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ARTICLES

A TAX ON UNREALIZED CAPITAL GAINS IS NOT A WEALTH TAX … BUT THAT MAY NOT MATTER TO THE US SUPREME COURT

Nicholas Misenti*

I. INTRODUCTION

President Biden's 2025 Budget proposal included a tax on unrealized capital gains of taxpayers with a net worth of $100 million or more.[1] The proposal was supported by Vice President Harris[2] but opposed by President Trump and republicans.[3] The 2024 reelection of President Trump, and the fact that republicans won control of both the House and Senate, puts such a proposal on hold, but it is likely to resurface gain. Thus, the constitutionality of a tax unrealized capital remains is an important issue.

The proposal to tax unrealized capital gains has been conflated with a wealth tax.[4] This confusion may be because the Biden proposal included a threshold where the tax would apply only to a taxpayer with a net worth of $100 million or more. But that confusion could also be a purposeful distortion by groups that oppose the tax. A wealth tax would not be deemed an income tax and thus could not be justified by the 16th amendment to the US Constitution. The 16th amendment overturned the holding in *Pollock v. Farmers' Loan & Tr. Co*., [5] that an income tax was a direct tax and thus authorized an income tax. Under *Pollock*, a wealth tax would still be deemed a direct tax in the form of a property tax that is not authorized by the 16th amendment. Such a direct tax would need to be apportioned among the states based on population[6], which isn't practical or even possible with a wealth tax. Thus, a wealth tax would have little chance of surviving a constitutional challenge.[7]

However, in contrast to a wealth tax, a tax on unrealized capital gains is a tax only on the incremental growth in the value of property over the course of a tax year, i.e., a tax on economic

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[1] Garrett Watson, Erica York. Analysis of Harris's Billionaire Minimum Tax on Unrealized Capital Gains. September 4, 2024. https://taxfoundation.org/blog/harris-unrealized-capital-gains-tax/

[2] *Id*

[3] Diccon Hyatt. Your Unrealized Gains Are Safe from Biden/Harris Tax Proposal—Unless You Have $100M. August 28, 2024. https://www.investopedia.com/unrealized-gains-are-safe-from-biden-harris-tax-proposal-unless-you-have-usd100-million-8703570

[4] *See,* e.g., Nathan Goldman and Christina Lewellen. The Pros and Cons of Wealth Taxes. October 23, 2024. https://poole.ncsu.edu/thought-leadership/article/the-pros-and-cons-of-wealth-taxes/.11/24/24 "One of Vice President Kamala Harris's centerpiece policy proposals is a wealth tax—a 25-percent minimum tax on unrealized gains for taxpayers whose net wealth exceeds $100 million."

[5] *Pollock v. Farmers' Loan & Tr. Co*., 157 U.S. 429 (1895)

[6] *See* Article I, Section 9, Clause 4 of the US Constitution

[7] During the oral arguments in *Moore v. United States*, the U.S. government's attorney conceded that a wealth tax would be unconstitutional under the 16th Amendment. *See* Tr. of Oral Arg. 127-128; *Moore v. United States*, No. 22-800, 38 (U.S. Jun. 20, 2024). *See also,* The U.S. Supreme Court hears Moore case, raising questions about income taxation. December 5, 2023. https://rsmus.com/insights/tax-alerts/2023/us-supreme-court-hears-moore-case-raising-questions-income-taxation.html.

income. Economic income is recognized as a type of income by economists[8] and under Generally Accepted Accounting Provisions (GAAP)[9] and International Financial Reporting Standards (IFRS).[10] Thus, a tax on unrealize capital gains can be sustained by the 16th amendment as a tax on income.

The constitutionality of a tax on unrealized capital gains would be an issue of first impression at the US Supreme Court.[11] Two independent arguments can be made that such a tax is constitutional: (1) The 16th amendment to the US Constitution authorizes the tax, and (2) a tax on income is not a direct tax and therefore the tax is authorized by Article I, Section 8, Clause 1of the US Constitution. In the event both arguments fail, a third option to achieve the same outcome could be used, namely, a tax similar to the individual mandate tax in the Affordable Health Care Act (ACA) that was upheld in *Nat'l Fed'n of Indep. Bus. v. Sebelius.*[12]

All three options would face a constitutional challenge. Two main issues under the first argument would arise: (1) Are unrealized capital gains income, and (2) Does the 16th amendment authorize a tax only on realized income? The second argument would require convincing the US Supreme Court to overrule *Pollock* with the result that an income tax would not be deemed a direct tax in the absence of the 16th amendment. The magnitude of the tax penalty under the third option would provoke substantive due process concerns. Particularly strong arguments can be made in favor of the first two options. The third option would be more difficult to sustain and should be regarded as a last resort to save a tax on unrealized capital gains.

Despite the merits of these arguments, four conservative US Supreme Court, Justices Barrett, Alito, Thomas, and Gorsuch, have predetermined that a tax on unrealized capital gains is not authorized by the 16th amendment.[13] Thus, the difference between a tax on unrealized capital gains and a wealth tax may not matter to the Court.

Ultimately, while the political and economic feasibility or desirability of a tax on unrealized capital gains can be debated, there are in fact legal paths where the tax could survive an inevitable constitutional challenge.

II. THE BIDEN/HARRIS PROPOSAL

Under the Biden/Harris proposal, taxpayers with a net worth of $100 million or more would be required to pay a minimum 25% effective tax rate on an expanded definition of income that includes taxable income as defined currently plus unrealized capital gains. If a taxpayer's effective tax rate on the expanded definition of income fell below 25 percent, the taxpayer would owe additional taxes to bring their effective rate to 25 percent on expanded income. The additional taxes would be payable over nine years initially, and over five years in the future. The additional taxes would be treated as prepayments of future tax liability from realized capital gains. The 25% rate would be phased in at $100 million of net worth, with the full 25% applying when a taxpayer had a net worth of $200 million or more.[14]

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[8] *See*, e.g., *Joint Committee on Taxation (February 8, 2012). Overview of the Definition of Income Used by the Staff of the Joint Committee on Taxation in Distributional Analyses (Report).*
[9] *See* FASB ASU 2016-01
[10] *See* IFRS 9
[11] The Court declined to take up the issue in *Moore v. United States*, No. 22-800, 38 (U.S. Jun. 20, 2024)
[12] 567 U.S. 519, 573-74 (2012)
[13] *See Moore v. United States*, No. 22-800, 38 (U.S. Jun. 20, 2024)
[14] *See*, Garrett Watson, Erica York. Analysis of Harris's Billionaire Minimum Tax on Unrealized Capital Gains. September 4, 2024. https://taxfoundation.org/blog/harris-unrealized-capital-gains-tax/.

III. IS APPRECIATION IN WEALTH INCOME?

A. 16th Amendment Implications

In *Moore*, the concurring opinion of Justices Barrett and Alito, and dissenting opinion of Justices Thomas and Gorsuch, argued that income must be realized to come within the authority of the 16th amendment; i.e., that, conversely, the 16th amendment does not authorize a tax on unrealized income. That argument presupposes, and thus appears to concede, that an appreciation in wealth is income. Should a tax on unrealized capital gains be adopted, and the inevitable challenge to the tax arise, it is unlikely that challengers to the tax would make that concession. It is one thing to argue that the history and natural meaning of the words in the 16th amendment demonstrate that the intent was to authorize only a tax on realized income and not unrealized income, and something quite different to argue that an appreciation of wealth is not income at all.

The 16th amendment authorizes a tax on "incomes, from whatever source derived." If an appreciation of wealth (unrealized income) is not income, then the 16th amendment doesn't come into play at all. Conversely, if an appreciation of wealth is income, the constitutionality of a tax on that income is not settled. The issue then becomes whether the 16th amendment authorizes a tax only on realized income.

The current Tax Code traces its roots to the 16th amendment. The general rule under the Tax Code among practitioners has always been that tax deductions are not available unless specifically authorized by the Tax Code, while income is always taxed unless there is a specific exclusion. That understanding of the term income would mean that an appreciation in wealth has always been taxable under the Tax Code, *if* an appreciation in wealth was considered a type of income. But that is not the case because the term income in the Tax Code has always been understood to exclude an appreciation in wealth. Of course, the explanation exists that in the Tax Code to date Congress intended to tax only realized income, but Congress has the power to expressly impose a tax on income in the form of unrealized capital gains. However, Congress certainly would not have the power to impose a tax pursuant to the 16th amendment on the value of *unappreciated* property by defining the tax as an income tax. The tax in that case would be deemed a property tax and thus an unconstitutional direct tax, despite the label as an income tax.[15] The question to whether the 16th amendment authorizes a tax on unrealized income arises only if unrealized income is in fact income.

B. Economic Income is Income

Economists recognize unrealized income is income. The Haig–Simons or Schanz–Haig–Simons definition of economic income is perhaps the best known definition of the term and is calculated as consumption plus change in net worth over a period such as a year.[16] The formula is designed to capture the improvement in a person's economic well-being. Consumption improves

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[15] *See*, e.g., *Hoeper v. Tax Comm'n of Wis.*, 284 U.S. 206, 215 (1931)

[16] *Joint Committee on Taxation (February 8, 2012).* *Overview of the Definition of Income Used by the Staff of the Joint Committee on Taxation in Distributional Analyses (Report).*

well-being, as does an increase in net worth after accounting for consumption. The Biden/Harris proposal has a similar goal but substitutes taxable income as currently defined for consumption.

Financial accounting regulators also recognize that unrealized income is income. US Generally Accepted Accounting Principles (GAAP) and International Financial Reporting Standards (IFRS) differ in some respects and contain exceptions, but the general rule is that unrealized income is shown in the Income Statement or Comprehensive Income Statement.[17]

The term income is certainly broad enough to include unrealized capital gains unless the 16th amendment expressly provides otherwise. Thus, whether the 16th amendment authorizes a tax only on realized gains is highly significant.

IV. THE 16TH AMENDMENT AUTHORIZES A TAX ON UNREALIZED INCOME

A. The 16th Amendment Language

The 16th amendment authorized the income tax and was enacted to overturn the *Pollack*[18] holding that an income tax was a direct tax that was unconstitutional unless apportioned. The 16th amendment itself makes no distinction between realized and unrealized income, stating simply that:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Notwithstanding, *Eisner v. Macomber*[19] is often cited as imposing a realization requirement under the 16th amendment because the Court said income is "a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital however invested or employed, and coming in, being 'derived,' that is, received or drawn by the recipient (the taxpayer) for his separate use, benefit and disposal."

However, that reading of *Macomber* is wrong. Realization wasn't the issue in *Macomber*. The taxpayer in *Macomber* received and thus realized stock in the form of a stock dividend. The Court's actual holding was that a stock dividend was not income under the Sixteenth Amendment because a stock dividend doesn't increase a shareholder's wealth. A company's value doesn't change when it issues additional shares of stock to its shareholders. That value must now be divided over a higher number of shares, so each share is worth less. There is no benefit, so accordingly, there is no income.

If anything, *Macomber* can be cited as supporting a tax on unrealized gains because, unlike a stock dividend, unrealized capital gains increase a taxpayer's wealth. Nevertheless, the

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[17] See FASB ASU 2016-01 and IFRS 9. *See* also Examining the Recognition and Measurement of Financial Assets and Financial Liabilities under ASU 2016-01Added Volatility or Improved Information Value? CPA Journal. https://www.cpajournal.com/2022/06/08/examining-the-recognition-and-measurement-of-financial-assets-and-financial-liabilities-under-asu-2016-01/. Last visited 1/8/25.

[18] *Pollock v. Farmers' Loan & Tr. Co*., 157 U.S. 429 (1895)

[19] 252 U.S. 189 (1920)

misreading of *Macomber* that arose from dicta has continued to today.[20] The debate in *Moore v. United States* provides an important example.

B. The Debate in Moore

The debate in *Moore* between Justices Barrett, Alito, Thomas and Gorsuch on the one hand, and Justice Jackson on the other hand, provides significant insight into the arguments that will be made, and the potential outcome, concerning the issue whether the 16th amendment authorizes a tax only on realized income.

1. Justice Barrett's Concurring Opinion

Justice Barrett, in in her concurring opinion *Moore v. United States*[21] that was joined by Justice Alito, maintained that the Court should have taken up the issue whether the 16th amendment requires realization and then held in the affirmative. Justice Barrett noted that *Pollock* "held that the apportionment rule applies not only to taxes on real and personal property, but also to taxes on income "derived" from that property".[22] She then noted that the 16th amendment "did not overrule *Pollock*'s first holding that taxes on personal property are direct taxes."[23] Her focus then turned to the critical question of the meaning of the word "derived" in the 16th amendment. Justice Barrett relied on four main arguments to make her case that the term derived means received or realized: (1) The Webster's Dictionary definition of derived[24]; (2) the notion that since the inception of the 16th amendment income was thought of as something that was received and thus realized[25]; (3) the fact that the government could not cite a case to support the conclusion that the 16th amendment authorizes a tax on unrealized income[26]; and (4) cases exist that suggest the term income means realized income.[27] These arguments are unpersuasive.

a. The Webster's Dictionary Definition of Derived

Justice Barrett cited Webster's Dictionary meaning for the word derived as something received. However, the best he best way to understand the term derived is to understand the intent and purpose of the 16th amendment. The Court in *Pollock* held that a property tax was a direct tax, and a tax on income derived from property (i.e., interest, dividends, and capital gains) was a tax on the property itself; i.e., a property tax, and thus a direct tax that was unconstitutional unless apportioned. This meant that all income taxes *derived from nonlabor income* were unconstitutional.

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[20] Subsequent cases undermine *Eisner* and the purported realization requirement under the 16th amendment, but without overruling *Eisner*. *See,* e.g., *Helvering v. Bruun*, 309 U.S. 461 (1940), *Helvering v. Griffiths*, 318 U.S. 371 (1943), and *Commissioner*. *Glenshaw Glass Co.*, 348 U.S. 426 (1955). However, the case is still erroneously cited as imposing a realization requirement.
[21] *Moore v. United States*, No. 22-800, 35 (U.S. Jun. 20, 2024)
[22] *Id*, at 35
[23] *Id*, at 35
[24] *Id*, at 36
[25] *Id*, at 37
[26] *Id*, at 38
[27] *Id*, at 36-37

Clearly, then the intent of the 16th amendment was to allow the Congress to impose an income tax on income that was *derived or earned from nonlabor income*. Thus, the term derived refers to the source of the income and not whether it was realized or unrealized. Ironically, the words of Justice Barrett prove this point:

> In *Pollock v. Farmers' Loan &Trust Co.*, the Court held that the apportionment rule applies not only to taxes on real and personal property, but also to taxes on income "derived" from that property-say, rents from leasing farmland. 158 U.S. 601, 618 (1895). The decision left Congress effectively unable to tax most nonlabor income.[28]

The purpose of the 16th amendment was to allow an income tax on income derived or attributable to sources other than labor, namely property. Thus, the Webster's Dictionary definition is irrelevant.

b. The Historic Use of the Term Income

The notion that since the inception of the 16th amendment income was thought of as received and thus realized has some merit, but ultimately is just a truism. That notion does not foreclose the conclusion that the 16th amendment authorizes a tax on unrealized income. This notion can be explained by recognizing simply that Congress hasn't to date exercised its power to tax unrealized income, perhaps because income and wealth inequality hadn't been a significant issue previously. Why would it be surprising that conversations discussing income and the Tax Code would refer only to realized income when Congress had previously only extended its taxing powers to realized income?

