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- ARTICLES -

IS AI FRIEND OR FOE: LEGAL IMPLICATIONS OF RAPID ARTIFICIAL INTELLIGENCE ADOPTION

MICHAEL CONKLIN*

> "We are however on the edge of a future that is so different from our past that it risks making previous advances that have impacted society look inconsequential."[1]

I. INTRODUCTION

The term "artificial intelligence" (hereinafter "AI") was coined in the 1950s[2] and has been a staple in science fiction movies and literature.[3] However, it appears that the 2020s is the decade when the real-world realities of AI are finally manifesting. In early

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* Powell Endowed Professor of Business Law, Angelo State University.

[1] MARK DEEM & PETER WARREN, AI ON TRIAL v (2022).

[2] Gil Press, *A Very Short History of Artificial Intelligence (AI)*, FORBES (Dec 30, 2016, 9:09 AM), https://www.forbes.com/sites/gilpress/2016/12/30/a-very-short-history-of-artificial-intelligence-ai/?sh=6b1750916fba.

[3] Isabella Hermann, *Artificial Intelligence in Fiction: Between Narratives and Metaphors*, 38 AI & SOC'Y 319 (2023).

2023, *The New York Times* referenced the beginning of an "AI arms race."[4] ChatGPT was introduced in November 2022 and has already passed a bar exam,[5] passed a medical licensing exam,[6] scored in the top 10th percentile on the combined SAT,[7] passed an entire semester's worth of classes at a tier 1 law school,[8] passed a University of Pennsylvania Wharton School of Business MBA Exam,[9] and written hundreds of books sold on Amazon.[10]

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[4] Kevin Roose, *How ChatGPT Kicked Off an A.I. Arms Race*, N.Y. TIMES (Feb. 3, 2023), https://www.nytimes.com/2023/02/03/technology/chatgpt-openai-artificial-intelligence.html.

[5] Karen Sloan, *ChatGPT Passes Law School Exams Despite 'Mediocre' Performance*, REUTERS (Jan. 25, 2023 12:40 PM), https://www.reuters.com/legal/transactional/chatgpt-passes-law-school-exams-despite-mediocre-performance-2023-01-25/.

[6] Shania Kennedy, *ChatGPT Passes US Medical Licensing Exam Without Clinician Input*, HEALTH IT ANALYTICS (Feb. 14, 2023), https://healthitanalytics.com/news/chatgpt-passes-us-medical-licensing-exam-without-clinician-input.

[7] Lakshmi Varanasi, *OpenAI Just Announced GPT-4, Which Can Pass Everything from a Bar Exam to AP Biology with Flying Colors. Here's a List of Difficult Exams Both AI Models Have Passed*, BUS. INSIDER (Feb. 11, 2023, 8:33 AM), https://www.businessinsider.com/list-here-are-the-exams-chatgpt-has-passed-so-far-2023-1.

[8] Jonathan H. Choi, Kristin E. Hickman, Amy Monahan & Daniel Schwartz, *ChatGPT Goes to Law School*, (Minn. Legal Studies Rsch. Paper No. 23-03, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335905. The law school used for this study was the University of Minnesota Law School. *Id.*

[9] Varanasi, *supra* note 7.

[10] Greg Bensinger, *ChatGPT Launches Boom in AI-Written E-books on Amazon*, REUTERS (Feb. 21, 2023, 2:43 PM),

Autonomous drones have already been used in military conflicts to kill soldiers.[11] Madison Square Garden is enforcing an expansive attorney ban through the use of facial recognition software.[12] And in 2023, Ford applied for a patent for self-repossessing automobiles.[13]

This is a brief review of Mark Deem and Peter Warren's new book, *AI on Trial*.[14] It offers diverse views regarding the rapidly evolving legal standards of AI. It is easy to read due to the conversation tone and lack of technical jargon. While the book offers an expansive coverage of AI, this review will focus on the topics of irrational fear of AI, biased AI, AI for legal determinations, immense benefits from AI compared to human labor, and the nuanced balancing act of regulating AI. The book would serve as a valuable resource for business law professors looking for topical, high-stakes, stimulating topics to act as a catalyst to ignite class discussion regarding the real-life application of law.

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https://www.reuters.com/technology/chatgpt-launches-boom-ai-written-e-books-amazon-2023-02-21/.

[11] DEEM & WARREN, *supra* note 11, at 3.

[12] Michael Conklin & Brian Elzweig, *A Face Only an Attorney Could Love: Madison Square Garden's Use of Facial Recognition Technology to Ban Lawyers with Pending Litigation*, ___ Md. L. Rev. ___ (forthcoming 2023), pre-publication manuscript available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4397400.

[13] Becky Sullivan, *A New Ford Patent Imagines a Future in Which Self-Driving Cars Repossess Themselves*, NPR (Mar. 3, 2023, 1:37 PM), https://www.npr.org/2023/03/03/1160932390/ford-patent-repossession-self-driving-cars.

[14] DEEM & WARREN, *supra* note 1.

II. IRRATIONAL FEAR OF AI

Overall, the authors do an excellent job of striking the right balance between explaining why much of the fear of AI is irrational and realizing that the harm from irrational fear is detrimental to progress. Headlines about the rapid adoption of AI technology are generally skewed toward the sensational, creating irrational anxiety and fear of the future. Examples include "March of the killer robots,"[15] "Lies of the Machine: Boffins urged to prevent fibbing robots from staging Terminator style apocalypse,"[16] and "TERMINATOR TERROR: Meet the 'Killer Robots' of modern warfare from AI-powered suicide drones to machine guns that choose their own targets."[17] Sensationalistic portrayals in Hollywood of AI turning against its programming and attempting to eradicate the human race is also likely not helpful here.[18] Unfortunately, top legislators and jurists who will shape the future of AI often lack the background to rebut such sensationalists claims, as very few of them have backgrounds in computer science.[19]

Unfortunately, on some topics the authors appear to succumb to the same irrational fears that they accurately criticize elsewhere. They express great concern that AI will result in high

[15] *Id.* at 9.
[16] *Id.*
[17] *Id.*
[18] *Id.* at 39–40.
[19] *Id.* at 26–28.

unemployment.[20] While this may seem intuitive at first, there is little evidence to support the claim. For example, the United States has never been as technologically advanced as it is right now, and unemployment is at the lowest rate in over fifty years.[21] Additionally, while technology has continuously advanced over the last 100 years, there is no corresponding trend in steadily increasing unemployment over the same period.[22] The authors' fear that adopting new technology will result in high unemployment is perhaps the result of a perceptual illusion regarding the difference between the seen and the unseen. When a new technology temporarily displaces workers, that is easily seen. People may know of someone who lost their job, and the media can broadcast interviews with those who lost their job. However, it is far more difficult to see the other side of the equation, where the less expensive product or service created by the new technology means that millions of people have more money to spend on other things, which creates new jobs. A media outlet is unlikely to run a segment in which it goes to a restaurant and interviews a new cook who was hired from the increased demand that resulted from the money consumers saved from a recent

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[20] *Id.* at 97, 256–57.

[21] *News: Unemployment Is at Its Lowest Level in 54 Years*, U.S. DEPT. OF COMMERCE (Feb. 3, 2023), https://www.commerce.gov/news/blog/2023/02/news-unemployment-its-lowest-level-54-years.

[22] Michael Conklin, *The Reasonable Robot Standard: Bringing Artificial Intelligence Law into the 21st Century*, YALE J.L. & TECH.: RECORD (Sep. 4, 2020), https://yjolt.org/blog/reasonable-robot-standard.

technological advancement in an unrelated field. Therefore, the salience of the jobs lost is likely to be disproportionately weighted when compared to the less obvious jobs gained by new technology.

III. BIASED AI

The implementation of AI has produced numerous examples of disparate outcomes. Amazon used an AI recruiting program that produced biased results against women because it was trained using the existing workforce, which was mostly male.[23] AI used to measure the necessity of additional medical care determined that Black patients were, on average, less deserving of healthcare expenditures.[24] The use of AI in the selling and renting of homes disproportionately rejects minorities.[25]

In covering this topic, the authors unfortunately make some poor word choices. They state that "AI can be racist"[26] and talk in detail about how one AI program "became racist."[27] But this is highly misleading, as racism is a mental state.[28]

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[23] DEEM & WARREN, *supra* note 1, at 44.
[24] *Real-Life Examples of Discriminating Artificial Intelligence*, DATATRON, https://datatron.com/real-life-examples-of-discriminating-artificial-intelligence/ (last visited Mar. 22, 2023).
[25] Patrick Sisson, *Housing Discrimination Goes High Tech*, CURBED (Dec. 17, 2019, 6:12 PM), https://archive.curbed.com/2019/12/17/21026311/mortgage-apartment-housing-algorithm-discrimination.
[26] DEEM & WARREN, supra note 1, at 155.
[27] *Id.* at 158.
[28] *See Racism*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/racism (last visited Mar. 26, 2023)

Computer programs have no mental state; they are simply binary code performing programmed tasks. AI is no more capable of formulating a racist mental state than an automobile engine. Certainly, a racist could create a computer program to further the programmer's racist ends, but the program itself does not possess the mental state of racism.

The examples provided by the authors to support their claim about AI being racist demonstrates the misunderstanding. For example, they mention how facial recognition software is better at recognizing white faces than Black faces.[29] This is true, and it is a real problem that can result in Black people being locked out of their cell phones, bank accounts, and apartments—and could potentially even result in their death in the event a self-driving car misidentifies them as a non-human object.[30] However, in none of these examples is this the result of a computer program manifesting racist thoughts toward Black people and choosing to discriminate against them. This is simply the result of the program being trained with more white faces

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(defining "racism" as "a belief that race is a fundamental determinant of human traits and capacities and that racial differences produce an inherent superiority of a particular race").

[29] DEEM & WARREN, *supra* note 1, at 155.

[30] Alex Hern, *The Racism of Technology – and Why Driverless Cars Could Be the Most Dangerous Example Yet*, GUARDIAN (Mar. 13, 2019, 12:31), https://www.theguardian.com/technology/shortcuts/2019/mar/13/driverless-cars-racist.

than Black faces,[31] and the increased difficulty of detecting differences on darker subjects.[32]

The authors demonstrate a similar misunderstanding when it comes to AI being sexist. They provide the example of asking a program to solve analogies based on information scraped from the internet.[33] Such a program is likely to answer that "man is analogous to a doctor and a woman is analogous to a nurse . . . ."[34] Again, the program that produced this result is not expressing a personal opinion that, say, women are inferior to men at being a doctor.

If computers ever reach true sentience,[35] then it would likely be possible for them to acquire a racist state of mind. But it is harmful to anthropomorphize existing technology to claim that it can be racist. These misleading claims are very important, given how easily new technology is to misunderstand and the harm that can come from irrational fears of it. Finally, the authors' use of the term "re-education" to refer to the process of reprogramming AI that begins produced undesirable outputs is an

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[31] Conklin & Elzqeig, *supra* note 12, at 26.
[32] Tom Simonite, *The Best Algorithms Struggle to Recognize Black Faces Equally*, WIRED (July 22, 2019, 7:00 AM), https://www.wired.com/story/best-algorithms-struggle-recognize-black-faces-equally/.
[33] DEEM & WARREN, *supra* note 1, at 157.
[34] *Id.*
[35] Christof Koch, *Will Machines Ever Become Conscious?*, SCI. AM. (Dec. 1, 2019), https://www.scientificamerican.com/article/will-machines-ever-become-conscious/.

unfortunate word choice.[36] The term likely conjures up dystopian fiction literature, such as George Orwell's *1984* and Ray Bradbury's *Fahrenheit 451*.[37] With "wokeness" being viewed strongly as a negative by so many lawmakers,[38] the notion of a re-education process for expressing the wrong position on issues such as race and gender likely does more harm than good.

IV. AI FOR LEGAL DETERMINATIONS

The authors are critical of racial disparities produced from AI courtroom risk assessment tools such as COMPAS.[39] These tools are used for predicting recidivism and flight risk, not for adjudicating guilt or innocence.[40] While these AI tools do, on average, produce racial disparities, the computer programs are never informed of the race of the defendant.[41] The disparities are simply the result

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[36] DEEM & WARREN, supra note 1, at 158.
[37] *See, e.g.*, *This Is Not Dystopian Fiction. This Is China*, N.Y. TIMES (Nov. 18, 2019), https://www.nytimes.com/2019/11/18/opinion/china-muslims.html.
[38] Charles M. Blow, *Why Wokeness Has So Many Opponents*, N.Y. TIMES (Nov. 10, 2021), https://www.nytimes.com/2021/11/10/opinion/wokeness-racism-politics.html.
[39] DEEM & WARREN, *supra* note 1, at 51.
[40] Michael Conklin & Jun Wu, *Justice by Algorithm: Are Artificial Intelligence Risk Assessment Tools Biased Against Minorities?*, ___ S. J. POL'Y & JUST. ___ (forthcoming 2023), pre-publication manuscript available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3877686.
[41] *Id.*

of other inputs that contain racial disparities, such as geography, criminal history, and employment.[42]

When assessing the pragmatism of using such courtroom AI, it is important to note that the standard for adoption is not perfection. The AI only needs to be better than the next-best alternative, which here is human judges. With this proper frame of reference in mind, it becomes clear that AI is the preferable alternative, as even judges with the best of intentions may succumb to subconscious racial discrimination.[43] Using AI that is not even aware of the defendant's race provides the additional benefit of perceived fairness. It is an easy accusation to make—and a difficult one to disprove—that a human judge's decision is racially motivated. But it is much more difficult to accuse a colorblind AI of racial discrimination.[44] Finally, AI offers an additional benefit over that of human judges, namely, consistency. An AI will produce the exact same outcome for all defendants with the same inputs. Not only are human judges notorious for being highly

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[42] *Id.*

[43] Jeffrey J. Rachlinski & Sheri Lynn Johnson, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1195 (2009)("We find that judges harbor the same kinds of implicit biases as others; that these biases can influence their judgment . . . .").

[44] However, it could be alleged that the race-neutral inputs for the AI are rooted in racially discriminatory decisions. These could include higher dropout rates in Black communities due to underfunded schools, higher criminal history rates in the Black community due to over policing and poor legal representation, and higher unemployment rates in the Black community due to white flight and historical redlining. *See, e.g.*, Conklin & Wu, *supra* note 40.

divergent from judge to judge, but studies show that even the same judge is likely to vary their judgments based on irrelevant factors such as the time of day,[45] the weather,[46] recent performance of a local sports team,[47] and various cognitive heuristics.[48]

V. IMMENSE BENEFITS OF AI COMPARED TO HUMAN LABOR

The authors correctly point out that AI does not make mistakes due to human-centric traits, such as anxiety or being argumentative.[49] However, the benefits of replacing human workers with AI goes far beyond this. The current legal system imposes a number of potential costs for utilizing human workers compared to AI. For example, AI will not embezzle money. AI will not attempt to unionize. AI will not go to the media and divulge damaging

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[45] Kurt Kleiner, *Lunchtime Leniency: Judges' Rulings Are Harsher When They Are Hungrier*, SCI. AM. (Sept. 1, 2011), https://www.scientificamerican.com/article/lunchtime-leniency/ (finding that judges are significantly more likely to grant a parole request when they are not hungry).

[46] Anthony Heyes & Soodeh Saberian, *Temperature and Decisions: Evidence from 207,000 Court Cases*, 11 AM. ECON. J.: APPLIED ECON. 238, 240 (2019) (finding that a 10°F increase in outdoor temperature reduced favorable outcomes by 6.55%, despite the judgments being made indoors).

[47] Ozkan Eren & Naci Mocan, *Emotional Judges and Unlucky Juveniles*, 10 AM. ECON. J.: APPLIED ECON. 171 (2018) (finding that an unexpected loss from a prominent team in the state increased length of sentences handed down the following week).

[48] See, e.g., Conklin & Wu, *supra* note 40.

[49] DEEM & WARREN, *supra* note 1, at 5.

information. AI will not sexually harass coworkers. AI does not require orientation and training on the various applicable industry regulations. AI does not have to be paid overtime. AI will not violate Occupational Safety and Health Administration standards. AI does not require the services of an immigration lawyer to finalize work visas. AI never takes leave under the Family Medical Leave Act. AI does not need to be paid benefits. AI never has to be accommodated under the Americans with Disabilities Act. And finally, AI never sues for gender, religious, race, nationality, handicap status, age, or sexual orientation discrimination.

VI. BALANCING ACT OF REGULATING AI

The issue of the future of AI is more complex than the analogy from the title of the book—*AI on Trial*—portrays. This is because the future of AI is not a simple, binary determination of guilt or liability. It is a highly nuanced, multifaceted debate around striking the perfect balance. Going too far in either direction of being too permissive or too restrictive would incur numerous negative consequences. Being too permissive when it comes to AI adoption could lead to violations of privacy, untenable AI-based legal standards, and the rampant spread of misinformation. Conversely, being too restrictive with AI adoption could result in people missing out on lifesaving healthcare, safer cars, and more accurate information. The highly speculative and rapidly evolving nature of AI makes striking the right balance even more difficult.

VII. CONCLUSION

Amara's law stipulates that society tends to overestimate the effect of technologies in the short term and underestimate technologies in the long term. If this holds true for AI, our legal system will likely go through the biggest change ever in the twenty-first century. Trying to determine exactly what those changes should be is a monumental task. While this review primarily focused on critiques, *AI on Trial* offers a valuable framework for assessing the topic and its rapidly increasing importance in the legal system.

A POSITIVE EDUCATIONAL DEVELOPMENT FROM THE COVID-19 PANDEMIC? DISCOVERING THE BENEFITS OF "MYFLEX" COURSE DELIVERY

LUCAS W. LOAFMAN*

I. INTRODUCTION

The COVID-19 pandemic was a "shock to higher education" that profoundly affected students and faculty.[1] Like many universities, we quickly shifted all courses online in March of 2020.[2] This

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[1] Tonia Hap Murphy, *A Post-COVID Review of Classroom Practices*, 39 J. LEGAL STUD. EDUC. 75 (2022).

[2] The exact phrasing will vary, as many experienced online educators described the transition as "emergency remote learning" rather than authentic online learning with more established quality standards and features. *See id.* at 76 (discussing the coining of the term during the pandemic in footnote five); *CHLOE7: Tracking Online Learning from Mainstream Acceptance to Universal Adoption The Changing Landscape of Online Education 2022*, QUALITY MATTERS 6 (2022), https://www.qualitymatters.org/index.php/qa-

quick transition was not as disruptive for the university's business faculty and students, as most already had significant experience with online courses. The administration then shifted its focus on approaching the fall, given the likely continuing impacts of COVID-19. Would the university stay wholly online? Would there be some classroom instruction to serve that population? If there is classroom instruction, how can it shift back online quickly if cases spike? As the university wrestled with numerous imperfect options, the conversations included a course delivery concept unfamiliar to many at the time known as "HyFlex."[3] The conversations continued in the summer when the Texas A&M University System hosted a three-part webinar introducing "HyFlex" in more detail. While it sounded like the ideal solution, there were challenges with courses already being published for registration, a lack of time to build such a course, and whether the university had the infrastructure to pull it off. In the end, faculty were given substantial latitude in delivering their fall courses, including

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resources/resource-center/articles-resources/CHLOE-7-report-2022 (last visited July 5, 2023).

[3] HyFlex was introduced to faculty via an email from the Provost in late April 2020, and a College of Business faculty member responded with a few articles via email for greater context. Though the HyFlex terminology was new, some colleagues had previously discussed the underlying principles of this course delivery model to address issues with the delivery of two low enrollment programs in the College of Business Administration. The faculty did not know there was a name to describe what they needed or have the information on how to deliver such a course effectively. HyFlex will be described in more detail in Part II(D).

staying wholly online, which resulted in a wide variety of delivery methods.

Given that latitude, I began experimenting with different approaches to account for the challenges of COVID-19 and the needs of our students, ultimately discovering an approach that has become an excellent fit going forward. This Article aims to provide general information about flexible teaching approaches and describe the course modifications made over the last two years. Part II will discuss four flexible approaches to traditional classroom instruction, especially HyFlex, since it is likely newer to most faculty. Part III will discuss the general benefits of flexible course delivery for students, faculty and the university. Part IV will describe the evolution of my classes for flexible delivery since the COVID-19 pandemic began to what I call "MyFlex" before concluding.

II. FLEXIBLE TEACHING APPROACHES FOR BUSINESS LAW COURSES

Educating students outside of the traditional classroom is not a new phenomenon, as distance education in the form of correspondence courses dates back to the 1800s.[4] Technology has provided instructional flexibility far longer than many likely

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[4] *See* Raven M. Wallace, *Online Learning in Higher Education: A Review of Research on Interactions Among Teachers and Students*, 3 EDUC. COMM. & INFO. 241 (2003); Anna Qian Sun & Xiufang Chen, *Online Education and its Effective Practice: A Research Review*, 15 J. INFO. TECH. EDUC. RESEARCH 157, 158 (2016).

think. Professor Daniel Davidson et al. discussed the lengthy history and benefits of telecourses utilizing televisions in learners' homes,[5] tracing the history of electronic instruction back to an instructional telecast from the State University of Iowa that aired in 1933,[6] and the launching of the first educational television station in 1953 by the University of Houston.[7] This history set the stage for describing their involvement in creating a Business Law telecourse for the Southern California Consortium that began in the late 1980s.[8] Almost thirty years ago, Professor Caryn Beck-Dudley wrote about the next electronic evolution, discussing considerations for developing and teaching electronic distance education (EDE) courses for Business Law and Ethics.[9] EDE was defined as "teaching 'for credit' courses where teacher and learner are physically separated, but have the ability to communicate with one another over a two way audio system."[10] Two-way communication was something not available with the telecourses.

Since these developments, flexible instructional practices utilizing technology have continued to evolve. Some were pedagogical considerations for faculty prior to the pandemic as a

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[5] *See* Daniel V. Davidson et al., *Business Law as a Telecourse*, 9 J. LEGAL STUD. EDUC. 129 (1990).
[6] *Id.*
[7] *Id.* at 130.
[8] *Id.* at 130-38.
[9] *See* Caryn L. Beck-Dudley, *Lessons from Beyond the Traditional Classroom: Electronic Distance Education in Business Law and Ethics*, 12 J. LEGAL STUD. EDUC. 121 (1994).
[10] *Id.* at 122.

part of the movement for greater Diversity, Equity, and Inclusion (DEI) in higher education,[11] or as a strategic response to universities facing declining enrollments.[12] COVID-19 provided a new and pressing reason for rapidly expanding the use of these approaches. For many faculty, the terminology used to describe the current range of instructional delivery options can be daunting, as some definitions are imprecise and may overlap.[13] The University of North Carolina at Wilmington recently had "eleven different course-delivery options,"[14] and my

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[11] *See e.g.*, Yasuhiro Kotera et al., *Towards Another Kind of Borderlessness: Online Students with Disabilities*, 40 DISTANCE EDUC. 170 (2019) (studying the inclusivity of online education for students with disabilities).

[12] See *Higher Education Enrollment: Inevitable Decline or Online Opportunity?*, MCKINSEY & CO. (Nov. 2020), https://www.mckinsey.com/industries/public-and-social-sector/our-insights/higher-education-enrollment-inevitable-decline-or-online-opportunity (last visited July 5, 2023).

[13] *See* Mary K. Tallent-Runnels et al., *Teaching Courses Online: A Review of the Research*, 76 REV. EDUC. RSCH. 93, 115 (2006) (establishing distinct definitions for online and distance education due to the inconsistency of use in the literature); Sun & Chen, *supra* note 4, at 160 (stating that "online education is variously termed as 'distance education,' 'e-learning,' 'blended learning,' 'computer-based learning,' 'web-based learning,' 'virtual learning,' 'tele-education,' 'cyber-learning,' 'Internet-based learning,' 'distributed learning,' etc." and that they "considered all of these terms sufficiently synonymous" to use interchangeably). I disagree that all the terms mentioned by Sun are interchangeable, as will be noted in section A, but this contrast illustrates how some view the potential overlap of terminology differently.

[14] Beth McMurtrie, *Teaching: Why the Term 'Hybrid Class' Continues to Confuse*, CHRON. OF HIGHER EDUC. (Feb. 18, 2021), https://www.chronicle.com/newsletter/teaching/2021-

university has six.[15] This Part will briefly introduce some of the key features and challenges of flexible delivery approaches, including online instruction, blended or hybrid delivery, the flipped classroom approach, and HyFlex, which combine to play a role in the current course that will be discussed in Part IV.[16]

A. Online Education

Online instruction was probably the most familiar flexible delivery approach to faculty prior to the pandemic due to its widespread adoption.[17] Even as early as 2000, Professor Linda Harasim noted that "online learning is no longer peripheral or supplementary; it has become an integral part of

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02-18 (citing a tweet by Kevin McClure about the fall 2020 course delivery options at UNC Wilmington).

[15] *See Program and Course Delivery Modes*, TEX. A&M UNIV. CENT. TEX. (Feb. 9, 2021) (listing course modalities of "Fully Online," "Online Blended," "Classroom Blended," "Web-Enhanced," "Synchronous Distributed," and "Classroom") [hereinafter Delivery Modes].

[16] The general benefits of flexible approaches will be discussed in Part IV, so the focus in this Part is on the basic mechanics of each and the challenges in execution.

[17] *See* Ron Legon et al., *CHLOE 4: Navigating the Mainstream*, QUALITY MATTERS (2020), https://www.qualitymatters.org/sites/default/files/research-docs-pdfs/CHLOE-4-Report-2020-Navigating-the-Mainstream.pdf?token=rp3kicVLTTPsxlTLvvHJwWNVbdV-87jmLHuhOXAAq98 (last visited July 5, 2023) (showing that prior to the pandemic the majority of the 367 universities surveyed already had ten to fifty percent of their courses online and that three percent of public and seven percent of private four-year universities had one hundred percent of their courses online).

mainstream society."[18] She chronicled the history of online education, noting that the first fully online course of any kind was delivered in 1981 and the first undergraduate course in 1984.[19] Public access to the World Wide Web in 1992 further sped the growth and capabilities.[20] For this Article, this section will frame the discussion from the perspective of a fully online course where all course activity is done electronically.

"In online education, learning is asynchronous or synchronous, or a combination of both."[21] "Synchronous online classes are offered in such a way that all students are online and communicating at the same time, while asynchronous online classes are those that students can log on to and work on even if no one else is logged on at the same time."[22] Definitions may still vary by scholar or institution,[23] and our university

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[18] Linda Harasim, *Shift Happens: Online Education as a New Paradigm in Learning*, 3 INTERNET & HIGHER EDUC. 41, 59 (2000).
[19] *Id.* at 43.
[20] *Id.* at 42.
[21] Sun & Chen, *supra* note 4, at 161.
[22] Tallent-Runnels et al., *supra* note 13, at 93.
[23] *See* Ida M. Jones, *Can You See Me Now? Defining Teaching Presence in the Online Classroom Through Building a Learning Community*, 28 J. LEGAL STUDIES EDUC. 67, 69 (2011) (stating that "definitions of online courses vary"); Harasim, *supra* note 18, at 46 (stating that "totally online mode relies on networking as the primary teaching mechanism for an entire course or program"); I. Elaine Allen and Jeff Seaman, *Online Nation: Five Years of Growth in Online Learning*, BABSON SURVEY RSCH. GRP, (October 2007), https://files.eric.ed.gov/fulltext/ED529699.pdf (last visited

defines it as "courses that have no on-campus, classroom, or synchronous activity. All course activity is done online."[24] Though our definition is that online courses are asynchronous, scholars have noted that early online education was predominantly synchronous.[25] From a definitional perspective, it is also worth noting a distinction between online education and distance education, as the latter includes online courses but may include other options like correspondence or telecourses.[26] Harasim notes, "both are any place, any time, and largely text-based. However, the critical differentiating factor is that online education is fundamentally a group communication phenomenon, and in this respect, it is far closer to face-to-face seminar type courses."[27]

Professor Raven Wallace states that online instruction involves "designing course materials, interacting with students and giving them feedback, and assessing student work are obvious tasks for the online teach."[28] However, faculty still have to figure out the best ways of going about these essential tasks in the virtual world. With the proliferation of online courses, universities have had to add various staff, such as Instructional Designers, to provide expertise in best practices in online education or help construct

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July 5, 2023) (stating that online courses are those with eighty percent of the content online or higher).

[24] Delivery Modes, *supra* note 15.

[25] *See* Sun & Chen, *supra* note 4, at 161

[26] *See* Wallace, *supra* note 4, at 242.

[27] Harasim, *supra* note 18, at 49-50.

[28] Wallace, *supra* note 4, at 255.

the courses themselves.[29] Beyond direct support from university personnel, there are considerable resources for faculty, with two of the better-known organizational sources being Quality Matters (QM) and the Online Learning Consortium (OLC). Each hosts conferences, provides online professional development opportunities, publishes research on online education, and has a tool for assessing the quality of an online course, the QM Rubric (Rubric)[30] and the OLC Quality Scorecard, respectively.[31] The Rubric, which focuses on course design, was featured in a 2014 article by Professors Lucas Loafman and Barbara Altman describing how to apply the Rubric in building a quality Business Law course.[32]

After laying the foundation through quality course design, a significant factor in quality online

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[29] *See* Robert A. Reiser, *A History of Instructional Design and Technology: Part II: A History of Instructional Design*, 49 EDUC. TECH. RSCH. & DEV. 57, 62-64 (discussing the history of instructional design leading into early online education); Coleen Halupa, Differentiation of Roles: Instructional Designers and Faculty in the
Creation of Online Courses, 8 INT. J. OF HIGHER EDUC. 55 (2019) (discussing the role of instructional designers).

[30] *See Course Design Rubric Standards*, QUALITY MATTERS, https://www.qualitymatters.org/qa-resources/rubric-standards/higher-ed-rubric (last visited July 5, 2023).

[31] *See OLC Quality Course Teaching and Instructional Practice*, ONLINE LEARNING CONSORTIUM, https://onlinelearningconsortium.org/consult/olc-quality-course-teaching-instructional-practice/ (last visited July 5, 2023).

