court found in 1974 that the original reporting requirements of the Bank Secrecy Act did not violate any First Amendment freedom of association rights, as such associational interests were too speculative to warrant proper consideration.[123] Now, however, those interests are less speculative: instead of the disclosure of a list of contributors to an organization, the query at hand relates to the disclosure of all the beneficial owners of most small businesses incorporated in the United States to a federal agency. As Justice Marshall

[120] *Freedom of Association*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[121] 357 U.S. 449, 462 (1958).
[122] *Freedom of Association*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[123] California Bankers Ass'n v. Shultz, 416 U.S. 21, 76 (1974).

pointed out in his dissent in *Shultz*, the Department of the Treasury must demonstrate "a compelling government interest requiring disclosure."[124] The compelling interest in *Shultz* was the fact that the government did not seek disclosure of an association's members and contributors, while the compelling interest at hand would be a balance of the interests of disclosing the personal identification information of many beneficial owners of entities incorporated within the United States against the revelation of the personal information of anonymous shell companies to FinCEN. Such a balance of interests would be a closer question than the significant, yet patently dissimilar, issue in *Shultz*.

On this particular question, a case of first impression does not yet exist. Thus, it may be in certain beneficial owners' best interest to bring the issue before the court whether FinCEN's retention of the personal information of shell corporations' beneficial owners is a compelling enough interest to justify the required reporting of the personal identification information of many more beneficial owners of U.S.-based small businesses. Such a balance of interests gets closer to the point of Justice Marshall's dissent in *Shultz*: "the fact that some may use negotiable instruments for illegal purposes cannot justify the Government's running roughshod over the First Amendment rights of the hundreds of lawful yet controversial organizations."[125] Because the Bank Secrecy Act has now been broadened even further, some modern Justices may be more sympathetic to Justice Marshall's concerns.

Justice Marshall's concerns, however, can be reasonably dismissed as well. First, the argument could be made that the association between a beneficial owner and a corporation is not an association protected by the First Amendment at all. This may not be so, because corporations are able to make constitutionally protected speech under *Citizens United*.[126] Even if this were constitutionally protected First Amendment speech, however, the government may still be able to demonstrate that their interest is substantially compelling: anonymous shell corporations are a scourge on the U.S. economy, and obtaining such beneficial ownership information would aid the relevant authorities in properly prosecuting them. In a way, a relative burden on the activity of a few will benefit the country as a whole through the added tax revenue that these corporations would pay through the likelihood that such a required disclosure would reveal illicit transfers of funds between shell corporations. The extent to which these factors balance against each other is difficult to determine, given the nature of anonymous shell corporations; they operate in the shadows, under the nose of the government. Once they are exposed, and the CTA has been law for a few years, courts would be able to better judge the relative merits of such a balance.

Thus, an argument can be made that the federal government should not be able to "run roughshod" over the right of beneficial owners to freely associate with their corporations without the federal government's oversight into their incorporation. However, the government likely would be able to make a winning case that anonymous shell corporations are such a menace to society that a relative, compulsory revelation of limited information from small corporations nationwide is a small price to pay for the probable exposure of wrongdoing.

---

[124] *Id.* at 98 (Marshall, J., dissenting).
[125] *Id.* at 99 (Marshall, J., dissenting).
[126] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 355 (2010).

B. RIGHT TO PRIVACY

Those opposed to the CTA on constitutional grounds may also take issue with the Act's treatment of personal privacy rights. The CTA's mandatory disclosure for beneficial owners within covered corporations and LLCs eliminates a monopoly on the beneficial ownership information that the corporation possesses, letting in the relevant federal authorities.

Traditionally, personal privacy rights baked into the Constitution have not been used to protect information in such a realm. Usually, the constitutional right to privacy has been construed specifically to protect an American's right to an abortion, contraception, or other personal healthcare decisions.[127] Privacy rights in relation to anti-money laundering legislation, however, becomes a bit more complicated. Just as with First Amendment rights, privacy rights in this realm remain a balancing act of interests.[128] Here, the right of the beneficial owner of a corporation to keep their interest in the corporation's private knowledge is balanced against the importance of tracking such information to prevent criminal abuse of the financial system. The issue for beneficial owners in this case, however, is how limited the extent to which their privacy is violated.

Compared to other federal legislation which allows the collection of personal information on Americans, such as the Patriot Act and National Security Act, the CTA does not require much information to be reported, and the information that is reported is predominantly going to one federal agency. FinCEN could paint this CTA framework as a sort of Social Security number system, where participation is compulsory in order to attain certain benefits. Here, instead of paying the price of government registration of a person's name in order to participate in the Social Security program and other parts of American society, beneficial owners pay the price of turning over their identity to federal authorities in order to incorporate. Such a tradeoff is relatively minor, as laws such as the Patriot Act are still enforced today, where the federal government has the authority to find out much more about beneficial owners than their black-and-white personal information, given cause. Thus, this common point of contention with the CTA is unlikely to lead to any serious action in the courts, given the fact that the constitutional right to privacy has not been expanded anywhere near the realm where turning over basic personal information to federal authorities in order to incorporate a business entity violates such privacy.