The term income is broad enough to include economic income and the Court should recognize this fact. After all, there is nothing in the language of the 16th amendment that limits an income tax to realized income and no historical evidence to show it was so limited. Given that 16th amendment authorizes a tax on income, and unrealized capital gains are income, Congress has the power to tax unrealized capital gains, despite the fact it hasn't exercised the power previously.

c. The Lack of Cases on the 16th Amendment and Unrealized Income

Similarly, the fact that the government could not cite a case to support the conclusion that the 16th amendment authorizes a tax on unrealized income is unconvincing. This omission is expected and is simply because the Congress to date has not chosen to tax unrealized income. Why would cases exist on the issue whether the 16th amendment authorizes a tax on unrealized income when Congress hasn't enacted a law taxing unrealized income? This is a red herring argument. As Justice Kavanaugh said in *Moore,* to the chagrin of four of his conservative colleagues, "Because the MRT taxes realized income-namely, income realized by the corporation and attributed to the shareholders-we do not address the Government's argument that a gain need not be realized to constitute income under the Constitution.[29] Thus, whether the 16th amendment requires realization would be an issue of first impression.

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[28] *Moore v. United States*, No. 22-800, 35 (U.S. Jun. 20, 2024)
[29] *Id* at 17 n.3

d. Cases "Hold" that Income Means Realized Income

Justice Barrett cites a series of cases purporting to establish that the Court has ruled that realization is a requirement under the 16th amendment, starting of course with *Macomber*. Given that whether the 16th amendment authorizes a tax on unrealized income would be an issue of first impression, it's obvious that Justice Barrett's conclusion here is not correct and there was no such holding in *Eisner*. The other cases cited by Justice Barrett also do not help he her cause because realization wasn't an issue, or the taxpayer had no increase in wealth. Thus, like *Eisner,* the cases amount to nothing more than *dicta.* Justice Barrett cites the following cases:

Lynch v. Hornby, 247 U.S. 339, 344 (1918). Here the Court ruled that ordinary cash dividends were subject to income tax under the 16th amendment. The dividends were received. Thus, realization wasn't an issue.

*Gibbons v. Mahon,*136 U.S. 549, 557-558 (1890). Here, the Court made a determination as to whether a corporate distribution was a stock dividend or a cash dividend. The dividend was received, and thus realized, either way, so realization wasn't an issue. The only issue was what type of dividend was received.

Commissioner v. Indianapolis Power & Light Co., 493 U.S. 203, 214 (1990). Here the Court ruled that, unlike rent, a security deposit isn't income. Of course, a landlord or other party that receives a security deposit holds the security deposit in escrow for the tenant or customer and has no immediate legal right to use it. Thus, there is no increase in wealth from the security deposit. This is in stark contrast to unrealized income that is owned and accessible by a taxpayer.

Helvering v. Bruun, 309 U.S. 461 (1940). Here the Court held that income doesn't have to be cash income. Specifically, the Court held that a building that was constructed on leased property by the tenant and that became the property of the landlord upon termination of the lease was income to the landlord upon the lease termination. Realization wasn't an issue, although Justice Barrett attempts to make it the issue:

> None of that remotely suggests, however, that realization is not required or (relatedly) that appreciation counts as taxable income. Instead, it explains that profit (there, the building) is realized when received, even if it cannot be physically separated from the capital (there, the land)."[30]

Justice Barrett misses or omits the point that the landlord had no legal right to the building during the term of the lease. The situation is analogous to a security deposit, where nothing of value is available to the taxpayer until, or if, certain events occur in the future that give the taxpayer legal right to the property. This once again is very different from unrealized income that is owned and accessible by a taxpayer.

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[30] *Id* at 41

Helvering v. Horst, 311 U.S. 112 (1940). Here the Court held that interest from bond coupons was taxable to a father who had had transferred the coupons to his son without transferring the bonds that gave rise to the interest. The failure to transfer the bonds meant the father had the legal right to the interest. Realization wasn't an issue. The interest was realized. The only issue was whether the interest was taxable to the father or his son. Thus, the case is irrelevant to the issue as to whether realization is required under the 16th amendment.

United States v. Phellis, 257 U.S. 156, 157 (1921). Here, the issue wasn't realization, but whether a realized distribution was a nontaxable return of capital or a taxable return noncapital: "It thus appears that in substance and fact, as well as in appearance, the dividend received by claimant was a gain, a profit, derived from his capital interest in the old company, not in liquidation of the capital but in distribution of accumulated profits of the company."[31]

Ivan Allen Co. v. United States, 422 U.S. 617, (1975). Here the issue wasn't realization but whether a corporation was subject to the accumulated earnings tax because its accumulation of income was unreasonable.

e. Justice Barrett's Conclusions

Justice Barrett argued that the issue whether realization is a required under the 16th amendment should have been taken up by the Court and decided in the affirmative. Ultimately, though, Justice Barret proves why realization wasn't taken up by the Court: "Though the Moores did not realize income as shareholders, KisanKraft realized income as a corporation-profits from supplying farm equipment to customers in India."[32] That of course means realization wasn't an issue in the case.

Despite what amounts to unconvincing arguments, Justices Barrett and Alito would be firm votes that the 16th amendment does not authorize a tax on unrealized capital gains.

2. The Dissenting Opinion of Justices Thomas and Gorsuch

Justice Thomas in his dissent, joined by Justice Gorsuch, makes similar arguments as Justice Barrett, but Justice Thomas adds a convoluted interpretation of the language in the 16th amendment to conclude that the 16th amendment "requires a distinction between "income" and the "source" from which that income is "derived. And, the only way to draw such a distinction is with a realization requirement."[33]

It is difficult to reconcile Justice Thomas's conclusion with the actual language in the 16th amendment that clearly allows Congress to tax "incomes, from whatever source derived." Given that Pollock had eliminated the possibility of an income tax on nonlabor sources, and the intent of the 16th amendment was to overrule *Pollock*, it's clear the language in the 16th amendment was intended to allow an income tax *derived from all sources*, including property. Thus, the term derived refers to sources and the 16th amendment doesn't include or even imply a realization

[31] *United States v. Phellis*, 257 U.S. 156, 175 (1921)
[32] *Moore v. United States*, No. 22-800, 42 (U.S. Jun. 20, 2024)
[33] *Id* at 51

concept. Justice Thomas's position here seems to be made with that understanding. Thus, as he must to sustain his conclusion that realization is required, he attempts, unconvincingly, to sever the term derived from the term sources.

Ultimately, Justices Barrett, Alito, Thomas and Gorsuch can be considered "hard no's" on the question whether the 16th amendment authorizes a tax on unrealized income. On the other side, only Justice Jackson took up the realization issue in her concurring opinion.

3. Justice Jackson's Concurring Opinion

In her concurring opinion in *Moore,* Justice Jackson makes arguments on the realization issue that are difficult to refute. She recognizes that there was no realization holding in *Macomber* and "That alleged requirement appears nowhere in the text of the Sixteenth Amendment." *Moore v. United States*, No. 22-800, 30 (U.S. Jun. 20, 2024). She then notes that:

> The alleged realization requirement is, instead, drawn from a decision of this Court, *Eisner v. Macomber*, 252 U.S. 189 (1920). *Macomber* struck down a tax on stock dividends, ostensibly because the taxpayer "ha[d] not realized or received any income in the transaction." *Id*., at 212. Like *Pollock*, *Macomber* was "promptly and sharply criticized." *Helvering v. Griffiths*, 318 U.S. 371, 373 (1943). Over the two decades that followed our pronouncement, we "limited" *Macomber*'s realization requirement "to the kind of dividend there dealt with," 318 U.S., at 375, while also "under-min[ing] . . . the original theoretical bases of the decision in" other contexts, *id*., at 394.[34]

Justice Jackson recognizes that "there is no constitutional requirement, from *Macomber* or otherwise, that a taxpayer "be able to sever . . . the gain from his original capital" in order to be taxed on it."[35] Further: "In the lower courts too, *Macomber*'s definition of income has long been deemed outmoded, if not overruled".[36]

It's clear that Justice Jackson can be considered a "hard yes" on the question whether the 16th amendment authorizes a tax on unrealized income.

4. Implications of *Moore* on the Realization Question

There are four conservative justices, Barrett, Alito, Thomas, and Gorsuch, who went out of their way in a case where realization wasn't even an issue to make it clear they would rule that the 16th amendment requires realization, and one liberal justice, Jackson, who did the same thing but who would rule in the oppose way. Based on the fact that Justices Sotomayor and Kagan joined the majority opinion in *Moore*, and their ideology, Justices Sotomayor and Kagan could be expected to take the same position as Justice Jackson.

That would leave Justices Roberts and Kavanaugh as the deciding votes, with the Justices Barrett, Alito, Thomas and Gorsuch group needing just one of these votes to win, and the Justices Jackson, Sotomayor, and Kagan group needing both Justices Roberts and Kavanaugh to win. Thus, the odds seem to favor the Justices Barrett, Alito, Thomas and Gorsuch group. However, Justice

[34] *Id* at 30-31
[35] *Id* at 31
[36] *Id* at 31

Roberts has been in favor of an expansive view of the government's power to tax[37]. That can't necessarily be counted on with respect to the realization issue, but that could signal that the most critical vote would be that of Justice Kavanaugh. Justices Barrett, Alito, Thomas and Gorsuch took issue with Justice Kavanaugh refusing to rule on the realization issue even though, as Justice Kavanaugh stated realization wasn't an issue in the case. This could suggest that Justice Kavanaugh is at least open to giving the issue a fair hearing.

V. *Pollock* should be Overturned

A. The Meaning of the Term Direct Tax

The fourth clause of Article I, Section 9, of the US Constitution contains the direct tax language and provides as follows:

> No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

Justice Kavanaugh in his majority opinion in *Moore* confidently said direct taxes are "those imposed on persons or property", while indirect taxes are "those imposed on activities or transactions."[38] Despite that confidence, that definition appears nowhere in the Constitution or the historical record of the ratifying convention.

The term direct tax as used in the constitution has never been completely clear. The classic illustration of this fact is from James Madison's notes describing Rufus King's request at the Constitutional Convention for an explanation of the meaning of a direct tax: "Mr. King asked what was the precise meaning of *direct* taxation? No one answd."[39]

The founders never provided a definition for the term direct tax and never intended the definition used by Justice Kavanaugh in *Moore*. Instead, the term was meant to apply to two types of taxes, namely a poll (capitation) tax, and a tax on lands, and designed to protect the southern states from onerous and disproportionate taxes.

For 100 years, the Court understood this fact. In 1796, the Court in *Hylton v. United States*[40] held that a federal tax on carriages wasn't a direct tax. Justice Paterson, who was as a member of the constitutional convention, explained in *Hylton* the rationale and intent of the direct tax clause:

> The provision was made in favor of the southern States. They possessed a large number of slaves; they had extensive tracts of territory, thinly settled, and not very productive. A majority of the states had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. The southern states, if no provision had been introduced in the Constitution, would have been wholly at the mercy of the other states. Congress in such case, might tax slaves, at discretion or arbitrarily, and land in every part of the Union after the same rate or measure: so much a head in the first instance, and so much an acre in the second. To guard them against imposition in these particulars, was the reason of introducing the clause in

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[37] See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012)
[38] *Moore v. United States*, No. 22-800, 2 (U.S. Jun. 20, 2024
[39] 2 Farrand's Records 350
[40] 3 U.S. 171 (1796)

> the Constitution, which directs that representatives and direct taxes shall be apportioned among the states, according to their respective numbers.[41]

In his dissent in *Moore,* Justice Thomas stated:

> As the Constitution's text made clear, a "Capitation" was "direct." Art. I, §9, cl. 3. And, all agreed that taxes on land and slaves were considered direct. See 3 Elliot's Debates 229. But, beyond that, the precise boundary between direct and indirect taxes was debatable."[42]

In 1880, in *Springer v. United States*, the Court held that an income tax was not a direct tax, saying that "Direct taxes, within the meaning of the Constitution, are only capitation taxes as expressed in that instrument, and taxes on real estate."[43]

It can be argued that the direct tax clause is obsolete given that its intent was to protect the southern states after the civil war ended and the constitution was adopted. At the very least, a direct tax should be narrowly construed and limited to what was clearly intended by the term, namely a capitation tax on residents in a particular state and a tax on lands located in a particular state. This was the conclusion of the Court for 100 years, until *Pollock*.

B. The Erroneous Holding in Pollock

The 16th amendment should have never been necessary to sustain an income tax because an income tax is not a direct tax. Therefore, *Pollock* should be overturned. The power of Congress to impose an income tax would then be derived from Article I, Section 8, Clause 1 of the US Constitution, which has been held to be extremely broad and expansive.[44] There is a solid basis for this argument.

Pollock is considered one the worst decisions to come out of the Supreme Court. As Justice Thomas noted in is dissent in *Moore*, "The *Pollock* decision sparked significant confusion and controversy throughout the United States."[45] In the congressional debate over the 16th amendment, Senator Joseph Bailey of Texas maintained that "an overwhelming majority of the best legal opinion in this Republic believes that Pollock was erroneous." [46] One commentator writing in the Harvard Law Review at the time summed it up this way:

> When a court of last resort not only overrules in effect three direct adjudications made by itself, but also refines away to the vanishing point two other of its decisions, and thereby cripples an important and necessary power and function of a coordinate branch of the government, and delivers an opinion in which is laid down a doctrine that is contrary to what has been accepted as law for nearly one

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[41] *Id*, at 177
[42] *Moore v. United States*, No. 22-800, 63 (U.S. Jun. 20, 2024)
[43] 102 U.S. 586 (1880)
[44] See, License Tax Cases, 72 U.S. (5 Wall.) a t471; *Brushaber v. Union Pac. R.R*., 240 U.S. 1, 12 (1916); *Moore v. United States*, No. 22-800, 2 (U.S. Jun. 20, 2024)
[45] *Moore v. United States*, No. 22-800, 11 (U.S. Jun. 20, 2024).
[46] 5844 Cong. Rec. 1351 (Apr. 15, 1909)

> hundred years, it I neither improper nor unprofessional carefully and earnestly to scrutinize that decision and the authorities and reasons upon which it is founded.[47]

While outrage over a Court decision doesn't prove it was wrong, it certainly suggests that possibility, especially in the context that for 100 years the Court correctly concluded the term direct tax applied only to a capitation tax and a tax on lands in a state.