[32] *See* Lucas Loafman & Barbara W. Altman, *Going Online: Building Your Business Law Course Using the Quality Matters Rubric*, 31 J. LEGAL STUD. EDUC. 21 (2014).

courses is the instructor's involvement in the course through their "presence."[33] Wallace indicates "that teachers can create presence in online discussions, though a number of techniques, including facilitating discussions, providing direct instruction, and through feedback."[34] Presence in the context of online legal environment courses has also been previously examined by Professor Ida Jones.[35]

Another common theme in the scholarly literature about quality online experiences is building a learning community.[36] Harasim believes that "collaborative learning may be the single most important concept for networked learning, since this principle addresses the strong socio-affective and cognitive power of learning on the web."[37] A final theme involves the importance of social presence,[38] which has been defined as the "ability of learners to project themselves socially and emotionally in a community of inquiry."[39]

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[33] *See* Wallace, *supra* note 4, at 255-58; Sun & Chen, *supra* note 4, at 164-66.
[34] *Id.* at 260.
[35] *See* Jones, *supra* note 23, at 67.
[36] *See* Sun & Chen, *supra* note 4, at 168-70; Wallace, *supra* note 4, at 261-71; Jones, *supra* note 23 at 89-95 (discussing the efforts to build a learning community). *See also* Harasim, *supra* note 18, at 43 (noting that computer conferencing is the core of online education as a collaborative community).
[37] Harasim, *supra* note 18, at 53.
[38] *See* Sun & Chen, *supra* note 4, at 167-68; Wallace, *supra* note 4, at 250-53.
[39] Liam Rourke et al., *Assessing Social Presence In Asynchronous Text-based Computer Conferencing*, 14 J. DISTANCE EDUC. 50 (1999). *See also* John Short et al., THE

B. Hybrid (AKA Blended) Delivery

"The pedagogical rationale behind the creation of a hybrid course is to maximize student learning by utilizing the strengths of both the face-to-face instructional technique and the virtual online classroom."[40] Part of the confusion with this type of delivery comes from using "hybrid" and "blended" interchangeably by some and not others,[41] thus two terms seen frequently to describe one instructional mode.[42] Scholars have tried to distinguish the two in saying that hybrid courses experience more of a stop/start between modes, but blended describes when courses are "seamlessly operational where the transition between classroom meeting and online

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SOCIAL PSYCHOLOGY OF TELECOMMUNICATIONS 65 (1976) (defining social presence as the "degree of salience of another person in interaction and the consequent salience of an interpersonal relationship").

[40] Susan R. Dana, *The Emergence of the Hybrid Delivery Approach: Utilization of a Six Step Instructional Modal for Business Law Curriculum*, 18 J. LEGAL STUD. IN BUS. 159 (2013).

[41] *See* Patricia McGee & Abby Reis, *Blended Course Design: A Synthesis of Best Practices*, 16 J. ASYNCHRONOUS LEARNING NETWORKS 7, 8 (2012) (discussing the distinction between hybrid and blended not being "clearly articulated in the best practices literature"); Susan A. O'Sullivan-Gavin & John H. Shannon, *Making the Leap: Using Information Technology to Develop and Enhance Student Learning in Legal Studies Courses*, 6 S. J. OF BUS. & ETHICS 69, 71 (2014) (using hybrid as the main descriptor in the title of Part II, but following with blended in parenthesis); Dana, *supra* note 40, at 166 (using hybrid and blended in the same paragraph).

[42] *See also* Harasim, *supra* note 18, at 46 (calling it "mixed mode" delivery).

component is minimal."[43] Thus, blended courses may be a subset of hybrid courses that achieve another level of development and interrelatedness of the modalities. This Article uses hybrid as it seems to appear more common in usage. Defining hybrid delivery is mainly contextual, as it can broadly describe any method between instruction for a course done entirely in the classroom and a course delivered fully online.[44] Thus, a hybrid course can be 99% in the classroom and 1% online, 99% online and 1% in the classroom, and anything in between.[45] As noted by Professor Susan Dana, and in the introduction to this section, university definitions tied to course registration may restrict the ranges of classroom and online activities.[46]

Though being able to capture the positive benefits of both classroom and online instruction, Professors Susan O'Sullivan-Gavin & John Shannon argue that "instructors must give a great deal of thought to the motives, foundations and learning goals upon which to create hybrid/online-learning environment," as just "recording a live lecture and posting to an online course alone, does not create an effective learning environment."[47] They further caution that successful hybrid instruction "requires a level of organization and motivation on the part of

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[43] McGee, *supra* note 41, at 8.
[44] *See* McMurtrie, *supra* note 14 (summarizing potential variations of hybrid course structures).
[45] *See* Dana, *supra* note 40, at 164 (discussing the variability of the classroom and online components).
[46] *See id.* (noting the percentage allocated to each component may be determined by the institution).
[47] O'Sullivan-Gavin & Shannon, *supra* note 41, at 71.

the student that may not be the same as in a face-to-face environment."[48]

The article goes on to detail ten steps for moving courses into the hybrid delivery or ultimately online from the moment of initial consideration to reflection upon the end of term. Given the introductory purposes of this Article, only the first four are highlighted here.[49] The first step is simply asking if the faculty member is technologically ready, as some are not. It is crucial to be transparent, or it could be a struggle for faculty and students.[50] The second inquiry is whether such a course is practical in light of the resources available for support, particularly technological, the need for the shift in modality, and other logistics.[51] The COVID-19 pandemic created a significant need for flexible instruction. The third consideration is allocating the time needed to develop the course as "it is a time-consuming process if done well."[52] At least two weeks in advance of a term should be allocated for development.[53] The final consideration to note here

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[48] *Id.* at 72. As such, this method might not be best for some students.

[49] *See id.* at 74-80. *See also* Dana, *supra* note 41, at 168-74 (describing a six-step approach to a hybrid course); McGee & Reis, *supra* note 41, at 7 (listing some additional organization resources on blended education in addition to the remainder of the article).

[50] O'Sullivan-Gavin & Shannon, *supra* note 41, at 74.

[51] *Id.* at 75 (asserting also a benefit from being able to have at least one in person meeting if students are close to campus).

[52] *Id.*

[53] *Id.* This will vary based on the extent of the online components and whether there is time for development during the term. Likely the two weeks would necessitate working

is what developmental resources there are to assist in development and execution, whether faculty mentors, instructional designers, training, or technical support.[54] Given the technological and pedagogical complexity, sufficient support is essential for success, but the extent will vary based on the structure of the course and the skills of the faculty member.

C. The Flipped Classroom

Of the flexible approaches discussed in this Part, more has been written about the flipped classroom in the "Business Law"[55] pedagogical literature than any other.[56] Professor Mystica Alexander states that the flipped classroom is a "way to engage your students and put them in control of

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only on this course all day, each working day. For every hour of video content, I probably have at least two additional hours in preparation.

[54] *Id.*

[55] For this Article, the umbrella term is used to describe discussions within the journals of the Academy of Legal Studies in Business and its regional associations.

[56] *See e.g.*, Tanya M. Marcum & Sandra J. Perry, *Flips and Flops: A New Approach to a Traditional Law Course*, 32 J. LEGAL STUD. EDUC. 255 (2015); Perry Binder, *Flipping a Law Class Session: Creating Effective Online Content and Real World In-Class Team Modules*, 17 ATLANTIC L.J. 34, 37 (2015) (describing flipping a four-hour MBA class session by substituting a seventy-five-minute recorded lecture and forty-five-minute case video to replace two of the hours of class); Mystica M. Alexander, *The Flipped Classroom: Engaging the Student in Active Learning*, 35 J. LEGAL STUD. EDUC. 277 (2018) (describing flipping the classroom for learning about product liability).

their learning environment" by "moving the basic content delivery outside the boundaries of class time."[57] "The instructor can use technology to bring a lecture outside of the classroom in addition to crafting engaging assignments that aid students in their preliminary exploration of a topic" before class.[58]

Professors Tanya Marcum and Sandra Perry assert that this approach "free[s] up valuable and limited class time for activities that reinforce previous learning outside the classroom and allow students to practice analysis and application of principles to real world scenarios."[59] The class sessions are dedicated to active versus passive learning.[60] They used the meeting time to present case information, discuss current events, other participation exercises, and small group application exercises.[61] Alexander used the time for a group

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[57] Alexander, *supra* note 56, at 280. *See also Definition of Flipped Learning*, Flipped Learning Network (Mar. 12, 2014), https://flippedlearning.org/definition-of-flipped-learning/ (last visited July 5, 2023) (defining flipped learning as "a pedagogical approach in which direct instruction moves from the group learning space to the individual learning space, and the resulting group space is transformed into a dynamic, interactive learning environment where the educator guides students as they apply concepts and engage creatively in the subject matter").

[58] *Id.* at 278. She further notes the importance of "completing some type of deliverable" to ensure the outside material is actually processed. *See id.* at 286.

[59] Marcum & Perry, *supra* note 56, at 257.

[60] *See* Alexander, *supra* note 56, at 255.

[61] *Id.* at 268-73.

debate activity.[62] It appeared that no class time was exchanged for the flipped content provided in advance of the class meeting in both applications.

Since this approach to teaching may be new to students, particularly if only used for limited class sessions, Alexander advises that "it is vital that the instructor thoroughly plan the flipped classroom and ensure that the instructions for preclass preparation and required participation on the day of the flip is carefully and clearly explained to the students."[63] She further noted that "the preparation involved in deciding how to present the out of class material and then actually recording itself takes considerably more effort than simply going into class to lecture and respond to student questions."[64] Marcum and Perry further state that "students must be accountable for the work completed outside of the classroom in order to assure that they acquire the basic knowledge necessary to complete the in-class activities."[65] This was done by quizzes over the videos.[66] They also caution that lower student evaluation scores should be anticipated since the format and logistics may be new to students and faculty.[67]

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[62] *See id.* at 282.
[63] *Id.* at 281. *See also* Marcum & Perry, *supra* note 56, at 275 (noting that "failure to make clear expectations for the course caused some student confusion").
[64] *Id.* at 285.
[65] Marcum & Perry, *supr*a note 56, at 257. *See also* Alexander, *supr*a note 56, at 286 (stating that "students must also be responsible for completing some sort of deliverable").
[66] *Id.* at 266-67.
[67] *Id.* at 276.

D. HyFlex

HyFlex, which is short for hybrid-flexible,[68] became a more mainstream scheduling solution during the COVID-19 pandemic due to the flexibility in allowing universities and students to address health concerns and continue learning, as well as it "allowed for the possibility of seamlessly returning to a completely online format if necessary."[69] In one example, Northeastern University even moved its 3,500-course schedule to HyFlex delivery for the fall of 2020.[70]

Dr. Brian Beatty originally developed the HyFlex model in 2006 to "accommodate working adult students in an education-technology graduate program."[71] It was somewhat of an accidental discovery as Beatty and his colleagues experimented with different instructional practices in moving the program fully online and realized along the way that

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[68] Brian J. Beatty, HYBRID-FLEXIBLE COURSE DESIGN, loc.1.1 (1st ed. 2019). The free online book is available at https://edtechbooks.org/hyflex (last visited July 5, 2023). Beatty notes several other modes that are essentially the same structure but branded differently, such as "Mode-Neutral," "Multi-Access Learning," "FlexLearning," "Converged Learning," "Peirce Fit," "Multi-Options," "Flexibly Accessible Learning Environment," and "Blendflex." *Id.*

[69] *Making HyFlex Teaching Work on Your Campus*, CHRON. OF HIGHER EDUC. 1, 8 (Maura Mahoney ed., 2021), https://spcc.edu/wp-content/uploads/Making_Hyflex_Teaching_Work.pdf (last visited July 5, 2023).

[70] *See id.* at 9 (quoting the university's Vice Provost, Tom Sheahan).

[71] Making HyFlex Teaching Work on Your Campus, *supra* note 69, at 4.

they were developing something entirely new.[72] HyFlex is designed to provide maximum flexibility for students who can "choose how to attend class on any given day—synchronously in-person or online, or asynchronously online."[73] Since this approach may be new to many, it is helpful that Beatty has published a comprehensive, open-access book that describes the model and includes tips for implementation, case studies of courses using the model, and hundreds of references.[74]

The HyFlex model rests on "four pillars," which are "learner choice, equivalence between participation modes, reusability of course materials across modes, and accessibility."[75] Learner choice means providing "meaningful alternative participation modes and enable students to choose between participation modes daily, weekly, or

[72] Beatty, *supra* note 68, loc.1.1. The current modality description at San Francisco State, where it originated, states that "HyFlex courses allow students to choose whether to attend each class session in person or online (e.g., synchronous, asynchronous, bichronous). Faculty decide which online mode(s) will be offered. Due to the online learning mode option for students, HyFlex courses are considered distance education courses." *Academic Senate Policy S23-264*, S.F. St. U. (2023), https://sfsu.policystat.com/policy/13710271/latest (last visited July 5, 2023).

[73] Beatty, *supra* note 68, loc.1.1.

[74] *See id.* Since this is the seminal resource, most of the overview of HyFlex will come directly from this pioneering work.

[75] Making HyFlex Teaching Work on Your Campus, *supra* note 69, at 4.

topically."[76] Equivalence ensures that the activities across the modes of delivery will lead to similar learning outcomes for all students.[77] Identical experiences are not possible since there are multiple pathways, but getting as close as possible is crucial. The reusability pillar focuses on "artifacts from learning activities in each participation mode as "learning objects' for all students."[78] This means that activities or materials covered in the classroom course can be captured and posted to benefit online students in that class and, potentially, students in future classes as well.[79] Finally, the accessibility pillar has two dimensions. Since one of the student access modes is electronic, students need the skills and training to access learning materials properly. Faculty may make false assumptions about students' ability to navigate the Learning Management System (LMS), ensure their microphone is connected to a web-conferencing platform, or know how to configure their computer for an exam properly. Each can inhibit their learning experience and are common issues students, and even faculty, can have. Second, faculty "need to make all course materials and activities accessible to and usable for all students."[80] Beatty notes the need to transcript or close caption videos or format documents for screen readers.[81] This can be thought of as another aspect of

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[76] Beatty, *supra* note 68, loc.1.3.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] Beatty, *supra* note 68, at loc.1.3.

equivalence as well, as accessibility barriers put some students at a disadvantage compared to others.

While HyFlex seemingly meets the needs of any student, it can be challenging to implement and confusing for students.[82] Two specific challenges for students include the "personal management related to learning path" and having the "personal and technical resources are required to participate in the online version of the course."[83] Beatty further notes that implementing "HyFlex takes time, money, and a lot of energy."[84] Some specific factors impacting faculty include having to:

- Design and develop a course that supports multiple and simultaneous modes of student participation, essentially creating both fully face-to-face and online formats.
- Manage the technical complexity of multi-modal instruction, especially when synchronous participation is supported.
- Administrate the participation of students in varied formats: tracking attendance and participation, practice and assessment

[82] *See* Making HyFlex Teaching Work on Your Campus, *supra* note 69, at 5.
[83] Beatty, *supra* note 68, loc.1.2.
[84] Making HyFlex Teaching Work on Your Campus, *supra* note 69, at 11. *See also id.* at 14 (quoting Tom Sheahan that "we had faculty say they were exhausted at the end of the day from processing somebody in class raise their hand or remote learners who were chatting or trying to raise their hands online").

activities, and providing interaction and feedback.[85]

Another concern of faculty is that control is turned over to students, and they have to adjust to how each student chooses to learn each class.[86] One significant issue is the potential variability in attendance in that a course may average ten students most weeks, but one week just three attend, potentially limiting the planned activities or depth of discussion.[87]

The monetary cost comes primarily from ensuring that the proper technology is in place, but also could be needed to for support staff and incentivize faculty undertaking the training and development.[88] Beatty's book specifically lists university/institution costs to:

- Support additional faculty development and workload; formally or informally. This may require additional financial resources.
- Provide technology-equipped classrooms to support online students as well: lecture/discussion capture, synchronous learning platform.
- Enable students to realize the scheduling flexibility value associated with HyFlex; modifications to class scheduling system,

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[85] Beatty, *supra* note 68, loc.1.2.
[86] *See* Making HyFlex Teaching Work on Your Campus, *supra* note 69, at 11.
[87] *Id.*
[88] *See id.* at 13.

student registration system, managing clear communications.[89]

Knowing that HyFlex has its benefits and drawbacks, Beatty has included in his ebook a worksheet to "Assess the Challenges and Opportunities" and recommends this as the first step in designing a HyFlex approach.[90]

III. THE BENEFITS OF FLEXIBLE DELIVERY

Davidson et al. noted, "there is no one method of teaching that is ideal for all professors, nor is there one method of learning that is ideal for all students."[91] As such, flexible delivery methods allow faculty and students to work toward what best fits their teaching or learning situation. This Part will discuss the benefits for students, faculty, and the university with flexible delivery approaches in setting the stage for discussing my approach in Part III. The extent or applicability of the benefits discussed below will depend on the exact mode a faculty member chooses will determine.

A. Students

In the flipped classroom context, Alexander noted that "students have a variety of learning styles, and some will respond more favorably than others to various approaches."[92] Beyond learning style,

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[89] Beatty, *supra* note 68, loc.1.2.
[90] *Id.* at loc.1.4.1.
[91] Davidson et al., *supra* note 5, at 138.
[92] Alexander, *supra* note 56, at 280.

flexibility helps to meet the demands of their individual lives in a way that works for them.[93] In the context of why students once engaged in telecourses, scholars noted:

> Original distance learners included professional workers who required some form of skill upgrading or continuing education credit to maintain their professional standing and/or certification. There were also displaced workers who needed to acquire skills and knowledge, but who were unused to traditional classrooms and traditional education. There may have been those physically unable to attend classes due to an illness or an injury, or financially unable to relocate to the proximity of campus. . . The distance learner may have been a single parent with small children, or a senior citizen who felt unable to sit in a traditional classroom and compete on an equal basis with students a mere fraction of his or her age.[94]

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[93] *See* Annelies Raes et. al., *A Systematic Review on Synchronous Hybrid Learning: Gaps Identified*, 23 LEARNING ENVIRONMENTS RSCH. 269 (2020) (stating that "the need for connecting remote individual students is increasing as the population in higher and adult education is getting more diverse. 'Lifelong learners' often cannot attend traditional classroom instruction because of, for example, family or work commitments").

[94] Davidson et al., *supra* note 5, at 131. *See also* Michael Moore & Greg Kearsley, DISTANCE EDUCATION: A SYSTEMS VIEW OF ONLINE LEARNING 8 (3rd ed., 2012) (noting eleven

Though the technology has evolved substantially, the rationale for flexible delivery has not. Professor Tonia Murphy noted that a lasting change from the pandemic was no longer requiring attendance as a portion of a student's grade, with a key rationale being that "mandatory attendance policies may provide a perverse incentive to attend class when ill and possibly contagious."[95] Students or their family members get ill, and providing flexibility to continue their studies while caring for others or preventing the spread of an illness to those in class, is certainly beneficial.

Beatty noted the following student benefits from the HyFlex approach:

- Increased access to courses:
    - when attending class in person is problematic, and
    - when desired classes are scheduled at the same time.
- Schedule control: more control over day-to-day schedules associated with attending class.
- More learning resources: multiple modes of participation often require more robust

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benefits of distance education in general); Sun & Chen, *supra* note 4, at 160 (stating that with online education "adult learners may enjoy flexibility when they have to balance work, study, and family responsibilities").

[95] Murphy, *supra* note 1, at 80. *See also* Raes, *supra* note 93, at 281 (stating that with synchronous delivery "when a student is ill or when they cannot move to the campus where the teacher is present, there is the opportunity to follow remotely through online participation").

instructional materials, enabling richer instruction and providing additional opportunities for learning.[96]

Beyond the significant logistical benefits for students, multiple studies have shown that flexible approaches produce greater student satisfaction.[97] Beatty notes that HyFlex "should contribute to greater student success, when done well."[98] In a review of HyFlex implementation Tom Sheahan, Vice Provost at Northeastern University noted that "we found students were actually more comfortable asking questions when they could do it through chat or other mechanisms than they would have been if they raised their hand in a large, in-person class."[99] Professor Annlies Raes et al. noted that "the hybrid virtual classroom offers the possibility to include expertise outside the institutions so that students are exposed to a broader range of views."[100] Finally, the literature is not clear that flexibility outperforms classroom instruction, but it also does not seem to underperform either.[101]

B. Faculty

After teaching in the classroom and online for over a decade, I cannot give a definitive answer to

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[96] Beatty, *supra* note 68, loc.1.2.
[97] *See* Dana, *supra* note 40, at 165-66.
[98] Beatty, *supra* note 68, loc.1.2.
[99] Making HyFlex Teaching Work on Your Campus, *supra* note 69, at 14.
[100] Raes, *supra* note 93, at 281.
[101] *See* Tallent-Runnels et al., *supra* note 13, at 109.

preferring one modality over the other, as each has unique benefits. Classroom-based courses better facilitate getting to know students and more robust discussion. With online courses, there is more convenience about how to schedule my time.[102] As an administrator, some faculty preferred an all-classroom-based schedule, others with an all-online one, and others liked a mix to capture the advantages and disadvantages of both modalities. Playing off of this, Beatty notes that one advantage of HyFlex delivery is that faculty can "develop skills and experience in teaching online without giving up classroom instruction"[103] if they seemed to want to stay in the classroom.

When serving in administrative roles, the ability to have online components was valuable when an unavoidable conflict arose with a major university activity or a conference. This benefit was also noted by Binder when he needed to miss a class,[104] Murphy when ill during the first week of the term, allowing the class to stay on pace with recorded lectures,[105] and Beatty as well.[106]

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[102] In the early days of online teaching, I had a student comment about being surprised to see a response to their email from that evening around 2 AM. I told them I had decided to go fishing that evening and work when I returned late that night. The asynchronous online structure allowed the flexibility to get the work done in responding to the student in less than twelve hours but also have fun.

[103] Beatty, *supra* note 68, loc.1.2.

[104] *See* Binder, *supra* note 56, at 34.

[105] Murphy, *supra* note 1 at 78.

[106] Beatty, *supra* note 68, loc.1.2 (noting that HyFlex provides "a built-in alternative when classroom instruction isn't possible due to scheduling conflicts").

My current flexible approach allows be to teach just one class session a week, as one of the biggest problems faculty face is their fractured work environment with constantly competing demands from teaching, including development and mandatory training,[107] scholarship, and service obligations. The fragmentation is highly disruptive, as a faculty member may have days with a committee meeting, two class sessions, class preparation for those sessions, mandatory training, and also wanting or needing to work on a paper and/or course development. With so much going on, it is difficult to find adequate time to be successful in the latter two, which are some of the most critical tasks of faculty. Meeting just once a week eliminates some fragmentation in preparation for the class session and delivery one day, allowing a more extended block of time for research, course development, or another critical task that needs more time. Scholars have previously noted this personal observation.[108]

C. The University

For the university, flexible delivery methods may provide key opportunities for growth, better resource utilization, and help with accreditation, such as with AACSB.[109] It goes without saying that

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[107] At Texas A&M University-Central Texas, we receive mandatory training notices throughout the year. Though most last less than an hour, they distract significantly from more critical tasks.

[108] *See* Dana, *supra* note 40, at 166.

[109] *See also* Allen & Seaman, *supra* note 23, at 17 (listing fourteen possible dimensions about why online education may be strategic to a university).

flexible offerings, particularly online and blended education, allow the university to enroll students they might not ordinarily have.[110] Professor Beck-Dudley noted that such expansion might also have political benefits for schools.[111]

As mentioned in the introduction, and will be described in Part IV(C)(3), courses like MyFlex can provide considerable efficiency in resource utilization, which is especially important as universities face shrinking enrollments.[112] Additional efficiencies may come from leveraging

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[110] *See* Sun & Chen, supra note 4, at 160 (noting that "online education provides potential opportunities to open new markets for higher education institutions"). Students may be willing to travel for programs with classroom-based components if they do not always have to do it. This is a common premise among weekend graduate programs. *See, e.g., Doctor of Business Administration*, PRAIRIE VIEW A&M U., https://www.pvamu.edu/business/departments/graduate/dba/ (last visited July 5, 2023) (stating that the program is offered "in an executive format and allow executives to continue their employment while pursuing the DBA").

[111] *See* Beck-Dudley, *supra* note 9, at 135.

[112] *See* Beatty, *supra* note 68, loc.1.2 (noting the ability to "increase overall course enrollment by offering additional schedule and location flexibility to students. When implemented at a large scale, HyFlex may lead to increased per unit course load and reduced time to graduation"). Instead of having just seven students in the spring 2021 hybrid course, I ultimately had twenty-four total in the cross-listed course, which made it much more financially viable. We have a graduate program in (omitted) with under twenty total students and cannot afford to offer both a classroom and online section each year. Thus, flexible delivery like HyFlex or MyFlex is a viable solution to ensure students have a chance at both modalities.

limited physical resources, such as classroom space.[113] If a course meets just one day a week, a university could feasibly schedule two courses in that time block that used to accommodate one course.

Finally, multiple scholars have noted the potential benefits in accreditation efforts.[114] With AACSB, flexible delivery could bolster the case for meeting standard four on the curriculum. The standards require that the curriculum be innovative, which "may be exhibited by incorporating cutting-edge or creative content or technologies and varied pedagogies and/or delivery modes."[115] HyFlex-type courses can undoubtedly meet this requirement with

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[113] *See* Dana, *supra* note 40, at 165 (stating that a hybrid format "provides a solution, in part, to the demands placed in campus facilities"); Beatty, *supra* note 68, loc. 1.2 (noting that this HyFlex may allow the university to "increase individual class section (a single instance of a course) enrollment beyond the seating capacity of a physical classroom. When implemented at a large scale, HyFlex may reduce space requirements for expanding enrollment and increase the availability of bottleneck courses"). As with transportation costs, construction and energy costs are also incredibly high, making it difficult to expand physical capacity in the near future.

[114] O'Sullivan-Gavin & Shannon, *supra* note 41, at 71 (discussing connections to then standard 13); Marcum & Perry, *supra* note 56, at 255 (discussing applications of experiential and active learning to the 2013 standards).

[115] *2020 Guiding Principles and Standards for Business Accreditation*, ASSOC. TO ADVANCE COLLEGIATE SCH. OF BUS. 42 (July 1, 2022), https://www.aacsb.edu/-/media/documents/accreditation/2020-aacsb-business-accreditation-standards-jul-1-2022.pdf?rev=b40ee40b26a14d4185c504d00bade58f&hash=9B649E9B8413DFD660C6C2AFAAD10429.

the type of technology incorporated, and it is a "varied delivery method." AACSB standard 4.1 on "Curriculum Content" requires that "current and emerging technology is infused throughout each degree program as appropriate for that degree and level of program."[116] Since flexible delivery infuses many technologies by necessity, utilizing current technology in these courses can aid in justifying compliance. The flipped classroom approach seems to support standard 4.3 in describing how the "school encourages learners to take responsibility for their learning and promotes characteristics of a lifelong learning mindset," as well as 4.4 in examining how "learner-to-learner and learner-to-faculty interactions are supported, facilitated, encouraged, and documented."[117]

IV. THE EVOLUTION OF THE "MYFLEX" APPROACH

I have taught in a variety of delivery modes over the years, including traditional classroom

[116] *Id.* at 43.
[117] *Id.* at 44.

instruction,[118] blended,[119] and fully online.[120] Before the pandemic, I tried to stay abreast of relevant pedagogical trends and experiment with different approaches based on the needs of the university and students. The evolution to the current "MyFlex" approach for all of my courses began in the fall of 2019 when reconsidering if the structure of the Legal Environment of Business (LEB) course met the needs of current students, as the same approach was seemingly resulting in lower performance than it had in previous years. The Sections below will discuss pre-pandemic delivery changes, the evolution of changes post-pandemic, and some suggestions for ease of execution.

A. Pre-Pandemic Delivery Changes - Flip it!

My teaching schedule has predominantly consisted of LEB sections in both classroom and fully online modalities each term. Though

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[118] (Anonymity) defines this as instruction where at least ninety percent of the contact hours are "organized around scheduled class meetings with the instructor and all students in the same location." *Supra* note 15.

[119] My original blended experience was teaching a graduate International Business Law course as a part of a flexible MBA cohort in the fall of 2009. The initial course met for four hours on five Saturdays over the sixteen-week term. Today, the university would likely define it as a "Classroom Blended Course" since it only had twenty in person contact hours. "Classroom Blended courses have a blend of online and classroom meetings with majority of course activity occurring online." *Id.*

[120] My first fully online course was in the fall of 2009, and online instruction has generally accounted for over half of my teaching load since.

examinations and most assignments were similar,[121] I approached the sections differently in the delivery of instructional content. For classroom courses, the class meetings were a combination of lecture, discussion, and some application problems if we had time. For online courses, half of the necessary contact hours are covered through personally recorded content videos, and discussion assignments and exams made up for the rest.[122] The organization of the videos generally followed the chapter's organizational pattern, but they provide additional examples and another explanation of the most important concepts rather than just repeating the text.[123]

Before the fall of 2019, content videos were always available to online students but were only posted in the LMS for the classroom students if a

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[121] The weighting and structure were usually the same, but the questions or cases were usually different for each section.
[122] For my Legal Environment of Business courses, I have approximately twenty hours of personally recorded content, equivalent to approximately one hour and fifteen minutes per week or one class session for the university.
[123] There are usually multiple videos per chapter, and each generally ranges from five to twenty-five minutes. In early recordings, I used to record the entire chapter as one video, but shorter videos are a better practice. *See* Elan Paulson, *Content Chunking*, TEACHING & LEARNING CONESTOGA (June 27, 2023), https://tlconestoga.ca/content-chunking/ (last visited July 5, 2023) (noting the research-based benefits of "chunking" content into smaller pieces). Each video also started with legal humor, such as a joke or funny courtroom story, to engage the students in the content.

class session was missed for my illness, weather,[124] or a conference.[125] Occasionally classroom students would request access, but I believed that posting the lectures would provide an excuse to miss the class session, thus reducing the quality of the classroom experience with lower attendance and less robust discussions.[126] The policy forced classroom students to attend class meetings, get notes from another student, or just miss out on the content, some of which was assessed on the exam and not covered in the text. I began to realize though, that I was likely doing a disservice to the classroom students who needed additional flexibility for work, family, or health issues they could not control.

After discussions with colleagues and reading about ways to provide flexibility, I decided to try the flipped classroom approach that fall. I posted all the video lectures on the LMS with the expectation that students had viewed them before coming to class. The class still met both days each week to do article presentations, reinforce some of the essential concepts, discuss current legal

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[124] We have had university classes canceled due to flooding, severe storms, and icy road conditions. We average at least two canceled days per year due to being a commuter school across a broad region, and do not want to risk the safety of students.

[125] This was be discussed more as a benefit of flexible approaches in Part III(B).

[126] *See* Making HyFlex Teaching Work on Your Campus, *supra* note 69, at 15 (quoting Tom Sheahan, who said that in moving to HyFlex, "we did see declines in student in-person attendance"). Kevin Gannon, a Professor of History at Grand View University, echoed this as well in the same piece.

developments, and work practice problems. In order to help ensure continued attendance, there was a participation component added that was worth ten percent of the course grade.[127]

Though the fall seemed to turn out okay for students, it felt disappointing to me. I intentionally had a very loose half-page outline for each class meeting, thinking that having the time to organically discuss the topics more, as opposed to me talking, would be more engaging for the students. Unfortunately, I struggled to fill all the time when some planned discussions did not take nearly as long as I had hoped, and I struggled with the lack of structure. This should not have been surprising based on what Alexander previously noted about best practices for flipped classrooms in needing thorough preparation.[128] Given that it was the first iteration of providing the lectures online and the schedule was already out in October, I could not make significant structural changes for the spring 2020 sections and worked on improving the organizational plan for the class time to provide more structure and content to cover the time. The pandemic changed that plan

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[127] The relevant portion of the syllabus stated that "we have approximately 24 class days (including the first day of class) where we will discuss the chapters further, work on application problems, have a guest speaker, etc. Each of these class days is worth five points. Your score might come from a quiz, exercises in class (have paper on hand), or simply attendance (sign in sheet each day) and will vary day to day. Though you may score no higher than 100 points, you do seemingly have four 'free' days built in. Historically, those that regularly attend make higher grades."

