

ATLANTIC LAW JOURNAL
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Each of the articles in the *Atlantic Law Journal* was recommended for publication by the staff editors and reviewers using a double blind review process.

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Atlantic Law Journal.

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-CONTENTS & OPINIONS-

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- ARTICLES -

ATLANTIC LAW JOURNAL: TWENTY YEAR REVIEW

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DANIEL T. OSTAS^{****}

I. INTRODUCTION

The *Atlantic Law Journal* (*ALJ* or *Journal*) has published its milestone twentieth edition. With two decades behind us, the new edition presents an opportunity for reflection. The *ALJ* was born in response to a growing need for peer-reviewed outlets for business professors teaching and researching in the legal field. The premier accrediting organization for business schools, the Association to Advance Collegiate Schools of Business (AACSB), emphasizes peer-review as a measure of validating intellectual contributions by business faculty. As a double-blind peer-reviewed journal, the *ALJ* is today

^{*} Stockton University, *Atlantic Law Journal* Co-Editor-in-Chief, Volume 20.

^{**} Peirce College, *Atlantic Law Journal* Editor-in-Chief, Volumes 18-20.

^{***} West Chester University, *Atlantic Law Journal* Editor-in-Chief, Volumes 11-17.

^{****} University of Oklahoma, *Atlantic Law Journal* Co-Editor-in-Chief, Volumes 4-5.

found on the list of target publications for many business schools across the United States. It continues to meet the unique needs of undergraduate business law professors at accredited institutions.

The *ALJ* was the brainchild of its original editor-in-chief, Dr. Brad Reid, who founded the *ALJ* with the support of a dedicated group of colleagues during the 1998 annual conference of the Mid-Atlantic section of the Academy of Legal Studies in Business (MAALSB)¹ held in Charlottesville, Virginia. Since that time, the *ALJ* has remained the official journal of the MAALSB. Over the years that followed, the *ALJ* provided an outlet primarily for members of the MAALSB, a small and collegial group of business law professors who attend and participate in its annual conference.

The early volumes of the *ALJ* were distributed primarily to MAALSB members and their associated institutions. The early editions of the *ALJ* were not readily available for review by those outside the academy. As the MAALSB grew and the *Journal* established a reputation of quality and innovation in scholarship, the membership identified a need to adapt the format and delivery systems of the *ALJ* to permit better distribution of contributors' scholarship and to establish a public face for the *Journal*. As technology advanced and institutional and scholarly acceptance of the online format increased, the *Journal* adapted. In September 2013,

¹ Formerly known as the "Mid-Atlantic Regional Business Law Association"; the MAALSB is one of many regional associations of the Academy of Legal Studies in Business (ALSB), www.alsb.org.

the official *Journal* website (www.atlanticlawjournal.org) launched. At that time, the *ALJ* began releasing new volumes in both electronic and print format.²

Following this public launch, the *Journal*'s cataloging in Cabell's Directories was swiftly joined by a listing on Washington & Lee's rankings, and an indexing in Thomson-Reuters Westlaw.³ The *Journal*'s years of limited distribution led to its proud reputation as a "somewhat obscure" outlet that hosts articles that have been "repeatedly cited,"⁴ despite their lack of availability, until recently, in mainstream research databases. Yet, this same history has led to many innovative articles being concealed only in the memories and on the bookshelves of those select scholars who participated in the early years of the *Journal*'s formation. We hope to revive those lost conversations with gratitude to the early voices of the *ALJ*.

As an association of law professors outside of traditional law schools, the MAALSB provides a forum for professional dialogue regarding a broad array of issues connected to business law and its associated pedagogy. The articles in the *ALJ* reflect the diversity of competencies and interests of our

² See www.atlanticlawjournal.org (which contains old and new volumes of the journal).

³ Thomson-Reuters Westlaw currently maintains all *ALJ* articles from Volume 9 to present.

⁴ Gavin Clarkson & Joshua Newberg, *Blunt Machetes in the Patent Thicket: Modern Lessons from the History of Patent Pool Litigation in the United States Between 1900 and 1970*, 22 J. TECH. L. & POL'Y 1, 15 (2018).

authors. It reflects authors' roles as educators and scholars primarily within business schools who are preparing students, not to be lawyers, but rather for careers in business and management. As a result, "business law," as taught in most business schools, maintains a wider meaning than "business law" within law schools, and encompasses everything students may need to know about the law to successfully enter the business world. The *how* to best relay this information to our students is a topic of perennial discussion at MAALSB meetings, and many of the *ALJ*'s articles contain experimental classroom exercises and pedagogical strategies for engaging students within the classroom. The breadth of "business law" in this context is further reflected in the *ALJ*'s many research articles that cover the ambit of legal scholarship.

The evolving AACSB standards continue to influence the *Journal*, and we understand the need for our authors to quantify the impact of their scholarship. We encourage our colleagues to continue to reference and discuss each other's work. The following sections provide a summary review of the content of the *ALJ*'s twenty years in press. It is our hope that our readership may more readily access the innovative ideas of our authors—especially those from our pre-electronic era. We begin with an overview of the *Journal*'s contributions to business law pedagogy, and then turn to its research articles. Our conclusion briefly examines the social context and future of the *ALJ*.

II. BUSINESS LAW PEDAGOGY ARTICLES

From its early volumes through today, the *ALJ* has played an integral role in advancing business law pedagogy. Recently, Professors Lasprogata and Foster's *ALJ* article received the "Ruane Award" for business education innovation, for their article, *Fostering Integrative and Interdisciplinary Learning: A Business Law Exercise in Social Entrepreneurship, Global Health Innovation, and Cloud Technology*.⁵ In this article, the authors explore what it means to be socially responsible leaders, and they detail the project they perform in the classroom to inspire students toward social innovation.⁶

The following subsections survey the major pedagogical trends reflected in the pages of the *Journal*: (A) in-class exercises and experiential learning, (B) moot court/mock trial in the classroom, (C) utilizing technology effectively in the classroom, (D) infusing interdisciplinary concepts, (E) improving the classroom learning experience, and (F) curriculum development and collaboration.