Justice Kavanaugh in his majority opinion in *Moore* implied that *Pollock* was wrongly decided when he said, "the Sixteenth Amendment expressly confirmed what had been the understanding of the Constitution before *Pollock*: Taxes on income-including taxes on income from property are indirect taxes that need not be apportioned."[48]

C. Revisiting Pollock

In the 1930's, the Court backed away from the *Pollack* reasoning, without overruling *Pollack*.[49] There is one simple reason why *Pollock* has not been revisited and overturned. Congress responded to *Pollock* quickly, passing the 16th amendment in 1909. The 16th amendment was then ratified by the states and became law in 1913. Thus, the fact that *Pollock* has lasted this long is a testament not to *Pollock*, but only to the fact that the 16th amendment overturned the Pollock holding that an income tax is a direct tax. After the enactment of the 16th amendment, there was no need to revisit *Pollock*. However, a tax on unrealized capital gains would provide the opportunity to reexamine *Pollock*. A tax on unrealized capital gains would be new and would require a ruling that the 16th amendment doesn't require realization if the basis for the tax was the 16th amendment. If the Court were to rule otherwise on the 16th amendment realization issue, *Pollock* would need to be revisited.

There were two holdings in *Pollock*: (1) a tax on personal property (in addition to real property) is a direct tax; and (2) an income tax is a tax on property itself that gives rise to the income, i.e., a property tax. Both holdings are wrong. The historical record, and 100 years of jurisprudence before *Pollock* prove that a direct tax is limited to a capitation tax and a tax on lands. The idea that an income tax is a property tax has no basis in the history of the constitution and no merit. Cities and towns commonly impose property taxes on real estate and personal property in the form of cars and trucks. No one has ever thought that these property taxes also applied to income generated by the property.

There is a modicum of evidence that supports the first holding in *Pollock*. Justice Thomas in his dissent in *Moore* said that "perhaps taxes on personal property "were intended to be included in the meaning of the term direct tax.[50] When the tax on carriages that was upheld in *Hylton* was being debated in Congress, James Madison objected to the tax as a direct tax.[51] However, that objection was after the Constitution was adopted and provides no relevance as to the intent of the term in the Constitution.

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[47] 59 Francis R. Jones, "Pollock v. Farmers' Loan and Trust Company," 9 Harv. L. Rev. 198 (1895-1896)
[48] *Moore v. United States*, No. 22-800, 11 (U.S. Jun. 20, 2024).
[49] *See, New York ex rel Cohn v. Graves,* 300 U.S. 308, 314–16 (1937); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 480 (1939)
[50] *Moore v. United States*, No. 22-800, 55 (U.S. Jun. 20, 2024)
[51] *See* 4 ANNALS OF CONG. 730 (1794)

Moreover, only the second holding would need to be overturned to justify a tax on unrealized capital gains outside of the 16th amendment. Overturning the second holding would mean a tax on unrealized capital gains is justified by the broad taxing power of Congress under Article I, Section 8, Clause 1 of the US Constitution, and not dependent on the 16th amendment. The precedent would then revert to the *Springer* case, which recognized a direct tax as only a capitation tax and tax on lands and upheld an income tax.

The Barrett, Alito, Thomas, and Gorsuch group from *Moore* would face a dilemma. They argued in *Moore* that income must be severed from the underlying property to give rise to taxable income under the 16th amendment because the amendment requires realization. If income is something different than the property that gives rise to the income, then the second holding in *Pollock* is wrong and must be overturned, and a tax on unrealized gains does not depend on the 16th amendment for validity. On the other hand, if income is no different than the property itself that gives rise to the income, then realization is not required by the 16th amendment.

Overturning the first holding would also open the door to a wealth tax, although an issue would exist as to whether the tax was a direct tax because a wealth tax in part could be viewed as tax on real property. However, a close reading of the term tax on lands demonstrates that the term meant a tax on lands *in a state*, which can be differentiated from a wealth tax. Nevertheless, the issue exists. If the first holding weren't overturned, then there would be a bigger hurdle for a wealth tax, namely that the tax was a tax on real and personal property as well, and thus more clearly a direct tax.

V. THE ACA TAX OPTION

A. The *Nat'l Fed'n of Indep. Bus. v. Sebelius* Precedent

Should the Court rule that realization is required under the 16th amendment and decline to overturn the second holding in *Pollock*, one other option exists to achieve the same result: A tax similar to the Affordable Care Act (ACA) individual mandate tax that was upheld in *Nat'l Fed'n of Indep. Bus. v. Sebelius*.[52]

The Court in. *Sebelius* declined to uphold the individual mandate tax under the Commerce Clause.[53] However, the Court upheld the individual mandate as a tax saying, "The Federal Government may enact a tax on an activity that it cannot authorize, forbid, or otherwise control."[54] Thus, if Congress can't impose a tax on unrealized capital gains under the 16th amendment or Article I of the Constitution, it could impose an ACA individual mandate like tax.

The *Sebelius* Court concluded that the tax wasn't' a direct tax because it wasn't a tax on real estate or personal property.[55] Thus, a tax on unrealized capital gains under this approach also wouldn't be a direct tax.

It could be argued that this type of tax on unrealized capital gains amounts to a tax on inactivity, i.e., the decision of the taxpayer to avoid selling capital assets. However, the *Sebelius* Court said "most importantly, it is abundantly clear the Constitution does not guarantee that individuals may avoid taxation through inactivity."[56]

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[52] 567 U.S. 519, 573 (2012)
[53] *Id* at 558
[54] *Id* at 537
[55] *Id* at 571
[56] *Id* at 571

B. The Rationale for Taxing Unrealized Capital Gains

A valid rationale exists for a tax on unrealized capital gains. The Biden administration estimated that the effective tax rate paid by America's 400 wealthiest families on an expanded measure of their income that includes unrealized capital gains was only 8.2%, despite a top marginal federal income tax rate of 37%.[57] Further, the study suggests the effective rate is likely actually lower than 8.2% because consumption, which is included in the Haigs-Simon definition of economic income but excluded from the definition of expanded income that was used in this analysis: "excluding consumption and some taxes from our measure of income suggests that the 8.2 percent estimate is actually higher than the tax rate measured relative to a truly comprehensive measure of income."[58] This is far lower than the effective tax rate paid by average Americans. Taxpayers with a wealth of $100 million or more generally have little or no need to liquidate unrealized capital gains and instead can let these gains accumulate indefinitely, thus depriving the federal government of revenue and exacerbating the wealth gap in this country.

An analogy can be made between the rationale behind an ACA individual mandate like tax and IRC section 401(a)(9) that governs required minimum distributions (RMD's') *RMDs*, are mandated annual withdrawals that individuals with for retirement accounts such as 401(k)'s and IRA's are required to make after reaching a specified age or inheriting retirement accounts. According to the Congressional Research Service, "RMDs are intended to prevent tax-advantaged retirement accounts . . . from being used as permanent tax shelters or as vehicles for transmitting wealth to beneficiaries."[59] "In addition to reducing federal revenues over the budget period, delaying or suspending the RMD might primarily benefit higher-income taxpayers who have other financial resources and can forgo distributions from their retirement accounts until they are required to do so."[60]

The same can be said for unrealized capital gains of the ultra-wealthy. In both situations, the overall resources of the ultra-wealthy would mean that this group could let funds accumulate indefinitely tax-free. This advantage is magnified for higher income taxpayers because of the progressive income tax system, and because higher wealth accumulates exponentially due to compounding. The result is an ever growing income and wealth gap, and deprivation of the federal government of tax revenues. However, the analogy between retirement accounts and unrealized capital gains isn't perfect. Retirement accounts involve income that would have been realized and thus taxed, except for the tax break that was provided by the government. Thus, it can be argued that RMD's just involve the government removing the tax break that it had granted. The same cannot be said about unrealized capital gains *if* the Court has ruled that a tax on unrealized capital gains is not valid under the 16th amendment or Article I of the Constitution. However, contributions to, and earnings on retirement accounts, are held by an independent trustee and never in the hands of the taxpayer. Thus, in both cases, the fact remains that the income is unrealized until the government seeks to tax it in some way.

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[57] The White House. What Is the Average Federal Individual Income Tax Rate on the Wealthiest Americans? September 23, 2021.Retireede at: https://perma.cc/S86W-N43K. January 9, 2025

[58] *Id*

[59] Required Minimum Distribution (RMD) Rules for Original Owners of Retirement Accounts. Congressional Research Service. August 29, 2024. At 1. https://crsreports.congress.gov/product/pdf/IF/IF12750/1.

[60] *Id*

C. Configuring the Tax

The individual mandate tax was configured to approximate the cost of health insurance that was avoided by the taxpayer. In 2016, for example, the penalty was 2.5 percent of an individual's household income, but no less than $695 and no more than the average yearly premium for insurance that covers 60 percent of the cost of 10 specified services (*e.g.,* prescription drugs and hospitalization).[61] According to the *Sebelius* Court: "for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more."[62] The ACA individual mandate like tax could be configured to yield the same result as the minimum 25% tax on expanded income in the Biden proposal. The goal would be to approximate the lost revenues the government from an affected taxpayer avoiding paying taxes on unrealized capital gains and deter tax avoidance by affected taxpayers. A simpler approach would be opt apply the same tax rate to unrealized capital gains that would apply to realized capital gains. In neither case, would a taxpayer pay a higher rate than if the unrealized capital gains were realized.

However, the *Sebelius* Court noted that "Congress's ability to use its taxing power to influence conduct is not without limits."[63] In *Department of Revenue of Mont. v. Kurth Ranch* the Court said, "a so-called tax's penalizing feature can cause it to lose its character as such and become a mere penalty."[64] In *Kurth Ranch,* a Montana tax on illegal drugs was struck down as being a punitive measure. The Court noted that "its high rate and deterrent purpose, in and of themselves, do not necessarily render it punitive, but other unusual features set it apart from most taxes."[65] The holding was based on these "other unusual factors", including a condition precedent that a person first be convicted of and sentenced for possession of illegal drugs. The Court noted that a fine for the conviction could have been increased instead of a tax being applied. The Court also found objectionable a provision that allowed for sanctions by restraint of person's property. Avoidance of "other unusual factors" could help sustain an ACA individual mandate like tax. Still, despite the idea that a high rate is not in itself fatal, the magnitude of the use of a tax on unrealized capital gains could raise serious concerns. With four conservative justices ready to strike down a tax on unrealized capital gains based on the 16th amendment, and probably not open to overturning the second holding in Pollock, an ACA individual mandate like tax likely has less chance of success.

VI. Conclusion

A wealth tax would be a tax on property and not an income tax and thus could not be sustained by the 16th amendment. Under existing precedent, it would be deemed a direct tax that could not be apportioned and thus unconstitutional.

In. contrast, the 16th amendment authorizes a tax on unrealized income and thus unrealized capital gains. However, that may not matter to the Supreme Court. Four conservative justices, Barrett, Alito, Thomas, and Gorsuch have already tipped their hand in *Moore*, a case that did not even involve the issue or realization, and indicated they would rule that realization is a requirement under the 16th amendment. If proponents of a tax on unrealized capital gains lost either Justices

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[61] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 539 (2012)
[62] *Id* at 556
[63] *Id* at
[64] 511 U.S. 767 (1994)
[65] *Id* at 768

Roberts or Kavanaugh, the soundness of their arguments wouldn't matter and a tax on unrealized capital gains would face the same fate as a wealth tax.

Sound arguments can also be made that an income tax is not a direct tax and thus that the second *Pollock* holding needs to be overturned. The fact that *Pollock* has lasted this long is a testament not to *Pollock*, but only to the fact that the 16th amendment overturned the Pollock holding that an income tax is a direct tax. Thus, to date there has been no need to revisit *Pollock*. However, a tax on unrealized capital gains would be new. If the Court were to hold that the 16th amendment requires realization, that would make the Pollock holding an issue and present the perfect opportunity for the Court to overturn *Pollock*.

Overturing the first *Pollock* holding would also open the door to a wealth tax. To sustain a wealth tax, the Court would also need to limit the real estate component of a direct tax to a tax that is imposed on the value of lands located in each state, which was the original intent. However, these concerns would not apply to a tax on unrealized capital gains.

Finally, if both arguments failed, Congress could opt for a third option, a tax similar to the ACA individual mandate tax. Under the *Sebelius* precedent, such a tax would be within the general taxing power of the Congress. However, the magnitude of the tax would present an issue such that the tax could be deemed an unconstitutional penalty. Thus, this option should be viewed more as an option of last resort.

ESTABLISHING A COMMON-LAW MARRIAGE: WEIGHING THE RELEVANT FACTORS

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I. INTRODUCTION

A common-law marriage is a legally recognized marriage between two people who have not purchased a marriage license or had their marriage solemnized by a ceremony. Instead, the union is deemed valid based on the couple's mutual agreement, cohabitation, and the perception of the community. The roots of common-law marriage can be traced back to medieval England, where formalities were less emphasized, and unions were often recognized based on the couple's intent and public acknowledgment.[1] In the United States, the origins of common-law marriage can be traced back to the colonial era, where legal systems mirrored those of England.[2] As communities developed, these informal marriages gained recognition.

The United States first recognized common-law marriages in 1847, when the Alabama Supreme Court acknowledged their validity.[3] This laid the groundwork for the recognition of informal unions, setting a precedent for other states to follow. Throughout the 19th and early 20th centuries, common-law marriage gained popularity as an acceptable form of marital union in various states. The legal landscape was diverse, with different jurisdictions embracing or rejecting the concept. As the nation expanded, the recognition of common-law marriage became a state-specific matter, with each region shaping its laws according to cultural, social, and religious influences.[4] In the mid-20th century, attitudes toward marriage underwent significant changes. With the advent of marriage license requirements and increased formality in marital unions, the prevalence of common-law marriage declined. Many states began enacting statutes that tightened the criteria for recognizing informal marriages.[5]

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While the majority of states have eliminated common-law marriage, they are still recognized in a minority of jurisdictions.[6] When a couple has established a valid common-law marriage in another jurisdiction, the Full Faith and Credit Clause of the United States Constitution requires all states to recognize this marriage and give it full legal force and effect.[7] Nevertheless, issues arise when, after the death of one of the individuals, the survivor asserts the existence of a common-law marriage, allowing the survivor to reap financial benefits. Common-law marriages can invite legal challenges, especially when determining the date of marriage, dividing assets, establishing spousal support, and establishing spousal inheritance rights. In these cases, courts have then been called on to evaluate the validity of these claims.