[128] *See* Alexander, *supra* note 56, at 281.

mid-term, but the transition was fairly smooth with the lecture content already online. To replace the weekly class meetings, I sent students a cleaner version of class outlines that highlighted the most crucial content points for that day and then had a few problems for them to submit for their participation points. Exams were shifted online in the LMS rather than being done in the classroom.

B. Major Post-Pandemic Changes

1. Fall 2020 – Welcome to WebEx!

University administration gave faculty considerable latitude for the fall of 2020 to teach in whatever modality they felt comfortable and was reasonable for the program. As a result, many courses that were normally taught in the classroom shifted entirely online due to the continuing risk of COVID-19.[129] If a faculty member did elect to have an in-person component in their course, they still had to be ready to move the course entirely online if the conditions changed. Though online delivery reduced the classroom spread of COVID-19, it could negatively impact students who preferred or needed classroom instruction.[130] Some negatives of fully online courses pre-pandemic included that the university charged an additional $80 per credit hour fee compared to classroom courses, online courses

[129] Fourteen BUSI prefixed courses had in-person components in the fall of 2019 compared to just six in the fall of 2020.
[130] Though the university system does not specifically track individual students by modality, my experiences would estimate that approximately twenty-five percent of business students strongly prefer classroom instruction.

could cause issues with governmental[131] or employer financial aid, and some students were not comfortable in the online environment and struggled to accomplish tasks due to the flexible, asynchronous structure.

In addition to the COVID-19 considerations, I reviewed the previous student comments from the flipped classroom experiment and realized that I had created too much space in the classroom and not enough outside. Students had twenty hours of videos to watch outside of class, and I was still meeting with them in class for two and half hours each week. As an administrator, a key focus point for my faculty had been ensuring faculty had enough contact hours, and I was now requiring too many! In trying to find more balance, a colleague had been a huge proponent of the hybrid/blended approach to courses, which seemed to solve the issue of requiring too much of students outside of class from the previous two semesters and reduce the in-class exposure to COVID-19.

Based on university course structure definitions, the class was designated in the registration system as "Web-Enhanced," which allowed up to forty-nine percent of the content to be

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[131] *See Post-9/11GI Bill Chapter 33 Rates*, DEP'T OF VETERANS AFF., https://www.va.gov/education/benefit-rates/post-9-11-gi-bill-rates/ (last visited July 5, 2023) (noting potential housing allowance limitations with online courses). Our university has a substantial percentage who are veterans, so this is a major consideration.

online.[132] The course was scheduled for Tuesdays and Thursdays but would only meet on Tuesdays after the first week. Thus, there were seventeen of the planned thirty-two meetings (fifty-three percent) scheduled to be delivered in the classroom, and the contact hours for the day not met would be covered by the content videos. The class meetings consisted of article presentations, discussing pivotal events, watching Justice Barrett's confirmation hearing, revisiting essential concepts, and working on application problems and accounted for ten and a half percent of the course grade to encourage attendance.[133] The four exams were scheduled on Thursdays, but students had the option of taking them in the classroom at the previously scheduled meeting time or online. The online exam option gave students more flexibility on Thursday to complete it, but, more importantly, allowed for completion without a mask, which would be required on campus.[134] Students that took the exam in the

[132] "Web-enhanced courses have the majority of their course activities in the classroom, but supplemented by online activities." *Supra* note 15.

[133] The relevant portion of the syllabus covering the in-class portion stated that "we have approximately 17 class days (including the first day of class) where we will discuss the chapters further, work on application problems, have a guest speaker, etc. Each of these class days is worth seven points. Your score might come from exercises in class, attendance (sign in sheet), or some other activity/method. Though you may score no higher than 105 points, you do seemingly have two 'free' days built in. Historically, those that regularly attend make higher grades."

[134] Exams are tough enough, and students need to be comfortable.

classroom received the benefit of a structured time and avoided remote proctoring, which has made some uncomfortable. If a student completed all the exams in the classroom, their classroom contact percentage would increase to approximately sixty-five percent (twenty-one out of thirty-two meetings). Since the university followed the CDC guidelines and a wide array of symptoms from seasonal allergies would have made me ineligible to be on campus, the syllabus also stated that if a class could not meet on Tuesdays, it might meet on Thursdays. Thankfully, no postponements were necessary.

Early in the semester, COVID-19 and other health issues began limiting in-person attendance. As a result, I started to synchronously broadcast the Tuesday class meeting on WebEx in the fourth week of the semester, which was a new experience for me. Despite at least one request, I declined to record and post these sessions based on privacy concerns.[135] I felt that the recording might limit students' willingness to share their candid opinions and had my own concerns about being recorded in class discussing sensitive topics, especially in today's social media environment.[136] One option could have been to review and edit out student content, but I was/am not adept at video editing for that to have been reasonably efficient, especially mid-term. This class was also already scheduled for classroom meetings, so the WebEx addition gave students

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[135] *See* Binder, *supra* note 56, at 46 (stating that "privacy concerns may affect a professor's decision to capture video content during class").
[136] *Id.* at 46-47 (echoing these concerns as well).

additional flexibility they did not expect when they registered.

The synchronous broadcast certainly changed some course dynamics, with student attendance and participation patterns varying more. The WebEx broadcast also was a challenge, as there were multiple sessions where the computer needed to reboot to connect to the microphone and several weeks where the camera just did not work. The camera issue was not a big deal, as I would move around a lot anyway, so I quit using it after a few classes and went to audio-only. The microphone would not connect for one class, so I had to call in using my cell phone so students online could hear. I also had to learn to repeat the questions and comments from the in-class students. The class was in a lecture hall-type room to accommodate social distancing, and the only microphone at the front of the room did not pick up the audio well for those in the back. I also did not want the virtual students to be left out of the discussion, so I encouraged them to ask questions by speaking up or via chat, requiring me to periodically check the WebEx screen if I had been walking around. It was by no means a perfect experience, but the format did allow some students the flexibility they needed. I also realized that learning flexibility could be valuable at any time for parents, children looking after parents, work issues, etc., and not just in a pandemic.

2. Spring 2021- Modifying for Asynchronous Students

The spring registration period opened about the same time the second wave of COVID-19 cases began to rise. It also meant that Employment Law needed to be offered in a classroom and the first time I would teach it in several years. Due to the positive feelings I had from the way the fall LEB class went, I planned to approach this course the same way with it classified as Web-Enhanced, meeting one day a week in the classroom on Wednesdays after the first week, and also doing a synchronous WebEx broadcast from the beginning of the term.

The plan went sideways when our chair asked if I could accommodate a non-local student needing the course to graduate. Given that the WebEx broadcast was planned, I figured there would not be significant issues to work through with the student just listening online and agreed to let the student could register for the section. Before I knew it, the chair had cross-listed a new Fully Online section with the previously scheduled Web-Enhanced section, and many students had registered for the new section. As such, I had to accommodate students who expected the learning and work to be asynchronous as well, marking a significant step towards a HyFlex-type course. All students could now attend class meetings in person, interact synchronously via WebEx, or work asynchronously online.

The first hurdle was determining whether I had to build two distinct courses in Canvas, our LMS, for each section in the registration system. Thankfully, that was not the case, as the registration programming allowed for all students to populate in

one of the sections, which saved time long term.[137] However, I still had to figure out how to design the section with synchronous and asynchronous students utilizing the same Canvas course shell. In most cases, the information would have appeared the same regardless of the modality, but the overview on the home page and syllabi would typically be different. The overview issue was easy to address with a simple paragraph describing the two different modalities and student options.[138] I still prepared different syllabi for each section, as there would be differences in the introduction, modality description section, technology needs, and the course schedules based on

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[137] Having not done this before, I was also concerned if the "Announcement" feature in Canvas would send messages to both sections. Thankfully, it did, and the design and communication issues turned out to be less time-consuming than I thought.

[138] The following is an example overview from another course. "This Canvas course supports both BUSI 3332.110 (CRN 81003), a 16-week 'Fully Online' course, and BUSI 3332.130 (CRN 81218), a 16-week 'Classroom Blended' course, that generally meets from on Tuesdays (every week) and some Thursdays (August 26th and optional for exams) from 2:00-3:15 in Founders Hall, Rm 211. The general coursework and materials will be the same for both sections. The structure of the combined sections allows a student in either section to attend the live sessions in person (FH 211), listen and participate in that live session via the synchronous WebEx broadcast (link will be posted in Canvas Announcements), or participate/work asynchronously fully online. Students can change their method of participation/completion on a week-to-week basis, so you have complete flexibility! If you do attend via WebEx, I encourage you to participate in the discussion and ask questions, but be sure to 'mute yourself' when not speaking."

expectations from the different modalities they registered for.[139]

In addition to the design considerations, there were also logistical considerations for assessments. Traditionally, due dates for classroom courses corresponded to the days and times the class met, and online due dates were generally at the end of the day, and towards the weekends. Except for the chapter quizzes, which would be due at the time the class started, and that material would be discussed and applied,[140] the deadlines were set to correspond to the traditional schedule of the online sections generally.

In previous classroom sections, even attendance might have counted as participation credit for a class meeting, but that was not an option for the asynchronous online students. As such, students in both modalities were given a document for each chapter with discussion and application questions to work.[141] The classroom students received credit by orally discussing any discussion questions and then writing down some brief thoughts on the application

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[139] A "Fully Online" student would traditionally have a schedule laid out for the week versus what would happen two days of that week.

[140] For this term, the due dates were Wednesdays at 11:00 AM. The uniform time was done to prevent answer sharing but was awkward for the asynchronous students, as their other assignments were due at 11:59 PM. As such, I did extend a few early in the term until they got in the rhythm.

[141] Though classroom students could access the work ahead of time, I always brought copies to class for them. Even though the exact number of students would fluctuate, I brought enough for the number of students registered for the classroom section and was never short.

problems. They would generally just hold up their papers at the end of class to show they were actively participating. Online students had to briefly type their answers and submit the document in Canvas by Saturday. Credit for both modalities was based on effort and not technical accuracy. To provide a level of equivalency for the online students, I would record a video earlier in the week with the answers and any other noteworthy topics that had come up in the classroom session and post it on Sunday mornings. If a student joined the synchronous class session via WebEx, they earned half of the participation points just by joining and could earn the other half by submitting their work online by Saturday. Though I tried to write down the names of the students who joined the WebEx prior to starting class, some popped in late that I had to be sure to also account for at some point during the class. Regardless of which section students signed up for, they had complete flexibility each week to come to class, attend via WebEx, or complete the work asynchronously and change on a week-to-week basis without any notification about their plan. Though this worked smoothly, there was some unexpected confusion in the first two weeks for the online students about the structure and whether they had to come to class or be on WebEx.

Another assessment consideration involved the article presentation. While presentations had previously been done in class, this would not work with asynchronous students, especially those not in the area. As such, I provided flexibility for all students to either present in class or record a video

and submit it in Canvas. The two options provided additional flexibility for online students who might struggle with recording technology or the classroom ones who would experience too much anxiety with a live presentation in front of some classmates to have a choice in best meeting their needs.

The final major assessment challenge involved exam logistics. Though I mentioned previously giving the LEB students online flexibility to complete it on the same day the exam was scheduled in class, fully online students have traditionally had two days to complete an exam.[142] With scheduled class meetings on Wednesdays, Mondays became the natural option for students to take the exam in class. The online exam was set for Sunday and Monday, and students could ultimately take an exam on Sunday or Monday online, or Monday from 11:00-1:00.[143] As with participation, students could change their exam choice each time, and I did not have to know in advance and graded whatever was completed.

3. Spring 2022 – Doubling Up[144]

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[142] After experimenting for many years, I now schedule exams for either Friday/Saturday or Sunday/Monday to accommodate those who have more flexibility on weekends and those during the week, especially parents whose kids go to school.

[143] One additional exam change for all students was extending the exam time to two hours as a more inclusive practice for students who experience anxiety over the time constraint and may need additional time to process the question and answer.

[144] Fall 2021 is not discussed, as the same structure from the spring, 2021 Employment Law course was used for the Legal Environment course. The only minor change from the prior

The spring of 2022 was the first time two sections with classroom components made in a semester. Both courses were originally scheduled to be "Classroom Blended," with no online section cross-listed with them.[145] However, the university's classroom enrollment has remained low since the pandemic started, and the LEB section was well below our normal minimum of ten. To avoid taking on a new course, I asked the chair to cross-list it with a newly created online section, which would get enough total students to work.[146] The Employment Law section had just seven students, but this was the only classroom opportunity since the spring of 2021, and there would not be a section of any modality in the fall, so an exception was granted to proceed.

Though a similar course structure would be used again, a logistical challenge arose with just fifteen minutes between classes. In order to have adequate time to prepare for the different classes, I decided to meet one on Tuesday and one on Thursday after the first week of class. I was pleased with how the LEB schedule had worked in prior semesters, so I left it meeting on Tuesdays after the first week and the Employment Law meeting on

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version was semantical in renaming "participation" to "application activities."

[145] *See supra* note 15. Technically, this means that less than fifty percent of the contact time is in the classroom now compared to over fifty percent previously, but I did not change the structure from previous terms, given the likelihood of students migrating and ending up with less than fifty percent of the time in class.

[146] The course started with twenty-four students between the two cross-listed sections.

Thursdays. When Employment Law was taught in the cross-listed format in spring 2021, I was present in the room for exams on the day we did not meet. Due to the classes being back-to-back, I could not still give students two hours to complete the exam on Tuesdays without leaving them for the last part to teach LEB. To avoid this issue, I changed the structure of the Employment Law to have three exams instead of four, and did them on Thursday meeting days instead of Tuesday when we did not meet. To cover the content, I had to double up more weeks on chapter coverage since two Thursdays were lost to exams that would have covered content. This change was not ideal for the students or me, as two chapters of reading and problems proved to be a lot for a week. However, it seemed like the best strategy given the unanticipated issues with the back-to-back schedule.

C. "MyFlex" is "Here to Stay"

While the course delivery adjustments may have been temporary for some, COVID-19 has forever changed my approach to classroom courses.[147] The previously discussed courses have developed into a version of instruction that I call "MyFlex," which combines elements of online learning, the flipped classroom, blended learning,

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[147] *See also* Murphy, *supra* note 1 at 78-79 (noting that improved comfort with technology now has resulted in eliminating handouts, the digital scheduling of appointments, recording some lectures or activities via zoom, and no longer taking attendance).

and HyFlex delivery into a system that appears to work for myself and my students thus far.[148]

Online instruction is critical for us, as the university has a substantial number of active-duty military personnel that may be deployed worldwide and still taking courses. These students and others who are non-local, or non-local for a part of the term,[149] can experience the course asynchronously or synchronously online with MyFlex. We also have a substantial number who are employed full-time and have families to take care of that benefit from the online flexibility options from time to time.[150]

With the MyFlex approach, the flipped classroom and blended learning approaches are interrelated but are experienced primarily by the classroom students. While it is possible to provide the course content outside of the class and then use all scheduled class time for other interactions, this risks putting a higher-than-normal time burden on the students. This happened in the fall of 2019 and is not advised.[151] As previously stated, I recorded video lectures accounting for approximately half the

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[148] The intent of this paper is just to inform rather than validate; thus I did not go through the IRB to specifically validate student learning outcomes and experiences over time.
[149] Military students may have field exercises that take them away for a week or two, students may have work trips, and a fair number also vacation during the term.
[150] In the Management and Marketing Department, seventy-three percent of the students are over the age of twenty-five.
[151] *See* Part II(A)(1). Again, this lack of foresight added twenty hours of work for students compared to other versions of the course I have taught over the years, where I either lectured in class or blended the instruction.

weekly meeting time and the one-course meeting is used to discuss critical points and work on applying the concepts through theoretical problems. Thus, the course is blended by generally meeting one day a week, and also flipped in that I do not cover the material in person, and students are responsible for reviewing it on their own.

I call the delivery approach MyFlex, since much of the spirit of HyFlex exists, but I have personalized it for what seems to work best for the students and myself. The first personalization came from seeing the substantial value in the flexibility of meeting just one day each week, instead of two, with the student population at our university and the economic circumstances with high transportation costs.[152] Second, the reusability principle of HyFlex seemingly encourages recording and posting the live class sessions,[153] but I have not, and likely will not, due to privacy concerns for students and fear of inhibiting the discussion, as well as "gotcha" moments where someone, especially myself, may have misspoken or what is said is just misunderstood.

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[152] In 2022, gas prices rose to approximately $4.50 a gallon locally, and vehicle prices are at all-time highs due to supply chain shortages. The IRS mileage rate also jumped to .625 cents per mile. Given that the university has no dorms and is on the far edge of town, it is reasonable that the average student has at least a thirty-mile round-trip commute. Using the mileage reimbursement rate, each trip to campus is $18.75. Thus, not making the other fifteen trips, as the course meets both days in week one, saves approximately $281.25.

[153] *See* Beatty, *supra* note 68, loc.1.3.

Professor Binder noted these concerns as well.[154] Finally, the base definition of HyFlex requires that faculty "combine at least two complete learning paths; classroom and at least one online."[155] With the WebEx broadcast, MyFlex has three complete learning paths: classroom, synchronous online, and asynchronous online.

D. Major Lessons Learned

As discussed in Section B, each new term generally had some modification based on a lesson learned or a new challenge to work on moving forward. Below, I will discuss four significant considerations that have been encountered applicable to MyFlex and other flexible instructional delivery.

1. Managing Technology Issues

While technology can be a blessing and curse, faculty must anticipate the curse to put their students in the best position for success, as well as demonstrate their instructional capabilities. After teaching classes utilizing microphones, cameras, and various software systems for synchronous broadcasting, I would advise arriving at the classroom at least ten minutes early for each meeting. In the last two years, I have had issues with general computer updates taking significant time to process and the computer being turned off versus logged off

[154] *See* Binder, supra note 56, at 46-47 (noting also a concern about ownership of the recording).
[155] Beatty, *supra* note 68, loc.1.1.

and having to boot up entirely. As noted earlier, there have also been times the WebEx platform would not recognize the microphone or camera. If an issue like this arises, there needs to be adequate time to get the technical support people to respond or have a plan to improvise, such with a cell phone like I used and/or an additional plug-in microphone or camera.[156]

As alluded to previously, the initial technology at the university was basic and hindered the experience for students, as well as made more work for faculty. The rooms had a simple webcam with a short cord sitting on top of the computer screen, which required staying virtually stationary to appear on camera. It generally utilized the system-embedded microphone, which had limited capabilities in capturing all conversations, especially in larger rooms or where students spoke softly. The university did begin to discuss technology upgrades for improved delivery of HyFlex-type courses in April 2020, but progress was slow. A faculty task force finally met the following year in April of 2021 to provide input on what types of technologies faculty would like to see in "Next Generation" classrooms, but it met only once. In September of 2021, the university hosted a demo on a software program called Echo 360, but communication

[156] *See* Making HyFlex Teaching Work on Your Campus, *supra* note 69, at 17 (interviewing Professor Beaty, who noted a variance in technology between classrooms, and he brings his own microphone, webcam, and cell phone not to have to rely on the room itself).

remained sparse after that.[157] Finally, faculty received notice in early August of 2022 that classrooms were being outfitted with new technology, and more in-depth training on Echo 360 would happen the following week. Unfortunately, just four faculty attended. The university now has two classrooms ready for HyFlex instruction and eight more in the works. These new rooms have Echo 360 on the desktop, drop-down microphones, and cameras and monitors in the front and back of the rooms.[158] Some larger rooms will be equipped with a motion tracking camera in the back for faculty that move around more. The training session did reveal that things were not ready to go, so true functionality might not be until spring 2023.

2. Recording Course Content

There are numerous ways to record content posted online for learning, but the key is to be comfortable, or it will not be genuine and engaging. Some faculty may prefer/be able to record in well-equipped recording studios, but Professor Binder opted to record in the classroom the course typically meets to "recreate the class experience as closely as possible."[159] He recorded a split screen that captured

[157] While waiting on the university improvements, our chair used departmental funds to buy portable technology that included lapel microphones to improve audio mobility to move around the classroom and cameras that could be placed elsewhere in the classroom to capture a better angle.
[158] This will allow online students to see the instructor on one pane from the back camera and then the students with the other pane from a front camera.
[159] Binder, *supra* note 56, at 45.

him on one side and notes on another.[160] In another approach, a colleague of mine records his actual class sessions and edits them for future use. Finally, I currently use Arc Studio, which is embedded in Canvas, to record lectures at my office or home desk. For almost all recordings, I set it to record the screen, which usually displays a PowerPoint presentation I have developed.[161]

The most significant advice after recording hundreds of hours of videos is to be sure that all likely interruptions are minimized to the extent possible, such as turning off phones (office and/or cell), closing any applications with audio or pop-up notifications on the computer (email in particular), and put others around you on notice to be as quiet as possible.[162] This dramatically helps to limit untimely interruptions requiring either editing or re-

[160] *Id.*

[161] When the recent *Dobbs* decision was announced and there was considerable uncertainty about what it meant, I opted to do a webcam recording of just me, as it was a more personal issue for many, and I thought the webcam was more appropriate for the content. *See also* René F. Kizilcec et al., *The Instructor's Face in Video Instruction: Evidence From Two Large-Scale Field Studies*, STAN. U. VIRTUAL HUM. INTERACTION LAB (2014), https://stanfordvr.com/mm/2015/kizilcec-jep-instructors-face.pdf (discussing research about including the instructors face in videos).

[162] At school, I close my door and post a sign that I am recording. At home, I have two kids and four dogs to manage, so I try to record later in the evening when things are quieter.

recording.[163] Some recording tips Alexander noted included being mindful of your recording style and appropriate pacing for maximum understanding, avoiding comments tied to a particular text edition if the intent is to reuse the recording, and ensuring copyright compliance when recording.[164] Binder noted lessons he learned in the recording process, including working with IT to select the right software and use it appropriately, as well as summarizing the previous lesson and previewing the next since he would not be in class to cover that.[165] He also provided several valuable production tips for recording in an empty classroom, including:

- Dress as you would for a typical class;
- Look directly into the camera as much as possible;
- Do not stand behind a computer podium (For PowerPoint, use a remote clicker to advance slides);
- Understand that there is a different dynamic when speaking to a camera, without the synergy presented by an inquisitive audience;
- Slow down;
- Aim to be as natural as you are in the class.[166]

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[163] Another way to minimize issues with editing and re-recording is to chunk videos into much smaller pieces. *See* Paulson, *supra* note 123.
[164] *See* Alexander, *supr*a note 56, at 285-86.
[165] *See* Binder, *supra* note 56, at 59.
[166] *Id.*

3. Try to Set a Schedule that Works for All

As the spring of 2022 showed, the first suggestion is to work with whoever handles course scheduling to avoid courses with back-to-back classroom meetings, especially when the content is different. I have taught back-to-back sections of the same course at my previous institution, and it generally worked fine, but back-to-back sections would reduce the ability to give students more than an hour and fifteen minutes for exams if they want or need more time.[167] Back-to-back classes leave little time for pre-class preparation,[168] as there can be questions after the first class, a need to get new materials out of the office, and the need to be in the next class to answer questions and/or ensure the technology is ready to go.

If there is the possibility of additional flexibility for selecting which days of the week courses are scheduled, it is crucial to map out the planned schedule to see what works best, given content coverage, the university schedule for that term, and assessment methodology. The Tuesday and Thursday schedule has generally worked well, with the class meeting on Tuesdays and Thursdays being a backup instructional day or used for exams. With the current assessment structure, students have a quiz due Tuesday, the application activity due Thursday, and then major assignments are due on Saturdays. However, it does create a flurry of

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[167] *See supra* note 143 and accompanying text.
[168] I usually spend at least an hour reviewing the material for any class, even more if it is only the first or second time teaching it.

activity early in the semester, as I meet both days during the first week. The first chapter is covered on Thursday and then two on Tuesday to get students on the schedule for the remainder of the term. Admittedly, that is much activity when students settle in, and some do not have their textbooks yet. Another potential challenge is that this schedule also means the exam is offered over a three-day window with the in-class opportunity on Thursday and then online on Friday and Saturday to meet the needs of our diverse student body. This does expand the opportunity for exam integrity issues. The significant start of the term work issue can be improved by making Thursdays the meeting day and Tuesdays for classroom exams, but in the spring, that would cause an exam at our university to fall right on the tail end of spring break,[169] as well as pinch the teaching time available in the last half of the course since the second exam went into week nine. With Monday and Wednesday possibilities, meeting on Wednesdays for application activities with exams on Mondays does allow for the exam to only be offered over a two-day window. However, it also could mean a carryover on the exam until after spring break and pinch the last half of the course without dropping from the preferred structure of four exams to three based on research that generally shows that it is better to have more assessments.[170] Meeting on

[169] The online exam window for this schedule would be Sunday and Monday, which still creates a three-day exam window.
[170] *See* Marilla D. Svinicki & Wilbert J. McKeachie, MCKEACHIE'S TEACHING TIPS STRATEGIES, RESEARCH, AND

Mondays with exams on Wednesdays would pose a considerable integrity challenge with exams extending over a four-day window, as the online students would likely have Friday and Saturday to complete the exam.

A third scheduling issue I have run into with the cross-listed sections is the timing of the quizzes referenced earlier. While it is natural for classroom students to have the quiz due before class, the majority of the students so far are enrolled in the asynchronous online section and are unaccustomed to having due dates in the middle of the day. Many work or have other obligations during the day and time a class meets, thus why they are taking the course online, so they often have to get accustomed to doing the quiz the night before, which also limits the time in initially processing the material. I am still experimenting with the right approach to this issue.

The final scheduling issue I have encountered is being mindful of the day that is not normally used for instruction and using your calendar. It is easy to forget about some course obligations when getting into the habit of not meeting on one day of the week. Admittedly, I did not have an exam day on my calendar in spring 2022 and was leaving to get a quick lunch when I ran into a student in the hall and realized I was ten minutes late in starting the

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THEORY FOR COLLEGE AND UNIVERSITY TEACHERS 77 (Linda Ganster et. al. eds., 4th ed., 2014) (stating that summarizing findings in Gulsah Basol & George Johanson, *Effectiveness of Frequent Testing Over Achievement: A Meta Analysis Study*, 6 INTL. J. OF HUM. SCI. 99-121 (2009) stating that having at least three exams has "a positive impact on student achievement").

classroom exam.

4. Workload Considerations

As discussed in Part III(C), flexible course delivery can increase enrollments and improve efficiency for the university. However, it is essential to consider that these formats can substantially increase faculty workload, especially if faculty were used to two smaller sections and now find them combined and teaching another section to satisfy their workload or the structure increases their average enrollments.[171] The current practice at my university has been only to grant the same three credits as for any undergraduate course until the enrollment gets past the standard enrollment for a single section.[172] My experience after teaching a few sections in the MyFlex format is that the workload is generally about a third more than a typical section

[171] In the past, the cross-listed section of twenty-four students in spring might have been two separate sections, as any undergraduate course typically proceeds at ten students, and chairs can petition the Provost to allow fewer in some circumstances.

[172] Our university works on a workload credit system, where a faculty is generally required to teach twelve credits per term. A typical undergraduate course has a base of three credits, and a graduate course has a base of four credits. Additional credits are possible for tasks like exceptional service responsibilities, research projects, or class conditions justifying additional credit. *See Faculty Workload*, TEX. A&M UNIV. CENT. TEX. (Oct. 9, 2020), https://www.tamuct.edu/compliance/docs/202010-SAP-12.03.99.D1.01-Faculty-Workload.pdf (last visited July 5, 2023).

when considering the additional syllabus to craft, questions to answer due to the flexible format, tracking students as needed, managing the classroom technology for the synchronous broadcast, and recording videos for the asynchronous students. I would argue that any MyFlex type course should receive at least four credits, which would put a faculty member on a path to no more than a three-course load for that term at my institution, as opposed to a standard four-course load in the past.[173]

V. Conclusion

The pandemic forced many faculty to instruct in new ways over the last two years. Though the pandemic was a global tragedy, it may positively impact higher education moving forward. Unless forced by administration, or the needs of the student population change, I intend to offer every course with classroom meetings as MyFlex moving forward.[174] Though there have been challenges to this point, I have learned a lot from them, the university appears poised to provide better technology to improve instruction, and the positives

[173] Faculty can also get releases for service, scholarship, or even course development which also alters the teaching load. *See id.*

[174] *See* Making HyFlex Teaching Work on Your Campus, *supra* note 69, at 18 (declaring that "it is clear that allowing students to choose—and switch back and forth among—different participation modes has great appeal not only during this particular time, but going forward"). Multiple contributors to the piece indicated HyFlex would likely remain in some capacity.

outweigh teaching in less flexible formats. As Alexander advised with the flipped classroom,[175] I will probably need to keep tweaking things moving forward, but the basic structure of meeting one day a week and students being able to move freely between the classroom, a synchronous digital broadcast, and asynchronous completion is here to stay. As discussed with colleagues, this approach will not work for everyone, but each can develop their own "MyFlex" that meets the needs of their instructional situation.[176]

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[175] *See* Alexander, *supra* note 56, at 282 (stating that "it may initially take some trial and error to find what works for your students, but as with all new initiatives, tweak as needed as you go along").

[176] *See* Making HyFlex Teaching Work on Your Campus, *supra* note 69, at 19 (interviewing Dr. Genye Boston, Associate Provost at Florida A&M University, who said that HyFlex is not a "cookie-cutter model where one size fits all. I think we've been able to take elements of the HyFlex model and tailor it to what we need to best serve our students and our faculty").

AN INTRODUCTION TO THE BASIC DIMENSIONS OF INVESTMENT PROTECTION IN THE ARCHIPELAGIC WATERS: A REVIEW OF IIAS AND UNCLOS

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I. ABSTRACT

Archipelagic Waters are a unique legal entity in the United Nation's Convention on the Law of the Sea (UNCLOS). These waters, as part of the territory of the Archipelagic State, can attract investors as a realm for investment. Investing in these waters

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causes two major rules to be adressed, investment law and law of the sea. Therefore, the basic question of this article is: what basic dimensions should an investor consider to invest in the Archipelagic Waters? In this article, by examining some International Investment Agreements (IIAs) as well as UNCLOS, we came to the conclusion that investors should consider three criteria to invest in these waters: first, the sovereignty of the Archipelagic State, second, the territory of the Archipelagic Waters under IIAs and, third, contrast of two sets of interests. It is clear that failure to consider each of these three criteria poses a challenge to the investor and investment. Hence, on the one hand, detailed education of these basic dimensions to investors will provide a framework for foreign investment at Archipelagic Waters and attract investors to the Archipelagic State; On the other hand, there is a mutual relationship between investment and business, as successful investment causes new business in this state.