CONCLUSION

Weighing the importance of the time, money, and privacy of small business owners within the United States with the economic need to hold those abusing the tax code and other laws accountable to federal authorities is at the crux of issues with the CTA. The Act certainly has its difficulties, as it will certainly vex business owners across the country who will inevitably need to put precious time and effort into dealing with compliance with the new statute. The tradeoff is that those looking to take advantage of the federal tax code and lax state incorporation laws will have a

[127] Griswold v. Connecticut, 381 U.S. 479 (1965).

[128] Robert S. Pasley, *Privacy Rights v. Anti-Money Laundering Enforcement*, 6 N.C. BANKING INST. 147, 226 (2002).

more difficult time attempting to use the avenue of anonymous shell corporations to dodge federal authorities and fund illicit acts. The issues surrounding the CTA, however, did not begin and end with such a balancing act of interests.

The term "beneficial owner" likely will be interpreted broadly by the courts, if they have to make a judgment on the matter. An expansive definition of the CTA's key term would best allow federal criminal authorities and the Department of the Treasury, who will promulgate rules concerning the enforcement of much of the CTA, to carry out the purpose of the Act, which is to identify those who own significant interests in incorporated entities in order to tease out financial wrongdoing. Courts will employ their own preferred mode of statutory interpretation when handling issues of interpreting the CTA, but most courts, even those sticking to strictly textual interpretations of statutes, likely will find that the CTA is rather straightforward. Beneficial owners of anonymous shell corporations do not have much leeway in navigating the Act, as courts are likely to defer to the Treasury's interpretation of its own rules, and they likely will maintain a deferential view toward the Treasury's interpretation of the CTA as well. Even within the text of the statute, states are unlikely to allow entities to incorporate without requiring filing with FinCEN, because of the statute's clarity on the point. Constitutional issues are also unlikely to change the trajectory of the CTA. A beneficial owner's rights to free association and privacy are overshadowed by the balancing interest of maintaining a corporate world where individuals cannot act within the United States to take advantage of the tax code and, by proxy, the United States taxpaying public. With some minor changes to the CTA's language to alleviate the burdens the reporting requirements put on small businesses based in the United States, the CTA certainly makes a step in the right direction toward corporate transparency and accountability. However, this Act is merely that: a step.

Criminals acting under the guise of a shell corporation are almost certainly more likely to be caught with the CTA in place, but surely criminals who would go to the lengths necessary to incorporate several shell companies to hide earnings would go to similar lengths to game the system in another, more undetectable way, even with the CTA in place. Such criminals could also simply provide false information on beneficial ownership to FinCEN. This mode of deception would be more likely to fail under intense scrutiny, but some bad actors may still evade FinCEN's enforcement capabilities if the Department of the Treasury is not given enough funding to out such actors. The exemptions for charitable organizations and large corporations pass the buck on inspecting such organizations to other federal agencies, potentially without as much enforcement capabilities. The two years the CTA gives existing corporations to file with FinCEN is enough time for existing shell companies to move offshore and avoid detection. These issues cannot all be solved by the CTA, an amended CTA, or the entire Department of the Treasury; addressing these issues will take comprehensive action toward the purpose of holding those powerful enough to exploit loopholes in the system as accountable as those who are inexperienced enough to be caught.

Such a system requires dismantling of the current corporate-backed campaign finance election system,[129] amending the tax code to make it more equitable and understandable for the average United States resident[130] in a historically long period of stagnant median wages for workers, and requiring wealthy corporations to take on more of the tax burden in times of historically low effective corporate tax rates in the United States,[131] as the gap between the capital gains of the wealthiest Americans and the wages of the average American worker continues to grow incredibly far beyond any reasonably acceptable levels. Even when financial criminals are caught and punished, their sentences are often more of a slap on the wrist than the punishments doled out to those convicted of petty theft. Although the CTA moves the United States in the direction of transparency, accountability, and equity, this momentum cannot stop here, as much more change is necessary to ensure an equitable future for every American.

[129] Such a solution may require the—albeit unlikely—overturning of *Citizens United v. FEC*, more publicly funded electoral campaigns, and shifting focus away from the two-party system.

[130] Potential equitable amendments to the tax code include a wealth tax, which would necessitate its own constitutional analysis; taxing capital gains as ordinary income; returning effective tax rates to the proportionality of the 1950s in the United States; and shifting the burden on filing federal income taxes to the Internal Revenue Service.

[131] The tax burden on the wealthiest corporations could be increased through raising the Internal Revenue Service's budget to allow them to audit large corporations that have largely gone unaudited, increasing the corporate tax rate for large multinational corporations, implementing harsh tax penalties for offshoring jobs based in the United States, and implementing a minimum global corporate tax to disincentivize corporate offshoring. Such revenue-raising efforts would be able to fund additional popular programs and benefits for the American working class, such as universalizing Medicare and Social Security benefits, increasing the availability of affordable housing, and introducing programs to address climate change.