The purpose of this article is twofold. First, the requirements necessary to establish a common-law marriage in each jurisdiction will be examined. Second, court rulings upholding or refuting the existence of a common-law marriage will be analyzed to provide the guidance necessary to avoid both unexpected and unintended outcomes

II. EXAMINATION OF COMMON-LAW MARRIAGE STATES

Only ten jurisdictions currently recognize common-law marriage in some form: Colorado, the District of Columbia, Iowa, Kansas, Montana, New Hampshire, Oklahoma, Rhode Island, Texas, and Utah.[8] Now that couples can readily obtain a marriage license it may seem that there is no longer the need for common-law marriage. Yet, when couples choose to forego the formalities of a marriage ceremony and opt for a common-law relationship, society does not benefit by denying the existence of a marriage. It is only when it is unclear whether the couple intended to enter a marital relationship, and one of the parties later asserts his or her entitlement to marital benefits, that issues arise.

Not all jurisdictions have statutes addressing common-law marriage. In some jurisdictions, case law and public policy determine the validity of these marriages. The requirements that must be met to establish a common-law marriage in each jurisdiction are reviewed below.

A. Colorado

Colorado has recognized common-law marriage as a legal and binding institution since 1877.[9] Common-law marriages in Colorado are treated the same as ceremonial marriages, and the parties are entitled to the same rights, privileges, and responsibilities. A common-law marriage can only be terminated by death or divorce.

Statutory Law:

Common-law marriage has been incorporated into Colorado's statutory law only to a limited extent. Colorado's statute pertaining to common-law marriage merely states:

> A common-law marriage entered into on or after September 1, 2006, shall not be recognized as a valid marriage in this state unless, at the time the common-law marriage is entered into:
>
> (a) Each party is eighteen years of age or older; and
>
> (b) The marriage is not a prohibited marriage.[10]

Prohibited marriages under Colorado law include a marriage entered into prior to the dissolution of an earlier marriage or civil union of one of the parties, marriage between an ancestor and a descendant or between a brother and a sister, whether the relationship is by the half or the whole blood, and marriages between an uncle and a niece or between an aunt and a nephew, whether the relationship is by the half or the whole blood.[11]

Case Law:

In Colorado, it is case law that sets forth the necessary elements for establishing a common-law marriage. In the 1987 *People v. Lucero*,[12] Colorado's Supreme Court found that a common-law marriage is established by "the mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship."[13]

Under *Lucero*, if one party denies the marital agreement, courts can infer consent from the couple's conduct. When applying the *Lucero* test, courts can consider factors such as use of the same surname, joint filing of taxes, cohabitation, childrearing arrangements, and testimony from witnesses who believe the couple to be married.[14] In 2021 the court refined the *Lucero* test when deciding *In re the Marriage of Hogsett and Neal*[15] and stated, "…social and legal changes since *Lucero* make its factors less helpful in sorting out who is 'acting married,' and who is not."[16] The court stressed the "importance of the parties' mutual agreement to enter a marital relationship," followed by "conduct manifesting that mutual agreement."[17]

The *Hogsett* decision emphasized that courts should still look to the *Lucero* factors, but must also consider things like joint bills or leases, evidence of joint estate planning, beneficiary and emergency contact designations, symbols of commitment, gifts and anniversaries and the parties' beliefs about the institution of marriage.[18] The court added

that claims asserting a common-law marriage years after the end of the relationship are "less credible" than those made promptly for dissolution of the marriage or probate purposes.[19]

In a concurring opinion in *Hogsett*, concerns were raised about the "validity of common-law marriage going forward" and called for Colorado to "join the overwhelming majority of states" in abolishing it. "The doctrine's application is often unpredictable and inconsistent, and it ties parties and courts up in costly litigation."[20] In addition, it was argued that the historical conditions that justified common-law marriage have been eliminated due to changing norms around relationships and the fact that Colorado is no longer a frontier state where couples might have to travel long distances to obtain a marriage license.[21]

Summary:

Elements: Colorado requires the following elements to establish a common-law marriage: (1) Mutual consent or agreement by the parties to be married, and (2) Conduct manifesting that mutual agreement.[22]

Evidence: The following factors are commonly considered by Colorado courts when determining whether the elements of a common-law marriage have been met. The parties: (1) live together for any period, (2) share joint bank accounts or other property, (3) hold each other out as spouses, (4) use of the same surname, (5) have joint bills or leases, (6) name each other as beneficiaries in legal documents, and (7) file joint tax returns.[23]

If a couple wants to document their common-law marriage so the relationship is not questioned in the future, they may file a signed, notarized affidavit with their County Clerk.[24]

B. District of Columbia

The District of Columbia has recognized common-law marriage since 1931.[25] In the eyes of the law there is no difference between a common-law marriage and a ceremonial marriage. Once recognized, common-law marriages attract the same rights, privileges, and obligations as ceremonial marriages. Both are perfectly valid forms of marriage, and both end only upon divorce or death.

Statutory Law:

The District of Columbia does not have a common-law marriage statute but has long recognized common-law marriages pursuant to case law.[26]

Case Law:

East v. East[27] sets forth the elements to establish a common-law marriage by two legally capable individuals. There must be a mutual agreement, in the present tense, to enter into a state of matrimony, as well as the consummation of that agreement by cohabitating as husband and wife.[28] Since ceremonial marriage is readily available and provides unequivocal proof that the parties are married, claims of common-law marriage are closely scrutinized, especially where one of the purported spouses is deceased and the survivor is asserting the claim to promote his or her financial interest.[29]

There is no time requirement of how long couples must live together before their common-law marriage is viewed as legal in the eyes of the law. However, when one of the parties to the alleged marriage asserts its existence but does not prove there was mutual consent or agreement, mere cohabitation will not justify an inference of mutual consent or agreement to be married."[30] While there is no set formula required for the agreement, the exchange of words must "inescapably and unambiguously imply that an agreement was being entered into to become man and wife as of the time of the mutual consent."[31]

In *Coates v. Watts*[32] the surviving "spouse" of an alleged common-law marriage asserted spousal rights against the decedent's estate. The decedent's sister challenged the existence of a common-law marriage, contending that there was never a mutual agreement, in the present tense, by the couple to enter into a marriage.[33] In reviewing the case, the court found that the couple conducted their business affairs as single persons rather than as a married couple. They referred to themselves as single or widowed in legal documents and filed their income tax returns as single individuals.[34] The surviving spouse also testified that the couple had agreed to be married at an unspecified future time, indicating that they had no agreement, in the present tense, to be married. The court found that there was insufficient evidence to establish the existence of a common-law marriage.[35]

Summary:

Elements: The District of Columbia requires the following elements to establish a common-law marriage: (1) Mutual agreement, in the present tense, to enter into a state of

matrimony, and (2) Consummation of that agreement by cohabitating as a married couple for any length of time.[36]

Evidence: The District of Columbia courts heavily concentrate on the "agreement" element when determining whether a common-law marriage exists. The agreement must be (1) made expressly by both parties, (2) in words of the present tense, (3) followed by cohabitation for any length of time. If the "agreement' does not meet this standard, cohabitation, even if followed by a reputation in the community of being married, does not justify the finding of a common-law marriage.[37]

In the District of Columbia common-law marriages may be "verified" by the parties by making and registering a "declaration of informal marriage" in the county in which they reside.[38]

C. Iowa

Common-law marriage has been recognized in Iowa since 1876.[39] Iowa considers a common-law marriage as valid as a ceremonial marriage, but its public policy does not favor these marriages. Therefore, claims of common-law marriage are carefully scrutinized. Once established, a common-law marriage can only be terminated by death or divorce.

Statutory Law:

In Iowa, statutory law defines common-law marriage as follows:

> A common-law marriage is a social relationship between a man and a woman that meets all the necessary requisites of a marriage except that it was not solemnized, performed, or witnessed by an official authorized by law to perform marriages. The necessary elements of a common-law marriage are:
>
> (a) a present intent of both parties freely given to become married,
>
> (b) a public declaration by the parties, or a holding out to the public, that they are husband and wife,
>
> (c) continuous cohabitation together as husband and wife (consummation of the marriage), and
>
> (d) both parties must be capable of entering into the marriage relationship.[40]

Case Law:

In re Estate of Fisher[41] the court analyzes the statue's elements. The requirement of a "present intent and agreement to be married" reflects the contractual nature of marriage. However, the court stated that an express agreement is not required. An implied agreement may support a common-law marriage where one party intends a present marriage, and the conduct of the other party reflects that same intent. The conduct of the parties and their general community reputation is evidence that can be used to support a present intent and agreement.[42] However it is important to note that the "present-intent-to-be-married" requirement precludes a common-law marriage based on an intent to be married at some future time.[43]

Marriage is normally followed by cohabitation. In Iowa continuous cohabitation is required to establish common-law marriage. However, the court in *Conklin by Johnson-Conklin v. MacMillan Oil Co.*[44] stated cohabitation is circumstantial evidence and cannot alone establish a common-law marriage. There is no particular duration that cohabitation must occur.[45]

The Iowa Supreme Court in *In Re Marriage of Martin*[46] stated the "public declaration" or "holding out to the public as married" is considered to be the "acid test" or a rigorous test to determine the existence of a common-law marriage. While this means there can be no "secret" common-law marriage, it does not require that all public declarations must be entirely consistent with marriage.[47] In *Martin* there was evidence that the couple had a general reputation of being married. However, at times the couple portrayed themselves in a manner inconsistent with marriage. During the time the couple lived together they maintained separate bank accounts and consistently filed separate income tax returns. Some employment records indicated they were married, while others reflected that they were single.[48] Overall, the parties treated themselves as married when it was convenient or beneficial to do so, and single when this provided a greater advantage. The court in *Martin* found that this degree of inconsistency undermined the finding of a common-law marriage and held that a marriage did not exist.[49]

Summary:

Elements: Iowa requires the following elements to establish a common-law marriage: (1) Both parties must presently agree to be married, (2) The couple must present themselves to the public as a married couple, (3) The couple must continuously live together as spouses for any length of time, and (4) The parties are capable of marrying.[50]

Evidence: The Iowa court places great weight on the "holding out to the public as married" element when determining whether a common-law marriage exists. The following factors are commonly considered: (1) continuous cohabitation for any length of time, (2) sharing joint bank accounts or other property, (3) naming each other as beneficiaries in legal documents, (4) general reputation of being married in the community, and (5) joint filing of tax returns. A common-law marriage may be found even if not all assertions are consistent, but great inconsistencies will defeat this finding.[51]

There is no formal way for a couple to document their common-law marriage in Iowa.

D. Kansas

The Kansas Supreme Court has recognized common-law marriages since 1913.[52] Once a common-law marriage is established in Kansas, the couple is entitled to the same legal rights and responsibilities as couples in formally recognized marriages. In case of a divorce, the couple must go through the same legal process as formally married couples.

Statutory Law:

Kansas' recognition of common-law marriage is based on legal precedents established through court decisions. These precedents were later codified, to some extent, in Chapter 23 of the Kansas Family Law Code.[53]

> (c) The two parties themselves, by mutual declarations that they take each other as husband and wife, in accordance with the customs, rules and regulations of any religious society, denomination or sect to which either of the parties belong, may be married without an authorized officiating person.

Case Law:

In the Matter of the Petition of Lola Pace,[54] the Court of Appeals outlined the three requirements that must coexist to establish a common-law marriage in Kansas.

First, both parties must have the capacity to marry, meaning that there is no legal impediment, or bar, to the marriage. This essentially requires that the spouses cannot be closely related, cannot be married to someone else, must be old enough to marry, and must have the mental and physical ability to marry.[55] Kansas' statutory law specifically

states that Kansas shall not recognize a common-law marriage if either party to the marriage contract is under the age of 18 years.[56]

Second, the parties must have a "present agreement" to marry. This agreement does not require a particular form; no writing is required. What is necessary is that two people intend to be spouses. A present agreement to marry can be inferred either from the behavior of the two people involved or by the way in which they mutually recognize each other as spouses.[57]

Third, the parties "hold each other out" to their family, friends, and the community as a married couple. The couple must do and say things that notify others that they believe that they are spouses. For example, they characterize each other as "husband," "wife," or "spouse" when talking to other people, sign documents reflecting that they are married, or file joint tax returns.[58] After taking all factors into consideration, if the couple has a general reputation as being spouses in a marital relationship, this third requirement is satisfied.[59]

Summary:

Elements: Kansas requires the following elements to establish a common-law marriage between parties capable of marrying: (1) The parties are legally eligible to marry each other, (2) The parties have a mutual present agreement to be married, and (3) The parties hold themselves out to be married.[60]

Evidence: The following factors are commonly evaluated by Kansas courts when determining whether the elements of a common-law marriage have been met. The couple: (1) agrees on the terms of their relationship and follows through on their agreements, (2) refer to each other as their spouse, (3) have a family together, (4) share a last name, (5) emotionally and financially support each other and their family, (6) file joint tax returns, and (7) while Kansas has no specific requirement that the couple must cohabitate, living together for any period may help demonstrate an agreement to be married.[61]

To acknowledge that they have entered into a common-law marriage, couples may sign an Affidavit of Common-Law Marriage. This document was developed by the Attorney General of Kansas. It is a sworn statement signed by the couple naming each other as dependents.[62]

E. Montana

Montana has recognized common-law marriage since 1873,[63] and broadly defines it as marriage formed without a license. In order for a common-law marriage to be recognized, a Declaration of Marriage must be signed by the parties.[64] Once established, a common-law marriage only ends upon divorce or death.

Statutory Law:

Title 40 of Montana Family Law affirms the validity of common-law marriages.[65] A rebuttable presumption exists in favor of a valid marriage when "[a] man and a woman deporting themselves as husband and wife have entered into a lawful contract of marriage."[66] However, it is case law that sets forth the necessary elements for establishing a common-law marriage.