Keywords: Archipelagic Waters, IIA, UNCLOS, Basic Dimensions, Investment protection, Business

II. INTRODUCTION

Maritime realm is an important source for investment.[1] One of the realms that attracts investors in the territory of the Archipelagic States is the Archipelagic Waters. The concept of an Archipelagic State is regulated in the Third United Nations Convention on the Law of the Sea, 1982 (UNCLOS, 1982).[2] It explains that an Archipelagic State consists of one or more islands, and includes a group of islands, the waters of which are made as a natural manifestation of a unified economic and political geography.[3] The Archipelagic State, like other states, has eight maritime zones.[4] However, in the Archipelagic State, according to UNCLOS, we face the legal establishment of the Archipelagic Waters. The point here is that the Archipelagic Waters include the waters between the islands of the

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[1] Emma Newburger, *Investors' Next High-Yield Bets Should Be on Ocean Sustainability*, CNBC (July 13, 2020, 9:36 PM), https://www.cnbc.com/2020/07/13/heres-the-economic-case-for-investing-in-oceans.html.
[2] U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOSE].
[3] Ahmad Muhdar, Muhammad Zilal Hamzah & Eleonora Sofilda, *Maritime Security Policy for Increasing National Economic Growth in Archipelagic Country*, 82 PROCEEDINGS 86 (2022).
[4] *See* Sora Lokita, The Role of Archipelagic Baselines in Maritime Boundary Delimitation 1–5 (2010) (Paper, The United Nations-Nippon Foundation Fellowship), https://www.un.org/depts/los/nippon/unnff_programme_home/fellows_pages/fellows_papers/lokita_0910_indonesia.pdf.

Archipelagic State, in other words, the waters behind the baseline of the same state.[5] It means that the Archipelagic Waters are actually including internal waters, with the difference that other states have certain rights within these waters, like the right of innocent passage, as well as respecting the existing submarine cables of other states and there are also traditional fishing rights for third states.[6] Therefore, the sovereignty of the Archipelagic State over the "Archipelagic Waters" is not an unlimited absolute sovereignty like internal waters.[7]

It is certain that the observance of the third states' rights creates some limits for the Archipelagic States. However, it should be noted that although the sovereignty in these waters is limited by observing the rights of the states, the coastal state in this region has the exclusive right to invest and exploit the resources and opportunities of the region, just like in internal waters. Hence, investors must obtain permission to invest in this region, because of the sovereignty of the Archipelagic State over this zone.[8] An investment within the Archipelagic Waters undoubtedly needs protection; Also, Investors need to be sure that they will be treated fairly when they invest abroad.[9]. Therefore, to establish a favorable

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[5] UNCLOSE, *supra* note 2, arts. 46–47.
[6] *Id.* arts. 50–52
[7] *Id.* arts. 51(1)–(2), 52.
[8] *Id.* art. 49 (1)–(2).
[9] European Comm'n, INVESTMENT PROTECTION AND INVESTOR-TO-STATE DISPUTE SETTLEMENT IN EU AGREEMENTS 4 (2013), https://www.italaw.com/sites/default/files/archive/Investment%20Protection%20and%20Investor-to-

environment for foreign investors and attract high levels of foreign investment, governments have tended to conclude International Investment Agreements (IIAs).[10] Today, IIAs[11] may be interpreted as a mechanism for overcoming

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State%20Dispute%20Settlement%20in%20EU%20agreements_0.pdf

[10] An international investment agreement (IIA) is a type of treaty between countries that addresses issues relevant to cross-border investments, usually for the purpose of protection, promotion, and liberalization of such investments. *See* Nicolette Butler & Surya Subedi, *The Future of International Investment Regulation: Towards a World Investment Organization?*, 64 NETH. INT'L L. REV. 43, 46 (2017).

[11] Today, international investment agreements, as UNCTAD has stated, include both bilateral investment treaties (BITs) and the Treaties with Investment Provisions (TIPs). A BIT is an agreement between two countries regarding promotion and protection of investments made by investors from respective countries in each other's territory. The great majority of IIAs are BITs. Also, the TIPs bring together various types of investment treaties that are not BITs. Three main types of TIPs can be distinguished: (i) broad economic treaties that include obligations commonly found in BITs (e.g., a free trade agreement with an investment chapter), (ii) treaties with limited investment-related provisions (e.g., only those concerning establishment of investments or free transfer of investment-related funds), and
(iii) treaties that only contain "framework" clauses such as the ones on cooperation in the area of investment and/or for a mandate for future negotiations on investment issues. *See International Investment Agreements Navigator: Terminology*, UNITED NATIONS CONF. ON TRADE & DEV.: INV. POL'Y HUB, https://investmentpolicy.unctad.org/international-investment-agreements (last visited Mar. 29, 2023).

commitment problems between the investor and host states as a way to generate mutual benefits.[12] Paying attention to the nature of the Archipelagic Waters under UNCLOS, as well as considering the investment protection in these waters under the IIAs, make the connection between law of the sea and investment law in the issue of investment, and therefore raises different dimensions.

So far, many articles and books have been written about the Archipelagic States, but none of them have paid attention to the basic dimensions of investment protection in the Archipelagic Waters, as well as the relationship between the two categories of rules of the law of the sea and investment law in this zone.[13] This article deals with the basic dimensions of investment at Archipelagic Waters. To invest in these waters, an investor must pay attention to three dimensions, 1. Nature of the Waters, 2. Realm of the Archipelagic Waters under IIAs and, 3. Contrast of public and special interest of states on the one hand, and the investor interests on the other hand.

In accordance with the purpose of this Article, there are five hypotheses here. First,

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[12] Anne van Aaken, *Between Commitment and Flexibility: The Fragile Stability of the International Investment Protection Regime* 1 (Univ. of St. Gallen L. & Econ., Working Paper No. 2008-23, 2008), https://www.researchgate.net/publication/228232293_Between_Commitment_and_Flexibility_The_Fragile_Stability_of_the_International_Investment_Protection_Regime

[13] *See Indonesia Extends USD 5 Million to Support Archipelagic Nations Tackling Climate Action*, UNITED NATIONS DEV. PROGRAMME INDONESIA (Oct. 16, 2022), https://www.undp.org/indonesia; *see also supra* note 2.

according to UNCLOS, the maritime zones include the internal water, Archipelagic Waters, territorial sea.[14] contiguous zones, exclusive economic zones (EEZs), the continental shelf, high sea, and seabed. Also, the coastal state has sovereignty, jurisdiction, or sovereign rights in these maritime zones. Since these waters have unique conditions (they are like internal waters on the one hand and territorial sea on the other, and other rights of third states are included in it), so, an investor should check that according to the law of the sea, the Archipelagic State has sovereignty, jurisdiction or sovereign rights in different parts of the Archipelagic Waters (such as water levels, water beds, and living or non-living resources) or it does not have jurisdiction and sovereignty at all. Second, in order to extend the protection of the IIA to the investor and investment, the specified territory of investment in the IIA of the Archipelagic State should include the Archipelagic Water.[15] Therefore, the investor should first of all consider the mentioned realm of the IIAs between the origin state and the Archipelagic State as a host one;

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[14] Sometimes the term "territorial waters" was used instead of territorial sea. *See* Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine, ICSID Case No. ARB/08/8, ¶ 282 (Mar. 1, 2012).

[15] In the preamble to each IIA, the relationship between territory and investment is emphasized, and also every investment treaty includes a section entitled definition of territory. *See* Mostafa Abadikhah, *Applying the Foreign Investment Agreements at Sea: Investigating the Concept of Territory in the International Investment Agreements of Iran, the Republic of Korea, and the European Union*, 21 J. KOR. L. 1 (2022).

because if the territory of the IIA does not include the Archipelagic Waters, in fact, the investor will not enjoy the protection of the treaty and the investment Court does not have jurisdiction as well. Third, investment in the Archipelagic Waters includes two sets of rules. Investment law possesses rules to protect investment, and the Law of the Sea, which includes rules to protect the public and special interests of states in the waters. The confrontation between these two sets can create a challenge for the investor. Therefore, the investor should consider this issue. Fourth, a detailed education regarding the basic dimensions of investment in Maritime Zones can clear the way for investors and hence investors will be more attracted to invest in these Zones due to the clarity of the path and conditions. Fifth, attracting foreign investors in the Archipelagic Waters and considering the types of maritime investment, can have effects on the business in the Archipelagic State.

To answer the Article's question, namely, what dimensions should an investor consider to invest in the Archipelagic Waters? The current Article uses qualitative method.[16] Thus, the current research analyzes the relevant contents of UNCLOS as well as some IIAs to prove the hypotheses. The current study proceeds in six steps. Part 1 focuses on nature of the Archipelagic Waters in accordance with

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[16] In line with the qualitative method, one of the important methods of data collection is textual analysis. *See* P. Gill, K. Stewart, E. Treasure & B. Chadwick, *Methods of Data Collection in Qualitative Research: Interviews and Focus Groups*, 204 BRITISH DENTAL J. 291 (2008).

UNCLOS. In Part 2, the study analyzes the realm of Archipelagic Water under the IIAs of the Archipelagic States. In Part 3, the Article shows the conflict between the investment interests and public and special interests of states at the waters. Part 4 examines the effect of education on attracting and encouraging the investors. In part 5, the article surveys the relationship between the investment and business in an Archipelagic State. Finally, the article concludes.

III. THE NATURE OF THE ZONES

The UNCLOS parcels the sea into a variety of maritime zones that a coastal state may claim. Each zone grants certain rights to the coastal states and imposes certain obligations on the foreign states and vessels.[17] In fact, according to UNCLOS, the coastal state has either sovereignty, jurisdiction, or sovereign rights in any maritime zones. Due to the unique nature of the Archipelagic Waters (they are like internal waters on the one hand and territorial sea on the other, and other rights of third countries are included in it), an investor must know whether the Archipelagic State has sovereignty, jurisdiction or sovereign rights in these waters. Some maritime realms actually have two natures at the same time; in other words, we see two natures in the exclusive economic zone and the continental shelf. Although

[17] Abadikhah, *supra* note 15, at 8; Christos Kastrisios & Lysandros Tsoulos, *Maritime Zones Delimitation - Problems and Solutions*, PROC. INT'L CARTOGRAPHER ASS'N, 2018, at 1, 2.

the waters in the exclusive economic zone are not under the sovereignty of coastal states, the seabed of these waters, i.e. the continental shelf, is under the sovereign rights of the coastal state. Therefore, it is important, whether the archipelagic waters have such a nature. It means that its bed has the nature of a continental shelf and the waters in it have the nature of high sea or territorial sea. Before describing the situation of the Archipelagic Waters, it is better to briefly examine the nature of other maritime zones based on UNCLOS.

A. Sovereignty

Here we can see two types of sovereignty: absolute sovereignty and relative sovereignty. In fact, these two types of sovereignty are related to internal waters and territorial sea. The coastal state has absolute sovereignty over internal waters and this sovereignty includes the seabed, water column, and air space.[18] The coastal state also has relative sovereignty over the territorial sea. However, unlike internal waters, there is no absolute sovereignty here, but there is a right of innocent passage for third states.[19] The difference between absolute sovereignty and relative sovereignty is related to the existence of the right of innocent passage in the territorial sea.[20]

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[18] UNCLOSE, *supra* note 2, art. 8.
[19] *Id.* arts. 3, 17.
[20] Another type of sovereignty is also envisaged, which we call limited sovereignty. *See infra* Section II.5.

B. Jurisdiction

Two areas are under the jurisdiction of the coastal state, or in other words, the Archipelagic State: contiguous zone and exclusive economic zone (EEZ). Within the contiguous zone, the coastal state has jurisdiction to regulate, prevent, and punish infringements of its customs, fiscal, immigration, or sanitary laws committed within its territory or territorial sea.[21] Also, the coastal state has jurisdiction in EEZ to conduct scientific research and establish artificial islands or installations.[22]

C. Sovereign Rights

The coastal state has sovereign rights only in the Continental Shelf. In fact, the state has sovereign rights to explore and exploit, conserve, and manage natural resources, both living and nonliving.[23]

D. Without any Sovereignty, Jurisdiction, or Sovereign Rights

There are two maritime zones here: high sea and area. According to UNCLOS, over the high sea, as well as the seabed of the high sea and the bed of the oceans, which is known as the "area," does not belong to any state. All states, whether coastal or landlocked, can use the high seas according to the

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[21] UNCLOSE, *supra* note 2, art. 33; *see also* Kastrisios & Tsoulos, *supra* note 17.
[22] *Id.* art. 55.
[23] *Id.* arts. 76, 77.

freedoms stipulated in UNCLOS.[24] Also, the area is under the special provisions of UNCLOS and the necessary permits for its exploitation must be obtained from the seabed authority.[25]

E. Unique nature

As previously mentioned, the nature of the Archipelagic Waters is unique; It means, we see another type of sovereignty regarding the waters; the Archipelagic State has "limited sovereignty" over the waters. So, in order to carefully examine the nature of the Archipelagic Waters, we must divide the components of this region into three categories.

The first category is the investments that actually target the waters in the "Archipelagic Waters." As some investments are located in the waters of this region, such as investing in solar panels or investing in generating electricity from waves or investing in the construction of artificial floating islands, and since paragraph 1 of Article 49 of the UNCLOS has extended the sovereignty of the coastal state over the entire waters, therefore, any investment in line with the investments whose domain is only the waters of this region requires obtaining permission from the Archipelagic State.[26]

The second category is the investment in living resources. This investment is actually the

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[24] *Id.* art. 86.

[25] Kastrisios & Tsoulos, *supra* note 17, at 2.

[26] If an investor invests by obtaining a license, he can use the protection of the investment agreement between the investment's host state and the investor's origin state, unless there are other challenges.

exploitation of fish and other biological species. In this context, since the Archipelagic State has sovereignty over this region,[27] and also, UNCLOS has emphasized the sovereignty of Archipelagic State extends to the resources contained in the waters,[28] therefore, investors need to obtain a fishing license from the Archipelagic State. Here, the situation is a little different; in the Archipelagic Waters, in addition to the fishing license that third states must obtain, some countries may have traditional fishing rights, as it is clearly mentioned in Article 51 of UNCLOS.[29] Hence, if states have traditional fishing rights in the Archipelagic Waters, the Archipelagic State will recognize and observe the rights within the waters. Additionally, in accordance with the aforementioned article, "the terms and conditions of the application of such rights and activities, including the nature and extent of these rights and activities and the areas in which they are applied, upon the request of each of the relevant states, will be regulated by multilateral agreements." It is clear that traditional fishing rights may exist in these waters. These rights are "acquired rights" according to the content of Article 51,[30] in line with the principle of acquired rights, the Archipelagic States are committed to respect the traditional fishing rights, and their framework is also adjusted according to the

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[27] UNCLOS, *supra* note 2, art. 49(1).
[28] *Id.* art. 49(2).
[29] *Id.* art. 51(1).
[30] *See* Ko Swan Sik, *The Concept of Acquired Rights in International Law: A Survey*, 24 NETH. INT'L L. REV. 120 (1977).

agreements between the right holder states and the Archipelagic States. Therefore, on the one hand, it is obvious that if these agreements provide special protections for traditional fishing rights, those protections will be enforced. On the other hand, the protection under the IIA between the host state and the respective state (if any) is applied to the investment due to the fact that the fishing area is located in the territory of the Archipelagic State. For example, in production sharing contracts, there is a settlement mechanism called "individual expert," which is not in a majority of IIAs.[31] So, there may be such a mechanism in the agreements regulating traditional fishing rights, which is not in the IIA and can be used by the contracting parties.

The third category is the investing in the exploitation of resources that require activity on the seabed. The UNCLOS explicitly shows that the sovereignty of the Archipelagic State extends to their bed and subsoil, and the resources contained therein,[32] and the state has the exclusive right to exploit this area, and investors must obtain permission to work on the seabed. It is obvious that by obtaining a license and starting investment, they can enjoy the protection of investment agreements.

We should consider three points regarding the nature of the Archipelagic Waters: 1. The state sovereignty extends to these waters. 2. There is a

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[31] GOV'T OF INDIA, MINISTRY OF PETROLEUM & NAT. GAS, MODEL PRODUCTION SHARING CONTRACTS: FIFTH OFFER OF BLOCKS, art. 33.1 (2005), http://petroleum.nic.in/sites/default/files/MPSC%20NELP-V.pdf.

[32] UNCLOSE, *supra* note 2, art. 49(2).

right of innocent passage in the waters. 3. There are other rights such as traditional fishing in the waters. Therefore, we cannot say that this area is completely like internal waters because the Archipelagic State does not have absolute sovereignty. Also, we cannot say that it is completely like a territorial sea because the state does not have relative sovereignty. In addition, we cannot say that it is like an EEZ, because the government here has a type of sovereignty over the Archipelagic Waters, resources, and substrate of this region, which we call limited sovereignty. However, although the state's sovereignty is limited here, the investor does not need to take permission from a special institution such as the seabed authority to exploit the seabed like the "area."

IV. REALM OF THE ARCHIPELAGIC WATERS UNDER THE IIAS

IIAs are one of the main tools for investment protection today.[33] One of the most important points under these agreements is the nexus between the territory of the contracting parties and investment,[34] because, to protect the investment and investors under an agreement, the parties need a requirement called a "territorial nexus"[35] as stated in the preamble

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[33] *See* NICK J. FREEMAN & FRANK L. BARTELS, THE FUTURE OF FOREIGN INVESTMENT IN SOUTHEAST ASIA 213–14 (2004).
[34] Abadikhah, *supra* note 15, at 3.
[35] Margaret Clare, *Is There a "Nationality" of Investment? Origin of Funds and Territorial Link to the Host State*, 8 JURISDICTION INV. TREATY ARB. 97, 112 (2018).

to these agreements. In accordance with the preamble to *the Indonesia - Switzerland BIT (2022),* “the Parties, desiring to create favorable conditions for increasing investments by investors of one Party ‘in the territory of the other Party…, have agreed.’”[36] The importance of territory has led to IIAs defining territory and its extent in the terminology section of the treaty. Therefore, in order to apply the protections under the IIAs to investments located in the Archipelagic Waters, one should refer to the section related to "territory definition" contained in the text of the IIAs of the Archipelagic State. IIAs may specify the territory precisely under the definition of the territory or may not specify the extent of the territory. If the agreements of the Archipelagic State have accurately mentioned the Archipelagic Waters as part of the territory, there will not be any challenge and the protection of the agreement will also include the Archipelagic Waters.

According to Article 1 of *the Indonesia - Singapore BIT (2018),* since Indonesia is an Archipelagic State, “The term ‘territory’ regarding Indonesia includes land territories, archipelago waters, internal waters and territorial sea... in accordance with the UNLOS.”[37] Also, in accordance *with Indonesia -*

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[36] Agreement Between the Swiss Federal Council and the Government of the Republic of Indonesia on the Promotion and Reciprocal Protection of Investments Indonesia, Switz.-Indon., May 24, 2022, https://edit.wti.org/document/show/7dc9bf0f-0f88-4edc-a7b1-4aa4386adab2.

[37] Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of Singapore on the Promotion and Protection of Investments, Indon.-Sing.,

Russian Federation BIT,

with respect to the Republic of Indonesia: the territory of the Republic of Indonesia, according to the provisions of international law and its national law, comprises the land, territorial sea as well as its seabed and subsoil, Archipelagic Waters, internal waters and the territorial sea in which Indonesia exercises its sovereignty, and also the exclusive economic zone and continental shelf in which Indonesia exercises its sovereign rights in accordance with the United Nations Convention on the Law of the Sea (1982).[38]

It should be noted that there are three points in these articles:

- First, these articles have considered the Archipelagic Waters as a zone under the sovereignty of Archipelagic State in the IIAs; So, if an investment is placed in the Archipelagic Waters, the protections of the agreement cover this investment as well.
- Second, attention to the UNCLOS; it means that the Archipelagic States pay attention to the Law of the Sea to determine the extent of the Archipelagic Waters under the IIAs.
- Third, the Indonesian state has considered a zone

Oct. 11, 2018, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6179/download.

[38] Agreement Between the Government of the Russian Federation and the Government of the Republic of Indonesia on the Promotion and Protection of Investments, Russ.-Indon., art. 1(D), Sept. 6, 2007, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5969/download.

under the title of internal waters.[39] This is in line with the permission of Article 50 of UNCLOS, which states, "Within its Archipelagic Waters, the Archipelagic State may draw closing lines for the delimitation of internal waters."[40] In that case, the Archipelagic Waters apply to the entire extent of internal waters.[41] However, the internal waters include only a part of the Archipelagic Waters.[42]

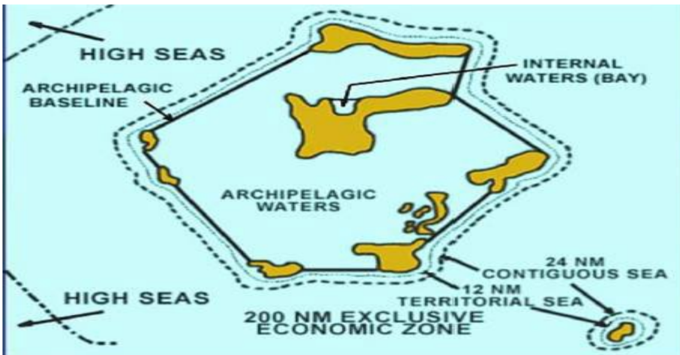

Figure1: the position of internal waters and Archipelagic Waters in comparison (source: Marin inbox)[43]

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[39] *See* Vivien Jane Evangelio Cay, *Supra* note 6, at 55.
[40] UNCLOS, *supra* note 2, art. 50.
[41] *See* Evi Purwanti, Analysis on the Application of Baselines Regulation in Determining Maritime Boundary of a State According to United Nations Convention on the Law of the Sea 1982 2–4 (Aug. 3, 2009) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2858931.
[42] *See* JOHN G. BUTCHER & R. E. ELSON, SOVEREIGNTY AND THE SEA: HOW INDONESIA BECAME AN ARCHIPELAGIC STATE (2019).
[43] Minbox, *Codes and Conventions Questions & Answers Part-17*, MARINE INBOX (Sept. 11, 2020), https://marineinbox.com/marine-exams/codes-and-conventions-questions-answers-part-17/. For more information

Sometimes, the Archipelagic Waters may not be specified under the IIAs. As Article 1 of *Austria - Philippines*[44] *BIT* states, "the term 'territory' means in respect of each Contracting Party the territory under its sovereignty as well as its exclusive economic zone and continental shelf over which each Contracting Party exercises sovereign rights or jurisdiction in accordance with its national law and international law."[45] Also, according to *the Mongolia - Philippines BIT,* "with respect to the Government of the Republic of the Philippines, the national territory as defined in Article I of its Constitution."[46]

These agreements require interpretation due to the lack of precise determination of the extent of the Archipelagic Waters. Therefore, it should be determined whether the Archipelagic Waters fall

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on Archipelagic Waters situation among the other zones, see Millicent McCreath, Coastal State Measures for Environmental Protection Affecting Transit Passage and Archipelagic Sea Lanes Passage, Presentation at the AsianSIL Junior Scholars' Workshop, slide 2 (Aug. 24, 2017), https://docplayer.net/90734299-Coastal-state- measures-for-environmental-protection-affecting-transit-passage-and-archipelagic-sea-lanes-passage.html.

[44] As an Archipelagic State.

[45] Agreement Between the Republic of Austria and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments, Austria-Phil., art. 1(D), Apr. 11, 2002, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/212/download.

[46] Agreement Between the Government of Mongolia and the Government of the Republic of the Philippines on the Promotion and Reciprocal Protection of Investments, Mong.-Phil., art.1(4), Sept. 1, 2000 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4676/download.

under the definition of territory in the mentioned articles or not. If the Archipelagic Waters are included under the definition of the territory of the investment agreement, the investment will also be protected by the same treaty, and otherwise they will not be protected. According to the articles, it is important to refer to the domestic laws of the Philippines to determine the extent of the territory. Hence, referring to the first principle of the Philippine Constitution, we see that the Archipelagic Waters are included in the national territory of the Philippines.[47] Also, as one of the maritime zones of the Archipelagic State, it is also considered in UNCLOS. Therefore, if an investment is placed in the Philippine Archipelagic Waters and the relevant IIA does not mention the Archipelagic Waters under the terminology, to determine the territory of the Philippines, one can refer to the domestic laws and here, the investment will be protected by the same IIA.[48]

V. CONTRAST OF TWO SETS OF INTERESTS

Regarding investment in the Archipelagic Waters, there are two opposing protective rules. On the one hand, the protection of the investor, which is

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[47] CONST. (1987), art. I (Phil.).

[48] In fact, an investment agreement that precisely specifies the territory can greatly help the investor in determining the territory of investment. Also, the investor can inform the Investment Court about the territorial connection by referring to such a treaty in future disputes. *See* Peteris Pildegovics & SIA North Star v. Kingdom of Norway, ICSID Case No. ARB/20/11, at 33 (Feb. 27, 2017).

done under the provisions of IIAs, and on the other hand, the protection of public and special interests of states.[49] Sometimes tensions may arise between investment installations in the "Archipelagic Waters" and "Public Interest." These tensions may be encountered in three ways:

- The Archipelagic State can resolve the dispute between the investor and the public interest for the benefit of both parties. Since the Archipelagic State has the right to determine the sea lanes passage and traffic separation schemes according to Article 53 of UNCLOS, it can resolve the tension between investment and international traffic by changing or replacing sea lanes passage. For instance, in 2008 the International Maritime Organization (IMO) reported, for the first time, that the UK had applied changes to a traffic separation scheme in the interest of protecting offshore renewable installations.[50] Subsequently, the Netherlands also proposed several traffic separation measures to the IMO Sub-Committee on Safety of Navigation, which related to the safety of its offshore energy installations in the territorial sea.[51] If an Archipelagic State takes such actions, they are actually a sign of the Sovereignty of the Archipelagic State over these waters, which is respected by UNCLOS[52] and IMO.[53]

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[49] UNCLOSE, *supra* note 2, art. 51.
[50] NIKOLAOS GIANNOPOULOS, INTERNATIONAL LAW AND OFFSHORE ENERGY PRODUCTION: MARINE ENVIRONMENTAL PROTECTION THROUGH NORMATIVE INTERACTIONS 52 (2020).
[51] *Id.*
[52] UNCLOSE, *supra* note 2, art. 51(1)–(2).
[53] *See Ships Routs in Maritime Zones*, INT'L MAR. ORG., https://www.imo.org/en/OurWork/Safety/Pages/ShipsRoutein

- Priority should be given to protecting the right of innocent passage, traditional fishing rights, and submarine cables. In this regard, if the states cannot choose the middle way between investment and public interest, the protection of the right of innocent passage, traditional fishing rights, and submarine cables will be prioritized due to the international acquired right.[54] In this way, the compensation of the investor can be based on the investment agreement or the investment contract according to the conditions.[55]
- Sometimes there is no interference between investment and public and special interest, but the factor that endangers national security is suspended or stopped, and this factor may be the same public interest, and rather, investment in that area is revived. For example, investment in the waters should be prioritized over the right of the innocent passage. The assumption is in the situation that the innocent passage is harmful to the national security of state. In this regard, Article 52 of UNCLOS states, "the Archipelagic State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its Archipelagic Waters the

g (last visited Feb. 24, 2023).

[54] Sik, *supra* note 30, at 120–25.

[55] In other words, the investor can use the right to refer to the court under the investment agreement. *See* Stanley U. Nweke-Eze, *Jurisdiction: Main Elements*, GLO. ARB. REV. (Jan, 14, 2022), https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/first-edition/article/jurisdiction-main-elements.

innocent passage of foreign ships if such suspension is essential for the protection of its security."[56] So, it is possible that the Archipelagic State organizes an investment at the same place of innocent passage and considers it appropriate to the state's security. As the Philippines considered many factors to provide its desired sea lines in the Archipelagic Waters, such as the effectiveness of the government to monitor the sea lanes, security of the country, the environment, and inter-island shipping.[57] Therefore, considering these factors by the Philippines shows that the basis for determining sea lines in these waters is the country's needs, and without a doubt, when any of these factors are in danger and harm the country's security, the Philippine government, according to UNCLOS, has the right to suspend innocent passage.[58]

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[56] UNCLOSE, *supra* note 2, art. 52.

[57] Vivien Jane Evangelio Cay, Archipelagic Sea Lanes Passage and Maritime Security in Archipelagic Southeast Asia 56–65 (2010), (M.S. dissertation, World Maritime University, master Dissertations), https://commons.wmu.se/cgi/viewcontent.cgi?article=1442&context=all_dissertations.

[58] It should be noted that there may be a conflict between investment and the marine environment in general, and on the one hand, UNCLOS protects the marine environment, as in arts. 192, 117, 118 & 119, countries are asked to respect the environment. On the other hand, IIAs provide rules for investment that are in contrast with the environment. *See* Nikolaos Giannopoulos, *Global Environmental Regulation of Offshore Energy Production: Searching for Legal Standards in Ocean Governance*, 28 REV. EUR., COMPAR. & INT'L ENV'T L. 289 (2019); *see also* GIANNOPOULOS, *supra* note 50, at 177–256.

VI. THE EFFECT OF EDUCATION ON ATTRACTING AND ENCOURAGING INVESTMENT

In the process of foreign investment, factors such as careful training, attracting and encouraging investors, and growth of business are related to each other like links in a chain. This means that first there must be dimensions and conditions of investment, and then those dimensions and conditions should be specified clearly and the investment parties should be trained precisely. Hence, the transparency of the path can lead to attracting and encouraging investment. Finally, this investment can cause the growth of business and economy. Education of the basic dimensions of investment in the Archipelagic Waters should be scrutinized by states and experts in the field of investment.

First, the role of the origin state is very important. The state of origin of the investor provides appropriate education to create a clear path and provide a detailed framework for its investors. In the first stage, it is the duty of the investor's government to provide a detailed framework. As the United States has provided detailed guidelines and educational frameworks regarding investment for its citizens in other countries. The *U.S. Embassy and Consulate in Indonesia* has provided detailed information about investment, types of investment, available opportunities, existing laws and provisions related to investment in the markets of Indonesia.[59]

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[59] *Investing in Indonesia*, U.S. EMBASSY IN INDON., https://id.usembassy.gov/business/getting-started-indonesia/ (last visited Mar. 30, 2023).

In accordance with the *International Trade Administration,* a successful investment in Indonesia requires sufficient awareness and knowledge about the dimensions of investment in Indonesia, such as leading sectors for exports and investments, customs, regulations and standards, and investment climate statements.[60]

Furthermore, in this regard, we can consider the comprehensive training plan for trade and investment in Indonesia provided by the Australian government. This plan accurately describes the comprehensive dimensions of investment, business, and trade in Indonesia for Australian investors in three parts including twelve chapters. It is important to note that the plan, in the sixth chapter, specifically mentions the special economic zones of Indonesia.[61] These zones are actually connected with other international markets through Indonesia's maritime zones. In accordance with the Indonesian IIAs and UNCLOS, these maritime zones include the internal water, Archipelagic Waters, territorial sea, contiguous zones, EEZ, the continental shelf, high sea, and seabed.[62] Undoubtedly, if an investor invests in the Archipelagic Waters, he must be aware of the international traffic routes through these waters, as well as the possibility of tensions between

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[60] *Indonesia Country Commercial Guide*, INT'L TRADE ADMIN., https://www.trade.gov/indonesia-country-commercial-guide (last visited Mar. 30, 2023).
[61] AUSTRALIAN GOV'T, DEP'T OF FOREIGN AFFS. & TRADE, A BLUEPRINT FOR TRADE AND INVESTMENT WITH INDONESIA 66 (2021).
[62] UNCLOS, *supra* note 2.

his investment and public interests in the waters.[63] Therefore, the action of the government of origin in clarifying the path encourages investors to invest. In other words, it creates a sense of trust and confidence for the investor that he is not alone in the process of foreign investment and starting a business in an Archipelagic State.