⁵ Geneva Anne Lasprogata & T. Noble Foster, *Fostering Integrative and Interdisciplinary Learning: A Business Law Exercise in Social Entrepreneurship, Global Health Innovation, and Cloud Technology*, 18 ATLANTIC L.J. 38 (2016); see also Terry Foster and Eva Lasprogata win best paper award, <https://www.seattleu.edu/commons/achievements/terry-foster-and-eva-lasprogata-win-best-paper-award.html>

⁶ *Id.*

A. *In-Class Exercises and Experiential Learning*

Experiential learning exercises are regularly explored in the *ALJ*'s pedagogical scholarship. Many such projects relate to teaching students about contracts, a vitally important component of business law education. Podlas and Marsnik, for example, construct an experiential learning exercise where students in the United Kingdom contract to sell a hypothetical product to students in the United States.⁷ The authors examine the importance of critical thinking, not only for students, but for professors as well, and how learning can be enhanced by asking students to negotiate and draft an international contract.⁸ Mallue takes a different angle on experiential learning about contracts by examining strategies for integrating cases about restrictive covenants into executive MBA classes.⁹ He suggests beginning the contracts segment of the class with a case involving a restrictive covenant pertaining to the sale of a business and then examining noncompete agreements in employment contexts.¹⁰ He also suggests providing students with cases wherein courts enforce restrictive covenants and other cases wherein courts reject them (he also

⁷ Kimberlianne Podlas & Susan J. Marsnik, *Setting the Stage for Understanding of International Contract Negotiation: Reflective Learning, Reflective Teaching*, 5 ATLANTIC L.J. 73 (2002).

⁸ *Id.*

⁹ Henry E. Mallue, Jr., *Contract Law for the Executive MBA Program*, 10 ATLANTIC L.J. 61 (2007).

¹⁰ *Id.*

provides examples of such cases).¹¹ Earle and Madek emphasize the importance of using case examples and in-class exercises in the classroom.¹² They provide a CISG contract case example along with instructions for using this case in the classroom, discuss issues involved, and analyze expected outcomes.¹³ Finally, Koval provides several sample scenarios, a sample services contract, and excellent tips and discussion regarding how to implement a contract negotiation exercise in the classroom.¹⁴

Experiential learning moves well beyond contracts, and into many facets of business law courses. Shrage, for example, describes an in-class arbitration exercise aimed at providing students with a “hands on” opportunity to learn about arbitration in an active group environment.¹⁵ He outlines the pedagogical benefits to using such exercises.¹⁶ Steslow describes engaging activities to conduct in the classroom when teaching negotiable instruments.¹⁷ She provides step-by-step

¹¹ *Id.*

¹² Beverley Earle & Gerald Madek, *Teaching International Business Law and Contracts Via Experiential Learning: A Case Example*, 13 ATLANTIC L.J. 1 (2011).

¹³ *Id.*

¹⁴ Michael R. Koval, *Not Too Hot and Not Too Cold: A Contract Negotiation Activity That May Be ‘Just Right’*, 20 ATLANTIC L.J. 35 (2018).

¹⁵ Harvey M. Shrage, *Using an Arbitration Simulation to Teach Critical Skills*, 13 ATLANTIC L.J. 191 (2011).

¹⁶ *Id.*

¹⁷ Donna Steslow, *I Don’t Want To Go To School Today; I Have to Teach Negotiable Instruments! Three Simple Hands-On Exercises to Enrich Lessons on Article 3*, 19 ATLANTIC L.J. 1 (2017).

instructions for classroom activities on commercial paper, along with teaching notes, and suggestions for faculty who will use these exercises.¹⁸ Binder writes about his experiences with flipping a classroom.¹⁹ He provides a detailed explanation of the process of creating an inverted classroom, addresses challenges, and lessons learned.²⁰ Binder offers strategies for effectively moving a business law course to a flipped classroom model.²¹ McDevitt provides strategies for engaging students through current events in the law.²² He provides an effective method for incorporating student presentations of current events into business law classes.²³

B. Moot Court/Mock Trial in the Classroom

Moot court/mock trials provide another valuable strategy for instructors to engage students in the business law classroom. Herron, Wagoner, and Scott compose an argument for utilizing Mock Trial programs to garner critical thinking skills.²⁴ They outline the Mock Trial process and how students can

¹⁸ *Id.*

¹⁹ Perry Binder, *Flipping a Law Class Session: Creating Effective Online Content and Real World In-Class Team Modules*, 17 ATLANTIC L.J. 34 (2015).

²⁰ *Id.*

²¹ *Id.*

²² William J. McDevitt, *In the News: The Perfect Class Commencement*, 18 ATLANTIC L. J. 1 (2016).

²³ *Id.*

²⁴ Daniel J. Herron, Ruth Wagoner, & Jo Ann Scott, *Enhancing Critical Thinking Skills Through Mock Trial*, 14 ATLANTIC L.J. 147 (2012).

learn critical thinking skills by engaging in this process.²⁵ Salimbene, further, provides a guide to incorporating moot court into business law classes, including detailed instructions, and student feedback.²⁶ He provides methods for developing and effectively running a moot court in the business law environment.²⁷ These works provide business law professors with innovative methods for fostering student participation and engagement through role playing activities.

C. Utilizing Technology Effectively in the Classroom

Technology can, in many ways, be utilized by instructors to enhance the classroom experience. Monseau provides tips for utilizing the internet within business law courses for research projects and the discussion of jurisdictional issues.²⁸ She provides resources and suggestions for integrating the internet into the learning process.²⁹ Binder discusses how the internet has changed the ways companies market and brand, and how they guard

²⁵ *Id.*

²⁶ Franklyn P. Salimbene, *Using Moot Court Simulations as Teaching Tools: An Implementation Guide for Business Law Instructors*, 19 ATLANTIC L.J. 177 (2017).

²⁷ *Id.*

²⁸ Susanna Monseau, *Using the Internet as a Teaching Opportunity*, 3 ATLANTIC L.J. 72 (2000).

²⁹ *Id.*

against dilution.³⁰ He provides a classroom activity for exploring the legal and management implications of these changes in business law classes and describes a useful context for the activity.³¹ Steslow examines the challenges instructors and students face when in large class settings, and she provides some strategies that can be used to foster student engagement.³² Steslow analyzes the benefits and drawbacks of using remote personal response systems (aka, “clickers”) in large classes, survey results, summarizes the literature, and shares her experiences using clickers in business law classes.³³

D. Infusing Interdisciplinary Concepts

Other authors focus on integrating interdisciplinary concepts into the business law classroom. Willey and Weston, for example, provide strategies and techniques for incorporating risk management into undergraduate law classes.³⁴ By incorporating risk management strategies in law courses, the authors argue, students can be exposed

³⁰ Perry Binder, *New Top-Level Domain Names Add .XXXTRA Company Burden – Group Activities for Creating Effective Domain Registration Portfolios*, 14 ATLANTIC L.J. 114 (2012).