Case Law:

In *Matter of Estate of Alcorn*[67] the surviving "spouse" of an alleged common-law marriage asserted spousal rights against the decedent's estate. The court held that, to establish a common-law marriage, the following conditions must be present:

1. The parties are competent to enter into a marriage. They must be of legal age and not married to someone else at the time;
2. There is an assumption by the parties of a marital relationship by mutual consent and agreement;
3. The parties must cohabitate, or make their home together, living as a married couple. No minimum time is required for them to cohabitate; and
4. The parties must have acquired the reputation, character, and status of marriage in public. [68]

In this case, the decedent's son challenged the existence of a common-law marriage, contending that the couple was incapable of consenting to marriage. When the couple met and began cohabitating, the surviving spouse was married, but separated from, her then-husband.[69] The court determined that, as a matter of law, the couple was incapable of consenting to marriage until the surviving spouse's divorce from her husband became final. Nevertheless, persons who cohabit after the removal of the impediment may become lawfully married as of the date the impediment is removed.[70] Therefore, when the surviving spouse's divorce became final, there was no longer an impediment to her common-law marriage to the decedent, and the couple was competent to marry.[71]

After the court found that the first three requirements of the Montana statue were met, it turned its attention to the fourth and final requirement: that the parties must have acquired the reputation, character, and status of marriage in public. Testimony by individuals in the community who knew the couple was heard, and the court found that the couple did have the reputation of being married.[72] To refute this, the decedent's son contended that couple had admitted in writing that they were not married by filing their tax returns as single individuals throughout their entire relationship.[73] In response, the surviving spouse testified that she filed her tax returns as a single person because she thought she could not file as "married" unless the marriage was a matter of record and she was advised by her accountants to file as single. The court accepted this explanation and affirmed the existence of a common-law marriage.[74]

Summary:

Elements: Montana requires the following elements to establish a common-law marriage: (1) The parties must be competent to marry, (2) There is mutual consent and agreement by the parties to marry, (3) The couple must cohabitate, and (4) The parties must acquire the reputation, character, and status of marriage in public.[75]

Evidence: The following factors are commonly evaluated by Montana courts when determining whether the elements of a common-law marriage have been met. The parties: (1) agree on a specific day and time that they were married, (2) live together for any length of time, (3) refer to each other as their spouse, (4) use the same surname, (5) tell their friends, family, or employers that they are married, (6) name each other as beneficiaries in legal documents, and (7) file joint tax returns.[76]

Couples in Montana must sign a Declaration of Marriage to verify the existence of their common-law marriage. This declaration must be drafted by an attorney licensed in Montana and the written declaration must be attested by at least two witnesses and formally acknowledged by an official authorized to administer oaths in Montana.[77] To be considered an official record, the declaration must be filed with the clerk of the district court in the county where the couple resides.[78]

F. New Hampshire

New Hampshire does not allow people to create common-law marriages in a way that entitles couples to benefit from most marriage laws. New Hampshire only recognizes common-law marriages under limited circumstances for probate or inheritance purposes.

Statutory Law:

The New Hampshire Statute states:

> Persons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of 3 years, and until the decease of one of them, shall thereafter be deemed to have been legally married.[79]

Thus, New Hampshire posthumously recognizes common-law marriages mainly to ensure that a surviving spouse inherits without any difficulty. It is the death of one partner which triggers the statute if all other elements are satisfied. This statute is commonly referred to as the, "I'd rather be dead than married" statute.

Case Law:

The petitioner in *In re Buttrick*[80] alleged she was entitled to a share of the decedent's estate as his legal spouse. There was no dispute that the petitioner and the decedent acknowledged each other as husband and wife and cohabited for a period in excess of three years at the time of the decedent's death. The sole issue addressed by the court was whether the couple was "generally reputed" to be husband and wife. The court found that testimony by the couple's family, friends, and members of the community verified that they were generally known as married in the community where they lived.[81]

Summary:

Elements: New Hampshire requires the following elements to recognize a common-law marriage upon the death of one of the parties: (1) The parties cohabitated the three years immediately preceding the death of one of them, (2) The parties acknowledged each other as husband and wife, and (3) The parties had acquired the reputation in their community as being married.[82]

Evidence: The following factors are assessed by New Hampshire courts when determining if the elements of the statute have been met. The couple: (1) lived together for at least three years before one died, and they were living together at the time of the death, (2) behaved as if they were a married, not merely romantic partners, (3) held themselves out as a married couple to their family, friends, and community, and (4) had the general reputation in the community as being married, and community members testified to this belief.[83]

Once a common-law marriage is recognized, it is the New Hampshire court's decision that documents its existence.

G. Oklahoma

Oklahoma first recognized common-law marriage in 1905.[84] Nevertheless, its position on common-law marriage has been unclear since the mid-1990s, with legal scholars periodically reporting that common-law marriage was abolished in the state. Once established, a common-law marriage only ends upon divorce or death.

Statutory Law:

Oklahoma's marriage statute requires couples to have a marriage license.[85] In contrast, the Oklahoma Tax Commission continues to present common-law marriage as a legal option.[86]

Case Law:

Oklahoma's case law has long upheld common-law marriages in the state.[87] In *Standefer v. Standefer*[88] the Court upheld the existence of common-law marriage, stating that a common-law marriage is formed when "the minds of the parties meet in consent at the same time."[89] Evidence of the parties' consent to enter into a common-law marriage includes cohabitation in a permanent, exclusive relationship, actions by the parties that are consistent with the relationship of spouses, recognition by the community of the marital relationship, and declarations by the parties that they are married.[90] There is no minimum time period that the parties must live together, and the person seeking to establish a common-law spousal relationship has the burden to show by clear and convincing evidence the existence of the marriage.[91]

In an attempt to prove that no common-law marriage existed, the husband in *Standefer* presented evidence that the wife purchased a house as a single person and that they had always filed separate income tax returns. In contrast, there were indications that after the couple began cohabiting the husband considered himself married, giving cards to "his wife" and listing "his wife" on his insurance.[92] Taking everything into account, the court found that the evidence was clear and convincing that both parties had assented to a marriage.[93]

Summary:

Elements: The following factors must be present for an Oklahoma court to find the existence of a common-law marriage: (1) A mutual agreement to be married, (2) Maintenance of a permanent and exclusive relationship, (3) Cohabitation as spouses for any length of time, and (4) Public representation as a married couple.[94]

Evidence: In Oklahoma, clear and convincing evidence must be present to support the claim of a common-law marriage. The following factors do not establish a common-law marriage on their own but are evaluated by Oklahoma courts when determining whether a common-law marriage exists. The parties: (1) live together for any length of time, (2) own joint property, (3) use the same surname, (4) name each other as spouses on legal documents, (5) have a child together and records identify both partners as the child's parents, and (6) file joint tax returns.[95]

Oklahoma does not require that a certificate or declaration of common-law marriage to be filed.

H. Rhode Island

While Rhode Island has recognized common-law marriage since 1926,[96] it has become clear through recent decisions that the state courts would prefer to see it abolished. Once a common-law marriage is recognized, it can only be terminated by divorce or death.

Statutory Law:

The recognition of common-law marriage is not codified in Rhode Island. It is merely a product of case law decisions from the Rhode Island Supreme Court.

Case Law:

In *Luis v. Gaugler*[97] the Rhode Island court noted that the following conditions must exist for a common-law marriage to be recognized: (1) the parties had the capacity to marry, for example, neither party was married to another person; (2) the parties seriously intended to enter into a mutual spousal relationship; and (3) the parties' conduct was of such a character that the community was led to believe that they were married.

In *Luis,* once the court established that the parties had the capacity to marry, it addressed the question of whether they "seriously intended" to enter into a marital relationship. The parties must mutually and presently intend to be married rather than

merely become engaged to be married at some point in the future.[98] Whether the individuals live together is often not the deciding factor of the existence of a common-law marriage. In *Luis* the couple had spent more than 23 years together, yet the Rhode Island Supreme Court determined that a common-law marriage did not exist. While it can be an important supporting factor, in Rhode Island common-law marriage can be established without cohabitation.[99]

The key factor for the Rhode Island court in *Luis* was whether the couple seriously intended to enter into a mutual spousal relationship. In other words, they are a married couple in every way except for the lack of an actual license.[100] Here the court found that the parties held themselves out as married when it benefited them and refrained from doing so when it did not.[101] On various work forms relating to employment benefits the couple indicated that they were single. However, with respect to health insurance they indicated that they were common-law spouses. The couple always filed their income taxes as "single" or "head of household," and never filed joint tax returns or as “married filing separately”. The court found that this, "strongly weighed against any serious intent to be husband and wife"[102] In determining whether their community believed they were married, a good litmus test is whether a stranger encountering the couple would presume that they are married. When questioning the couple’s family, colleagues, and friends the testimonies were not consistent and therefore inconclusive.[103]

Rhode Island has adopted the heightened “clear and convincing” standard of proof to establish a common-law marriage.[104] In this case the conflicting nature of the evidence was found to be insufficient to meet this higher standard. Therefore, the court found that a common-law marriage did not exist.[105] After rendering its opinion the court explicitly asked the Rhode Island legislature to overturn the practice of recognizing common-law marriages.[106] This was not the first time this request was made.

Summary:

Elements: In summary, Rhode Island requires the following elements to establish a common-law marriage: (1) There must be no legal impediments for the parties to marry, (2) The parties must intend to be married, and (3) The parties must hold themselves out as married.[107]

Evidence: The following factors are commonly reviewed by Rhode Island courts when determining whether the elements of a common-law marriage have been met. The parties: (1) share joint bank accounts or other property, (2) tell their friends, family, or employers that they are married, (3) have joint loans, bills, or other economic partnerships, (4) have

children together, (5) wear wedding rings or bands, (6) file joint tax returns, and (7) while Rhode Island has no specific requirement that the couple must cohabitate, living together for any period may help demonstrate an intent to be married.[108]

No one single factor is typically enough to legally support a common-law marriage, but multiple factors together can build a case for one.

Rhode Island does not require that a certificate or declaration of common-law marriage to be filed.

I. Texas

In 1840, the Republic of Texas adopted the English common law system, and Texas still recognizes common-law marriages today.[109] Once established, a common-law marriage is treated the same as a formal marriage and can only be terminated by divorce or death.

Statutory Law:

In Texas, common-law marriage is governed by statute.[110] To prove the existence of a common-law marriage, both parties must:

> (1) Agree that they are married;
> (2) Live together as husband and wife in the state of Texas; and
> (3) "Hold out" to others, within the state of Texas, that they are married.

All three conditions must exist simultaneously to establish a valid common-law marriage. It should be noted that the couple must live together in the state of Texas, but there is no stated period of time the cohabitation must last. Additionally, the parties must have the capacity to marry. This means both parties must be at least 18 years old, unrelated, and not currently married to someone else.[111]

Case Law:

When applying the statute in *Winfield v. Renfro* the Texas court stated that there must be proof that the parties intended to have a present, immediate, and permanent marital relationship.[112] An agreement to be married in the future is not sufficient. Courts can consider circumstances indicating that the couple represented themselves as being

married to establish the existence of an agreement to be married. Often, the evidence that supports the "holding out" element also supports the "agreement" element. However, if direct evidence shows that there was no agreement, a common-law marriage will not be found.[113]

Texas courts weigh the evidence that the parties "represented themselves as married" far less seriously if the couple made such representations to obtain benefits. In *Fuller v. DeFranco*[114] the parties mutually indicated to others, in the form of written documents, that they were spouses. However, the purpose of these documents was to obtain financial benefits that were available only if they were married. At the same time, the parties indicated in other written documents, such as income tax returns and loan applications, that they were not married. On their income tax returns each filed as head of household and neither filed as married or "married filing separately" during the years they resided together. Each claimed their own biological children as dependents, but did not claim the other party's children as dependents.[115]

Summary:

Elements: Texas requires the following elements to establish a common-law marriage: (1) The couple must agree to be married; this agreement may be inferred. (2) After the couple agrees to be married, they must live in Texas, for any length of time, as a married couple, and (3) The couple must hold themselves out as married to others.[116]

Evidence: The following factors are commonly considered by Texas courts when determining whether the elements of a common-law marriage have been met. The couple: (1) lives together, (2) shares joint bank accounts or other property, (3) refer to each other as their spouse, (4) use the same surname, (5) have joint bills or leases, (6) name each other as beneficiaries in legal documents, (7) have children together, and (8) file joint tax returns.[117]

Couples in Texas may sign a Declaration of Informal Marriage. However, if the court finds that the evidence does not support the claim that the parties had a "mutual intent or agreement to be married" no common-law marriage will be found.[118]

J. Utah

Common-law marriage cannot be established in Utah in the typical ways. Instead, starting in 1987,[119] the court can be petitioned to recognize a relationship as a marriage even though there was never a marriage ceremony. If the court approves, the parties will

be considered to have been married from the time the necessary requirements were met.[120] Once recognized, a common-law marriage can only be terminated by death or divorce.

Statutory Law:

To prove the existence of a common-law marriage, the petitioner must show the court that the marriage comes from an agreement between partners who:

(a) are of legal age and capable of giving consent;
(b) are legally capable of entering a solemnized marriage under Utah law;
(c) have cohabitated;
(d) mutually assume marital rights, duties, and obligations; and
(e) who hold themselves out as and have acquired a uniform and general reputation as spouses.[121]

There are time limits for asking that the relationship to be recognized as a marriage. The court must be petitioned either during the relationship, or within one year after the relationship ends. A relationship ends when one or both partners have died, or the partners have separated. Either partner or a next of kin may petition the court.[122]

Case Law:

When applying the statute in *Whyte v. Blair*[123] the Utah court stated that numerous factors should be considered when recognizing a common-law marriage, and no single factor is determinative. Evidence of each element is essential. Often the five elements of the statute can be proved or disproved with relative ease. However, whether the parties consented to be married is often contested.[124]

The best evidence of marital consent is a written agreement, signed by both parties, manifesting their consent to assume all marital responsibilities. The testimony of others who were present when the agreement was made may also be highly persuasive.[125] Despite the form of evidence used to show marital consent, what the party claiming the benefit of a common-law marriage must prove is that, at some point, mutual consent was given.[126]

Care must be given to guard against fraudulent marriage claims, especially where a declaration of marriage would reap financial rewards for an alleged spouse. When financial gain is at issue, acknowledgment of marital consent by the parties may be less persuasive if contradictory evidence is presented. But if the acknowledgment is

uncontradicted, or if it does not benefit the parties but rather some third person, then the acknowledgment of consent to be married may be more persuasive.[127]

Summary:

Elements: In order for a Utah court to recognize a common-law marriage, a couple must prove that a marriage arose out of their agreement to be married and that the two: (1) Are of legal age and capable of giving consent; (2) Are legally capable of entering into a solemnized marriage; (3) Have lived together for any length of time; (4) Treat each other as though they are married; and (5) Present themselves to the public so that other people believe they are married.[128]

Evidence: In order to prove that there was a common-law marriage between the two parties, Utah courts will typically consider the following pieces of evidence: (1) a written agreement documenting marital consent, (2) testimony of others who were present when the agreement was made, (3) the parties lived together for any length of time, (4) the parties had joint bank accounts or other property, (5) the parties refer to each other as their spouse, (6) the parties use the same surname, (7) the parties have joint bills or leases, (8) the parties name each other as beneficiaries in legal documents, (9) the parties have children together, and (10) the parties file joint tax returns.[129]

If the court approves the petition to recognize a common-law marriage, it will sign a decree that recognizes the marital relationship. Once the marriage is officially declared, and the validity is backdated to the start of the relationship.[130]

III. UNITED STATES TAX COURT ANALYSIS

The majority of jurisdictions that recognize common-law marriage require that the couple "agree to be married" and/or "hold themselves out" to the community as married. The existence of these factors may be inferred if the couple indicates in written documents, such as the filing of joint income tax returns, that they are spouses. When courts look to the couple's income tax filing status as an indication of whether a common-law marriage exists, it is important to understand the state's tax law. Many state tax laws are based on the federal tax law. Marital status is determined at the state level, but tax filing status is determined at the federal level, which looks back to the state's determination of marital status. If this analysis feels circular, that is because it is.