Figure 2: Special Economic Zones in Indonesia (source: Indonesia Business Post)[64]

Second, role of the host state of investment is very important. Proper training of the host state is also effective in attracting foreign investors and these trainings can be provided in two parts. On the one hand, official bodies and agencies of the Archipelagic States play a direct role in attracting investors by effective training and creating a clear and transparent

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[63] *See*, *supra* Part IV.

[64] Valina Zahra, *What to Consider Before Investing in Special Economic Zone*, INDON. BUS. POST (Jan. 18, 2023), https://indonesiabusinesspost.com/insider/what-to-consider-before-investing-in-special-economic-zone/.

framework for foreign investors and other states. *The Indonesia Investment Coordinating Board (BKPM)* as the government agency in Indonesia for formulation of government policies in the field of investment, always updates information and policies regarding investment dimensions in Indonesia and expresses them in the form of comprehensive plans or meetings.[65] On the other hand, states work indirectly in educating investors and attracting them in this way; it means that states first train experts and then those experts work in attracting investors through comprehensive training and providing useful plans. It is clear that higher education can play an important role in attracting foreign investment. As the official authorities of Wales believe Wales has a large number of higher education institutes as well as colleges that can play a critical role in attracting foreign investment.[66] Therefore, private individuals, both natural and legal, who have been trained in this field and are experts, can operate. In this regard, we can refer to a comprehensive plan titled "an Introduction to doing Business in Indonesia" which has been prepared by a non-governmental institution for business and investment in Indonesia.[67] Some

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[65] *See* Thomas Lembong, *Indonesia: Moving Forward*, INDON. INV. COORDINATING BD. (Nov. 26, 2018), https://www.asean.or.jp/ja/wp-content/uploads/sites/2/01.-BKPM.pdf.

[66] *Strong Skills and Education Base Key for Attracting Foreign Direct Investment*, WALESONLINE (Mar. 27, 2013), https://www.walesonline.co.uk/business/business-news/strong-skills-education-base-key-2058383.

[67] *See* Dezan Shira, *An Introduction to Doing Business in Indonesia*, ASEAN BRIEFING (Feb. 22, 2023),

parts of this text deal with information about maritime investment, and most of it is related to investment in the marine energy sector. The important point is that investors should invest in these territories according to the provisions and interests governing maritime zones in accordance with UNCLOS.[68] Although this text is provided by an intentity in the private sector, it provides useful information to foreign investors and undoubtedly helps the host government in attracting foreign investment.[69]

Finally, on the one hand, whether education is done through the investor's home government or through the investor's host government (directly or indirectly), it is very effective in attracting foreign investment. Because by specifying the way and clarifying the dimensions and conditions, it helps the investor to make a better decision. On the other hand, the elements such as comprehensive and effective training, investment attraction, and business growth are interconnected.

VII. THE RELATIONSHIP OF INVESTMENT AND BUSINESS IN THE ARCHIPELAGIC STATE

Foreign investment not only injects new capital, but also brings new businesses with

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https://www.aseanbriefing.com/news/an-introduction-to-doing-business-in-indonesia-2023/.

[68] *See* UNCLOS, *supra* note *2*; *see also supra* Part IV.

[69] We can also mention other texts in this regard, such as the text entitled *Legal Guide to Investment in Indonesia*. *See* ALLENS, LEGAL GUIDE TO INVESTMENT IN INDONESIA (2014), https://data.allens.com.au/pubs/pdf/Investing-in-Indonesia.pdf.

connections in different markets, and opens additional export opportunities. It also encourages competition and increased innovation by bringing new technologies and services to the market.[70] The Archipelagic State can grow the economy by attracting foreign investors to its maritime zones, especially the Archipelagic Waters. The investor can invest in six areas in the Archipelagic Waters, which include investment in non-renewable energies, investment in renewable energies, investment in marine living resources, investment in seabed mining, investment in submarine cables and pipelines, and investment in the construction of artificial islands.[71] These types of investments are in line with the resources and opportunities in the Archipelagic Waters. Therefore, according to the investments and existing conditions in the waters, new businesses can be created for the market of the Archipelagic State.

It should be noted that the relationship between investment and business is a mutual one. It means that on the one hand, in an Archipelagic State like Indonesia, some business areas limit which foreign investors can invest in that field. On the other hand, the same investment can provide new

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[70] *The benefits of Foreign investment*, AUSTRALIAN GOV'T: DEP'T OF FOREIGN AFFS. & TRADE, https://www.dfat.gov.au/trade/investment/the-benefits-of-foreign-investment (last visited Mar. 30, 2023).

[71] The mentioned division criterion is an allegorical criterion and is not exclusive. In other words, by examining the types of maritime investment in various books, articles, and treatises, the conclusion was reached that the most important types of investment in the Archipelagic Waters are six cases.

businesses or new manner in the current businesses that help the growth of the Archipelagic State's economy. However, in order to establish a successful mutual relationship, an investor who invests in the Archipelagic Waters must be fully aware of the basic dimensions of the investment, including first, the sovereignty of the Archipelagic State, and second, the territory of the Archipelagic Waters under IIAs and, third, conflict of two sets of interests. Otherwise, failure in investment will also cause business failure.

Additionally, Indonesia has liberalized over 245 business lines, including important sectors, such as energy; In this regard, the Indonesian government considers some businesses open to 100% foreign investment, such as offshore distribution pipelines or offshore oil and gas drilling services, which are open to foreign investors.[72] The liberalization of investment in the field of energy as well as submarine pipelines can attract investors to the Indonesian Archipelagic Waters. However, the important point is that the Indonesian government should evaluate the clarification of the basic dimensions in the waters and educate investors accordingly. Or, as previously stated, the government of the origin of the investor should describe these dimensions. Therefore, if an investor has full right to invest in submarine pipelines in the Archipelagic Waters, this right includes two points: First, the Indonesian government grants the right to investors in accordance with Article 51 of UNCLOS.[73] Second,

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[72] Shira, *supra* note 67.

[73] *See* UNCLOS, *supra* note 2, art. 51.

the investor should know that in accordance with the Article 51, there is the right of innocent passage[74] and traditional fishing rights for third countries, and it should not disturb those rights.[75]

The general principle under the positive investment list of Indonesia is that a business sector is open to foreign investment unless it is subjected to a specific type of limitation.[76] It is clear that such principle is established according to UNCLOS. For example, the system of traditional fishing rights according to UNCLOS is the rights that exist in the Indonesian Archipelagic Waters, and the states that have traditional fishing rights in these waters, according to the agreement between the Indonesian government and that government, can invest in this field. Therefore, since traditional fishing rights are an acquired right and are mentioned in UNCLOS,

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[74] *Id.*, art. 53.

[75] *See id.*, art. 51. ("1. An Archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighboring States in certain areas falling within archipelagic waters. The terms and conditions for the exercise of such rights and activities, including the nature, the extent and the areas to which they apply, shall, at the request of any of the States concerned, be regulated by bilateral agreements between them. 2. An Archipelagic State shall respect existing submarine cables laid by other States.").

[76] As such, the government has classified business fields into four categories: 1. Priority sectors; 2. Business fields that stipulate specific requirements or limitations; 3. Businesses fields open to large enterprises, including foreign investors, but are subject to a compulsory partnership with cooperatives and micro, small, and medium-sized enterprises (MSMEs); and 4. Business fields that are fully open to foreign investment. Shira, *supra* note 67.

foreign investors can invest in this field in Archipelagic Waters freely and fully. Otherwise, fishing in a normal way, which is not under the traditional fishing rights system, is domestic and foreign investors face restrictions.[77] Furthermore, in other types of investment, such as investment in offshore mining, we can see the change in the current business field in Indonesia. Today, due to the high reserves of minerals in the seabed and sub-bed of the Archipelagic Waters, the territorial sea and the exclusive economic zone of Indonesia, many miners are more active in the offshore mining sector than the onshore mining sector.[78]

VIII. CONCLUSION

The Archipelagic Waters are one of the maritime zones of the Archipelagic State that can attract foreign investors. This article explained that investment in the Archipelagic Waters brings the provisions of the law of the sea regarding the Archipelagic Waters and IIAs closer to each other. Therefore, an investor should know the basic dimensions of these waters in connection with the investment before starting to invest in the waters. The three basic dimensions here include the nature of the Archipelagic Waters, the realm of the waters

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[77] *Id.*

[78] *See* Andrew Thaler, *Tin Mining in Indonesia Moves Offshore*, DEEP-SEA MINING OBSERVER (Aug. 24, 2021), https://dsmobserver.com/2021/08/tin-mining-in-indonesia-moves-offshore/.

under IIAs, and the conflicts between public and special interests of third states in the waters and in investor protection.

Regarding the first dimension of the present study, it concluded that the nature of the Archipelagic Waters in accordance with UNCLOS is a unique one and is under the sovereignty of the Archipelagic State. This sovereignty is divided into absolute sovereignty where the Archipelagic State has absolute control over its internal waters, relative sovereignty where the state has relative control over its territorial waters, and limited sovereignty where the Archipelagic State possesses sovereignty over the Archipelagic Waters. This Article has chosen the title of "limited sovereignty" over this kind of sovereignty. Although the state sovereignty has expanded over the waters, air and seabed, it must respect the rights of other state such as innocent passage, traditional fishing rights, submarine cables and contracts. Therefore, an investor must be aware of the nature of these waters and the type of state sovereignty over the waters.

Territorial nexus is a very important factor for an investment. There should be a nexus between investment and the Archipelagic Waters. In other words, the investment must be located in the waters to be protected by IIAs. This means that the IIAs of the Archipelagic State pay special attention to the maritime zones in accordance with UNCLOS because these treaties, in defining the territory of the Archipelagic State, place the waters under the sovereignty of the state. However, some IIAs do not consider the exact territory of the Archipelagic State

regarding the Archipelagic Waters and need to be revised.

UNCLOS also considers the public and specific interests of third states in the Archipelagic Waters. These interests include innocent passage, traditional fishing rights, contracts, and submarine cables. Obviously, the UNCLOS's protection of these rights may sometimes conflict with the protection of the investor. On the one hand, IIAs intend to protect the investor and establish various substantive rules in this regard. But on the other hand, UNCLOS wants to protect the mentioned interests in the Archipelagic Waters. Sometimes this conflict can be resolved in favor of both parties, as UNCLOS has given the Archipelagic State the authority to determine the sea lanes. Hence, the state may determine the sea lines as appropriate to the conditions to balance the interests of investors and international traffic and present them to the IMO. Sometimes there may not be a balanced solution and one of the parties is forced to give up his right. Undoubtedly, the investor's lack of knowledge of such interests in the Archipelagic Waters can cause the investor to face challenges. Therefore, scrutinizing these matters in the text of IIAs as well as separate reports of states regarding the related aspects of the Archipelagic Waters and investment can clear the way for the investor.

In order to clarify the investor's path, education of the basic dimensions of investment in the Archipelagic Waters plays an important role. The education should be considered in two parts by states, investors, or experts in the field of foreign

investment. First, the role of the origin state must be considered. Education of the investor by the state of origin should create a clear path and provide a precise framework for its investors. So, at the very beginning, it is the duty of the investor's government to provide a detailed framework. Second, the role of the host state must be considered. Proper education by the host state is also effective in attracting foreign investors. On the one hand, official bodies and agencies of the Archipelagic States play a direct role in attracting investors by effective training and creating a transparent framework for foreign investors. On the other hand, states work indirectly in educating investors and attracting them; It means that states first train experts and then those experts work in attracting investors through comprehensive education.

Finally, it is important to note that in the process of foreign investment in the Archipelagic Waters, education about the dimensions of investment in these waters, attracting investors to existing businesses in the Archipelagic State and also creating new businesses in line with investment and economic growth of the state, are connected to each other. In addition, the relationship between investment and business is a mutual one. It means that in an Archipelagic State like Indonesia, some business areas are limited to which foreign investors can invest in that area. The same investment can provide new businesses that help the growth of the Archipelagic State's economy. However, in order to establish a successful mutual relationship, an investor in the Archipelagic Waters must be fully

trained and aware of the basic dimensions of the investment.

THE SUPREME COURT FUMBLES SCHOOL PRAYER IN *KENNEDY V. BREMERTON SCHOOL DISTRICT*

JULIE D. PFAFF*

The Supreme Court's June 27, 2022, decision in *Kennedy v. Bremerton School District*[1] called into question over 75 years of Establishment Clause jurisprudence as it relates to school prayer and blurred the line between church and state in the public-school setting. In *Kennedy*, a high school football coach lost his job after he repeatedly prayed alone, and with students, on the 50-yard line of the football field following school football games.[2] A

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[1] Kennedy v. Bremerton School District, 142 S. Ct. 2407 (2022). Justice Gorsuch delivered the majority opinion in which Chief Justice Roberts, Justice Thomas and Justice Barrett joined and in which Justice Kavanaugh joined, except as to Part III-B. Justice Thomas and Justice Alito filed concurring opinions. Justice Sotomayor filed a dissenting opinion, in which Justice Breyer and Justice Kagan joined.

[2] *Id.*

divided Supreme Court rejected the District's Establishment Clause concerns, instead characterizing Coach Kennedy's prayers as personal religious observances protected by the Free Exercise and Free Speech Clauses of the First Amendment.[3] The dissenting opinion argued that the majority mischaracterized the prayers as private while the record revealed that the prayers were in fact demonstrative public displays in which Coach Kennedy consistently invited students to join.[4] As such, the dissent found that Coach Kennedy's prayers were a clear violation of the Establishment Clause of the Constitution.[5] This article will trace the development of the major Establishment Clause jurisprudence as it relates to school prayer, beginning with the Supreme Court's decision in *Engle v. Vitale*[6] and evaluate the competing factors considered by the Justices in *Kennedy v. Bremerton School District*. Finally, this article will discuss the limitations and implications of the decision in *Kennedy*, particularly as they relate to the ambiguous test promulgated by

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[3] *Id.*

[4] *Id*. at 2433.

[5] *Id*. at 2434.

[6] Engel v. Vitale, 370 U.S. 421 (1962). *See also* Mark Strasser, *Religion in the Schools: On Prayer, Neutrality, and Sectarian Perspectives*, 42 AKRON L. REV. 185, 185–87 (2009) (noting that while *Engle* was the first school prayer case, Everson v. Bd. Of Educ., 330 U.S. 1 (1947) "marked the beginning of modern Establishment Clause jurisprudence" holding that the Establishment Clause had been incorporated against the states through the Fourteenth Amendment and by articulating the expansive limitations imposed by the Establishment Clause.).

the majority; the glaring absence of a critical element of the majority's test—a discussion of the legislative intent of the Establishment Clause; and the limitations of the Court's decision to make its analysis heavily dependent upon the facts of the case. This article focuses exclusively on school prayer however, it is important to note that Establishment Clause jurisprudence touches a variety of educational areas including Financing,[7] curriculum,[8] and use of school facilities for sectarian purposes.[9] All of these areas are critical to the understanding of the role of the Establishment Clause in public education but are not within the purview of this article.

I. Early School Prayer Cases - State Sponsored Prayer

A. Engel v. Vitale

Education—and more specifically school prayer—has been at the epicenter of the Supreme Court's First Amendment Establishment Clause jurisprudence.[10] The first public school prayer case

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[7] *See, e.g.*, Carson as next friend of O. C. v. Makin, 142 S. Ct. 1987 (2022).
[8] *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987).
[9] *See, e.*g., Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).
[10] *See* R. Collin Mangrumt, *Shall We Pray? Graduation Prayers and Establishment Paradigms*, 26 CREIGHTON L. REV. 1027 (1993); Amanda Harmon Cooley, *The Powerful Problem of Prayer at Public School Board Meetings*, 43 CARDOZO L. REV. 573, 579 (2021) (noting that "[t]he net

decided by the Supreme Court was *Engel v. Vitale*.[11] In *Engel,* the New York State Board of Regents, a governmental agency with supervisory authority over the state's public school system, composed a non-denominational prayer to be recited by students at the beginning of each school day in the presence of the teacher.[12] This prayer, which was adopted by the Board of Education of the Union Free School District, No. 9 (the "District"), stated as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[13] The parents of ten students sued the District in New York State Court, arguing that the prayer adopted by the public school violated the Establishment Clause of the First Amendment.[14] The New York Court of Appeals sustained the lower court's order upholding the power of the state to incorporate the recitation of the Regents' prayer into the public-school day, provided that the school did not compel student

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result of this decision-making has been a prohibition on coercive, majoritarian school prayer that harms conscientious liberty and risks degradation of religion, as this type of religious exercise in the public school environment violates the Establishment Clause.)

[11] *Engle*, 370 U.S. 421.

[12] *Id.* at 422.

[13] *Id.*

[14] Engel v. Vitale, 191 N.Y.S.2d 453 (Sup. Ct. 1959), *aff'd*, 11 A.D.2d 340, (1960), *aff'd*, 176 N.E.2d 579 (1961), *rev'd*, 370 U.S. 421, 82 (1962). *See also* U.S. Const. amend. I.; Everson v Board of Education, 330 U.S. 1 (1947) (incorporating the Establishment Clause to the acts of state and local governments).

participation in the prayer. The United States Supreme Court granted certiorari.[15]

The Supreme Court held that the District's daily classroom prayer promulgated by its Board of Regents was a religious activity that violated the Establishment Clause of the Constitution, despite the fact that student participation was not mandatory.[16] In so holding, the Court relied heavily on the historical underpinnings behind the separation of church and state, noting:

> By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services.[17]

The Court was not persuaded by the state's argument that the Establishment Clause was not implicated when prayer was non-denominational and student

[15] Engel v. Vitale, 11 A.D.2d 340 (1960), *aff'd,* 176 N.E.2d 579 (1961), *rev'd,* 370 U.S. 421 (1962).
[16] *Engel*, 370 U.S. 424.
[17] *Id.* at 429.

participation voluntary, stating, "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."[18] Despite the Court's supposition that coercion was not necessary to create an Establishment Clause violation, the Court dismissed the notion that prayer, even when cast as voluntary, was free of the indicia of coercion, stating: "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[19] Significantly, the *Engel* decision signaled the Court's refusal to find any Establishment Clause violation de minimis and not worthy of protection.[20] Moreover, the *Engel*

[18] *Id*. at 430.

[19] *Id.* at 431. *See also* Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 377 (1992) ("Coerced worship is one way to understand school prayer; all the students are required to participate in this little worship service")

[20] *Engel*, 370 U.S. 436 ("To those who may subscribe to the view that because the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment: '(I)t is proper to take alarm at the first experiment on our liberties. * * * Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?'")

decision came to stand for the proposition that there was a clear and delineated constitutional wall of separation between Church and State in public schools.

B. *School District of Abington Township, PA v. Schempp*

Just one year later, the Supreme Court strengthened its decision in *Engle* when it revisited school prayer in the case of *School District of Abington Township, PA v. Schempp*.[21] *Schempp* was a companion case in which Pennsylvania and Maryland laws requiring schools to begin each day with readings from the Bible were challenged by parents.[22] The Pennsylvania law required the reading of at least ten verses from the Holy Bible "without comment, at the opening of each public school on each school day" and provided that "[a]ny child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian."[23] The Maryland law required the "holding of opening exercises in the schools of the city, consisting primarily of the reading, 'without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer.'"[24] Like the Pennsylvania law, a child could be excused from the Bible reading upon written request by a parent or

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[21] Sch. Dist. Of Abington Twp., Pa. v. Schempp, 374 U.S. 203 (1963).
[22] *Id.*
[23] *Id*. at 205 (internal quotations omitted).
[24] *Id*. at 211 (internal quotations omitted).

guardian.[25] After conflicting outcomes were reached by lower courts, the Supreme Court granted certiorari.[26]

As in *Engel*, the Supreme Court began its discussion in *Schempp* by reflecting on the role of religion in the nation's history and government, maintaining that "[t]he fact the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings…"[27] However, the Court noted, juxtaposed to these deeply held religious convictions was the equally compelling promise of religious freedom which was instigated by the religious persecution suffered by the Founding Fathers.[28] From this footing the Court rejected the contention that the Establishment Clause forbade only governmental preference of one religion over another, arguing that the First Amendment's purpose was "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[29] It was from this perspective that the Court articulated the following test of whether a state-sponsored religious exercise violated the Establishment Clause:

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[25] *Id.* at 211, note 4.
[26] *Id.* at 212.
[27] *Id.* at 213.
[28] *Id.*
[29] *Id.* at 217 (citing Everson v. Bd. Of Educ., 330 U.S. 1, 31-32 (1947)).

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause, there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[30]

Upon applying this test, the Court concluded that the Pennsylvania and Maryland laws were religious exercises which violated the Establishment Clause.[31] As in *Engel*, the Court rejected the argument that the Establishment Clause was not implicated when student participation in the religious exercise was voluntary—a fact, the Court noted, which "furnishes no defense to a claim of unconstitutionality under the Establishment Clause."[32]

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[30] *Id*. at 222.
[31] *Id*. at 224–25.
[32] *Id. at 225; see also id*. at 208 (Edward Schempp further testified that he considered and rejected the idea of having his children excused from attendance at the exercises because he believed, among other things that the children's relationships with their teachers and classmates would suffer.).

II. Muddying the Waters - The Lemon Test and its Impact on School Prayer

A. Lemon v. Kurtzman

While not a school prayer case, a discussion of Establishment Clause jurisprudence must include a brief discussion of the *Lemon* test, as promulgated in *Lemon v. Kurtzman.*[33] In *Lemon*, the Court considered whether Pennsylvania and Rhode Island statutes, which provided state aid to church-related elementary and secondary schools violated the Establishment Clause.[34] To evaluate the relationship between government and religion, the Court fashioned the now infamous *Lemon* test, articulated as follows: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion,[35] finally, the statute must not foster 'an excessive government entanglement with religion.'"[36] While acknowledging that the legislative purposes of the Pennsylvania and Rhode Island statutes showed no indication that the legislative intent was to advance religion, the Court found that both statutes fostered impermissible degrees of entanglement.[37] The Rhode Island statute

[33] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[34] *Id.*
[35] *Id.* at 612–13 (internal citations omitted). This prong of the *Lemon* test incorporates the Court's language in *Schempp*, 374 U.S. 203, 222.
[36] *Lemon*, 403 U.S. 602, 612–13 (internal citations omitted).
[37] *Id*. at 613.

provided salary supplements to teachers of secular subjects in parochial schools, which helped to fulfill the religious mission of the church.[38] The Pennsylvania statute reimbursed parochial schools for teachers' salaries, textbooks, and instructional materials.[39] In both cases the Court concluded that the state statutes posed the possibility of a progression leading toward the establishment of a state endorsed religion.[40]

The *Lemon* test became the standard upon which the Court, albeit reluctantly,[41] based its decision in the forthcoming school prayer cases beginning with *Wallace v. Jaffree*.[42]

B. Wallace v. Jaffree

In *Wallace v. Jaffree*, the parents of three public school students challenged the constitutionality of an Alabama statute which authorized a one-minute period of silence in all

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[38] *Id*. at 617–20.
[39] *Id*. at 620–22.
[40] *Id*. at 624–25.
[41] *Lemon* has faced substantial criticism since its promulgation. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (SCALIA, J., concurring in judgment) (collecting opinions criticizing *Lemon* and noting that the *Lemon* test was like a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried. . ." *See also* Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (REHNQUIST, J., dissenting and noting that *Lemon's* "three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine. . .")
[42] Wallace v. Jaffree, 472 U.S. 38 (1985).

public schools for the purposes of meditation or voluntary prayer.[43] Despite the binding Supreme Court precedent in *Engel* and *Schempp*, the Alabama District Court concluded that "the establishment clause of the first amendment to the United States Constitution does not prohibit the state from establishing a religion."[44] The District Court acknowledged its holding was contrary to Supreme Court precedent, stating, "in cases involving the federal constitution, where correction through legislative action is practically impossible, a court should be willing to examine earlier precedent and to overrule it if the court is persuaded that the earlier precedent was wrongly decided."[45] The Eleventh Circuit disagreed and reversed.[46] The Supreme Court granted certiorari.[47]

In its brief opinion the Court concluded that it need not look any further then the first prong of the *Lemon* test in order to dispose of the issues presented in the case:

> In applying the purpose test, it is appropriate to ask "whether government's actual purpose is to endorse or disapprove of religion." In this case, the answer to that question

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[43] *Id.*

[44] Jaffree v. Bd. Of Sch. Comm'rs of Mobile Cnty., 554 F. Supp. 1104, 1128 (S.D. Ala.), *aff'd in part, rev'd in part and remanded sub nom.*

[45] *Id*. at 1127.

[46] Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *aff'd in part*, 466 U.S. 924 (1984), *and aff'd*, 472 U.S. 38 (1985).

[47] *Wallace*, 472 U.S. 38.

> is dispositive. For the record not only provides us with an unambiguous affirmative answer, but it also reveals that the enactment of § 16–1–20.1 was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose.[48]

Since the Court concluded that the legislative intent was to return prayer to the public schools, as opposed to merely protecting a student's right to engage in voluntary prayer during a moment of silence, the Court found that the statute was a state endorsement of prayer and a clear Establishment Clause violation.[49]

In a concurring opinion, Justice O'Connor suggested using an endorsement test to evaluate the state statute.[50] The endorsement test, which Justice O'Connor first set forth in *Lynch v. Donnelly*, proposed refining the first two prongs of the *Lemon* test to require courts to examine whether the government's purpose is to endorse religion and whether the statute actually conveys a message of

[48] *Id.* at 56. Here, Justice Stevens explicitly references the endorsement analysis offered by Justice O'Connor in Lynch v. Donnelly, 465 U.S. 668, 687 (1984).
[49] *Id.* at 59. *See also* William P. Marshall, *The Constitutionality of School Prayer: Or Why* Engel v. Vitale *May Have Had It Right All Along*, 46 CAP. U. L. REV. 339, 353 (2018)(stating that: "Notably, Wallace did not conclude that any moment of silence would be improper, only that Alabama's was improper because of its particular history.").
[50] *Wallace*, 472 U.S. 38, 67.

endorsement.[51] Justice O'Connor reasoned that the Endorsement Test was useful because "of the analytic content it gives to the *Lemon*-mandated inquiry into legislative purpose and effect."[52] Thus, *Wallace* marked the first time the Endorsement Test was introduced in the context of school prayer.

Wallace would perhaps have been of greater import if the Court could have reached the second and third prong of the *Lemon* test. Unlike *Engel* and *Schempp*, the Alabama statute at issue in *Wallace* did not mandate the reading of a particular prayer or Bible verse, rather, students were free to engage in any religious exercise or no religious exercise.[53] Furthermore, fear that the law might coerce non-observing individuals was of little concern, as no one would know how another used their period of silence.[54] Since these questions were not reached however, the Court had little opportunity to use

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[51] *Id.* (citing Lynch v. Donnelly, 465 U.S. 668, 687 (1984)).
[52] *Id*. at 69.
[53] Mark W. Cordes, *Prayer in Public Schools After Santa Fe Independent School District,* 90 KY. L.J. 1, 10 (2002) (noting that "[i]n many respects, the statute in *Wallace* avoided some of the most serious concerns identified in *Engel* and *Schempp*. Most notably, no prayer or reading was prescribed, and thus any prayer that might occur was completely of a student's own choosing. This avoided the problem of prescribed prayer very much at the heart of *Engel* and *Schempp*. Moreover, since no content was provided, there was no endorsement of an official religious view, a significant concern in *Schempp*. Finally, although coercion was not the focus of either of the earlier decisions, to the extent it might be a consideration, it seemed to be nonexistent in *Wallace* since no one would know how any particular student used the minute of silence.").
[54] *Id.*

Wallace to clarify the application of *Lemon's* second and third prongs. Thus, the *Lemon* test persevered despite criticism.[55]

III. The Element of Coercion

A. Lee v. Weisman

Lee v. Weisman marked another significant development in Establishment Clause jurisprudence in school prayer cases because it signified the introduction of the coercion test—a test which required the Court to evaluate whether the state exercised control over the religious activity and, more specifically, whether the student's participation in the religious activity had an indicia of coercion.[56] In *Lee*, the Supreme Court was confronted with the question of whether a non-sectarian prayer given by a member of the clergy at a middle-school graduation ceremony in the Providence School District violated the Establishment Clause.[57] *Lee* was noteworthy because it represented the first case in which the Court considered whether a prayer that took place outside of school hours was a violation of the Establishment Clause.[58] The District Court applied

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[55] *See supra* note 41.
[56] Lee v. Weisman, 505 U.S. 577 (1992). *See also* Sara Grossman, *The Football Game Prayer Decision: How the Supreme Court Dropped the Ball in Santa Fe*, 38 HOUS. L. REV. 615, 620–22 (2001).
[57] *Lee*, 505 U.S. 577 (1992).
[58] Bridget Asplund, *First Amendment – Establishment Clause – Student-Led, Student-Initiated Prayer at Football Games Violates the Establishment Clause – Santa Fe Independent*

the *Lemon* test, holding that invocations and benedictions in public school graduations violated the Establishment Clause of the First Amendment.[59] The United States Court of Appeals for the First Circuit affirmed [60] and the Supreme Court granted certiorari.[61]

Like the courts below, the Supreme Court found an Establishment Clause violation. The majority opinion, authored by Justice Kennedy, avoided the use of the *Lemon* test, but did not discard it.[62] Rather, the Court revisited the element of coercion originally raised by the Court in *Engel*. Unlike *Engel*, where the Court found that coercion was unnecessary to an Establishment Clause violation,[63] Justice Kennedy emphasized the

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School District v. Doe, 530 U.S. 290 (2000)., 13 SETON HALL J. SPORT L. 97, 106 (2003).

[59] Weisman v. Lee, 728 F. Supp. 68 (D.R.I.), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *aff'd*, 505 U.S. 577 (1992).

[60] Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990), *aff'd,* 505 U.S. 577 (1992).

[61] *Lee*, 505 U.S. 577.

[62] *Id.* at 587 (stating: "We can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured. Thus we do not accept the invitation of petitioners and amicus the United States to reconsider our decision in *Lemon v. Kurtzman*. . ."); *see also* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398, (1993) (SCALIA, J., concurring in judgment and noting the Court avoided using the Lemon test in *Lee* without repudiating it)

[63] William P. Marshall, *The Constitutionality of School Prayer: Or Why Engel v. Vitale May Have Had It Right All Along*, 46 CAP. U. L. REV. 339, 353 (2018) (stating "To be sure, the introduction of coercion into the Establishment Clause inquiry was not completely novel. There was, for

importance of coercion, even indirect coercion, stating:

> What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy. We need not look beyond the circumstances of this case to see the phenomenon at work. The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. [64]

A concurring opinion written by Justice Blackmun and joined by Justices Stevens and

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example, a reference to the constitutional problems raised by government coercion of religious belief raised in *Enge*l . . . But *Engel* also made clear that there was no coercion component in its Establishment Clause analysis").