³¹ *Id.*

³² Donna M. Steslow, *Click Here to Participate: Participation and Student Performance in a Large Business Law Course Before and After Implementation of a Remote Personal Response System*, 11 ATLANTIC L.J. 144 (2009).

³³ *Id.*

³⁴ Susan L. Willey & Harold Weston, *Introducing Risk Management Concepts to Business Law Students: It's More Than Contracts*, 16 ATLANTIC L.J. 20 (2014).

to another dimension of the material.³⁵ Hibscheweiler and Salzman, moreover, provide strategies and tips for incorporating sustainability and corporate governance into business law courses.³⁶ They provide recommendations based on student feedback and share their experiences integrating these concepts into a graduate law class.³⁷ Providing context through interdisciplinary study and application is a valuable teaching strategy that these authors utilize and explain.

E. Improving the Classroom Learning Experience

Instructors are regularly tasked with overcoming new challenges and must continuously strive to improve the classroom and learning experience. Golden examines how student use of media in the classroom, such as cell phone use, disrupts the learning experience.³⁸ She provides strategies for instructors facing this common problem arising from increased access to portable technologies.³⁹ Woods discusses strategies for making multiple choice exams more effective tools

³⁵ *Id.*

³⁶ Arlene M. Hibscheweiler & Martha L. Salzman, *Sustainability and Corporate Governance in a Business Law Course: A "Real World" Project*, 19 ATLANTIC L.J. 225 (2017).

³⁷ *Id.*

³⁸ Nina Golden, *Could You Repeat the Question? How Media Distractions Detract from Learning and a Courteous Classroom Environment*, 19 ATLANTIC L.J. 58 (2017).

³⁹ *Id.*

for learning.⁴⁰ He outlines a group-review method which allows students the opportunity to appeal the answers to the question, the benefits and downsides to using multiple choice exams, and methods for making multiple choice exams better tools for learning in a business law class.⁴¹ Koval and Garner devise a model for conceptualizing and categorizing legal writing assignments.⁴² They provide samples of writing assignments for business law classes and then map them onto their model to reveal how business law professors can engage in Writing Across the Curriculum initiatives in their universities.⁴³ These articles provide excellent advice for professors seeking to improve the classroom process and environment.

F. Curriculum Development and Collaboration

Curriculum development and collaboration across institutions has also made its way into the *ALJ*. Mong examines what legal instructors can learn from the principles set forth by business school pioneers,

⁴⁰ Dexter R. Woods, Jr., *An Appealing Exercise: Group Review of Multiple-Choice Exams*, 12 ATLANTIC L.J. 198 (2010).

⁴¹ *Id.*

⁴² Michael R. Koval & R. Michael Garner, *I Don't Do Writing: A Model for Overcoming Faculty Resistance to Using Writing Assignments in the Classroom*, 15 ATLANTIC L.J. 120 (2013).

⁴³ *Id.*

Joseph Wharton and Albert Bolles.⁴⁴ He examines how learning goals for legal instruction in business schools can be improved by examining historical and more contemporary trends.⁴⁵ Peterson, Bernacchi, Patel, and Oziem discuss the intersection of law and business by examining the perceived collaboration between business schools and law schools, the offering of JD/MBA programs and cross-listed interdisciplinary courses within the schools, and impediments to effective collaboration.⁴⁶ Mong, in another article, examines the challenges of developing a healthcare law course for a business program, how to overcome those challenges, and strategies for creating an effective healthcare law class.⁴⁷ Curriculum development can be enhanced through effective collaboration both within business schools and among other schools within a university.

III. BUSINESS LAW RESEARCH ARTICLES

Beyond pedagogy, the *ALJ* hosts an eclectic array of research articles. Many of the *Journal's* research articles have been cited in a variety of publications including law reviews and books. Many

⁴⁴ Donald Mong, *Introductory Legal Instructors Can Learn from Joseph Wharton and Albert Bolles*, 14 ATLANTIC L.J. 34 (2012).

⁴⁵ *Id.*

⁴⁶ Evan A. Peterson, Michael D. Bernacchi, Dhruv S. Patel, & John T. Oziem, *Law School-Business School Collaboration: An Examination of Interdisciplinary Courses in JD/MBA Programs*, 18 ATLANTIC L.J. 21 (2016).

⁴⁷ Donald R. Mong, *Developing the Legal Environment of Healthcare Course*, 18 ATLANTIC L.J. 84 (2016).

of our authors have attained prominence within their respective fields of expertise. For example, Joshua Newberg's widely cited *ALJ* article on patent pool litigation⁴⁸ was recently revitalized as a tribute to his work and mentorship.⁴⁹ The breadth of the journal as a vehicle for the dissemination of intellectual innovation with a nexus to business law provides a venue for facilitating diverse interdisciplinary and disciplinary research.

The following subsections survey the major research trends reflected in the pages of the *Journal*, categorized broadly by area of interest: (A) employment law, (B) corporate law, (C) criminal law, (D) intellectual property law, (E) procedural law, (F) regulatory law, (G) sports law, (H) tax law, (I) technology law, (J) tort law, and (K) business law and practice.

A. *Employment Law*

Employment law continues to be a widely debated area, with many articles in the *ALJ* addressing various aspects of employment law from employment-at-will to discrimination and other statutory violations. Brinckman examines the evolution of the public policy exception to

⁴⁸ Joshua A. Newberg, *Antitrust, Patent Pools, and the Management of Uncertainty*, 3 ATLANTIC L.J. 1 (2000).

⁴⁹ Gavin Clarkson & Joshua Newberg, *Blunt Machetes in the Patent Thicket: Modern Lessons from the History of Patent Pool Litigation in the United States Between 1900 and 1970*, 22 J. TECH. L. & POL'Y 1 (2018).

employment-at-will in Virginia.⁵⁰ He traces the history and development of the common law in Virginia.⁵¹ Katz also examines the employment-at-will doctrine, and the public policy exception to it.⁵² He addresses the history and developing jurisprudence of the doctrine and advocates for standard legislation to govern the area.⁵³

Zugelder and Champagne examine cases arising under the American with Disabilities Act and the conflicting interpretations of the act.⁵⁴ They analyze the managerial implications for these interpretations.⁵⁵ Roach examines the evolution of gender stereotyping cases under Title VII to the Civil Rights Act of 1964.⁵⁶ She traces the jurisprudence in this area and the rights under this theory of recovery.⁵⁷ Valenti traces U.S. Supreme Court cases relating to retaliation under Title VII to the Civil Rights Act of 1964 and the difficulties of proof

⁵⁰ Douglass E. Brinckman, *Recent Developments in Virginia's Public Policy Exception to Employment-At-Will Doctrine*, 3 ATLANTIC L. J. 43 (2000).