Treasury Regulations state that "a marriage of two individuals is recognized for federal tax purposes if the marriage is recognized by the state, possession, or territory of

the United States in which the marriage is entered into, regardless of domicile."[131] Since federal individual income is taxed at progressive rates, deciding whether it is beneficial to file as "married filing joint" is made by the couple based on their specific circumstances. Oftentimes, where spouses have large differences in earned income for the year, averaging this income can result in a lower bracket. Additionally, standard deduction amounts, gift and estate tax rates, and retirement savings options may also benefit the couple if they use the "married filing joint" status. When individuals claim that they are in a common-law marriage, the court will question why the couple did not use this income tax filing status if doing so would have been advantageous. In addition, the court will question why the individuals filed as "single" versus "married filing separate" if they consider themselves common-law spouses.

In *Brzyski v. Commissioner*[132] the United States Tax Court was called upon to assess the validity of a common-law marriage. In *Brzyski* the couple resided together in California. In 2011 they flew from California to Missouri to visit Brzyski's family. While in Missouri they drove to Kansas, a common-law marriage state, for dinner. After returning to California Brzyski posted on social media that they were engaged.[133] In the following years Brzyski selected inconsistent filing statuses on his tax returns. From 2011 through 2015 Brzyski filed as "single" with no dependents. However, in 2016 he filed as "head of household", claiming a dependency exemption for each of his partner's two minor children, as well as the child tax credit.[134] It should be noted that to qualify as a head of household you must be unmarried and have a qualifying child or dependent. However, Brzyski claimed he was entitled to the dependency exemption because the couple had entered into a common-law marriage while in Kansas.

Taxpayers bear the burden of proving the entitlement to any deduction or credit claimed on a return.[135] For a taxpayer to claim an individual as a qualifying child, the individual must satisfy five requirements.[136] The first requirement is that the individual must bear a specified relationship to the taxpayer. An individual meets the relationship requirement "if such individual is--(A) a child of the taxpayer or a descendant of such a child, or (B) a brother, sister, stepbrother, or stepsister of the taxpayer or a descendant of any such relative." A stepchild is included in the term "child".[137] Brzyski admitted he was not the biological or adoptive father of the children he claimed. Therefore, the relationship requirement is satisfied only if the children were Brzyski's stepchildren. Accordingly, the key to whether the minor children meet the relationship requirement is whether the couple was married.[138]

One of the three requirements in Kansas to establish a common-law marriage is that the parties have a "present agreement" to marry.[139] The court found that Brzyski did not meet his burden of proof to fulfil this requirement; he did not prove that the couple visited Kansas with the intent to establish a common-law marriage while there.[140] Conversely, after their trip Brzyski posted that the couple was engaged, which indicates a future agreement to marry, not present. Therefore, Brzyski was disallowed the dependency exemption and child tax credit.[141]

IV. EVALUATION OF COMMON-LAW MARRIAGES BY A STATE THAT HAS ABOLISHED THE DOCTRINE

If a common-law marriage was previously recognized in the state in which it arose, then all jurisdictions are required to recognize its validity.[142] Alternately, when a couple alleges that they entered into a common-law marriage while visiting or previously residing in a common-law marriage state, and the validity of that marriage was not examined by that state, the elements necessary to establish a marriage must be scrutinized by the state where they currently reside. Many times, the state making this determination no longer recognizes the establishment of common-law marriages within its jurisdiction. This is what occurred in *In re. Rogers*,[143] a recent New York case.

New York State abolished common-law marriages in 1933.[144] It should be noted that New York has long regarded common-law marriage as a fruitful source of fraud and perjury, and common-law marriages have been tolerated by the state, but not encouraged.[145] In *In re. Rogers* a New York decedent died without a will. Rogers alleged that he was the decedent's common-law spouse, stating that their marriage was established in the District of Columbia.[146] As previously noted, to establish a common-law marriage in the District of Columbia there must be a mutual agreement, in the present tense, to enter into a state of matrimony, as well as the consummation of that agreement by cohabitating as husband and wife.[147] Courts have closely examined and scrutinized the agreement element, stating that, "... a party must submit proof of an agreement to enter into the legal relationship of marriage through an exchange of words in the present tense 'spoken with the specific purpose that the legal relationship of husband and wife be thereby created.'"[148]

It is important to note that Rogers was asking a New York court to establish the validity of his alleged common-law marriage to the decedent after her death. If the common-law marriage was found to be valid, that finding would be to Rogers' financial

benefit. While these circumstances do not delegitimize Rogers' claim, the court stated that it was compelled by these facts to employ close scrutiny.[149] In the District of Columbia the proponent must prove these elements by a preponderance of the evidence.[150] Only Oklahoma and Rhode Island have adopted the heightened "clear and convincing" standard of proof to establish a common-law marriage.

After reviewing the evidence, the court found that Rogers failed to establish the agreement element. There was no express, mutual, and present tense agreement signifying the couple intended to become married at the time the words were exchanged. Additionally, while there is no minimum time requirement for cohabitation, Rogers did not establish a specific period of cohabitation as husband and wife.[151] Furthermore, the court also noted that, while it was not a controlling factor under the District of Columbia's test for common-law marriage, it was significant to the court that Rogers' and the decedent's personal affairs lacked important indicators that traditionally support a claim that a couple agreed to, and did, live their lives as husband and wife. For example, they did not hold any assets, accounts, or real estate jointly, and did not file joint income tax returns.[152]

As a result, the New York court found that the evidence presented did not establish a valid common-law marriage under the law of the District of Columbia, and therefore no common-law marriage existed between Rogers and the decedent in New York.[153] It is interesting to contemplate whether a District of Columbia court examining the same evidence would come to the same conclusion.

V. CONCLUSION

In the eyes of the law, once a common-law marriage is recognized as valid, there is no difference between a common-law marriage and a ceremonial marriage. Both are perfectly valid forms of marriage, and both are terminated only upon divorce or death. Common-law marriage is not a loophole to avoid divorce, since there is no "common-law divorce." A common-law marriage does not magically dissipate if the parties physically separate.[154] The couple must legally divorce if they wish to end the marriage.

The number of jurisdictions that recognize common-law marriage has been declining over the years. Of the ten jurisdictions that currently have common-law marriage statues or case law setting forth the necessary elements to establish a common-law marriage, Colorado and Rhode Island have indicated that they would prefer to see it abolished. Statements made by justices in recent cases decided in these states explicitly called upon

the abolishment of the doctrine.[155] Since the historical conditions that justified common-law marriage have been eliminated, and the doctrine's application is often unpredictable and inconsistent, it may be only a matter of time before common-law marriage is eliminated altogether. For now, common-law marriage remains technically legal in ten jurisdictions, but it may be living on borrowed time.

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[1] http://the-history-of-common-law-marriage.
[2] Id.
[3] *Meagher v. Meagher,* 229 Ala. 680, 150 So. 216 (Ala 1935).
[4] http://the-history-of-common-law-marriage.
[5] *Id.*
[6] National Conference of State Legislatures, Mar. 11, 2020, available at http://ncsl.org/human-services/common-law-marrige-by-state.
[7] U.S. Const. art. IV § 1, cl. 1.
[8] National Conference of State Legislatures, Mar. 11, 2020, available at http://ncsl.org/human-services/common-law-marrige-by-state.
[9] *People v. Lucero,* 747 P. 2d 660 (Colo 1987).
[10] COLO. REV. STAT. §14-2-109.5 (2020).
[11] COLO. REV. STAT. §14-2-110 (2020).
[12] *People v. Lucero,* 747 P. 2d 660 (Colo 1987).
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[14] *Id.* at 665.
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LOGICAL FALLACIES:
HOW THEY UNDERMINE CRITICAL THINKING
AND
HOW TO AVOID THEM

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ABSTRACT

This paper explains how to recognize and steer clear of numerous common logical fallacies, ranging from ad hominem arguments to wishful thinking, that can damage an argument. Critical thinking is essential in the digital age, where we must question false or flawed claims. It helps us base our decisions on facts and evidence, not feelings or fallacious reasoning. Unfortunately, many employers struggle to find workers with this skill. To develop it, one must learn how to understand and evaluate the essence of an argument.

Keywords: critical thinking, cognitive bias, logical fallacy, Aristotle, causal arguments, straw man argument, moral equivalence, appeal to authority, false dilemma, tu quoque fallacy.

INTRODUCTION

We live in a post-factual and post-truth society where people are more influenced by their emotions and beliefs than by evidence. In addition, it is no longer the case that a college degree is necessary for a successful profession. The typical employee switches employment every four years, and the average person works twelve different jobs during their career (Kolmar, 2022). The idea that you can use the abilities you acquire at college for the rest of your career is unreasonable. To be competitive in the employment market, you must be a lifelong learner and constantly expand your knowledge and skill set.

The digital era requires robust and logical reasoning skills as knowledge expands exponentially. Companies can face competition from anywhere, even from other industries they believe to be non-competing. Thus, successful companies are agile and able to adjust their business models and seek new opportunities. For instance, initially a modest online bookseller, Amazon has expanded its horizons significantly. It now provides cloud computing services and operates a delivery network that utilizes drones and aircraft. This extensive transportation system competes directly with established carriers like UPS and FedEx. Additionally, Amazon has ventured into the online pharmacy business. Furthermore, Amazon Studios creates cutting-edge films and television shows. That is why firms need adaptable employees eager to learn and open to change.

This means that employees also need to be able to think critically, which is a necessary ability for the majority of high-level positions. A critical thinker knows when it is time to discard obsolete theories and dated information. They also know how to use critical thinking to challenge misinformation based on emotions or fallacious ideas rather than facts.

A significant proportion of American employers—roughly 73%—state that they have trouble hiring recent college graduates with critical thinking, communication, and listening abilities (Wilkie, 2019). Only 60% of companies stated that college graduates had the knowledge and abilities necessary to succeed in entry-level professions, according to the 2021 AAC&U (Association of American Colleges and Universities) poll (Flaherty, 2021, para. 21). It appears from this that a significant number of college graduates do not have the basic skills to succeed in entry-level jobs.

Friedman (2023) discusses the importance of understanding cognitive biases and cognitive distortions as a tool to enhance one's logical thinking skills. This paper will focus on why people and students need to understand the logical fallacies that interfere with rational decision making. If students are taught to think logically, it will be easier for them to reject the false arguments that encourage racism. As we shall see, there are severe errors in the way people who are prejudiced against other groups think, whether the discrimination is based on sex, race, religion, nationality, ableism, sexual orientation, physical attractiveness, or age. One should question the accuracy of any statement that begins with "All _____ are _____."

Academics should introduce the importance of clear, logical thinking in all courses. Lies and illogical conclusions are pervasive in many disciplines. Braithwaite (2006) provides examples demonstrating how inaccurate beliefs are spreading worldwide. Numerous people believe the myth that we only use 10% of our brains. No scientific evidence exists for such a ridiculous viewpoint; we use all our brains. Similarly, a large number of people believe that the MMR vaccine causes autism. Friedman (2024) discusses eight fitness myths that science has debunked (e.g., "You need to lift heavy weights to build muscles.").

More recently, millions of Americans believe that Donald Trump actually won the 2020 election. In some cases, academics have been teaching theories that have been disproven (e.g., rational man theory in economics). McCandless (2021) debunks 51 beliefs that a significant part of the population believes to be true. Some examples he provides are: "Alcohol kills brain cells," "Einstein failed math," "The Great Wall of China is visible from space," "MSG causes headaches," "There is a solid division between the talents of the left and right brain," "Salty water boils quicker," "Napolean was short," and "Swimming after eating causes cramps." There is evidence that, at the age of 14, children start believing in conspiracy theories. Teenagers also have trouble separating nonsense from truth on the internet (Moyer, 2022).

Students should be able to recognize how to determine whether an argument or assertion is valid. If college graduates cannot tell whether something is factual, then we are all in trouble. A healthy democracy requires intelligent citizens who understand how to distinguish between rubbish and accurate information. Approximately 2,400 years ago, Aristotle recognized the importance of studying logical fallacies (Groarke, 2020).

The Talmud is replete with logical reasoning; some may even be found in the Torah (Gabbay, Schild, and David, 2019; Sion, 1995). The Talmud frequently uses a fortiori reasoning (known as *kal vachomer* — literally "lenient and strict"). The definition of a *kal vachomer* is if a case that tends to be strict but has a specific leniency, then in a case that is usually mild, it will all the more so have that leniency. Or, suppose cable X is made of more robust materials than cable Y. We know that cable Y can support 100 lbs., so cable X should undoubtedly be able to support 100 lbs.

The Midrash (Genesis Rabbah 92:7; cited in the commentary of Rashi on Exodus 6:12) states that this *kal vachomer* reasoning is used ten times in the Hebrew Bible (Genesis 44:8, Exodus 6:12, Numbers 12:14, Deuteronomy 31:27, I Samuel 23:3, twice in Jeremiah 12:5, Proverbs 11:31, Esther 9:12, and Ezekiel 15:5). According to tradition, the Torah is more than 3,300 years old which indicates how old *kal vachomer* reasoning is.

COMMON LOGICAL FALLACIES THAT INTERFERE WITH CRITICAL THINKING

Logical fallacies should not be confused with cognitive biases. A logical fallacy occurs at the moment and is either intentionally or unintentionally used to win a dispute through the use of unfounded assertions, invalid inferences, unsupported conclusions, or groundless arguments. They are more about how you present and support your arguments and statements. Cognitive bias, on the other hand, refers to ongoing predispositions or established, set thinking patterns ingrained in how the brain works, which may result in systematic judgment errors. This paper will discuss some common logical fallacies. There are many other fallacies that are not listed below. Those interested in studying additional fallacies should consider reading Changing Minds (2024) and Bennett (2022).

Ad Hominem Argument

Originating from a Latin phrase meaning "against the person," an ad hominem argument is a fallacy where the attack is against the person making the argument, not the claim or opinion itself. This accomplishes two things: it distracts from the soundness and accuracy of the opponent's viewpoint and can also cause the person to feel attacked and, therefore, become defensive. If an adversary uses an ad hominem attack, one should not take the bait but rather keep the spotlight on the issue. An example of an ad hominem attack would be if someone disagreeing with you says, "You are wrong because you are a crook and liar."