[64] *Lee*, 505 U.S. 577, 592–93.

O'Connor emphasized that while coercion clearly violated the Establishment Clause, it was not required because even a public school's conveyance that a particular religion is favored or preferred is a violation.[65] An additional concurring opinion, penned by Justices Souter, Stevens and O'Connor, further advocated for the use of the Endorsement Test, arguing that government endorsement of religion, even without coercion, violated the Establishment Clause.[66] Thus, while the Justices disagreed on the proper test to apply, they seemed to agree that public school officials cannot direct the performance of a formal religious exercises without violating the Establishment Clause.[67]

B. Santa Fe Independent School District. v. Doe.

Santa Fe Independent School District v. Doe tested whether student led prayer at a school sponsored event violated the Establishment Clause.[68] The Santa Fe Independent School District had a policy permitting the student council chaplain to deliver a prayer over a loudspeaker before each home varsity football game. In practice, these prayers appealed to "distinctively Christian beliefs."[69] Mormon and Catholic students challenged this

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[65] *Id.* at 604.
[66] *Id.* at 609
[67] *Id. at* 586. *See also* Mark W. Cordes, *Prayer in Public Schools After Santa Fe Independent School District,* 90 KY. L.J. 1, 10 (2002).
[68] *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 (2000).
[69] *Id.* at 299.

practice, among others, claiming it was a violation of the Establishment Clause.[70] While proceedings were pending in the District Court, the School District adopted a different policy which, with regard to football games, authorized two student elections; the first to decide whether prayer should be delivered at football games, and the second to choose which student would deliver it.[71] The students subsequently voted to permit the prayer and selected a student to deliver it.[72] The District later amended the policy to remove the word "prayer," substituting the words "messages," "statements," and "invocations."[73]

The District Court entered an order precluding the District's new policy, concluding that prayer before football games coerced student participation in religious events.[74] The Court of Appeals reversed in part, holding that, nonsectarian student-led prayer approved by a vote of the students was permissible at high school graduation ceremonies because of the solemness of the occasion, but not at high school sporting events.[75] The Supreme Court granted the school district's petition for certiorari, limited to the question of whether the District's policy permitting student-led, student-

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[70] *Id.* at 294.
[71] *Id.* at 297.
[72] *Id.* at 297–98.
[73] *Id.* at 298.
[74] *Id.* at 299.
[75] Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806 (5th Cir. 1999), *aff'd*, 530 U.S. 290 (2000).

initiated prayer at football games violated the Establishment Clause.[76]

Writing for the Court, Justice Stevens concluded that the policy was a violation of the Establishment Clause. The Court rejected the District's argument that the Establishment Clause was inapplicable to its policy because the invocations were private student speech, not public speech.[77] While the Court acknowledged that there was "a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protects" it determined that the pregame invocations were not private speech.[78] In support of this position, the Court noted that the invocations were authorized by District policy and took place on school property at school-sponsored and school-related events; the invocations were broadcast over the school's public address system; and, the school's name appeared on uniforms, banners, signs, and apparel.[79] The Court concluded that "[i]n this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration."[80]

After addressing the public nature of the speech, the Court next considered the coercion test

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[76] *Santa Fe*, 530 U.S. 290, 301.
[77] *Id*. at 302.
[78] *Id.*
[79] *Id.* at 307–08.
[80] *Id*. at 308.

articulated in *Lee*,[81] summarily rejecting the District's argument that coercion was absent when prayer was student selected and took place at an extracurricular activity.[82] First, the Court noted that while the choice of a student speaker may be an action attributable to the students,
the decision to hold the election was an action attributable to the District.[83] Second, the Court emphasized that for some students such as cheerleaders, players, and members of the band, attendance at school football games was compulsory.[84] Even for those whom attendance was not compulsory, the Court recognized the "immense social pressure" or "genuine desire" a student may feel to attend.[85] Furthermore, the Court noted that even if each student voluntarily decided to attend the game, the pregame prayer still retained its coercive element:

> For "the government may no more use social pressure to enforce orthodoxy than it may use more direct means." As in *Lee*, "[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter

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[81] *Lee*, 505 U.S. 577.
[82] *Santa Fe,* 530 U.S. 290, 302.
[83] *Id.* at 311.
[84] *Id.*
[85] *Id.*

> to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." The constitutional command will not permit the District "to exact religious conformity from a student as the price" of joining her classmates at a varsity football game.[86]

Finally, the Court addressed the District's argument that Doe's facial challenge to the District policy was premature because there was no guarantee that any of the student led invocations would be religious in nature. Here, with strong dissent from three Justices,[87] the Court applied, and implicitly reaffirmed, the validity of the *Lemon* test—finding that District policy failed the first prong of *Lemon* because the context in which the policy was adopted reflected that the clear purpose of the policy was to promote prayer.[88]

The Court's application of multiple tests in *Santa Fe* did little to resolve concerns about the efficacy of the *Lemon* test, or to resolve the confusion in Establishment Clause jurisprudence.[89] Additionally, since the Court granted certiorari over the limited issue of whether student-initiated prayer at a school football game violated the Establishment Clause, the reach of the *Santa Fe* decision was

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[86] *Id.* at 312 (internal citations omitted).
[87] Id. at 319–20 (discussing the *Lemon* test's inconsistent application).
[88] *Id* at 314–15.
[89] Grossman, *supra* note 56.

undefined.[90] It was perhaps this ambiguity that led to *Kennedy v. Bremerton Area School District*.[91]

IV. Dismantling the Constitutional Wall Between Church and State

A. Kennedy v. Bremerton Area School District

In 2022, the Supreme Court upended its long line of school prayer jurisprudence when it decided *Kennedy v. Bremerton Area School District*. Football Coach Joseph Kennedy sued the Bremerton Area School District (hereinafter "District") for violating the First Amendment's Free Speech and Free Exercise Clauses after he was placed on administrative leave for ignoring the District's directives to stop leading his team and others in mid-field prayers immediately following school football games.[92]

1. History of the Case

Coach Joseph Kennedy was employed as a football coach at Bremerton Area High School from 2008 until approximately 2015.[93] Immediately following each game, Coach Kennedy, a practicing

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[90] *Id.*
[91] Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1228 (W.D. Wash. 2020), *aff'd*, 991 F.3d 1004 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 857 (2022), and *rev'd,* 142 S. Ct. 2407 (2022), and *vacated and remanded*, 43 F.4th 1020 (9th Cir. 2022).
[92] *Id.*
[93] *Kennedy*, 443 F. Supp. 3d 1223, 1228.

Christian, delivered a short prayer on one knee at the 50-yard line.[94] According to Coach Kennedy, he felt compelled to "give thanks through prayer, at the end of each game, for what the players had accomplished and for the opportunity to be a part of their lives through the game of football."[95] When Coach Kennedy began his prayers in 2008 he prayed alone, however eventually players joined him in his prayer. According to Coach Kennedy, a majority of the team eventually took part.[96] Coach Kennedy also delivered inspirational speeches with religious references, as well as pre- and post-game locker room prayers.[97]

In early September 2015, the District learned of Coach Kennedy's prayers when a coach from an opposing team informed the District that Coach Kennedy had invited his team to join him in prayer.[98] On September 11, 2015, the Athletic Director confronted Coach Kennedy about his prayer, after which Coach Kennedy posted on Facebook that he might get fired for praying.[99] On September 17, 2015, the District wrote Coach Kennedy a letter telling him to stop his practice of giving religious

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[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id. See also* Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1011 (9th Cir. 2021) (The Ninth Circuit opinion includes the additional fact that the coach who informed the District of Coach Kennedy's prayer did so approvingly–stating he thought it was "pretty cool" that the District permitted Coach Kennedy's religious activity).

[99] *Id.*

inspirational talks and leading prayer in the locker room because of Establishment Clause concerns.[100] Coach Kennedy initially complied with the District's request, but in October he began making media appearances stating that he intended to pray after the October 16, 2015 game.[101] True to his word, Coach Kennedy prayed on the 50-yard line after the game, surrounded by cameras and joined by players, coaches, and a state representative.[102]

On October 23, 2015, the District sent Coach Kennedy another letter notifying him of his non-compliance with the September 17 letter and informing him that his duties as an assistant coach included the supervision of players in the locker room following games and continued until the players were out of the dressing rooms and released to their parents.[103] The District further offered to explore possible religious accommodations for Coach Kennedy.[104] Despite the District's directives, Coach Kennedy continued praying on the 50-yard line following the next three games.[105] On October 28, 2015, the District placed Coach Kennedy on paid administrative leave.[106] It also renewed its offer to discuss religious accommodations with Coach Kennedy, which he declined to do.[107]

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[100] *Id.*
[101] *Id.* at 1230.
[102] *Id.*
[103] *Id.*
[104] *Id*. at 1231.
[105] *Id.*
[106] *Id.*
[107] *Id.*

2. Procedural Posture

On August 9, 2016, Coach Kennedy filed a Complaint in the U.S. District Court for the Western District of Washington alleging that the District violated his First Amendment rights to free speech and free exercise by limiting his practice of post-game prayer.[108] Coach Kennedy moved for a preliminary injunction ordering the District to cease discriminating against him in violation of the First Amendment, reinstate him as football coach, and allow him to kneel and pray on the 50-yard line.[109] The Court denied Coach Kennedy's motion and Kennedy appealed.[110]

The Ninth Circuit affirmed finding that Coach Kennedy's prayers were delivered in his capacity as a public employee and were unprotected speech. The Supreme Court denied certiorari, however Justices Alito, Thomas, Gorsuch and Kavanaugh issued a concurring opinion stating the Ninth Circuit's understanding of the free speech rights of public school teachers was troubling and may justify review in the future.[111] In particular, Justice Alito noted that under the Ninth Circuit's interpretation, a teacher may be prevented from bowing their head in a silent prayer in the school cafeteria if they were in view of students.[112] The case

[108] *Id.* at 1231–32. Kennedy also raised five claims under Title VII of the Civil Rights Act.
[109] *Id.* at 1232.
[110] *Id.*
[111] Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 636 (2019).
[112] *Id.* at 636.

then returned to the District Court where both parties moved for summary judgment.[113]

The District Court first analyzed whether the District violated Coach Kennedy's First Amendment rights to free speech and free exercise by limiting his practice of praying at the 50-yard line. The Court's analysis relied on the Ninth Circuit's First Amendment retaliation test set forth in *Eng v. Cooley*,[114] which requires asking five questions:

> (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech.[115]

In applying this test, the District Court concluded that Coach Kennedy spoke as a public employee when he engaged in his prayers, not a private citizen. The Court noted:

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[113] *Kennedy*, 443 F. Supp. 3d 1223, 1232.
[114] 552 F.3d 1062, 1070 (9th Cir. 2009).
[115] *Kennedy*, 443 F. Supp. 3d 1223, 1233.

> Kennedy's speech was uniquely tied to his job. Kennedy's sincerely-held beliefs did not allow him to pray just anywhere about anything; he was required to pray on school-controlled property about a school-sponsored event. The place and manner of Kennedy's speech also gave it a unique effect that derived from his position. . . And indeed, whether Kennedy intended it or not, his prayers did have an impact: players joined Kennedy at the 50-yard line for years despite evidence that some would not have done so if Kennedy were not a coach.[116]

The District Court next considered the District's justification that it disciplined Coach Kennedy to avoid an Establishment Clause violation.[117] In its analysis, the Court applied both the Endorsement Test as well as the Coercion Test, concluding that Coach Kennedy's 50-yard line prayers failed both.[118] In its endorsement analysis, the District Court noted that "speech from the center of the football field immediately after each game [ ] conveys official sanction" because a reasonable observer would conclude that the school was

[116] *Id.* at 1236.
[117] *Id.* at 1237.
[118] *Id.* at 1238.

allowing a Christian prayer to occur.[119] With regard to coercion, the Court stated:

> But even more than the perception of school endorsement, the greatest threat posed by Kennedy's prayer is its potential to subtly coerce the behavior of students attending games voluntarily or by requirement. Players (sometimes via parents) reported feeling compelled to join Kennedy in prayer to stay connected with the team or ensure playing time, and there is no evidence of athletes praying in Kennedy's absence. Kennedy himself testified that, "[o]ver time, the number of players who gathered near [him] after the game grew to include the majority of the team." This slow accumulation of players joining Kennedy suggests exactly the type of vulnerability to social pressure that makes the Establishment Clause vital in the high school context. As anyone who has passed through that fraught stage of life can confirm, there is no time when the urge to join majority trends is greater. But when it comes to religion, the Establishment Clause forbids government actors from using

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[119] *Id.*

this pressure to promote conformity.[120]

Finally, the District Court considered Coach Kennedy's argument that the District's directive violated the Free Exercise Clause because it specifically targeted Coach Kennedy's religious conduct.[121] The Court concluded that even if this is the case, the District had a compelling interest in avoiding an Establishment Clause violation. The Court also noted that the District's application of its directive was narrowly tailored to protect Coach Kennedy's rights—the District offered Coach Kennedy a religious accommodation, however he rejected or ignored the District's attempts at accommodations.[122] Accordingly, the District Court granted the District's Motion for Summary Judgment[123] and Coach Kennedy appealed.[124]

The Ninth Circuit affirmed the District Court. With regard to Kennedy's free speech claim, the Ninth Circuit concluded that the record clearly reflected that Coach Kennedy's speech was made pursuant to his official duties.[125] The court noted that Coach Kennedy engaged in a "media blitz" to generate support from the community.[126] And, in

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[120] *Id.* at 1239 (internal citations omitted).
[121] *Id.* at 1240.
[122] *Id.*
[123] *Id.* at 1245. The Court also considered Coach Kennedy's Title VIII claims, however these will not be discussed here.
[124] Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004 (9th Cir. 2021).
[125] *Id.* at 1015.
[126] *Id.* at 1017.

seeking this support, individuals were encouraged to rush the District's field (which was not open to the public) to join Coach Kennedy in "a conspicuous prayer circle that included students."[127]

> An objective observer would know, in advance of the October 16 game, BSD made clear that the field was not open to the public, specifically denying access to other religious groups. Yet, Kennedy used his access as a school employee to conduct his religious activity. Viewing this scene, an objective observer could reach *no other conclusion* than that BSD endorsed Kennedy's religious activity by not stopping the practice . . .[128]

To address the concerns raised by Justices Alito, Thomas, Gorsuch and Kavanaugh, the Ninth Circuit noted that Coach Kennedy's prayers were of a wholly different character then a teacher engaging in a silent prayer before a meal in the school cafeteria: "Kennedy insisted that his speech occur while players stood next to him, fans watched from the stands, and he stood at the center of the football field."[129]

The Ninth Circuit next considered Coach Kennedy's Free Exercise claim noting that a policy like the District's directive to Coach Kennedy which

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[127] *Id.* at 1018.
[128] *Id.*
[129] *Id.* at 1015 (citing Kennedy II, 139 S. Ct. at 636 (Alito, J.)).

restricted his religious conduct, "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."[130] "A state interest in avoiding an Establishment Clause violation 'may be characterized as compelling,' and therefore may justify content-based discrimination."[131] The court concluded that the District's directive was "narrowly tailored to the compelling state interest of avoiding a violation of the Establishment Clause."[132] Moreover, the District had no other means to avoid an Establishment Clause violation since Coach Kennedy refused their invitation to discuss a religious accommodation in favor of kneeling in prayer on the 50-yard line immediately after the game in view of students and spectators.[133] The court also affirmed the District Court's dismissal of Coach Kennedy's Title VII claims.[134] Coach Kennedy filed a Petition for writ of certiorari, which was granted by the Supreme Court on January 14, 2022.[135] The case was argued on April 25, 2022. On June 27, 2022, the Supreme Court issued its Opinion overruling the Ninth Circuit and holding that The Free Exercise and Free Speech Clauses of the First Amendment protected Coach Kennedy's personal religious observances.[136]

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[130] *Id*. at 1019–20 (citing Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993)).
[131] *Kennedy*, 991 F.3d 1004, 1020 (citing Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112 (2001)).
[132] *Id.*
[133] *Id*.
[134] *Id.* at 1021.
[135] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 857 (2022).
[136] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

3. The Supreme Court's Framing of the Facts

The Court's analysis of a legal issue usually begins with a recitation of the relevant facts. The depth of treatment given to the facts of each case varies. Here, the majority and dissenting opinions contained an extensive discussion of the facts.[137] The dissenting opinion even took the unusual step of including photographs as evidence of the facts upon which it relied.[138] While facts were replete in the Supreme Court's analysis, the majority opinion and the dissenting opinion framed the facts entirely differently. The majority opinion, written by Justice Gorsuch and joined by Justices Roberts, Alito, Barrett, and Kavanaugh (in part)[139] characterized Coach Kennedy's prayer as a short, private, personal prayer.[140] They concluded that "[t]he contested exercise before us does not involve leading prayers with the team or before any other captive audience."[141] The dissenting opinion, written by Justice Sotomayor and joined by Justices Breyer and Kagan, vehemently disputed this characterization, noting that Coach Kennedy's prayers only came to the attention of the District after Coach Kennedy invited the opposing team's coaches and players to join him in prayer.[142] Referencing the District Court

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[137] *Id.*
[138] *Id.* at 2436–39.
[139] Justices Thomas and Alito filed concurring opinions.
[140] *Kennedy*, 142 S. Ct. 2407, 2422.
[141] *Id.*
[142] *Id.* at 2435.

record and including media accounts and photographs from the event, Justice Sotomayor wrote:

> Kennedy recounted that he initially prayed alone and that he never asked any student to join him. Over time, however, a majority of the team came to join him, with the numbers varying from game to game. Kennedy's practice evolved into postgame talks in which Kennedy would hold aloft student helmets and deliver speeches with "overtly religious references," which Kennedy described as prayers, while the players kneeled around him.[143]

The interpretational difference seems, in part, to result from the majority's focus on Coach Kennedy's conduct only during the October 14th, 16th, 23rd, and 26th games.[144] The dissent's analysis considered Coach Kennedy's established practice of praying with players prior to the October games.[145] The time periods under consideration alone, however, do not fully account for the factual dispute.

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[143] *Id.* at 2435–36 (internal citations omitted). *See also* Aaron Blake, *Gorsuch and Sotomayor's Extraordinary Factual Dispute*, THE WASHINGTON POST (June 29, 2022,) https://www.washingtonpost.com/politics/2022/06/29/gorsuch-sotomayor-praying-coach/ (last accessed August 12, 2022).
[144] *Kennedy*, 142 S. Ct. 2407, 2417–19.
[145] *Id.* at 2435–39.

Take, for example, the October 16 game. The majority stated that on October 14th, Coach Kennedy's counsel sent a letter to school officials stating that his sincerely held religious beliefs compelled him to offer a post-game personal prayer at midfield and requested that the District to allow him his private religious expression.[146] The majority noted that Mr. Kennedy objected to the "logical implication of the District's September 17 letter, which he understood as banning him 'from bowing his head' in the vicinity of students, and as requiring him to 'flee the scene if students voluntarily [came] to the same area' where he was praying."[147] The majority continued by scolding the District's refusal to accommodate Coach Kennedy's request to offer a brief prayer on the field while students were busy with other activities, as well as the District's directive that Coach Kennedy abstain from engaging in any overt actions that may appear to endorse prayer while he was fulfilling his duties as a District employee.[148] Finally, the majority asserted that it was Coach Kennedy's prayer at the October 16th game that "spurred media coverage of Mr. Kennedy's dilemma and a public response from the District."[149]

Aside from the contents of Coach Kennedy's October 14th letter, the dissent viewed the events surrounding the October 16th game almost entirely differently. First, the dissent noted that after Coach Kennedy sent the letter, but before the October 16th

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[146] *Id*. at 2417.
[147] *Id*.
[148] *Id.* at 2422–23.
[149] *Id.* at 2418.

game, Coach Kennedy made multiple media appearances to publicize his plans to pray at the 50-yard line.[150] This allegation stands in stark contrast to the majority's assertion that media coverage did not begin until after the October 16th prayer.[151] The dissent stated that as a result of the media coverage, the District received emails, letters, and calls, many of them threatening.[152] Next, the dissent focused on the contents of the District's letter, a topic not addressed in depth in the majority's opinion.[153] The dissent stated that the District's letter disputed Coach Kennedy's assertions that he had not invited anyone to pray with him.[154] Further, the dissent observed that while Coach Kennedy's letter claimed that his prayers occurred on his own time, after the completion of his duties as a football coach, the District argued that Coach Kennedy was still on duty immediately following the football game, until the time when players are released to their parents or otherwise allowed to leave.[155] Finally, the dissent asserted that the District had no objection to Coach

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[150] *Id.* at 2437.
[151] *Id.* at 2418. The timing of the media coverage is particularly relevant because it goes to whether the prayer was truly private, as the majority contended, or public as the dissent believed.
[152] *Id.* at 2437–38.
[153] *Id.* at 2417.
[154] *Id.* at 2437.
[155] *Id.* *See also Id.* at 2426 (the majority disputes Coach Kennedy's post-game obligations, stating that during the postgame period coaches were free to attend briefly to personal matters, such as checking sports scores on their phones and greeting friends and family in the stands).

Kennedy returning to the stadium when he was off duty to pray.[156]

These perceived factual differences are not insignificant. In her dissent, Justice Sotomayor referred to the majority's opinion as "misreading the record" and included photos of Coach Kennedy kneeling in prayer with students.[157] For the most part, the factual differences in the majority and dissenting opinions seem to stem from their divergent beliefs that certain facts are more relevant to their Constitutional inquiry than others. However, in one circumstance the majority's version of the facts seem to lack evidentiary support—specifically with regard to when Coach Kennedy enlisted the media to garner support for his "private" prayer.

The majority characterizes the Coach Kennedy prayer at the October 16th game as the impetus for media coverage.[158] A review of media coverage prior to the October 16th game paints a different picture. Between October 14th and October 16th, Coach Kennedy gave televised public interviews on nationwide news outlets such as *Fox and Friends*[159] and *Good Morning America*[160] to garner support for his intended October 16th prayer. The *Seattle Times* also interviewed Coach Kennedy

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[156] *Id*. at 2438.
[157] *Id*. at 2436–39.
[158] *Id*. at 2418.
[159] *See* Fox and Friends, FOX NEWS, (October 15, 2015) https://archive.org/details/FOXNEWSW_20151015_100000_FOX__Friends.
[160] *See* Good Morning America, ABC NEWS, (October 16, 2015) https://abcnews.go.com/GMA/video/high-school-football-coach-fired-praying-players-34517396.

and ran a story about his anticipated post-game prayers.[161] Additionally, the "Support Coach Joe Kennedy" Facebook page made multiple posts in anticipation of the October 16th game sharing media appearances and asking for public support.[162] All of these media appearances lend credence to the dissent's version of the facts surrounding the public nature of the October 16th prayer.

4. Pitting the Establishment Clause Against the Free Exercise and Free Speech Clauses

In addition to the factual dispute surrounding Coach Kennedy's prayers, the Court also expressed disagreement as to the operative legal principles governing Coach Kennedy's case—specifically whether the Free Exercise Clause [163] and Free Speech Clause were dispositive, as Coach Kennedy and the majority argued, or whether the Establishment Clause was dispositive, as the District and the dissent maintained.

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161 Matt Calkins, *Why Bremerton Coach Joe Kennedy's Stance on Postgame Prayer is Admirable,* THE SEATTLE TIMES, (October 15, 2015 at 7:40 p.m.) https://www.seattletimes.com/sports/high-school/why-bremerton-coach-joe-kennedys-stance-on-postgame-prayer-is-admirable/

162 *See Support Coach Kennedy*, FACEBOOK, https://www.facebook.com/supportcoachkennedy?fref=ts (last visited December 16, 2022).

163 The Free Exercise Clause of the First Amendment to the U.S. Constitution states: "Congress shall make no law … prohibiting the free exercise" of religion.

The majority claimed that the proper legal analysis must first consider whether Coach Kennedy demonstrated an infringement of his rights under the Free Exercise and Free Speech Clauses. If he carried these burdens, the District must then show that its actions were justified.[164] The majority began by evaluating Coach Kennedy's Free Exercise claim, noting Coach Kennedy could meet his burden of proving a free exercise violation in a number of ways, including "by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'"[165] If Coach Kennedy made such a showing, the Court would subsequently find a First Amendment violation "unless the government can satisfy 'strict scrutiny' by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest."[166] The majority found that Coach Kennedy carried his burden, concluding that it was uncontroverted that Coach Kennedy was engaged in a sincerely held religious practice of giving thanks through prayer.[167] The Court likewise found that the District's challenged policies were neither neutral nor generally applicable.[168]

Next, the majority contemplated Coach Kennedy's free speech argument by considering the interplay between Coach Kennedy's free speech

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[164] *Kennedy*, 142 S. Ct. 2407, 2421.
[165] *Id*. at 2421–22.
[166] *Id*. at 2422.
[167] *Id*.
[168] *Id*.

rights and his status as a government employee.[169] Citing *Pickering v. Board of Ed. of Township High School Dist.*,[170] the majority stated the first inquiry was into the nature of the speech at issue. If, for example, a public employee like Coach Kennedy were to speak pursuant to his official duties, the Free Speech Clause would not shield him from the District's control and discipline. However, if Coach Kennedy were to speak as a citizen addressing a matter of public concern, the Court should proceed to a second step in which it balances the competing interests surrounding the speech and its consequences:[171]

> [I]t seems clear to us that Mr. Kennedy has demonstrated that his speech was private speech, not government speech. When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech "ordinarily within the scope" of his duties as a coach. He did not speak pursuant to government policy. He was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a

[169] *Id.* at 2423.
[170] 391 U.S. 563 (1968).
[171] *Kennedy*, 142 S.Ct. 2407, 2423.

> coach. Simply put: Mr. Kennedy's prayers did not "ow[e their] existence" to Mr. Kennedy's responsibilities as a public employee.[172]

Finally, the majority dismissed the District's argument that its suspension of Coach Kennedy was essential to avoid an Establishment Clause violation, stating, "the District effectively created its own 'vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other,' placed itself in the middle, and then chose its preferred way out of its self-imposed trap."[173] In so doing the majority made clear that *Lemon* had been abandoned.[174] In its place, the majority determined that the Establishment Clause should be analyzed in light of history and its original meaning, noting that "[T]he line that courts and governments must draw between the permissible and the impermissible has to accor[d] with history and faithfully reflec[t] the

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[172] *Id.* at 2424.

[173] *Id*. at 2427.

[174] While *Lemon* has been discarded, it has not been expressly overruled. Moreover, it appears that *Lee* and *Santa Fe* have not be similarly cast off. In an attempt to distinguish the facts in *Kennedy* from that of *Santa Fe*, the majority claims that in *Santa Fe* attendance at football games was required for cheerleaders, members of the band and the team members themselves. The majority maintains that students were not required or expected to participate in Mr. Kennedy's prayers. The majority, however, does not address whether attendance at Bremerton football games was required for cheerleaders or team members.

understanding of the Founding Fathers."[175] However, in the majority's view, this history apparently did not include the past 60 years of the Court's school prayer jurisprudence.[176]

While the majority believed the *Kennedy* case was centered around the contours of the Free Exercise and Free Speech Clauses, the dissent characterized the case as one which struck at the

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[175] *Kennedy*, 142 S.Ct. 2407, 2428 (internal quotations omitted). *But see* Christopher J. Roederer, *The Establishment Clause: An Empty Vessel Filled with Lemon(s)*?, 47 U. DAYTON L. REV. 483, 521 (2022) ("Although Justice Gorsuch cites James Madison for this view, he fails to acknowledge that James Madison had argued that the history and tradition of Congressional legislative prayer, which the Court used to justify the practices in *Marsh v. Chambers, and in Town of Greece*, violated the Establishment Clause.").

[176] Ira C. Lupu & Robert W. Tuttle, *Kennedy v. Bremerton School District – A Sledgehammer to the Bedrock of Nonestablishment,* American Constitution Society Blog (June 28, 2022), https://www.acslaw.org/expertforum/kennedy-v-bremerton-school-district-a-sledgehammer-to-the-bedrock-of-nonestablishment/ (last accessed August 12, 2022) ("Having swept aside the last sixty years of non-establishment law, what did the Court put in its place? Without elaboration or example, the opinion tells us that "the Establishment Clause must be interpreted by 'reference to historical practices and understandings.' [citations omitted] '[T]he line' that courts and governments 'must draw between the permissible and the impermissible' has to 'accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.' And what would those practices and understandings be? They would most certainly not include the teachings of the School Prayer Cases and their progeny, which time after time require the exclusion of worship from public school practices.").

heart of the Establishment Clause.[177] Accordingly, the dissent focused its analysis on the principles of endorsement and coercion, observing that families should be able to "entrust public schools with the education of their children ... on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family."[178] Additionally, the dissent cautioned that the State exerts substantial coercive power over schools through mandatory attendance requirements, as well as great authority over children, who are uniquely susceptible to coercive pressures.[179] With these principles in mind, the dissent concluded that Coach Kennedy's post-game prayers smacked of both endorsement and coercion. According to the dissent, endorsement occurred because Coach Kennedy was a District representative during football games; the timing and location of his prayers occurred during a school sporting event; the playing field was accessible only to students and school employees; and, despite the fact the game itself had ended, Coach Kennedy's responsibilities continued until the players went home.[180] Coercion occurred because students faced immense social pressure to conform, and because of the tangible and intangible

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[177] *Kennedy*, 142 S.Ct. 2407, 2434 (stating "[t]his case is about whether a public school must permit a school official to kneel, bow his head, and say a prayer at the center of a school event. The Constitution does not authorize, let alone require, public schools to embrace this conduct.").
[178] *Id*. at 2442.
[179] *Id*.
[180] *Id*. at 2443.

benefits of a coaches' approval, including extra playing time, a letter of recommendation, and additional support in college athletic recruiting.[181] When considering the tensions between Coach Kennedy's speech interests, religious exercise, and the Establishment Clause, the dissent concluded that the District's interest in avoiding an Establishment Clause violation justified both its time and place restrictions on Coach Kennedy's speech and his exercise of religion.[182]

Finally, the dissent criticized the majority's annihilation of the *Lemon* test stating that "*Lemon* summarized 'the cumulative criteria developed by the Court over many years' of experience 'draw[ing] lines' as to when government engagement with religion violated the Establishment Clause."[183] In place of *Lemon*, the dissent complains that the majority sets forth a vague "history and tradition test" that offers no guidance to educators and replaces more logical precedent and purpose.[184]

In sum, over the dissent's fervent objections, the Court held that The Free Exercise and Free Speech Clauses of the First Amendment protected Coach Kennedy's post-game prayers.[185]

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181 *Id*.
182 *Id*. at 2445 (*citing* Garcetti v. Ceballos, 547 U.S. 410 (2006); Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., 391 U.S. 563 (1968)).
183 *Kennedy*, 142 S. Ct. 2407, 2449.
184 *Id*. at 2450.
185 *Id*. at 2411.