⁵¹ *Id.*

⁵² Michael Katz, *Still Crazy After All These Years: The Employment-At-Will Doctrine and Public Policy Exceptions*, 10 ATLANTIC L.J. 1 (2007).

⁵³ *Id.*

⁵⁴ Michael T. Zugelder & Paul S. Champagne, *Disabling the ADA: Recent Supreme Court ADA Decisions and Their Implications on Employer Practices*, 5 ATLANTIC L.J. 103 (2002).

⁵⁵ *Id.*

⁵⁶ Bonnie L. Roach, *Gender Stereotyping: The Evolution of Legal Protections for Gender Nonconformance*, 12 ATLANTIC L.J. 125 (2010).

⁵⁷ *Id.*

spurring from this jurisprudence.⁵⁸ Pattison and Guth examine gender identity discrimination on a cross-cultural basis by analyzing the relevant laws associated with this claim in the United States and the United Kingdom.⁵⁹ They provide analysis of cases and statutes regarding gender identity discrimination.⁶⁰

Other statutes pertinent to employment law are also discussed in the *ALJ*. Hollon and Bright examine the then-existing standards of the Fair Credit Reporting Act and employer obligations under the act.⁶¹ They examine managerial implications, provide guidance to employers, and discuss the consequences for violating the act.⁶² Gray analyzes whistleblowing retaliation in the state of Maryland and its interrelationship with the tort of abusive discharge.⁶³ He examines cases and statutes while providing recommendations for employer caution against retaliation.⁶⁴ Diener provides the historical and social context of the Family and

⁵⁸ Alix Valenti, *University of Texas Southwestern Medical Center v. Nassar: Will Plaintiffs' Claims of Retaliation Be More Difficult to Prove?*, 16 ATLANTIC L.J. 95 (2014).

⁵⁹ Patricia Pattison & Jessica Guth, *The Road Less Traveled: Gender Identity Discrimination in the US and UK*, 17 ATLANTIC L.J. 85 (2015).

⁶⁰ *Id.*

⁶¹ Charles J. Hollon & Thomas Bright, *Investigating Employee Workplace Misconduct Under the Fair Credit Reporting Act*, 5 ATLANTIC L.J. 119 (2002).

⁶² *Id.*

⁶³ John Gray, *Employers Beware: The Tort of Abusive Discharge and Sarbanes-Oxley, Section 1107*, 10 ATLANTIC L.J. 47 (2007).

⁶⁴ *Id.*

Medical Leave Act, and analyzes its regulations and cases relating to the compliance period.⁶⁵ He makes an argument for adherence to the Department of Labor's intent when construing regulations relating to employee medical certifications.⁶⁶ These articles provide scholarly perspectives on employment law issues of practical importance for courts, practitioners, and policy makers.

B. Corporate Law

Issues impacting corporate and private law are analyzed in the *ALJ*. Miller, Greenberg, and Tucker contend that a risk management framework can be effective to manage the internal and external risks of private companies.⁶⁷ They detail the framework and explain its application and scope.⁶⁸ Misenti discusses the jurisprudence in Illinois relating to personal liability for LLC owners, and the policy implications of this jurisprudence within Illinois.⁶⁹ He examines the scope of Illinois's rule, the ethical implications of it, and the potential

⁶⁵ Keith William Diener, *The Broadening Scope of the FMLA Compliance Period: Employers, Yield and Proceed with Caution!*, 15 ATLANTIC L. J. 96 (2013).

⁶⁶ *Id.*

⁶⁷ Sandra K. Miller, Penelope Sue Greenberg, & James J. Tucker III, *A Model for Managing Private Company Legal Risks and Harnessing Legal Opportunities*, 15 ATLANTIC L.J. 1 (2013).

⁶⁸ *Id.*

⁶⁹ Nicholas C. Misenti, *The Evolution of the Illinois "Super Business Entity" and Absolute Limited Liability for LLC Members and Managers*, 19 ATLANTIC L.J. 20 (2017).

implications of Illinois's unique interpretation for Illinois LLC owners who transact business in other states.⁷⁰ Peterson analyzes the potential for collaboration between in-house counsel and managers.⁷¹ He utilizes the Delphi method to examine the relationship between lawyers and non-lawyer managers, to conclude as to strategies that businesses should foster to improve collaboration between them.⁷² These articles provide useful lenses by which to view issues facing contemporary companies in various contexts.

C. Criminal Law

Criminal law is also discussed in the *Journal*. Ellis analyzes the death penalty from an efficiency perspective, while pointing out methodological flaws in certain studies that show that implementing the death penalty is more expensive than life imprisonment.⁷³ He explains the difficult issues associated with calculating costs in these situations and analyzes other relevant factors pertaining to the death penalty versus life imprisonment.⁷⁴ Mayer examines the impact of the great recession on markets and argues that some individual criminal

⁷⁰ *Id.*

⁷¹ Evan Peterson, *Empowering Business Policy & Strategy Through Improved Collaboration Between Managers and In-House Counsel*, 20 ATLANTIC L.J. 225 (2018).

⁷² *Id.*

⁷³ Howard C. Ellis, *Costs Affecting the Choice Between the Death Penalty and Life Imprisonment Without Parole*, 3 ATLANTIC L.J. 28 (2000).

⁷⁴ *Id.*

prosecutions for fraud would help to restore balance in the market.⁷⁵ He examines the ethical and legal failures of organizations and explores how prosecuting fraud could provide the necessary incentive to deter such actions.⁷⁶

D. Intellectual Property Law

Beyond Newberg's influential article⁷⁷ the *ALJ* hosts several other articles addressing intellectual property issues. Quesenberry analyzes U.S. copyright protections for art by examining the key characteristics of a protectable intellectual property interest in light of case and statutory interpretation.⁷⁸ The author suggests that changes to this area of law are needed to encourage the proliferation of artistic expression.⁷⁹ Jones provides an overview of Cuban copyright law, while analyzing the details and implications of a unique case involving the rights of a freelancing photographer who worked for a government owned newspaper.⁸⁰ Bixby and Baughn examine the

⁷⁵ Don Mayer, *Individual Criminal Liability for Financial Fraud in the United States: A Moral and Legal Imperative*, 14 ATLANTIC L.J. 1 (2012).