Accent (Also Known as the Fallacy of Emphasis)

The fallacy of accent or emphasis is among the original fallacies that Aristotle, the first philosopher to organize and define logical errors, described (Cline, 2018). It is more common in Greek than in English. The spoken word can usually communicate more than the written word by emphasizing a particular word or sentence. Indeed, stressing a word in a certain way can change the meaning of a sentence. Thus, accent is a logical fallacy that occurs when the connotation of a word or sentence is altered because of where the emphasis is placed, which causes the audience to

be confused or deceived. Cline (2018) offers the following statement by a hypothetical politician as an example of the above fallacy: "I am opposed to taxes that slow economic growth." Is the politician opposed to all taxes because they slow economic development, or simply those particular taxes that hinder growth? Sarcasm is a way of saying one thing and meaning the opposite (e.g., "We are having wonderful weather" during a blizzard).

Affirming the Consequent

One who assumes a statement is true just because its outcome or consequence is true is guilty of this logical fallacy. The first statement (before the outcome) is called the "antecedent," and the second statement is the "consequent." It has the following form:

- If P, then Q.
- P.
- Therefore Q.

An example of this fallacy would be: "If I work hard, I will get an A on the exam. I got an A on the exam. Therefore, I must have worked hard." Or, "All humans have a brain. Thus, if it has a brain, it must be human."

Anecdotal Evidence

Anecdotal evidence is the term for basing a claim on a single case or a personal story rather than solid reasoning or convincing data. For example, someone who says, "Smoking is not bad for you; my grandfather smoked all his life, and he was 93 when he died," is using an anecdote instead of reliable evidence. Anecdotal evidence is not valid or representative and can lead to false or inaccurate conclusions when making a broad statement or argument.

Appeal to Authority

An appeal to authority (also known as an argument from authority) is a logical fallacy that uses the reputation or expertise of a person as the reason for believing a claim or idea without providing any other evidence. It suggests that a statement is accurate simply because it is told by someone seen as an expert or an authority in the related field. Of course, the accuracy of an authority's viewpoint depends on the trustworthiness and expertise of the source. Even experts do not always get things right. Also, one may have expertise in one area, e.g., oncology, and know little about nutrition. Often, appeals to authority rely on religious leaders or scientists.

Many experts rely on statistical evidence, but this may be insufficient to corroborate any theory if not done correctly. Unsurprisingly, several books have been written about expert predictions that usually turn out wrong. Kahneman (2011, pp. 218–219) cited research conducted by Tetlock (2005) that demonstrated how poorly experts who make a living "commenting or offering advice on political and economic trends" actually perform. They do not perform better than monkeys throwing darts at a board displaying the various possible outcomes (p. 219).

Kahneman (2011, p. 241) said about expert intuition: "Claims for correct intuitions in an unpredictable situation are self-delusional at best, sometimes worse... intuition cannot be trusted in the absence of stable regularities in the environment." If an environment is stable and regular, an expert can understand the regularities by observing the right cues. People cannot develop real expertise in areas with no regularities and consistencies (e.g., the stock market or a political environment).

According to Dobelli (2013):

> Experts suffer even more from the overconfidence effect than laypeople do. If asked to forecast oil prices in five years' time, an economics professor will be as wide of the mark as a zookeeper will. However, the professor will offer his forecast with certitude (Dobelli, 2013, para. 3).

Appeal to Emotion

Appealing to emotion is a logical fallacy that involves trying to persuade someone to agree with a claim or carry out an action by evoking feelings rather than logic. Politicians who lack factual evidence might attempt to manipulate the public by appealing to emotions and talking about the horrors of home invasions and rape when the crime rate is trivial. Cognitive distortions are irrational and inaccurate ways of thinking that can lead to mental health problems. Emotional reasoning is one example of cognitive distortion because it is a process where emotions are used to validate beliefs, regardless of whether they are supported by facts or logic. Emotional appeals might aggravate existing cognitive distortions by reinforcing their irrational thinking.

Appeal to Fear

An appeal to fear is an appeal to emotion and a persuasive tactic used when an individual seeks to influence others by exploiting their fears of negative consequences. For instance, a politician might exaggerate the effects of not building a wall to stop illegal immigration. One of the problems with appeals to fear is that they can potentially create a climate of hate and distrust.

Appeal to Ignorance

An appeal to ignorance is a logical fallacy that occurs when an individual claims something is true or false because there is no proof to the contrary. Of course, a lack of evidence to the contrary does not necessarily mean the claim is valid. For instance, Dr. Wednesday Adams is a great teacher because no one has complained about her. In the legal system, an appeal to ignorance works because an individual is innocent until proven guilty.

Appeal to Nature

An appeal to nature is a fallacy that occurs when an individual claims that something is good or bad based on how natural it is perceived. This is a logical fallacy because naturalness alone should not determine the quality, value, or goodness of something. Sugar may be more natural than sucralose, but that does not necessarily mean it is healthier. The same applies to herbal remedies, which might be more natural than drugs but not necessarily more effective.

Appeal to Novelty

The appeal to novelty logical fallacy is based on the belief that something is better than an alternative simply because it is newer or more novel. This logic is used to promote new drugs or products. Of course, new does not always mean better. One should demand evidence before accepting the superiority of something new.

Appeal to Pity

An appeal to pity is a reasoning error that happens when someone tries to persuade others by making them feel sorry or empathetic instead of providing relevant facts or reasons. For example, a politician might use the desperate struggles of low-income people to buy food for their families to argue for raising the minimum wage in his state. Note that it involves manipulating emotions rather than the quality of the evidence. Many economists believe raising the minimum wage can reduce employment and thus hurt people experiencing poverty.

Appeal to Popularity

An appeal to popularity is a logical fallacy that occurs when an individual argues that a claim is accurate because it is a widely held belief. This approach is problematic because a statement is not necessarily true simply because many people believe it. There was a time when almost everyone thought that the earth was flat. Similarly, claiming that a particular brand is the best in the market because it has the highest market share is an example of the appeal to popularity fallacy.

Appeal to Ridicule

An appeal to ridicule is a logical fallacy that attempts to invalidate, discredit, or undermine an argument or claim by making it seem foolish, absurd, or asinine. By getting people to laugh at it without providing any evidence or logic, you will often successfully get people to reject it. A person who says, "You believe in climate change. Do you also believe in demons, fairies, and witches?" Sarcasm is a tool often used to mock someone's argument.

Appeal to Tradition

Those who argue their claim is accurate because it is based on a custom or tradition are guilty of the appeal to tradition fallacy. Just because people have done something a certain way for a long time does not mean it is the best way. For instance, people used to wash their clothing by beating it against rocks. Would one claim that this is the best way to clean clothing?

Bandwagon Fallacy

The bandwagon fallacy arises from the mistaken belief that an idea or action must be correct, accurate, or suitable merely because it is popular and enjoys widespread support. It hinges on the assumption that embracing a popular trend or belief is justified solely by its universal acceptance rather than by evaluating it based on factual evidence or logical reasoning. Just because a belief is prevalent does not make it accurate. Also, just because everyone behaves in a certain way does not make it correct. This fallacy makes people susceptible to groupthink.

Groupthink, a concept first developed by social psychologist Irving Janis (1972), describes a psychological phenomenon wherein individuals suppress their viewpoints to conform to the majority opinion within a group. The priority of maintaining harmony often surpasses any inclination to challenge the group's unity. As a result, individuals tend to adopt opinions or conclusions that reflect the perceived consensus within the group. Unfortunately, groupthink frequently results in suboptimal decision-making. An effective strategy to reduce the issues linked with groupthink involves cultivating diversity within the group and aggressively encouraging a range of perspectives (Cherry, 2022a).

Biased Sample

This fallacy occurs when one attempts to draw a conclusion about a population based on a sample that does not represent the population. Researchers use representative samples to make inferences about a population. A convenience sample of 30 students in a history class may not represent the entire population of students at a college.

Burden of Proof

This fallacy is similar to the appeal to ignorance. Both involve shifting the responsibility of providing evidence for a claim to the opponent. The main difference is that the appeal to ignorance fallacy stresses that the claim cannot be rejected because there is a lack of evidence to the contrary. With the burden of proof fallacy, the emphasis is on the obligation of the opponent to disprove the claim. An example of this might be someone maintaining that if you do not believe that vampires exist, then you go ahead and prove it.

Causal Arguments

Causal arguments involve claims that one thing or factor causes another or is responsible for a particular outcome. These arguments assert that one thing led to another, thus answering the question, "What triggered it?" There is a tendency for people to "see" causes even when they are not responsible for a specific response (Hanscomb, 2023, pp. 184–199). According to Hanscomb (p. 189), "The main fallacies associated with causal reasoning fall under the headings of overlooking coincidence, mistaking direction of cause, overlooking a shared cause, multiple causes, the placebo effect, and mistaking cause for correlation." Only a few of the above causal argument fallacies will be discussed.

Post Hoc Ergo Propter Hoc Fallacy

The fallacy known as "post hoc ergo propter hoc" (Latin for "after this, therefore because of this") occurs when one assumes that because one event follows another, the first event is the cause of the second. It is an example of a causal argument. For instance, someone who decides that her arthritis flared up because it snowed the previous day would be guilty of this logical fallacy. Many superstitions probably arose because of this fallacy.

Mistaking Cause for Correlation (Sod's Law Fallacy)

The phrase "correlation does not imply causation" is frequently used in introductory statistics courses in disparate disciplines to warn students of the above fallacy. Zach (2021) highlights numerous correlations that do not suggest a causal relationship. One example he provides demonstrates a strong correlation between shark attacks and ice cream consumption. Obviously, consuming ice cream does not cause attacks by sharks. Zach provides a simple explanation. When the warm weather arrives, people are more likely to swim in the ocean and eat ice cream. A third factor, outdoor temperature, influences shark attacks and ice cream consumption.

The direction of the relationship is evident in some cases. The amount of rainfall and the

number of people walking outdoors with umbrellas are strongly correlated. Nobody would be so silly as to think they could cause rain by having everyone go outside with an umbrella.

Regression To The Mean Fallacy

Regression to the mean was explained above as a cognitive bias. It could also result in incorrectly identifying the cause of an outcome. Regression to the mean predicts that "an extreme measurement for any phenomenon will typically be followed by a less extreme one" (Hanscomb, 2023, p. 190). Hanscomb underscores that because pain and other symptoms of illness often come in cycles such as severe □ less severe; □ severe □ less severe; □ severe □ less severe; it is highly likely that patients will seek medical treatment when their symptoms are at a peak. A few days later, the symptoms may ease up, and the patient will mistakenly believe that it was a medication given to him by the doctor (or quack) that was responsible for the pain reduction. This is why all clinical trials should control for placebo effects and regression to the mean.

An athlete with a phenomenal year who hits 60 home runs will probably not do as well the following year. Smith (2016) discusses the so-called "Sports Illustrated Cover Jinx." There is no curse associated with being on the cover of Sports Illustrated. The reason players tend to have a poor year after being on the cover of Sports Illustrated is not a curse but due to the regression to the mean. Smith (2016) demonstrates that the five baseball players with the highest batting averages in 2014 (the average for the five was .328) did worse in 2015 (the average dropped to .294).

Regression to the mean can result in serious mistakes by researchers and decision- makers. They may believe something is due to an experimental factor when it is simply due to chance. Suppose you take a sample of 200 ADHD children who score very highly on aggressiveness and feed them borscht three times daily. If you examine the aggressiveness scores 60 days later, the scores should be lower because of regression towards the mean, not drinking borscht. This is true for any measurement. If you examine the scores of subjects that are either much higher or much lower than average and then take a second set of measurements from the same people, the second set of scores should be closer to the population average. Kahneman (2011, pp. 175-176) describes the mistakes made in teaching flight instructors. The belief that praising trainee pilots for an excellent landing often resulted in a subsequent poor landing is contrary to theories that claim that good performance should be rewarded so that subjects become conditioned to do well. The correct explanation was a regression to the mean.

Kahneman (2011, pp. 181–182) underscores that a statement such as "Highly intelligent women tend to marry men who are less intelligent than they are" will result in many interesting theories involving causality. For example, some people will feel this is because intelligent women do not want to compete with their husbands. In actuality, regression to the mean provides a more straightforward explanation. Tversky and Kahneman (1974) describe "misconceptions of regression" as one of the six cases of the representativeness/similarity bias in judgment.

Placebo Effect

Hanscomb (2023, p. 193) defines the placebo effect as "someone's expectations that an intervention (such as a drug) for a certain condition will work cause the condition to improve, rather than the intervention itself being the cause of the improvement." The placebo effect is well known in medicine; this is why trials are "double-blind," so both the subjects and the experimenters are unaware of who is in the experimental group and who is in the placebo group. There is a fear that the expectations of the people running the experiment might unconsciously influence the outcome.

There is a phenomenon known as the "Pygmalion effect" (the "Golem effect" is the opposite and deals with low expectations). It is a psychological phenomenon in which people perform better or worse depending on the expectations they face. High expectations lead to improved performance; low expectations result in worse performance. Psychologists Robert Rosenthal and Lenore Jacobson, who were the first to study this phenomenon, found that teachers' expectations regarding the abilities of their students had an impact on academic success. This effect has also been observed in many situations, including management, sports, business, and education (Hanscomb, 2023, p. 194). A leader or coach who believes in the abilities of his team to do well will achieve more than one with low expectations. The Pygmalion effect demonstrates the power of positive feedback and self-fulfilling prophecy.

A self-fulfilling prophecy is defined by Cherry (2022b) as "an expectation or belief that can influence your behaviors, thus causing the belief to come true." If you expect to do well on an exam, this might cause you to study harder, have more confidence, and do well. On the other hand, if you expect to do poorly, this will ruin your self-confidence, and you will not put in much effort.

The bottom line regarding any casual argument is that it must be carefully scrutinized. Indeed, Hanscomb identifies several critical questions that should be examined when making a causal argument:

> Q1: Has a correlation been identified?
> Q2: If so, how convincing is the causal reasoning that attempts to explain the phenomenon in question?
>
> Can the correlation be explained by coincidence? Can the causal relationship be reversed?
> Can the correlation be explained by a shared cause?
> Have multiple causes been overlooked?
> Can the correlation be explained by psychological phenomena such as the placebo effect or a self-fulfilling prophecy?
> Are there reasons for thinking that the possibility of a causal relationship (rather than a mere correlation) has been dismissed too quickly for the wrong reasons? (Hanscomb, 2023, pp. 196–197)

Cherry-Picking

Cherry-picking, a type of confirmation bias, is a logical fallacy where an individual selectively chooses data, evidence, or facts that support one's argument while ignoring contradictory evidence. This can be done intentionally or unintentionally and can lead to false conclusions. For example, a researcher citing only studies that agree with a claim while ignoring those that disagree is a form of cherry-picking. Finding sources that agree with one's beliefs is effortless with the internet, regardless of how outlandish. Calzon (2022) demonstrates how data visualization techniques can be manipulated to deceive the public. The point of using cherry-picked visuals is to obfuscate by omitting critical pieces of information and presenting results that appear to fit into a neat graphic.