V. Implications and Complications

The decision in *Kennedy* presents several problems. First, although the majority has discarded the *Lemon* test in favor of a historical approach to Establishment Clause analysis, the historical approach it suggests is largely undefined. The new test promulgated by Justice Gorsuch is only given a few sentences of explanation:

> In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted "'by reference to historical practices and understandings'". "'[T]he line'" that courts and governments "must draw between the permissible and the impermissible" has to "'accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers'". An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some "'exception'" "within the Court's Establishment Clause jurisprudence."[186]

[186] *Id*. at 2428 (internal citations and quotations omitted) *citing* Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 576 (2014); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2086 (2019); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 294 (1963) (Brennan, J., concurring).

This brief description offers little elucidation for future courts that are left to grapple with this issue. As one constitutional scholar notes: "Justice Gorsuch unceremoniously buried the *Lemon* test, but without developing a different test, beyond making a now-fashionable bow toward the 'original meaning and history' of constitutional language in his interpreting of the Establishment Clause. However, this gesture rings hollow because he never cites historical or textual evidence that supports his interpretation of the clause—chiefly because there is none to be had."[187] Additionally, as noted by the dissent, such a test offers little to no guidance to school administrators, faculty, and staff, who will be on the front lines of future Establishment Clause battles.[188]

In addition to the nebulous test proposed by the majority, the majority neglected to substantively discuss the very history it deemed critical to its proposed analysis.[189] This was not because there was no precedent for such a discussion—*Engel* and its progeny addressed the original meaning of the

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[187] Richard A. Epstein, *Unnecessary Church-State Confusion: The Case of the Praying Coach Does Little to Sort Out an Enduring American Conflict of Rights*. THE HOOVER INSTITUTE (July 25,2022), https://www.hoover.org/research/unnecessary-church-state-confusion.

[188] *Kennedy*, 142 S. Ct. 2407, 2450.

[189] *See, e.g.*, *Kennedy*, 142 S. Ct. 2407, 2450 (Sotomayor J., dissenting: "The Court reserves any meaningful explanation of its history-and-tradition test for another day, content for now to disguise it as established law and move on.").

Establishment Clause at length. The majority, however, neither cited such analysis favorably nor directly considered the history's application to the case at hand. Certainly, the facts of prior school prayer cases are markedly different then *Kennedy*—*Engel* required students to recite a non-denominational prayer at the beginning of each school day.[190] *Schempp* considered Pennsylvania and Maryland laws which required schools to begin each day with Bible readings.[191] *Wallace* dealt with an Alabama statute which authorized a one-minute period of silence in all public schools for the purposes of meditation or voluntary prayer.[192] *Lee* considered whether a non-sectarian prayer given by a member of the clergy at a middle-school graduation ceremony violated the Establishment Clause.[193] Finally, *Santa Fe* considered a student led prayer at a school football game.[194] While the facts of these cases are easily distinguishable from those of *Kennedy,* history by its very nature, is unchangeable. Thus, the discussion of the historical evidence of the legislative intent of the Establishment Clause is directly relevant to the test proposed in *Kennedy* and its absence is not insignificant.

In *Engel,* for example, the Court undertook a lengthy analysis of the original meaning of the Establishment Clause, stating that the Founding Fathers perceived "one of the greatest dangers to the

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[190] *Engel*, 370 U.S. 421.
[191] *Schempp*, 374 U.S. 203.
[192] Wallace, 472 U.S. 38.
[193] *Lee*, 505 U.S. 577.
[194] *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290.

freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services."[195] The *Engel* Court acknowledged that government endorsement of prayer did not amount to a total establishment of religion, but found little solace in this proposition, stating:

> [I] n the words of James Madison, the author of the First Amendment: '(I)t is proper to take alarm at the first experiment on our liberties. ***Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?'[196]

Likewise, in *Schempp*, the Court used history to flatly reject any perceived governmental support of religion, noting that the Establishment Clause reflected the Framers' belief that "a union of

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[195] *Engel*, 370 U.S. 421, 431–33.
[196] *Id.* at 436.

government and religion tends to destroy government and to degrade religion."[197]

*Wallac*e, however, presents a different circumstance. While the majority spent little time on historical analysis, Justice Rehnquist's dissent contained an extensive discussion of the legislative intent of the Establishment Clause stating:

> The Framers intended the Establishment Clause to prohibit the designation of any church as a "national" one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the "incorporation" of the Establishment Clause as against the States via the Fourteenth Amendment in *Everson*, States are prohibited as well from establishing a religion or discriminating between sects. As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.[198]

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[197] *Schempp*, 374 U.S. 203, 221.
[198] *Wallace*, 472 U.S. 38, 113 (Rehnquist, J., dissenting).

Justice O'Connor too, included historical analysis in her concurrence. In response to Justice Rehnquist, she noted that public education was virtually nonexistent during the drafting of the Constitution. Accordingly, she reasoned that since few government-run schools existed, "it is unlikely that the persons who drafted the First Amendment, or the state legislators who ratified it, anticipated the problems of interaction of church and state in the public schools."[199]

In *Lee,* Justice O'Connor, joined by Justices Stevens and Souter again engaged in a lengthy reflection into the Framers' intent when drafting the Establishment Clause, concluding that history neither contradicts nor warrants reconsideration of the settled principle that the Establishment Clause forbids support for religion in general no less than support for one religion or some. [200] Justices Scalia, White and Thomas likewise penned a dissenting opinion in which they set forth their historical argument against forbidding prayer at a high school graduation ceremony.[201]

With such a rich body of historical analysis from which to draw, particularly in the context of school prayer, it is curious as to why the majority did not expound upon the test it offered. Despite this glaring absence, there are subtle indications as to how the Court may view future Establishment Clause

[199] *Id.* at 80.
[200] *Lee*, 505 U.S. 577, 609 (O'Connor J., Stevens J. and Souter J., concurring).
[201] *Id.* at 632.

cases, indications that warrant future observation and study. For example, the Majority includes a footnote favorably citing the historical examination suggested by Justice Gorsuch in his concurrence in *Shurtleff v. City of Boston*, and that of scholar Michael W. McConnell.[202] In *Shurtleff,* Justice Gorsuch identified the following traits of founding-era religious establishments: (1) government control over the doctrine of the established church; (2) government mandated attendance in the established church; (3) punishment of religious dissenters; (4) restricted political participation by dissenters; (5) preferential government financial support of the established church; and, (6) use of the established church for certain governmental functions.[203] A more thorough analysis of the concepts presented in the preceding footnote could have increased the credibility of the Court's decision. "If a Court abandons precedent too readily and without adequate explanation, observers may conclude that its decisions are driven by preference rather than principle."[204]

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[202] *Kennedy*, 142 S. Ct. 2407, 2429 note 5 (citing Shurtleff v. City of Boston, 142 S. Ct. 1583, 1603 (2022) and Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religio*n, 44 WM. & MARY L. REV. 2105, 2107 (2003)). *See also* Daniel L. Chen*, Kennedy v. Bremerton School District: The Final Demise of Lemon and the Future of the Establishment Clause,* 2022 HARV. J.L. & PUB. POL'Y PER CURIAM 21 (2022).
[203] Shurtleff v. City of Bos., Massachusetts, 142 S. Ct. 1583, 1609 (2022).
[204] Kermit Roosevelt III, *Polyphonic Stare Decisis: Listening to Non-Article III Actors*, 83 NOTRE DAME L. REV. 1303, 1305 (2008).

Additionally, the majority's fact-specific inquiry may have the unintended consequence of further limiting the precedential value of the *Kennedy* Opinion. In an attempt to characterize Coach Kennedy's prayers as "private" and "personal" the majority focused almost entirely on Coach Kennedy's actions.[205] Ironically, this fact-specific inquiry may limit the precedential value of the opinion.[206]

VI. Conclusion

Kennedy v. Bremerton represents a dramatic shift in Establishment Clause jurisprudence. Although *Kennedy* stated that the Establishment Clause must be interpreted by reference to historical practices and understandings, the Court engaged in no such historical analysis.[207] Moreover, as Justice O'Connor observed in *Wallace,* the public school system as we know it did not exist while the founding fathers were drafting the Establishment Clause, raising the question of whether it was even contemplated.[208] Accordingly, it will be important for future research to evaluate the application of this

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[205] Richard A. Epstein, *Unnecessary Church-State Confusion: The Case of the Praying Coach Does Little to Sort Out an Enduring American Conflict of Rights*. THE HOOVER INSTITUTE (July 25, 2022), https://www.hoover.org/research/unnecessary-church-state-confusion

[206] *Id*.

[207] *Kennedy*, 142 S. Ct. 2407, 2428.

[208] *Wallace*, 472 U.S. 38, 80.

historical test to the modern Establishment Clause concerns raised in public (and private) schools.

Future scholars might consider whether the *Kennedy* decision results in an overcorrection in public institutions—one in which the fear of litigation prompts the allowance of more religious speech. School districts and their advocates have already expressed concerned about how to manage religious speech in the wake of *Kennedy*. The School Superintendents Association released a statement saying that *Kennedy* was a "nightmarish" result for school districts because of the confusion as to "when prayer by a school official can be appropriate and whether a district can shield students adequately from perceived or actual religious coercion."[209] How these issues may play out is ripe for future study.

On the other hand, could the decision in *Kennedy* empower states and schools to adopt more statutes and policies permitting voluntary or student led prayer like the kind seen in *Wallace*[210] and *Santa Fe*?[211] In the last two years a number of states introduced legislation related to prayer in schools or at school-sponsored events.[212] While none of these

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[209] Mark Walsh, *Supreme Court Says High School Coach's Post-Game Prayers Protected by the First Amendment*. EDUC. WEEK, (June 27, 2022), https://www.edweek.org/policy-politics/supreme-court-says-coachs-post-game-prayers-were-protected-by-the-first-amendment/2022/06.
[210] *Wallace*, 472 U.S. 38.
[211] *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290.
[212] Bryan Kelley, *School Prayer and State Policy: Kennedy v. Bremerton School District Explained.* EDUCATION COMMISSION OF THE STATES, (Aug. 22, 2022),

bills passed, they were introduced prior to the *Kennedy* decision. Will states now see a renewed push for such legislation?[213] What about the fear that schools will become entangled with religion at taxpayers' expense? Will prayer in school be permitted or sponsored as long as students can opt out?[214] What about prayer that incorporates intolerance towards other religious groups, minorities, women, or LGBTQ students? All of these questions remain unanswered.

The lack of historical analysis, a nebulous test, and the fact-intensive analysis of the majority opinion in *Kennedy* will offer little pragmatic guidance for school administrators, faculty, and staff, and may limit the precedential value of the case. The practical effect of this shift has yet to unfold. Regardless, it is likely that increased policy action surrounding prayer in public schools and more court challenges are to come.

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https://ednote.ecs.org/school-prayer-and-state-policy-kennedy-v-bremerton-school-district-explained/.

[213] *Id.*

[214] *See* Lupu & Tuttle, *supra* note 176.

THE ROLE OF BLOCKCHAIN TECHNOLOGY IN CROWDFUNDED PRIVATE EQUITY SECONDARY TRADING

RUTH HUGHES*

SHAOKANG WANG**

I. INTRODUCTION TO CROWDFUNDING

A. Background

The Securities Act of 1933 (the "1933 Act") requires that issuers register with the SEC any "sale of securities" but includes several statutory exemptions from this requirement.[1] The listed exemptions resulted from extensive negotiation and compromise, in particular with those legislators who felt that cumbersome registration would slow any recovery in the financial market.[2] Thus, the

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[1] 15 U.S.C. 77D(a)(6) (1933).

[2] *See* James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29 (1959), at 37 which described the process of separating "public

Act prioritized disclosure to any offering to investors needing the most protection, either because of lack of sophistication or numbers of investors involved.[3] In general, the Act made a distinction between "public" and "private" offerings, requiring full offering registration only with a public offering.[4]

Crowdfunding, or the solicitation of financing from many investors using the internet, began organically as small entities and nonprofits used websites to allow people to fund their ventures in return for some tangible or intangible reward, but not ownership equity.[5] Because these entities were not selling "securities" as defined by the Securities Act of 1933, the solicitations were not covered by the registration requirements.[6] In particular, the traditional definition of "investment contract" used by the SEC to determine whether an offering is

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offerings" from "private offerings," the latter of which became one category of exemption from 1933 Act registration as currently codified at 15 U.S.C. 77d(a)(2).

[3] Landis, *supra* at 37. Milton Cohen, "*Truth in Securities Revisited*", 79 HARV. L. REV. 1340 (1965), 1348. Other transaction exemptions can be found at 15 U.S.C. 77d(a)(1)-(5), (7) (1933).

[4] Landis, *supra* note 2 at 37.

[5] CROWDFUNDING: A GUIDE TO RAISING CAPITAL ON THE INTERNET, 10 (Steven Dresner, ed. 2014); R. Kevin Saunders II, Note, *Power to the People: How the SEC Can Empower the Crowd*, 16 VAND. J. ENT &TECH. L. 945, 951-2 (2014).

[6] *See*, David Mashburn, *The Anti Crowd Pleaser: Fixing the Crowdfund Act's Hidden Risks and Inadequate Remedies*, 63 EMORY L. J. 127(2013), for a good summary of the origins of crowdfunding and the ability to raise money without registration requirements., 135-139.

subject to the 1933 Act registration requirement would not apply.[7] Thus, small businesses used these "reward based" crowdfunding websites to raise money for startup, growth or other capital needs without having to register any offering under the 1933 Act.[8]

In 2012 Congress passed the Jumpstart Our Business Startups Act (JOBS Act) which, among other things, created a new transaction exemption under the 1933 Act for equity offerings using web based crowdfunding.[9] While the 1933 Act had investor protection as its primary goal, the JOBS Act provisions targeted increasing the ability of small businesses to raise capital.[10] This article focuses on the expansion of private equity, the JOBS Act also

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[7] C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, 2012 COLUM. BUS. L. REV. 1, 8 (2012) which notes the offerings of rewards would not fit the definition given in SEC v. Howey for an "investment contract" which is also the traditional definition used for a security subject to the 1933 Act registration requirement. Howey states that an "investment contract" is "an investment of money in a common enterprise with an expectation of profits arising solely from the efforts of the promoter or third party." While the term "solely" has been changed by the courts to "significantly", the definition otherwise has been unchanged over the years. Bradford at 8.

[8] *Id*.

[9] *See* JOBS Act, Pub. L. No. 112-106, 126 Stat 306 section 3012 (2012) adding section 4 (a) (6) of the Securities Act of 1933, 15 U.S. C. section 77 (d) (a) (6) (2012).

[10] Michael Zeidel, *The JOBS Act: Did It Accomplish Its Goals?* HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE, https://corpgov.law.harvard.edu/2016/07/18/the-jobs-act-did-it-accomplish-its-goals/ (last visited Mar. 28, 2023).

sought to increase economic activity in the public market by easing restrictions on initial public offerings for "emerging growth companies."[11] In particular, this article, aims to study how the JOBS Act affects a company in expansion of private equity financing by creating a mechanism to create a consistent secondary market to trade private equity securities.

In allowing crowdfunding web portals to sell equity securities, small businesses now have the opportunity to raise significantly more capital at a lower cost than with reward crowdfunding.[12] Some commentators have also applauded the increased access for small investors to equity investment opportunities through crowdfunding.[13] However, this specific exemption for what would otherwise be considered a public offering has arguably made the line drawn between "private" and "public" offerings made in the original 1933 Act a bit less clear.[14] Thus,

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[11] *Id.*

[12] *See*, Gregory C. Dreschler, "*Wisdom of the Intermediary Crowd: What the Proposed Rules mean for Ambitious Crowdfunding Intermediaries*" 58 ST. LOUIS L. J. 1145 (2013) which cites President Obama's praise for the Act allowing "ordinary Americans to go online and invest in entrepreneurs they believe in."

[13] *See e.g.* Usha Rodrigues, *Securities Law Dirty Little Secret*, 81 FORDHAM L. REV. 3389 (2013), Jeff Thomas, *Making Equity Crowdfunding Work for the Unaccredited Crowd*, 4 HARVARD BUSINESS LAW REVIEW ONLINE 62, 63-4 (2014).

[14] Robert Thompson and Donald Langevoort, *Redrawing the Public-Private Boundaries in Entrepreneurial Capital Raising*, 98 CORNELL L. REV. 1573 (2013) has a good overview of the debate over this line of demarcation and the relationship between the 1933 Act and the JOBS Act.

the legislation and Securities and Exchange Commission (SEC) regulations have tried to balance this desired access to capital and investment opportunities with the goals of disclosure at the foundation of the 1933 Act. The JOBS Act requires that all equity crowdfunding offerings be made through an "intermediary" registered as a broker-dealer under the Securities Exchange Act of 1934.[15] These registered intermediary websites must monitor any issuer using their online sites to ensure that the issuer is providing all disclosures required by crowdfunding regulations.[16]

The law includes mandatory disclosure for crowdfunding issuers, in keeping with that central premise of the 1933 Act.[17] In drafting the regulations, one key issue was the appropriate amount of disclosure to require, balancing the needs of the issuer with the goal of adequately informing all investors of major risks.[18] In the final version of the legislation and regulation, required disclosure is substantially less than that required of a full

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[15] 15 U.S.C. 77d(a)(6)(C)(2012).
[16] 17 C.F.R. 227.301 (2016). This rule also describes the responsibility of intermediaries to ensure issuer compliance, including requirement that intermediaries remove non complaint issuers from their websites.
[17] 15 U.S.C. 77d(a)(d)(3) (2012) 17 C.F.R. 227.201 (2016).
[18] Joan MacLeod Heminway, *The Disclosure Debates: The Regulatory Power of an Informed Public,* 38 VT. L.REV. 827,844-847 (2014); R. Kevin Saunders, *Power to the People: How the SEC Can Empower the Crowd,* 16 VAND. J. ENT & TECH. L. 945, 970-971 (2014).

registration, but still ensures that prospective investors get information about the issuer.[19]

Rather than being reviewed and enforced by the SEC, the regulations rely on the intermediary to ensure that disclosure from the issuer to the public is adequate and that individuals are aware of all risks of investment.[20] The intermediary is ultimately responsible for ensuring issuer compliance with the applicable law and must take steps to ensure that offerings are not fraudulent.[21] Thus, the intermediary must conduct required background checks and deny access to the offering if the background checks shows any of the principals are disqualified.[22] Further, if the intermediary determines that an issuer is not complying with the SEC regulations, they are required to remove the issuer from their site.[23]

B. Overview of Types of Securities Offered under Regulation CF

The 1933 Act has never attempted to regulate the types of securities offered, but has focused instead on disclosure to ensure that investors have

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[19] 15 U.S.C. 77d(a)(d)(3) (2012); 17 C.F.R. 227.201 (2016). Full registration of an offering under the Securities Act of 1933 requires filing of Form S-1 while Regulation CF only requires filing of a Form C together with a business plan that gives basic information about the company, use of proceeds, the securities being offered and the intermediary in the sale.
[20] Michael Vignone, *Inside Equity Based Crowdfunding: Online Financing Alternatives for Small Business,* 91 CHI-KENT L. REV. 804, (2016).
[21] 17 C.F.R. 227.301.
[22] 17 C.F.R. 277.301 (c) (1).
[23] *Id.*

adequate information to evaluate all risks of investment.[24] The JOBS Act also allows issuers to use any investment vehicle as long as they give the appropriate disclosure to investors.[25] Data shows that equity crowdfunding offerings vary in the types of investment being offered; in addition to traditional offerings, such as common stock, promissory notes, limited liability company units and partnership units, offerings have included Simple Agreements for Future Equity (SAFE's), Simple Agreements for Future Tokens (SAFT's) and Securitized Tokens.[26] The recent trend in offering securitized tokens will be the focus of this article

SAFEs, SAFTs and Securitized Tokens[27] all share an innovative offering of securities that has grown rapidly under Regulation CF.[28] SAFE as a vehicle for documenting private equity investment was originated by one particular Regulation CF

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[24] Landis, *supra* note 2, at 34.

[25] Joseph M. Green and John F. Coyle, *Crowdfunding and the Not So Safe SAFE,* 102 VA L. REV. ONLINE 168 169 (2016), explains that the SEC made a conscious decision not to restrict the type of securities, trying to ensure maximum flexibility for issuers.

[26] Data retrieved from Form C's filed at www.sec.gov. All issuers using Regulation CF crowdfunding exemption to sell securities must file a Form C with the SEC that includes information about the issuer and the offering.

[27] Securitized tokens refer to digital tokens that used to represent a security or potential security in a company, such as a share of stock.

[28] Patricia H. Lee, *Crowdfunding Capital in the Age of Blockhain Based Tokens,* 92 ST. JOHNS LAW REV. 4,18 (2019).

intermediary, WeFunder.[29] The SAFE agreement gives an investor the right to purchase future equity in the offering company only if the company is successful in raising significant additional funding in the future, such as venture capital investment or an initial public offering.[30] In the meantime, pending such capital, SAFE investors do not have an equity stake in the company, shareholder rights and no rights to division of profits.[31] By its nature, crowdfunding can present young, resource poor companies with corporate governance demands when they suddenly have a large number of shareholders.[32] SAFEs avoid those demands by deferring shareholder status until a company had additional resources to manage the necessary corporate governance.

SAFTs have the same qualities as SAFEs but award tokens to investors rather than shares when the

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[29]*See* Green and Coyle, *supra* note 25 at 172. WeFunder continues to be dominant in SAFE offerings although other intermediaries also host SAFE offerings.

[30] Green and Coyle, *Supra* note 25 at 172-3.

[31] *Id.* The article correctly notes, however, that most startups and early stage companies do not issue dividends or have any ability to share profits even if they are selling common or preferred stock.

[32] *See e.g.* JW Verret, *Uber-ized Corporate Law: Toward a 21st Century Corporate Governance for Crowdfunding and App Based Investor Communications,* 41 IOWA J. CORP.L. 927, 930 (2016). *See also,* Martin Edwards, *The Big Crowd and the Small Enterprise: Intracorporate Disputes in the Close-But-Crowdfunded Firm,* 122 PENN ST. L. REV. 411, 444 (2018) explaining that "A corporation utilizing equity crowdfunding transitions overnight from a close corporation to a corporation with many quasi-public shareholders."

triggering event occurs.[33] Like SAFEs, SAFTs allow a young company to avoid costly, cumbersome corporate governance requirements, but the question arises as to why tokens would be preferable to shares as the ultimate investor reward. The answer may lie in the nature of the securitized tokens which are digital "coin" that can be used to represent ownership (present or future) or other interest in a company.[34] These digital securities exist only on a digital blockchain platform, also known as distributed ledger technology.[35] This article will discuss both the concept of digital securitized tokens and blockchain technology later, but in general studies seem to point to several perceived advantages of using digital securitized tokens in crowdfunding offerings: (1) use in determining demand or interest for a relatively new product or service; (2) use to determine the quality of a project where the degree of uncertainty is high; (3) allowing creation of a network separate from traditional governance; and

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[33] Juan Batiz-Benet, Marco Santori, Jesse Clayburgh, *SAFT Project: Toward a Compliant Token Sale Framework* (October 2, 2017) (Protocol Labs) is a whitepaper explaining the concept of the Simple Agreement for Future Tokens.
[34] Lee, *supra* note 28 at 19.
[35] *Id.* The article discusses security tokens and distributed ledger technology in Part II. In summary, a security token is a digital asset the attributes of which are entered by code into a platform designed to hold and trade that coded token. The platform used in the transactions is distributed ledger technology, or blockchain, platform that uses decentralized peer to peer "nodes" to verify all aspects of each coded transaction.

(4) mitigation of moral hazards.[36] This article will focus on the use of tokens to create a network and in particular to create the digital network needed for secondary trading of securities, particularly those issued in private equity crowdfunding campaigns.

C. Lack of Secondary Market for Crowdfunded Securities

Regulation CF requires that any purchaser of a security purchased in a crowdfunding campaign must agree not to sell that security for at least 12 months.[37] While this requirement is a regulatory obstacle to investors, the larger obstacle is the lack of a platform for secondary trading once that 12 month period is lifted.[38] Under the current system, investors must rely on a purely private market of potential purchasers for their securities.[39] If one

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[36] Anton Miglio, *Theories of Crowdfunding and Token Issues: A Review,* 15 J. OF RISK MANAGEMENT 218 (2022). The article provides an analysis of theoretical literature studying crowdfunding and token issues internationally. The first two findings focused on the use of tokens in crowdfunded ventures that had relatively high uncertainty and risk related to the products or the company itself. The network discussed in the article focused on the creative networking needed to solve problems, but this article will contend that it can also expand to the network needed for secondary trading.

[37] 17 C.F.R. section 227.501 (2016). For a good discussion of the resale restrictions, *see* Joan Heminway, *Selling Crowdfunded Equity: A New Frontier,* 70 OKLA. L. REV. 189, 200-201 (2017).

[38] Heminway, *supra* at note 18, 208-212.

[39] Similar to the traditional market for private placements, which have no platform, secondary trades are nothing more that individually negotiated agreements.

assumes that crowdfunding investors are motivated by the same desire for investment value growth and liquidity,[40] the current system does not provide those benefits to investors. This lack of secondary market is particularly difficult for the crowdfunding investors, many of whom need access to liquidity and would prefer not to wait for a liquidation event for their return on profit.[41]

D. Slow Growth of Crowdfunding

Both the popular and academic press have lamented the disappointing lack of growth and enthusiasm for Regulation CF Crowdfunding.[42] The

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[40] *See eg*, Sabrina Howell, Marina Niessner and David Yermack, *Initial Coin Offerings: Financing Growth with Cryptocurrency Token Sales,* European Corporate Governance Institute (ECGI) Finance Working Paper no. 564/2018 (2018). https://www.ecgi.global/sites/default/files/working_papers/documents/finalhowellniessneryermack.pdf (last visited Mar. 28, 2023).

[41] Heminway, *supra* note 37 at 211, stating that "Both the lack of the existence of a resale market and support for an unsustainable resale market may have adverse effects on the markets involved in equity crowdfunding." It should be noted, though, that this article does not advocate for secondary trading of crowdfunded securities.

[42] *See eg,* Jo Won, *Jumpstart Regulation Crowdfunding: What is Wrong and How to Fix It,* 22 LEWIS & CLARK L. REV. 1393 (2018), *Have the Wheels Fallen Off Regulation CF Crowdfunding*, April 19, 2017 retrieved from https://www.crowdfundinsider.com/2017/04/98769-wheels-fallen-off-reg-cf-crowdfunding/ (last visited Mar. 28, 2023).
Why Equity Crowdfunding Is Not Living Up to the Hype, Inc. Magazine, May 9, 2018, retrieved from https://www.inc.com/associated-press/equity-crowdfunding-

consensus in both circles is that the regulatory burdens are too time consuming and costly for both issuers and intermediaries.[43] However, firms are still registering as broker-dealers to become Regulation CF intermediaries indicating that the industry sees promise for Regulation CF Crowdfunding ventures and for that market.[44] After federal regulators and industry officials met to discuss the situation, Regulation CF requirements changed to increase the offering limit of the Regulation CF offerings, but did not make structural changes to the exemption.[45]

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investing-business-not-working-hype-investors-regulation-sec.html (last visited Mar. 28, 2023).

[43] *Id.* Won, *supra,* points out that while international crowdfunding campaigns have grown dramatically while US crowdfunding under Regulation CF has raised "less than 1% of the capital raised under the other crowdfunding models." He cites the reason as the "substantial transaction costs associated with complying with its disclosure requirements, which were not required under the other crowdfunding models" Won at 1405.

[44] As of September 30, 2022, there were a total of 81 FINRA approved Regulation CF funding portals (also known as intermediaries). https://www.finra.org/about/firms-we-regulate/funding-portals-we-regulate (last visited Mar. 28, 2023).

[45] In 2017,Crowdfund Insider reported that the SEC and the North American Securities Administrators Association (NASAA) as well as representative crowdfunding intermediaries had met to discuss the situation. "Have the Wheels Fallen Off" *supra* at note 39. In March 2021, the SEC announced final rules increasing the offering limit of Regulation CF offerings to $5 million as part of their efforts to streamline private equity offering rules. *See*, Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets Effective Date*:* March 15, 2021 at

Without any prospect of a regulatory structural change, intermediaries need to innovate in order to boost interest in these Regulation CF offerings. Use of digital securities and the attendant platforms may be one such innovation.[46] At least one intermediary, StartEngine, has identified providing secondary trading for these securities as another tactic to boost interest.[47]

II. RISE OF TOKEN OFFERINGS IN CROWDFUNDING

A. Summary of Token Offerings and Blockchain Technology

Tokens are a subcategory of digitally traded assets that typically use a decentralized system of verification to identify and verify the assets.[48]

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https://www.sec.gov/rules/final/finalarchive/finalarchive2020.htm

[46] Structural changes suggested have ranged from eliminating the resale restrictions to eliminating the investor restrictions, both of which are seen as onerous to Regulation CF offerings.

[47] *See* https://www.startengine.com/trade which states on the site that StartEngine Secondary is "One of the first markets in the US where non-accredited investors can publicly trade investments in startups that have raised capital via Regulation Crowdfunding.." The site highlights the ability of the users to "discover, buy, trade."

[48] The SEC has provided the definition of tokens in a variety of recent statements and opinions, including, for example, the Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Release No. 81207 (July 25, 2017, available at https://www.sec.gov/litigation/investreport/34-81207.pdf (commonly known as the DAO Report); *See also*, "Digital

Security tokens are those that have been identified as having the characteristics of a "security" using the Howey test.[49] The Howey test, enunciated by the United States Supreme Court, states that any investment contract is a "security", and therefore subject to regulation under federal law, if it is an investment of money in a common enterprise with the expectation of profit from the efforts of others.[50] While the SEC has recently issued at least one no action letter indicating that a specific token offering was not a "security,"[51] the trend in enforcement has been to assume that most token offerings are indeed

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Asset Transactions: When Howey Met Gary (Plastic)", June 14, 2018 Speech by William Hinman, Director of Corporation Finance, SEC, made at the Yahoo Finance All Markets Summit: Crypto retrieved from https://www.sec.gov/news/speech/speech-hinman-061418 (last visited Mar. 28, 2023).

[49] *See* Crosser, *Initial Coin Offerings as Investment Contract: Are Blockchain Utility Tokens*, Securities, 67 U. KAN. L. REV. 379 (2018) and Michael Mendelson, *From Initial Coin Offerings to Security Tokens, A U.S. Federal Securities Law Analysis,* 22 STAN. TECH. L. REV. 52 (2019) The SEC in the DAO Report, *supra* note 45, issued a strong opinion stating that token offerings could be securities and if defined as such would be subject to regulation.

[50] Securities and Exchange Commission vs. WJ Howey Co, et al, 328 U.S. 293 (1946).