⁷⁶ *Id.*

⁷⁷ Joshua A. Newberg, *Antitrust, Patent Pools, and the Management of Uncertainty*, 3 ATLANTIC L.J. 1 (2000).

⁷⁸ LeGene Quesenberry, *Copyright Infringement in the Wake of Rogers v. Koons*, 3 ATLANTIC L.J. 61 (2000).

⁷⁹ *Id.*

⁸⁰ Michael E. Jones, *Che and Korda: A Convolutd and Contentious Cuban Copyright Case*, 15 ATLANTIC L.J. 145 (2013).

increasing prevalence of trade secrets in U.S. businesses and litigation.⁸¹ They discuss contributing factors and trends relating to this growth and explain how managers can overcome common problems associated with preservation of trade secrets.⁸² Carr examines the intellectual property issues of biorepositories by delving into the practice and intellectual property implications of this field which falls at the intersection of science and law.⁸³

E. Procedural Law

Various procedural law topics are addressed in the *ALJ*. McEvoy examines the demographics of the jurors in the O.J. Simpson murder trial and concludes that the outcome of the case had more to do with non-racial factors than racial factors.⁸⁴ She examines these factors (sex, age, and occupation) for several cases and concludes that non-racial factors of jurors may play a determinative role in predicting the outcome of cases.⁸⁵ Hosack and Solberg trace the historical development of punitive damages from the Code of Hammurabi to contemporary U.S. Supreme

⁸¹ Michael B. Bixby & Christopher Baughn, *Trade Secret Theft and Protection*, 12 ATLANTIC L.J. 59 (2010).

⁸² *Id.*

⁸³ Nanci K. Carr, *Intellectual Property Issues Associated with Biorepositories: Current Practices*, 16 ATLANTIC L.J. 55 (2014).

⁸⁴ Sharlene A. McEvoy, *What's Race Got to Do With It? A Theory of Jury Decision-Making?*, 4 ATLANTIC L.J. 61 (2001).

⁸⁵ *Id.*

Court cases.⁸⁶ They place punitive damages within the broader societal context to analyze the standards employed by courts to decipher excessive awards.⁸⁷ Ames explores whether the current U.S. Supreme Court has provided sufficient clarity with regard to issues involving personal jurisdiction.⁸⁸ He suggests ways to facilitate business planning and risk assessment through an understanding of personal jurisdiction.⁸⁹

F. Regulatory Law

Regulatory and administrative issues are also regularly discussed in the *ALJ*. Inlow and Foster examine the changing dynamics of accounting firms and the concerns for independence spurring from, among other things, disproportional increases in consulting fees to accounting firms and related scandals.⁹⁰ They examine the Securities and Exchange Commission regulations concerning auditor independence and the potential negative

⁸⁶ Karen A. Hosack & Joseph J. Solberg, *Punitive Damages and the Due Process Clause: An Examination of Recent Supreme Court Decisions*, 11 ATLANTIC L.J. 72 (2009).

⁸⁷ *Id.*

⁸⁸ Orrin K. Ames III, *Personal Jurisdiction: Has the Roberts Court Provided Businesses and Their Counsel with Sufficient Predictability about Personal Jurisdiction to Make Properly Informed Compliance and Risk Assessments?*, 20 ATLANTIC L.J. 191 (2018).

⁸⁹ *Id.*

⁹⁰ Neely S. Inlow & Sheila Foster, *Auditor Independence and Non-Audit Services: Are They Compatible?*, 4 ATLANTIC L.J. 49 (2001).

ramifications of them.⁹¹ Hutter argues for the importance of a suitability analysis when investment brokers sell investments to less sophisticated clients.⁹² He provides cases and examples that vividly support this view.⁹³ Auditor independence continues to be a highly debated area.⁹⁴ Fichtner examines the audit committee requirements for many nations and considers the diverse approaches to the auditor independence requirement in major capital markets.⁹⁵ He contends that most of the academic research reveals that firms produce better financial statements when members of the audit committee are independent.⁹⁶

Walker examines laws and contracts relating to appearances by celebrities to endorse businesses and products.⁹⁷ He discusses the expanding involvement of the Federal Trade Commission (FTC) in celebrity endorsement cases.⁹⁸ Smith and Jones analyze the legality of restraints on trade and the appropriate interpretation within antitrust laws.⁹⁹

⁹¹ *Id.*

⁹² Robert G. Hutter, *Rule 10(b)(5) and the Suitability of Investments*, 4 ATLANTIC L.J. 73 (2001).

⁹³ *Id.*

⁹⁴ J. Royce Fichtner, *International Audit Committee Independence Requirements: Are Policymakers Putting the Academic Research to Use?* 13 ATLANTIC L.J. 117 (2011).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Patrick Douglas Walker, *FTC v. Garvey: A New Trend or an Aberration?*, 11 ATLANTIC L.J. 170 (2009).

⁹⁸ *Id.*

⁹⁹ Steven R. Smith & Bryce J. Jones, *Determining the Legality of Restraints of Trade: A Third Way*, 5 ATLANTIC L.J. 1 (2002).

They trace judicial opinions that reflect a movement away from a two-approach method of deciphering the legality of restraints on trade and toward a third way.¹⁰⁰ Epstein explores the regulatory environment of the multi-level marketing (MLM) business model, including statutes and regulations that impact MLMs.¹⁰¹ He explores case law and the authority of the FTC and Securities and Exchange Commission to regulate MLMs.¹⁰²

Lammendola and Valenza provide an in-depth study of Margaret Hill Collins, the social and legal environment of her time, and a detailed review of her contribution to fair housing.¹⁰³ Hunter, Mest, and Shannon analyze the Foreign Corrupt Practices Act including major provisions and recent cases that influence the interpretation and enforcement of the act.¹⁰⁴ Tapis, Kisska-Schulze, Priya, and Haser examine safety issues in the airline industry by reviewing cases and aviation regulations.¹⁰⁵ The

¹⁰⁰ *Id.*

¹⁰¹ Adam Epstein, *Multi-Level Marketing and its Brethren: The Legal and Regulatory Environment in the Down Economy*, 12 ATLANTIC L.J. 91 (2010).