Circular Arguments (Also known as Begging the Question)

Circular arguments, or begging the question, also known as circular reasoning, are logical fallacies that occur when both parts of the argument rely on each other to be true: "P is true because of Q, and Q is true because of P." Basically, the argument repeats its own conclusion as a premise without providing separate, distinct evidence to support the claim. The following would be an example of a circular argument: "The book must be true because it says so in the book."

Conspiracy Theory

A conspiracy theory logical fallacy happens as follows: First, someone claims that a specific event or phenomenon is caused by a secret or hidden group of people without proper evidence or reason. Second, anyone who challenges the claim is accused of covering up the truth, being duped by the conspirators, or being part of the conspiracy. The fact that the assertion is being challenged proves that the original claim is valid. This makes it almost impossible for anyone to refute the desired narrative successfully. Some people believe that the COVID vaccines contain microchips planted by a global elite to track and control individuals.

Denying the Antecedent

One who assumes that a statement is false just because its antecedent is false is guilty of this logical fallacy. It has the following form:

- If P, then Q.
- Not P.
- Therefore, not Q.

This is a fallacy because the truth of Q depends not only on the veracity of P. Q might still be true for other reasons, even when P is false.

An example would be: "If I work hard, I will get an A on the exam. I did not work hard. Therefore, I did not get an A." You might have gotten an A because the teacher was very lenient and gave everyone an A. Another example of this fallacy is: "All dogs have four legs. If it is not a dog, it does not have four legs."

Equivocation Fallacy

An equivocation fallacy, or doublespeak, is a type of logical error that occurs when a word or phrase is used intentionally with multiple meanings or in more than one sense within the same argument, resulting in a misleading or confusing argument. The following would be an example of the equivocation fallacy (based on an example in GrammarBrain, 2022): "Margot Robbie is a star, and the sun is a star. Thus, both Margot Robbie and the sun are the same as each other."

Fallacy of Composition

The fallacy of composition is flawed reasoning that occurs when a person concludes that what is true for an individual part must also be valid for the whole thing, group, or system. This error can occur if someone generalizes from a specific population to the entire population. An example of this fallacy is if someone asserts, "All the physics majors in this college are smart; therefore, all the students in the college are smart."

False Analogy (Also Known as False Equivalence or Weak Analogy)

This logical fallacy results when an analogy to support or refute a statement is drawn by comparing two situations, viewpoints, or objects. However, the comparison is too dissimilar to support the conclusion. Objects can be quite different despite sharing some similarities. Drew (2023) opines that comparisons lack precision, which prevents them from being conclusive in a logical argument. One example he provides is that someone may ask for a spoon for her soup and be given a fork and told that the two are both cutlery and silver, so either is acceptable. False analogies are used by individuals from the right and the left to frighten the public. Forcing people to wear masks during the COVID-19 outbreak was not the same as the Nazis forcing Jews to wear yellow stars. Comparing abortion to the Holocaust of unborn children is also a false analogy. One must remember that individuals using this logical fallacy tend to exaggerate similarities and ignore critical differences. Moral equivalence discussed infra is a type of false analogy.

False Dilemma Fallacy (also known as the Fallacy of the Excluded Middle)

A false dilemma (or black-and-white fallacy if only two choices are offered) is a fallacy that presents only two options as the only possible choices while ignoring or hiding other alternatives. This is an underhanded way of trying to persuade people. A critical thinker often realizes that there are many solutions to a problem and that different choices might result in positive outcomes. Sometimes, a compromise makes more sense than the two suggested options. For example, students might be taught that because predatory capitalism does not work, the only choice is communism. The reality is that many other possibilities include regulated capitalism, democratic socialism, and autocratic capitalism.

Similarly, students might be taught that individuals are either people of privilege or victims. Thus, all white people are automatically people of privilege. Even the term "white privilege" can be misleading. The discrimination against obese white women may be worse than that of Black men.

Guilt by Association

Guilt by association is a logical fallacy that tries to undermine an argument, person, or claim by linking them to a disliked group or ideology. An example of this fallacy would be to dismiss an economist's opinion because they are a communist or Trump supporter.

Hasty Generalization

A hasty generalization fallacy happens when people make sweeping judgments from a sample that is too small or has too few examples. Before drawing a conclusion, the sample size must be adequate; examining a few possibly exceptional cases will often result in incorrect results. Thus, stating that all French citizens are rude because you encountered several who were unpleasant to you when on vacation would be a hasty generalization. A sample of one is never sufficient in statistics. Even if you know five people who were not appropriately treated when vacationing in France, this would be an insufficient sample size. Sadly, we make hasty generalizations about all kinds of people based on race, religion, gender, appearance, age, and how they dress. We had one bad experience with a waiter in a restaurant, and we warned everyone to avoid it. Note that this logical fallacy is related to the cognitive bias of overgeneralization.

Middle ground

Middle ground is a logical fallacy that assumes that the compromise between two opposing positions is always the best solution or the truth, regardless of logic or supporting evidence. Thus, if some people claim that the MMR vaccine causes autism and others that it does not, deciding that the truth is that it sometimes causes autism would be an example of this type of fallacy. The "compromise effect" might be a good approach in some conflict situations, but it makes no sense when using facts and evidence to determine the truth is the correct method.

Misleading Vividness

This fallacy relates to the availability heuristic, a cognitive bias that involves the tendency of people to overestimate the importance of information that is easily recalled, even if relatively rare, and thus readily available to them. Therefore, this bias makes us believe that the probability of being killed in a terrorist attack or airplane crash is much higher than in a car accident. This logical fallacy might use several memorable, dramatic events to argue that a particular situation is much more likely than it actually is. For example, a politician might use a particularly gruesome crime to scare the public into believing that crime is out of control.

Moral Equivalence

This fallacy, essentially a false analogy, compares minor offenses and misdeeds with major horrors, suggesting they are both equally wrong. For example, one who is unhappy with a waiter in a restaurant because of her rudeness and then says, "She is like Hitler," would be guilty of this. Extremists on both the right and left are guilty of this. One does not have to agree with Wokeism, but comparing it to Nazism or Communism would be erroneous. Not all police officers behave correctly, but to classify all as fascists would be wrong. "Defund the police" makes much less sense than "Reform the police."

No True Scotsman

This fallacious way of reasoning occurs when someone makes a universal claim and then faces a counterexample, so they redefine the criteria for membership in that group or category to exclude that counterexample and thereby justify the universal claim. For instance, saying, "No true Democrat would support building a wall to close the borders" or "No true Christian would support legalizing abortion" involves this type of fallacy.

Non Sequitur

One who draws a conclusion not logically supported by the evidence or the premise that preceded it is guilty of this fallacy. An example is, "He is going to be a brilliant physicist because he speaks seven languages."

Perfectionist Fallacy

The perfectionist fallacy is the idea that if a solution to a specific problem is not perfect, then it should be rejected. It might also be viewed as a belief that there is an ideal solution; therefore, no action should be taken until a faultless solution is found. This fallacy can result in procrastination, unrealistic expectations, and considerable dissatisfaction. One example of this fallacy would involve rejecting solutions to reduce homelessness in the United States because no

solution is 100% effective. Many vaccines are not 100% effective, but this does not mean they should be rejected.

Personal Incredulity

One who rejects a claim because it is difficult to comprehend or imagine rather than because of a lack of hard evidence or logic, is guilty of this error. For example, stating that "I can't accept as true that there are more stars in the universe than grains of sand on Earth; therefore, the claim is false."

Poisoning the Well

One who presents negative information or a personal attack on a person before they state their point of view in order to discredit them or make their argument less persuasive would be guilty of this logical fallacy. For example, one who avows: "Do not listen to him; his wife divorced him because he committed adultery."

Red Herring Fallacy

A red herring fallacy involves introducing misleading or irrelevant facts or details in a discussion or argument to divert attention from the topic being discussed. It may be viewed as a smokescreen or diversionary tactic. It is a device commonly used in mysteries and refers to a misleading or false clue to keep the reader guessing what is actually happening. It is a trick authors use to distract the audience from the actual villain or direction of the story. Red herrings are not always used intentionally. An example of a red herring fallacy would be the following:

- Politician A: "We should spend more money to reduce homelessness. More than half a million people are experiencing homelessness in the United States."
- Politician B: "But what about the American borders? Thousands of people are entering the country illegally, and many are criminals and rapists."

Note how Politician B is distracting the audience by introducing another issue.

Slippery Slope

This logical fallacy is similar to the straw man fallacy. It occurs when someone takes an issue to a hypothetical extreme by claiming that a particular event or action will trigger a chain reaction (i.e., a domino effect) of other events or actions that ultimately end up in a negative outcome; we should then reject it based on what *might* happen. The flaw with this reasoning is that the chain reaction that is being predicted may never occur. An example of the slippery slope fallacy: Some politicians argued that raising the minimum wage would result in inflation and job losses. Economists are still debating this, and there is no definitive answer regarding the long-term effects of raising the minimum wage. Because slippery slope arguments tend to be based on speculation and fear appeals rather than conclusive proof, they are often misleading.

Straw Man

A straw man argument is a strategy where an opponent's view is slanted, exaggerated, or falsified, making it easier to refute. Thus, one using this approach might misrepresent his opponent's position as extreme, making it much easier to argue against. For example, a politician might try to convince the public that their challenger's opinion is highly left-wing and accuse them

of being communists. Indeed, many left-wing politicians who believe in democratic socialism are often portrayed in the right-wing media as communists. Left-wing politicians reciprocate by labeling those they disagree with as fascists.

Style Over Substance

The style over substance logical fallacy deals with how the argument is delivered, not the content or strength of the logic. When the form or presentation of an argument is prioritized over the actual evidence that supports it, this can result in its acceptance based on superficial, outward features rather than the validity of the evidence. The fact that something is attractive does not necessarily make it correct.

Texas Sharpshooter

This logical fallacy is similar to cherry-picking. The difference is that Texas sharpshooter involves not having any prior hypotheses and then looking for patterns or correlations after the analysis. This form of data dredging uses advanced analytics tools to find patterns and correlations in the data without any prior hypotheses or assumptions. This fallacy is based on a hypothetical Texan who fired at a barn without aiming, then painted a bullseye around the densest cluster of shots and boasted about being an outstanding marksman. This fallacy can be intentional or accidental, resulting in misleading conclusions and spurious correlations. Dredging through the data will allow one to find all kinds of meaningless correlations. The above example of the high correlation between shark attacks and ice cream consumption is an example of a spurious correlation (Zach 2021). Finding a significant positive correlation between the number of murders and ice cream consumption would also be meaningless and probably the result of the effects of warm weather (Calzon, 2022). See the related issue of "Data Snooping" discussed later in this paper.

Tu Quoque

A tu quoque fallacy, a Latin phrase that means "you too," in effect, combines ad hominem and red herring faulty ways of reasoning. It is a counter-accusation that attempts to undermine an argument by exposing the hypocrisy or double standard of the individual making it. This is done to redirect attention from the topic being discussed to the behavior of the person making the argument. It is also called the "you too" fallacy, the "two wrongs" fallacy, or the "pot calling the kettle black" fallacy.

- Individual A: "You should vaccinate yourself against preventable diseases such as measles, COVID-19, and polio. Vaccines can save many lives."
- Individual B: "You should not talk. You smoke cigars, eat red meat, and dozens of candy bars every day, and that is bad for your health."

Wishful Thinking

It is a logical fallacy (also a cognitive bias) where people believe a claim is true or false because that is what they really desire, not because of solid evidence or sound thinking for its truth. This can lead to poor decision-making.

AVOIDING COMMON STATISTICAL FALLACIES

In addition to logical fallacies that hinder critical thinking, there are also statistical fallacies that lead to significant errors. The scientific community has been discussing a replication crisis, pointing to serious issues in reproducing study results; additionally, less reliable research tends to receive more citations (Korbmacher et al., 2023; Page, Noussair, and Slonim, 2021; and Serra-Garcia and Gneezy, 2021).

The authors will discuss two major issues that contribute to poor-quality research.

Data Snooping

Data snooping occurs when a researcher performs numerous univariate tests (such as t-tests comparing many pairs of means) on a single dataset without considering the cumulative risk of making a Type I (alpha) error. Instead of first conducting a comprehensive multivariate analysis, the researcher conducts many statistical tests within a single experiment or study.

Unfortunately, this approach inadvertently increases the likelihood of finding statistically significant results purely by chance. This is why the researcher must consider the experiment-wise error which refers to the probability of making at least one Type I error. Basically, the more tests conducted on a single dataset, the higher the probability of falsely rejecting the null hypothesis of no genuine underlying effects. Thus, a researcher who churns the data and conducts 20 different tests on one dataset, each at a .05 alpha, has about a 64.2% chance of making at least one Type I error (one false positive).

P-value issues

There are significant issues with the standard 0.05-level p-value approach used almost universally in many fields. Here we underline just three of them.

Effect Sizes: P-values do not provide information about the magnitude of an effect. Even if p-values indicate significance, especially in studies with large sample sizes, the actual effect might be minimal or insignificant. Overlooking effect sizes has led to many false positives, making replicating results across various fields challenging.

Confidence Intervals: For a fuller understanding, it's essential to consider confidence intervals along with p-values. Confidence intervals offer a range within which the effect size will likely fall.

Data Manipulation: Researchers can manipulate data or use large sample sizes to achieve statistical significance (p-value less than 0.05). This practice raises concerns about the integrity of scientific research.

CONCLUSION

Constructive argumentation aims to get individuals to work together to find the truth, not to win a fight. To accomplish this, we must respect each other, listen carefully, learn from different viewpoints, and avoid ridiculing those who disagree with us (Friedman, 2023b). This paper highlighted many logical fallacies that interfere with clear thinking. Regrettably, numerous political attacks nowadays are characterized by the fallacies of ad hominem and straw man arguments.

Hanscomb (2023, p. 98) posits that argument reconstruction and evaluation are essential parts of critical thinking: "The basic aim of argument reconstruction is simple enough: distill the essence of the argument that is being made." Students must learn how to produce powerful, convincing arguments and how to evaluate the statements of others. It is hoped that this paper will help with both tasks.

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