[51] TurnKey Jet, Inc. SEC No-Action Letter, April 3, 2019 retrieved from http://www.sec.gov/divisions/corpfin/cf-noaction/2019/turnkey-jet-040219-2a1.htm. This letter noted that the specific use of funds, structure of the tokens and other unique aspects of the offering as support for its opinion that the tokens being sold were not "securities".

securities offerings.[52] In particular, tokens offered on digital platforms are "numbered entries on a blockchain-based electronic ledger. These ledger entries may indeed be structured to look very much like traditional 'securities'-representing promises to pay amounts in the future, ownership, and other interests in an entity, etc. …".[53]

The blockchain technology plays a central role in token offerings. Blockchain, also known as distributed ledger technology, was first introduced in 2009 by an anonymous source.[54] As described in a recent article, blockchain is "a kind of distributed ledger. It is 'distributed' in that there is no master copy. Any participant in the network can maintain an instantiation of the ledger, yet be confident that it matches all the others."[55] One of the benefits of using distributed ledger technology (DLT) is that the

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[52] *See e.g.* DAO Report, *supra* note 48, Hinman Speech supra note 48. *See also*, Joshua Ashely Klayman, "Mutually Assured Disruption: The Rise of the Security Token" in BLOCKCHAIN AND CRYPTOCURRENCY REGULATION 2019, 62 (Global Legal Insights 2019).

[53] Joshua Ashley Klayman, Lewis Rinaudo Cohen and Robin Sosnow, *There are Two Sides to the Initial Coin Offering Debate*, (Oct. 31, 2017), available at https://www.crowdfundinsider.com/2017/10/123863-perspective-two-sides-initial-coin-offering-debate/.

[54] *See,* Kevin Werbach ,*Trust but Verify: Why the Blockchain Needs the Law*, 33 BERKELEY TECH.L. J. 487, 489,498 (2018). Crypto lore has identified the "inventor" of Blockchain as Satoshi Nakamoto, a still unidentified individual or group of individuals. To maintain consistency, this article will refer to the platform as blockchain rather than distributed ledger technology.

[55] *Id*. at 500.

transactions are verified by multiple, unaffiliated parties and the ledger records all transactions on a public, transparent system.[56]

Thus, the transaction of initially issuing a security token using the blockchain technology can be summarized as follows: the issuer of the security token and the purchaser agree to terms regarding the price, voting rights, resale restrictions and the like. All of these terms are entered into code that is recorded on the blockchain platform.[57] Once the transaction is recorded, the platform acts as a secure repository for the token until the owner gives additional instructions.[58]

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[56] *Id.* at 502-3. In addition, on pages 510-11, the author explains that "With the blockchain, every new block reconciles its transactions across the entire system. Each participant knows that its copy of the ledger is identical to every other. The truth-or what scientists call the network's 'state'- is shared among them."

[57] Primavera De Filippi & Aaron Wright, BLOCKCHAIN AND THE LAW, 93 (2018).

[58] *Id.*

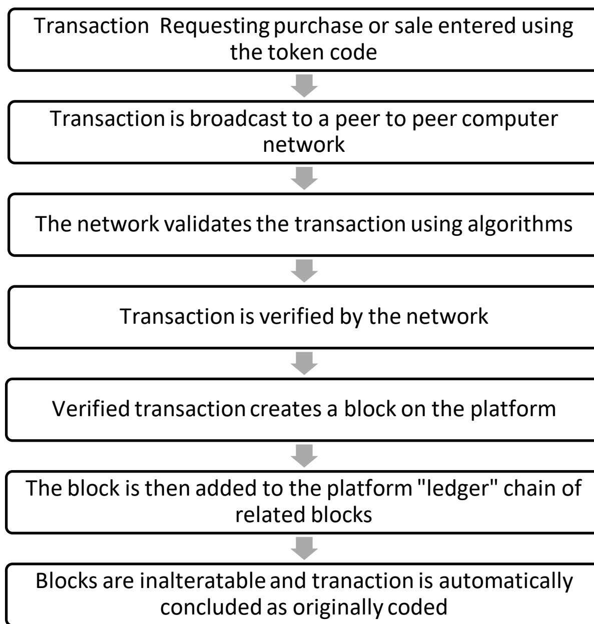

Figure 1 showing blockchain transaction

Several high profile businesses have commercialized blockchain into platforms that are recognized for a variety of legal transactions, including digitized contracts and securities transactions.[59] These digital platforms can facilitate transactions by using code to immediately communicate when the requirements for the transaction have been met.[60] In addition, the

[59] Etherium is one of the most prominent platforms and has garnered a large part of the commercial market share for blockchain transactions.
[60] De Filippi&Wright, s*upra n*ote 57 at 93.

transaction can occur almost instantaneously due to the automated nature of the transaction.[61]

B. Token Offerings in Crowdfunding

Since Regulation CF does not restrict the types of securities offered by issuers, crowdfunding campaigns have had a variety of securities offered. While debate in the academic and regulatory community has raged about whether a token is a "security", issuers and intermediaries in crowdfunding offerings have acknowledged that their token offerings are securities offerings by complying with applicable law.[62]

The first security token was offered in December 2017 by Medchain, Inc. Medchain is a very early stage software company focusing on the healthcare industry and was seeking in this offering to raise capital to invest in technology research and development.[63] Medchain's offering of a Simple Agreement for Future Tokens (SAFT) raised $ 467,396 from investors.[64] The Simple Agreement for Future Tokens, a protocol developed by a group

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[61] *Id.*
[62] For examples of the debate, *See eg* Crosser *supra* note 49; Jonathon Rohr, Aaron Wright*, Blockchain-based Token Sales, Initial Coin Offerings and the Democratization of Public Capital Markets* 70 HASTINGS L. J. 463 (2019).
[63] MedChain Offering Memorandum filed on December 29, 2017 with the SEC.
at
https://www.sec.gov/Archives/edgar/data/1726640/000166516017000720/offeringmemoformc.pdf (last visited Mar. 28, 2023).
[64] MedChain Offering Memorandum *Supra*.

at Protocol Labs/Cooley, allows an issuer to solicit funds in anticipation of a larger, future investment.[65] Subsequent crowdfunding offerings have moved away from the SAFT format and instead are offering opportunities to invest directly in Security Tokens or Securitized Tokens.[66] One reason for this shift may be the recognition that the SAFT does not offer the benefit to investors that investing directly in a token would offer.[67]

Another more recent example of a token offering is Halen Technologies, Inc. which offered "investment commitment tokens" for sale using the Ethereum blockhain platform.[68] These digital securities represent convertible debt and are seeking a minimum of $3,000,000 under the new SEC

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[65] *See*, Benet, et al *Supra* at note 33. The SAFT is similar to the Simple Agreement for Future Equity described at the beginning of this paper. However, unlike the SAFE, investors under a SAFT are never promised any ownership in the company but only tokens to "cash in" for future growth.

[66] *See,* Anthony Zeoli, *Initial Coin Offerings: Why the SAFT is DEAD*, www.crowdfundinsider.com/2018/03/131044-initial-coin-offerings-why-the-saft-is-dead/ (2018) which argues the original rationale for the SAFT was to allow issuers to avoid securities regulation. Since the SEC has taken the position that tokens and thus also SAFT's are securities in most cases, the SAFT serves no purpose. It should be noted that MedChain complied with federal securities regulation by complying with Regulation CF in its offering.

[67] *Id.*

[68] Halen Techologies Offering Memorandum filed on September 23, 2022 with the SEC at https://www.sec.gov/Archives/edgar/data/1877907/000166919121000859/offeringstatement.pdf

regulations for crowdfunding.[69] The intermediary for the offering was Akemona, Inc., a relatively new registered intermediary.[70] This more recent offering seems to represent the growing confidence of issuers and intermediaries that digital securities have gained popularity and acceptance.

Because tokens are digital securities, there is no instrument other than the digital code; the issuer and investor enter into a virtual investment contract with terms disclosed in the offering document.[71] For example, in the case of the Epigen, Inc. offering of securitized tokens, Epigen offered a fixed number of tokens that are given revenue sharing rights based on the issuer meeting certain financial benchmarks.[72] The tokens do not give investors any direct ownership interest in that case and so do not allow investors any role in corporate governance.[73]

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[69] The SEC increased the offering limit under Regulation CF to $5,000,000 in a final rule dated March 15, 2021. The SEC ruling is found at https://www.sec.gov/rules/final/2020/33-10884.pdf, page 147.

[70] Akemona, Inc registered as an intermediary on March 15, 2021 found at https://www.sec.gov/edgar/search/#/ciks=0001748730&entityName=AKEMONA%252C%2520INC%2520(CIK%25200001748730)

[71] *See eg,* Offering Memorandum Part II of Offering Statement (Exhibit to Form C) for EpigenCare, Inc. retrieved from https://www.sec.gov/Archives/edgar/data/1727821/000166516018000222/offeringmemoformc.pdf (last visited Mar. 28, 2023).

[72] *Id.*

[73] *Id.*

C. Risks and Benefits of Tokens

Tokens offer benefits to an early stage issuer, but also pose risks. Risks of token investment include the risk of fraud, breach of security, an uncertain regulatory environment and investor confusion.[74] Investment in digital assets, such as securitized tokens have particular risks related to their nature since they are so new and may be more vulnerable to economic downturns than other types of securities.[75] Security of the digital assets depends on the blockchain platform used to hold and, eventually, transfer the token. Halen Techonologies, for example, uses the Ethereum network for its token transaction mechanism; that network, like any network, is subject to disruption, breach or an eventual incompatibility with the digital assets being offered.[76] However, as noted by Halen in its offering memorandum, issuers could move the tokens to another blockchain network.[77]

Despite the risks, issuers and intermediaries have gravitated to tokens for their benefits. As

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[74] *See*, William Magnuson, *Regulating Fintech,* 71 VAND. L. Rev. 1167 (2018) for a good discussion of risks related to the FinTech industry, including digital assets such as tokens. *See also*, for example, the risks listed in the EpigenCare Offering Memorandum *supra* note 46 which states that "There is unpredictability regarding regulations for blockchain and cryptocurrency related or derived assets" explaining that there is a lack of clarity in current government regulations, as well as the potential for manipulation by "unsavory third parties" in the digital market.

[75] *Id*. At 1172.

[76] Halen Technologies Offering s*upra* at note 68.

[77] *Id*.

discussed previously, Regulation CF campaigns have not resulted in the capital growth anticipated and intermediaries have sought innovative ways to try and generate excitement in the financial markets for these offerings.[78] As discussed below, token offerings may have the characteristics needed to generate the excitement needed. Token offerings, as part of the growing fintech financial market, tap into certain investors' desire to invest in an innovative, albeit speculative, type of security.[79] Under the "herd theory" that investor excitement of an innovation in the financial markets should multiply to create additional interest in token offerings, because of their innovative nature.[80]

Since these token offerings do not give any ownership stake in the company, either present or future, small, early stage issuers do not have to worry about corporate governance. One concern with crowdfunding has been the burden on new ventures

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[78] *See eg* "Indiegogo Has Quietly Exited Equity Crowdfunding", https://www.crowdfundinsider.com/2019/03/145226-indiegogo-has-quietly-exited-crowdfunding/ Indiegogo, one of the leaders in reward crowdfunding, was expected to be an equally large presence in equity crowdfunding, but decided to withdraw as an intermediary. The article notes that because of the regulations and the relatively small cap on offerings, "Investment crowdfunding platforms are looking to scale by becoming broker-dealers and issuing securities under Reg D and A+. "

[79] Magnuson, *supra* at note 74 at 1183.

[80] Adam Hayes, *Herd Instinct: Definition, Stock Market Examples, & How to Avoid*, https://www.investopedia.com/university/behavioral_finance/behavioral8.asp (last visited Mar. 28, 2023).

that find themselves suddenly with large numbers of shareholders after a crowdfunding campaign selling shares of stock to a large number of purchasers.[81] Although the JOBS Act exempts companies using the crowdfunding exemption from registration as a public company, the corporate issuer who has sold shares using the crowdfunding exemption is still responsible for all duties to shareholders under state law.[82]

Another potential benefit derives from the accounting categorization of tokens. If tokens are not categorized as liabilities on a balance sheet, the early stage issuer financial statements appear stronger and not burdened by debt. While United States and international accounting standards have yet to develop a standard for cryptoasset (digital asset) accounting, all of the governing bodies

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[81] *See e.g.* J.W. Verret, *supra* note 32 at 930.

[82] Regulation CF Rule 12g-6 exempts crowdfunding issuers from registration under the Securities Exchange Act of 1934. The SEC in its final rule adoption explains that companies that would otherwise be required to register are exempt "provided the issuer is current in its ongoing annual report required…, has total assets at the end of its last fiscal year not in excess of $25 million and has engaged the services of a transfer agent registered with the commission…". https://www.sec.gov/rules/final/2015/33-9975 at 482-483. In contrast with token offerings, those companies offering ownership positions, such as common stock offerings, would generally have to comply with state corporation laws giving shareholders the right to elect directors at an annual meeting, potentially allowing the shareholders control over the operations of the company. See Model Business Corporation Act (2016 revision enacted on December 9, 2016), Section 8.03.

recognize that tokens are not a liability, but would be categorized most likely as an intangible asset for the purchaser and equity investment by the issuer.[83]

Token offerings also have an inherent benefit in the ability to have third party verification of these securities. Blockchain gives investors some sense of confidence of a third party verification of the tokens with any future trading or transactions.[84] This platform for a secondary market for crowdfunding issued securities may be the most potent benefit for issuers. In particular, the blockchain technology may allow for development for a trading platform available to all token investors in crowdfunding campaigns; a platform not necessarily available for other types of securities.[85]

III. ALTERNATIVE TRADING SYSTEMS

A. Background of Alternative Trading Systems

As noted previously in this paper, investors, including early stage investors, such as those in crowdfunding, value liquidity.[86] This focus on

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[83]"IFRS Accounting for Cryptoassets" at https://www.ey.com/Publication/vwLUAssets/EY-IFRS-Accounting-for-crypto-assets/$File/EY-IFRS-Accounting-for-crypto-assets.pdf . Cryptoassets are defined as "digital assets in which cryptographic techniques are used to regulate the generation of units of the asset and to verify their transfer between parties via a blockchain without a central party." *Id.*

[84] *See*, DeFilippi *supra* note 57 at 93 which explains the steps of a securities trading transaction using blockchain technology.

[85] *Id.*

[86] ECGI *supra* note 40 at 3.

liquidity and the ability to trade securities purchased in a secondary market highlight the need for a trading platform for securities purchased in a crowdfunding issuance.

In order to have a consistent secondary market for securities, investors need access to a platform for exchange to facilitate trades between willing buyers and sellers.[87] After the failure of unregulated trading exchanges in 1929, the Securities Act of 1934 required registration of securities exchanges and imposed specific requirements on those registered exchanges.[88] The purpose of such regulation was, and continues to be, to ensure fairness and transparency to the investing public in these secondary market transactions.[89] While these exchanges available to the public have always been regulated by the 1934 Act, private exchanges were not subject to regulation. For example, a broker dealer arranging trades between

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[87] For a nice background on securities exchanges see, Kristin Johnson, *Regulating Innovation: High Frequency Trading in Dark Pools*, 42 IOWA J. CORP. L. 833,839- 846 (Summer 2017).

[88] 15 U.S.C. section 78c (a) (1). The 1934 Act defines an Exchange subject to regulation as "any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities or functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.

[89] SEC Strategic Plan, https://www.sec.gov/about (last visited Mar. 28, 2023).

clients was not regulated, nor was a private exchange available only to members.[90]

With the advent of technology platforms able to facilitate trades, Alternative Trading Systems (ATS) began to appear on the market.[91] The SEC realized that they needed to update their regulatory structure and so adopted Regulation NMS (National Market System) to include registration of these ATS as regulated exchanges.[92] These rules use a test based on the actual functions of the platform to determine whether they are subject to regulation, including registration and compliance with requirements.[93] Functions of a platform that would lead to regulation include a platform or program that "(1) brings together the orders for securities of multiple buyers and sellers; and (2) uses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and

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[90] *See* "Statement on Digital Asset Securities Issuance and Trading", SEC Public Statement issued on November 16, 2018 for background on SEC regulation of trading in digital assets https://www.sec.gov/news/public-statement/digital-asset-securities-issuance-and -trading. In this statement, the SEC makes clear that regulation only applies to platforms that facilitate exchange between third parties and does not regulate transactions that only involve the parties.

[91] Johnson s*upra* note 87 at 854.

[92] Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844, 70863 (December 22, 1998) (Regulation of Exchanges and Alternative Trading Systems) (hereinafter Regulation ATS Adopting Release)

[93] 17 CFR 240.3b-16 (Exchange Act Rule 3b-16(a). See also Regulation ATS Adopting Release, *Supra.*

sellers centering such orders agree to the terms of the trade."[94]

Any platform requiring registration under this regulation is required to register as a broker dealer under Section 15 of the 1934 Act, [95] and to file an initial report on Form ATS at least 20 days before beginning operations.[96] As of September 20, 2022, 69 entities had registered as Alternative Trading Systems by filing Form ATS with the SEC.[97]

B. Alternative Trading Systems and Crowdfunding

Alternative Trading Systems are available for secondary trading of any securities, including those sold in securitized token offerings in

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[94] 17 CFR 240.3b-16(e) (Exchange Act Rule 3b-16(e)). Note that Rule 3b-16(b) excludes from regulation any entity that "performs only traditional broker dealer activities including (1) systems that route orders to a national securities exchange, a market operated by a national securities association or a broker-dealer for execution, or (2) systems that allow personal to enter orders for execution against the bids and offers of a single dealer if certain additional conditions are met."

[95] 17 CFR 242.301(b)(1) (Exchange Act Rule 301(b)(1).

[96] 17 CFR 242.301(b)(2)(i). In the Adopting Release, the SEC explained that Form ATS would allow the Commission to identify problems before operations begin and would thus better protect investors from potential impact. See Regulation ATS Adopting Release, *supra* note 69 at 70864.

[97] "Alternative Trading Systems with Form ATS on File with the SEC as of September 30, 2022 retrieved from https://www.sec.gov/foia/docs/atslist.htm. This list includes 42 platforms that only trade private equity securities; of those private equity platforms, 19 reference using either security tokens, blockchain technology or both.

Regulation CF crowdfunding campaigns. Thus, ATS platforms have the advantage of the securitized tokens using the blockchain technology to verify and track the token securities.[98] An opportunity, then, might exist for an existing crowdfunding intermediary, already registered as a broker- dealer intermediary under Regulation CF, to also provide a system for trading tokens sold by its issuer clients. One intermediary taking the lead with this idea is StartEngine. StartEngine registered as a Regulation CF intermediary in 2016 and had one of the first Regulation CF transactions on its site.[99] Since then, the site has been a leader in equity crowdfunding activity.[100]

In 2019, StartEngine publicized its intent to expand services to include trading; The CEO of

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[98] In an interview, Alexander Hoptner, CEO of the Borse Stuttgart in Germany explained that "For digital assets, the technology can replace clearing and custody institutions that are necessary for traditional securities today." *Stuttgart Stock Exchange and Digital Asset Trading: A Discussion with Alexander Hoptner, CEO of Borse Stuttgart,* https://www.crowdfundinsider.com/2019/04/146421-stuttgart-stock-exchange-and-digital-asset-trading-a-discussion-with-alexander-hoptner-ceo-of-borse-stuttgart/

[99] https://www.startengine.com

[100] https://www.startengine.com/blog/equity-crowdfunding-by-the-numbers-q3-22/ discloses the most recent figures comparing StartEngine crowdfunding activity as of June 30, 2022 with peers as follows: "StartEngine ranked among the front of the pack. In Q3, we posted a total of $41.8M raised between Reg. CF and Reg. A+ offerings combined. That puts us ahead of Wefunder's raise total by a whopping 28% and ahead of Republic's numbers by an astonishing 139%."

StartEngine articulated the company's growth plan as follows:

> Our priority in 2019 is getting registered as a broker-dealer and ATS (Alternative Trading System). Once registered, we will launch StartEngine Secondary, our planned trading platform, where investors can buy and sell shares that were originally issued by companies raising capital on StartEngine. StartEngine Secondary will use StartEngine Secure, our registered transfer agent. It is our intention that StartEngine Secure will allow StartEngine Secondary to function with the speed and efficiency expected by today's investors. The full implementation of StartEngine Secondary, though, is ultimately dependent upon the SEC's and FINRA's approval of StartEngine as a registered broker-dealer and an ATS.[101]

StartEngine ultimately was successful in obtaining its registration as an ATS.[102] While

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[101]https://www.startengine.com/trade On the same web page, the Question and Answer portion includes the following:

How does Secondary work?

Secondary allows investors to trade with each other in a peer to peer marketplace. Sellers can post offers to sell a specific number of shares by setting a minimum price. Buyers can post offers to buy a specific number of shares by setting a maximum price. If a match is made, then the trade is executed.

[102] StartEngine Secondary received approval for its ATS application from the SEC in July 2019. *See,* https://www.crowdfundinsider.com/2019/08/150578-

StartEngine had a clear plan for providing a secondary platform, company executives have also been clear on the obstacles to such a path. In a forum hosted by StartEngine, one of the panels was titled "Where to Trade Security Tokens." [103] In this session, StartEngine executives explained that they have taken steps to achieve their goal, including implementation of StartEngine Secure, a transfer agent registered with the SEC.[104] While the transfer agent cannot act as a trading platform, StartEngine's ultimate goal, the registered transfer agent can have a centralized database to hold all investor information, control trades (allow or block transactions) and to relay results of transaction to the blockchain.[105] Participants in this November 2018 panel noted the difficulty of operating an Alternative Trading System, explaining that an ATS must create liquidity solutions and achieve trading velocity to have an operational market for token trading.[106]

StartEngine's trading platform, StartEngine Secondary, has been operational since its approval in July 2019. On its site, StartEngine highlights its ability to allow investors to "discover, invest and trade."[107] This web intermediary has recently

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startengine-receives-ats-license-so-when-will-secondary-trading-in-crowdfunded-securities-start/

[103] *See* https://www.startengine.com/blog/where-to-trade-security-tokens/

[104] *Id.*

[105] *Id.*

[106] *Id*. Shari Noonan, CEO of Rialto Solutions, a registered ATS was particularly vocal on these points.[107] http://www.startengine.com/ trade

[107] http://www.startengine.com/ trade

expanded operations even further by acquiring one of its main competitors, SeedInvest.[108]

Thus, with a site such as StartEngine, the token issuance and trading on a blockchain platform would unfold as follows: As noted previously in Part II, the digital token represents a current or future ownership equity interest in an issuer. After agreement on all of the attributes of the security, those attributes would be coded and entered into the distributed ledger platform.[109] The token would remain recorded on the platform until a trade is requested.[110] If a buyer requests a purchase of tokens in that issuer, the buyer would enter the coded request onto the ledger platform which will broadcast transaction to the nodes on the platform.[111] The platform would seek sellers with matching terms and use the platform to attempt a match for a completed transaction.[112] Once the match is made, the

[108] https://crowdfundinsider.com/2022/10/197993-more-details-on-strartengine-aquisition-of-seedinvest-purchased-for-24-millin/ The CEO of StartEngine, Howard Marks, is quoted in the article responding to a question on the future of investment crowdfunding, "I believe few will become broker dealers because of the cost it entails. Not only the costs, but the time it takes to properly maintain the regulated entity. I think consolidation is inevitable, and we intend on being the consolidatoe."

[109] DeFelippi *Supra* note 57 at 93. See the description of how the distributed ledger technology works previously in this article, Section II A.

[110] *Id.*

[111] *Id.*

[112] *Id.*

clearance would happen simultaneously using the self-executing nature of the blockchain platform.[113]

C. *Recommendations for ATS Regulation Revision*

The StartEngine experience emphasizes that there is an opportunity for the Securities and Exchange Commission to revisit the regulations regarding trading systems, particularly for private equity trades using blockchain verification.[114] Currently, registration as an ATS requires that the applicant be a registered broker-dealer, become a member of a financial services self-regulatory organization (such as FINRA), prepare an operations report and agree to ongoing compliance.[115] The

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[113] *Id*. At 94. In particular DeFelippi writes that "With a blockchain, a trade is complete once the underlying network verifies and validates a token based transaction. To the extent that parties rely on the same blockchain based system, post-trade affirmations and confirmations, as well as the alignment of trade and settlement data, become less necessary. By decreasing the need for data reconciliation, blockchains reduce the risk of error and the time required to settle and clear a trade, reducing both counterparty risk and potential for disputes." *Id*. at 94

[114] One entity registered under Rule ATS has already proposed a rule change to accommodate its trading of securitized token trading using blockchain technology. *See,* BOX Exchange LLC Proposed Rule Change filed on 5/30/2019 with the SEC found at https://cdn.crowdfundinsider.com/wp-content/uploads/2019/06/SEC-Box-Exchange-Proposed-Rule-Change-SR-BOX-2019-19.pdf. BOX Exchange's 421 page form gives an extensive argument for recognition of the current trading needs of digital securities.

[115] 17 CFR Parts 232,240, 242 and 249 Final Rule (2018). *See also*, https://dilendorf.com/blockchain-crypto/ats-

SEC recognizes that an ATS differs from a "national securities exchange" under the Securities Exchange Act of 1934, but nonetheless holds an ATS to many of the same requirements as a national exchange.[116] Regulation ATS (Alternative Trading System) allows certain platforms to be exempt from the national exchange registration, including private equity platforms using blockchain technology, but still requires a significant amount of oversight.[117] While the SEC has issued clarification regarding regulation of digital assets and securities, most of these have focused on definitional issues rather than trading.[118] A 2018 Fintech Forum hosted by the SEC gave some hope that the SEC was in the process of developing a regulatory framework to facilitate digital asset trading platforms for crowdfunding and similar ventures.[119] However, rather than seeking to

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registration.html#:~:text=Specifically%2C%20Regulation%20ATS%20requires%20that,maintain%20the%20ATS%20and%20broker%2D for a law firm's assessment of the ATS requirements for a blockchain platform seeking to register as an ATS.

[116] 15 USC 78e (1934) requires registration of a national securities exchange with the SEC.

[117] Securities Exchange Act Release No. 40760 (1998) 63 CFR 70844 (Regulation ATS Adopting Release) at 70852 with one exemption being "systems that allow persons to enter orders for execution against the bids and offers of a single dealer if certain additional conditions are met". This exemption covers, for example, the StartEngine application to trade crowdfunded securities on its site.

[118] *See eg* DAO Report supra at note 48.

[119] On May 31, 2019, the SEC hosted its FinTech Forum. The agenda included a session on trading and market considerations, https://www.sec.gov/news/press-release/2019-59.

ease the burden of private equity platforms such as StartEngine, the SEC seems to be positioning to increase requirements for these platforms by requiring additional reporting and oversight.[120] The SEC should be focusing on developing regulations tailored to the needs of these specific blockchain platforms rather than trying to fit the regulation of single broker dealer platforms to the same mold as the regulation needed for larger, more complex exchanges.[121] Having a specific regulation that takes into account the limited nature of the private equity trading operations, as well as the mechanics of those operations could yield a system that adequately protects investors, while also allowing registered intermediaries to create secondary markets for issues who have raised capital in the private equity market.

In short, the SEC should consider having different trading system regulations for private equity, such as those originally offered in crowdfunding campaigns, and publicly traded

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[120] https://www.sec.gov/news/statement/crenshaw-ats-20220126 In this statement, SEC Commissioner Crenshaw notes that the SEC is considering adding Alternative Trading Systems exempt under the single broker dealer section to the requirements of reporting on operational transparency. Operational transparency includes "the ATS's interaction with related markets, liquidity providers, activities the ATS undertakes to surveil and monitor its market, and any potential conflicts of interest that might arise from the activities of the broker-dealer operator or its affiliates."

[121] SEC Commissioner Hester Peirce seems to agree that the proposed amendments are burdensome on smaller systems, as noted in her dissent statement: https://www.sec.gov/news/statement/peirce-ats-20220126

securities.[122] One suggestion to achieve the balance would be to lower the capital requirements for an ATS platform trading only crowdfunded or other similar private equity securities. This relaxation of the capital rules would expand opportunities for secondary trading of crowdfunded and other private equity securities.[123] Protection of investors should focus on continuing robust disclosure of risks of the secondary trading to all investors. The SEC could also impose a limit on trading based on the income of the investor, similar to the restrictions imposed on

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[122] As noted previously *Supra* at note 97, 69 entities have filed Form ATS registering as Alternative Trading Systems as of September 30,2022. 42 of these platforms trade only private equity securities, 21 trade only publicly traded securities and 6 report trading both private equity and publicly traded securities on their platforms. Thus, the division of regulation could be relatively straightforward for most registrants.

[123] The recent collapse of FTX Crypto, a digital trading system, should be contrasted with the focus of this paper. FTX traded in cryptocurrency unrelated to equity securities, the value of which is tied to a company performance. Researchers have already started empirical studies on the FTX case and empirical results did not challenge the use of tokens or the blockchain technology. Instead, they all pointed to managerial reasons such as misconduct in corporate governange, failure in the decentralized finance applications and the lack of regulatory guidance on cryptocurrency exchange markets. *See,* Thomas Conlon, Shaen Corbet & Yang Hu, *The Collapse of FTX: The End of Cryptocurrency's Age of Innocence*, SSRN: https:ssrn.com/abstract=4283333; Jalan Akanksha & Roman Matkovskyy, *Systemic Risks in the Cryptocurrency Market: Evidence from the FTX Collapse*, FINANCE RESEARCH LETTERS (Elsevier) at https://doi.org/10.1016/j.frl.2023.103670.

investors in Regulation CF offerings.[124] Having these separate regulations could achieve the goal of fostering capital formation in early stage companies, while also providing a level of protection for investors.

IV. CONCLUSION

The StartEngine proposal to offer secondary market opportunities for its security token issuers highlights the current lack of a consistent secondary market for securities initially purchased in a crowdfunding campaign. Instead, purchasers were reliant on a negotiated private transaction or, more likely, an exit strategy provided by the initial issuer. If StartEngine is able to successfully implement its alternative trading system for token offerings, that innovation could signal a dramatic increase in crowdfunded offerings.[125] Investors not only would have the opportunity to invest in a potential high growth, early stage company, but would also have the security of a secondary market for their investment should they want to liquidate. This secondary market might even give crowdfunding an advantage over other exempt offerings that

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[124] Regulation CF limits investment in equity crowdfunding offerings based on annual income. For a good summary of those limits, *See,* https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_crowdfundingincrease.

[125] Since StartEngine Secondary is relatively new as a trading platform, there is no data available on its trading volume to date. The site started trading only one stock, that of StartEngine, and it is not clear if trading for other stocks on the platform is yet active.

traditionally have been more popular.[126] The future of crowdfunding may indeed rely on this rapidly evolving technology. However, regulators must examine the current structure of securities trading rules to ensure that the framework recognizes the distinct features of trading digital securities, such as tokens, and the role of blockchain verification.

[126] These more traditional exempt offerings would include Regulation D and Regulation A which have been in existence longer, but which also lack a consistent secondary market for securities sold.

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