¹⁰² *Id.*

¹⁰³ James M. Lammendola & Michael A. Valenza, *Practicing Fair Housing Principles in Southeastern Pennsylvania Before the 1968 Fair Housing Act: Margaret H. Collins and Suburban Fair Housing, Inc.*, 11 ATLANTIC L.J. 107 (2009).

¹⁰⁴ Richard J. Hunter, Jr., David Mest, & John Shannon, *A Focus on the Foreign Corrupt Practices Act (FCPA): Siemens and Halliburton Revisited as Indicators of Corporate Culture*, 13 ATLANTIC L.J. 60 (2011).

¹⁰⁵ Gregory P. Tapis, Kathryn Kisska-Schulze, Kanu Priya, & Jeanne Haser, *Balancing Customer Service, Safety Issues, and*

authors discuss implications for practice and future research.¹⁰⁶ Falchek and Schoen examine commercial speech in the pharmaceutical industry.¹⁰⁷ They analyze the tests and standards that may apply by discussing cases and commentary.¹⁰⁸

Bordelon explores the federalism issues incumbent in seeking to legalize certain vices, including gambling and the use of recreational marijuana.¹⁰⁹ He traces the historical development of the anti-commandeering principle and provides a suggested framework for improving court analysis of these issues.¹¹⁰ Noe describes the historical development of Fannie Mae and Freddie Mac.¹¹¹ She provides case law analysis, and an overview of the problems of the current system.¹¹² Regulatory law continues to be a highly influential area of business law that is frequently examined in the *Journal*.

Legal Requirements: It's All About Safety, 13 ATLANTIC L.J. 92 (2011).

¹⁰⁶ *Id.*

¹⁰⁷ Joseph S. Falchek & Edward J. Schoen, *Thompson v. Western States Medical Center: An Opportunity Lost*, 13 ATLANTIC L.J. 164 (2011).

¹⁰⁸ *Id.*

¹⁰⁹ Gregory R. Bordelon, *The De-Federalization Gamble: A Workable Anti-Commandeering Framework for States Seeking to Legalize Certain Vice Areas*, 20 ATLANTIC L.J. 103 (2018).

¹¹⁰ *Id.*

¹¹¹ Mary Noe, *The Drip Started the Waterfall*, 20 ATLANTIC L.J. 89 (2018).

¹¹² *Id.*

G. Sports Law

Thanks to Adam Epstein and his colleagues, the *ALJ* maintains an ongoing research stream pertaining to legal issues in sports. Epstein and Niland explore the legal and regulatory environment of sports agents.¹¹³ They provide many examples of things gone wrong in agency relationships from both civil and criminal law perspectives.¹¹⁴ In another article, Epstein and Niland provide many examples of sport-related ethical issues that intertwine with legal issues, and NCAA rules.¹¹⁵ Epstein and Kisska-Shulze examine the development of the amnesty clause within the National Basketball Association's collective bargaining agreement, and the tax implications of it.¹¹⁶ Epstein and Halsey introduce sports-related cases rooted in Philadelphia.¹¹⁷ They examine both the history and development of sports-related cases in Philadelphia along with implications.¹¹⁸ The legal and ethical issues arising within the business of sports are frequently commented upon in the *ALJ*.

¹¹³ Adam Epstein & Bridget E. Niland, *Sports Agent Litigation and the Regulatory Environment*, 11 ATLANTIC L.J. 36 (2009).

¹¹⁴ *Id.*

¹¹⁵ Adam Epstein & Bridget Niland, *Exploring Ethical Issues and Examples by Using Sport*, 13 ATLANTIC L.J. 19 (2011).

¹¹⁶ Adam Epstein & Kathryn Kisska-Shulze, *The NBA's 2011 Collectively Bargained Amnesty Clause – Exploring the Fundamentals*, 16 ATLANTIC L.J. 1 (2014).

¹¹⁷ Adam Epstein & Brian J. Halsey, *Philadelphia and Sports Law*, 19 ATLANTIC L.J. 114 (2017).

¹¹⁸ *Id.*

H. Tax Law

Tax law is often discussed in the *Journal*. Halsey examines the disparate tax treatment of SUVs and hybrid cars under federal law, briefly surveys state law, examines the consequences of this disparate treatment, and proposes an equalizing solution to the problems created by it.¹¹⁹ Sims examines the practical impact of Connecticut's property taxes on the horse industry, and the consequences surmising a failure by many horse owners to report ownership to the tax assessor.¹²⁰ Cullis examines the tax consequences of home foreclosure and legislative changes in this arena.¹²¹ Austill and Proctor argue for reform to tax laws in light of the changing modalities of sales through the internet.¹²² They also examine relevant statutes, cases, and strategies.¹²³ Gantt examines how moral beliefs and the freedom of association can lead to

¹¹⁹ Brian J. Halsey, *IRC §179, Hybrid Cars & Sport Utility Vehicles: The Counterproductive Income Tax Treatment of Certain Vehicles Under the Internal Revenue Code and a Proposed Solution*, 9 ATLANTIC L.J. 39 (2006).

¹²⁰ Donna L. Sims, *Where Have All the Horses Gone? Driving Forces Behind the Underground Horse Industry in Connecticut*, 9 ATLANTIC L.J. 59 (2006).

¹²¹ David Cullis, *Tax Consequences of Foreclosures*, 10 ATLANTIC L.J. 37 (2007).

¹²² A. David Austill & Thomas Y. Proctor, *The Times They Are A-Changin': Time to Revisit Quill Corporation v. North Dakota*, 12 ATLANTIC L. J. 1 (2010).

¹²³ *Id.*

conflict.¹²⁴ She examines this conflict in the non-profit context and makes suggestions about how this conflict can or should impact tax-exempt status.¹²⁵ DeLaurell, VanDenburgh, and Barroso examine the cat-and-mouse game often played between the Internal Revenue Service and corporations.¹²⁶ They examine corporate inversions, the impact of new tax regulations on corporate inversions, and they make recommendations to policy makers.¹²⁷

I. Technology Law

Many authors address how current trends in technology impact the law. Zugelder and Flaherty address legal issues associated with marketing and web page management, including issues of jurisdiction, FTC regulations, intellectual property concerns, privacy concerns, and potential tort liability.¹²⁸ Zugelder, Flaherty, and Clarke, in another article, address major legal issues associated with blogging, with a focus on jurisdictional issues, intellectual property rights, and employment law

¹²⁴ Karen Gantt, *Non Profit Status and the Public Policy Exception Revisited: How Much Does Freedom of Belief Cost?*, 9 ATLANTIC L.J. 1 (2006).

¹²⁵ *Id.*

¹²⁶ Roxane DeLaurell, William M. VanDenburgh, & Parks Barroso, “Whack-a-Mole” Regulation: Corporate Inversions, 20 ATLANTIC L. J. 269 (2018).

¹²⁷ *Id.*

¹²⁸ Michael T. Zugelder & Theresa B. Flaherty, *Legal Issue Associated with Marketing and Webpage Management*, 4 ATLANTIC L.J. 29 (2001).

concerns.¹²⁹ Podlas examines the impact of syndicated television courtrooms on the norms of the U.S. public.¹³⁰ She concludes that there is support for the hypothesis that these televised “syndi-courts” cultivate attitudes favoring litigation and pro se representation in courtrooms.¹³¹ She analyzes the implications of this phenomenon for business and society.¹³² Halsey examines security and privacy concerns associated with networks arising from the changing technological methods by which contemporary businesses engage electronically both on site and across locations.¹³³ Hayward examines the social and legal context surrounding sexting, as well as the legislative response, and proposes a model statute for addressing sexting under state laws which does not criminalize teenage sexting.¹³⁴

J. Tort Law

Tort law has also been covered in the *ALJ*. Podlas analyzes the status of the law pertaining to defamation of teachers and considers the varied

¹²⁹ Michael T. Zugelder, Theresa B. Flaherty, & Irvine Clarke III, *Legal Concerns Associated with Blogging as a Marketing Tool*, 9 ATLANTIC L.J. 23 (2006).

¹³⁰ Kimberlianne Podlas, *The Normative Influence of Syndi-Court On Contemporary American Litigiousness*, 5 ATLANTIC L.J. 41 (2002).

¹³¹ *Id.*

¹³² *Id.*

¹³³ Brian J. Halsey, *Security, Confidentiality, and the Gramm-Leach-Bliley Act*, 11 ATLANTIC L.J. 194 (2009).

¹³⁴ John O. Hayward, *Hysteria over Sexting: A Plea for a Common Sense Approach*, 14 ATLANTIC L.J. 60 (2012).

treatment of teachers as public officials or private individuals across the states.¹³⁵ She analyzes case law and makes a proposal for the treatment of teachers as limited public figures.¹³⁶ Austill discusses the reform of the tort law underlying medical malpractice lawsuits.¹³⁷ He provides an explanation for the need for reform and suggests criteria for governments to consider when reforming laws.¹³⁸ He outlines methods and types of substantive and procedural reform and considers both state and federal levels.¹³⁹ Dallavalle, Hunter, and Lozada discuss the relevant case law underlying product warnings.¹⁴⁰ They analyze the standards and potential standards associated with product warnings, the necessity of considering use by non-English speakers, and alternative solutions.¹⁴¹ Katz examines the varying theories by which accountants can be held liable by third parties for negligence and fraud, when these third parties rely on an accountant's work prepared for a client, and even if the accountant has never met or contracted with these

¹³⁵ Kimberlianne Podlas, *A Poison Apple: The Status of the Defamed Teacher*, 4 ATLANTIC L.J. 1 (2001).

¹³⁶ *Id.*

¹³⁷ A. David Austill, *Medical Tort Reform: Policy Considerations and Proposals*, 15 ATLANTIC L.J. 57 (2013).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Kelly Dallavalle, Richard J. Hunter, Jr., & Hector R. Lozada, *Should a Legal Analysis of the Adequacy of Warning Labels Consider Issues Relating to Use of Products by Non-English Speakers?*, 16 ATLANTIC L.J. 70 (2014).

¹⁴¹ *Id.*

third parties.¹⁴² He provides the state of the law for accountant liability to third parties circa the year 2000.¹⁴³

K. Business Law and Practice

The scope of the *ALJ* has expanded from time-to-time to include a variety of articles impacting business law and practice broadly construed. For example, Tapis, Priya, Haser, and Zampieri link moral intensity to jurisprudence to provide a conceptual framework for research in this area.¹⁴⁴ They overview the implications for pedagogy and practice.¹⁴⁵ Katz provides the historical background for service-member relief laws, the key statutory requirements pertaining to property and money, and implications for businesses.¹⁴⁶ Zylstra examines the potential for use of collaborative law methodologies for resolving business disputes and cautions against its utilization due to the inherent power imbalances reflected in many business relationships.¹⁴⁷ She

¹⁴² Michael A. Katz, *The Current State of Accountant Liability Regarding Third Party Plaintiffs*, 3 ATLANTIC L.J. 83 (2000).

¹⁴³ *Id.*

¹⁴⁴ Gregory P. Tapis, Kanu Priya, Jeanne Haser, & Rebecca L. Zampieri, *Antecedents of Ethical Decision Making: An Investigation into Moral Intensity and Jurisprudence*, 12 ATLANTIC L.J. 174 (2010).

¹⁴⁵ *Id.*

¹⁴⁶ Michael A. Katz, *The Servicemembers Civil Relief Act: Contemporary Revisions to the Soldiers' and Sailors' Civil Relief Act of 1940 Regarding Rights and Responsibilities of the Military, Their Dependents and Those Who Do Business with Them*, 13 ATLANTIC L.J. 146 (2011).

¹⁴⁷ Alexandria Zylstra, *Collaborative Law and Business Disputes: A Marriage of Equals?*, 17 ATLANTIC L.J. 1 (2015).

outlines the collaborative law process, its benefits and risks, and relevant studies.¹⁴⁸

Moore examines the historical and societal reasons why lawyers are not typically referred to as doctors, even when they have attained a Juris Doctor (J.D.) degree within the United States.¹⁴⁹ He contends that lawyers should indeed be referred to as “doctors.”¹⁵⁰ Daughtrey looks at the ways in which liquidated damage clauses can be challenged under Virginia precedents based on the discrepancy with actual damages, the intent of the parties at the time of contracting, or both.¹⁵¹ Daughtrey’s review of case law reveals that if the stipulated damages is a good faith estimate of uncertain real damages, then the clause will be upheld so long as this result is not overly disproportionate to the actual damages sustained.¹⁵²

Bennett recounts three true stories in the context of just-in-time production management and examines their implications for business executives and business lawyers.¹⁵³ The stories illustrate that lawyers must think through the business consequences of legal difficulties because executives

¹⁴⁸ *Id.*

¹⁴⁹ Larry Moore, *Is the Lawyer a Doctor?*, 17 ATLANTIC L.J. 72 (2015).

¹⁵⁰ *Id.*

¹⁵¹ William H. Daughtrey, Jr., *Actual Loss in Determining Reasonableness of Liquidated Damages Clauses: Virginia’s Show-Me Law*, 3 ATLANTIC L.J. 94 (2000).

¹⁵² *Id.*

¹⁵³ Robert B. Bennett, Jr., *Three Stories and Their Morals*, 11 ATLANTIC L.J. 1 (2009).

often do not.¹⁵⁴ The stories are told in a first person narrative with a conversational tone and illustrate the business value that lawyers can provide to clients.¹⁵⁵ Business law and practice continue to influence the authors of the *ALJ*.

IV. THE SOCIAL CONTEXT AND FUTURE OF THE JOURNAL

The *ALJ* was born and continues to thrive within one of about a dozen regional associations within the Academy of Legal Studies in Business (ALSB). The ALSB itself is “a collegial association of teachers and scholars in the fields of business law and legal environment who reside outside of professional law schools.”¹⁵⁶ The ALSB hosts an annual national conference where members from around the nation (and world) come to present scholarly manuscripts and exchange ideas. In addition to the ALSB national conference, the regional sections of the ALSB typically hold annual meetings for each region. The regional meetings provide members with a smaller forum within which to present ideas, discuss papers, and socialize a bit closer to home. Other regional associations within the ALSB also sponsor journals, many of which, like the *ALJ*, have grown in reputation and impact over

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See Robert C. Bird, *The Intellectual and Social Antecedents to the American Business Law Journal*, 50 AM. BUS. L.J. 1, 3 (2013) (providing a history of the ALSB’s flagship journal and a description of the social context of the ALSB).

time.¹⁵⁷ As long as ALSB members continue to support the *ALJ*, it will continue to publish for decades to come.

- THE EDITORS

¹⁵⁷ ALSB, <http://www.alsb.org/regional-associations>

**NOT TOO HOT AND NOT TOO COLD: A
CONTRACT NEGOTIATION ACTIVITY
THAT MAY BE ‘JUST RIGHT’**

MICHAEL R. KOVAL*

Legal Environment and Business Law instructors face an embarrassment of riches when it comes to robust and engaging experiential teaching activities for negotiating and drafting contracts, but, as we all know, we are a picky lot, and none is ever “just right” to suit our particular pedagogical circumstances. Too complicated. Too simple. Too much writing. Too little writing. Too time-consuming. This article describes yet another problem-based learning activity for contract law that gives students the opportunity to understand important contract principles by drafting a straightforward service contract, but one that strikes, in the author’s opinion, the right balance of sophistication, rigor, practicality, enjoyment, and ease. The activity is called Draft Your Own Contract (“DYOC” or the “Activity”), and uses five scenarios—wedding planner, pet sitter, house painter, personal trainer, and rock band—as the basis for the contracts. The Activity can be adapted to large, small, and online classrooms. It can be utilized

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as an in-class activity, outside homework assignment, or combination of both, and it is designed to give students the opportunity to apply contract law principles to hypothetical yet real-world business situations. Part I of this article explains the author's motivation for creating and implementing the Activity. Part II describes the Activity materials. Part III explains the classroom implementation strategy for the Activity, including the learning objectives, the classroom methodology, grading guidelines, and a summary of the author's observations and lessons learned from using the Activity. The materials for the Activity are reproduced in Appendices A-C.

I. PURPOSE

There are numerous terrific contract-based experiential activities that have been created and published over the years for use in business law classrooms.¹ So why create another? The author had

¹ See, e.g., Judy Gedge, *Launching Your Business Law Course with an "Awesome First Day!"*, 25 S.L.J. 341 (2015); Susan J. Marsnik & Dale B. Thompson, *Using Contract Negotiation Exercises to Develop Higher Order Thinking and Strategic Business Skills*, 30 J. LEGAL STUD. EDUC. 201 (2013); Bruce W. Klaw, *Deal-Making 2.0: A New Experiential Simulation in Contract Negotiation and Drafting for Business Students in the Global and Digital Age*, 33 J. LEGAL STUD. EDUC. 37 (2016); Susan M. Denbo, *Contracts in the Classroom—Providing Undergraduate Business Students with Important "Real Life" Skills*, 22 J. LEGAL STUD. EDUC. 149, 163-164 (2005); Diana Page & Arup Mukherjee, *Using Negotiation Exercises to Promote Critical Thinking Skills*, 33 DEV. BUS.

several specific parameters and objectives in mind during the development of the Activity, and was unable to find any published activities that fit the bill. First, it should be experiential in nature to complement the black letter legal principles presented in class. Second, it should be easy for all students to understand the details of the transactions without any prior business experience. Third, it should be based on a purchase and sale of services rather than goods. Fourth, it should contain multiple scenarios so that all students are not drafting the same contract. Fifth, it should include both individual and group components. Sixth, it should require students to actually write a contract. Finally, it should be executed with minimal class time and minimal instructor supervision. The reasoning behind the selection of these seven parameters is described more fully below.

A. *Experiential Problem-Based Learning Activity*

Problem-based learning activities are generally defined as “realistic simulations . . . designed to provide a context for learning.”² The benefits are well-documented. They help students

SIMULATION & EXPERIENTIAL LEARNING 71 (2006); Marlene E. Barken, *Integrating Contract and Property Fundamentals with Negotiation Skills: A Teaching Methodology*, 9 J. LEGAL STUD. EDUC. 73 (1990); Ida M. Jones, *Bridging the Gap: Using Contract Simulations as an Experiential Teaching Method*, 6 J. LEGAL STUD. EDUC. 71 (1987). For a more exhaustive list, see Marsnik & Thompson, *supra*, at 204 n.10.

² Marsnik & Thompson, *supra* note 1, at 201.

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“build bridges between the course materials and their own context of knowledge.”³ Contract principles, which are usually presented in discrete units, can be difficult for students to synthesize, but active engagement with the principles not only enhances the process, it also moves students into the realm of higher-order learning as they make decisions and solve problems together.⁴ Additionally, “content learned through a realistic exercise is more likely to be learned at a deeper level and remembered and used appropriately when it is needed later.”⁵ Such problem-based learning also encourages students to improve written and oral communication skills and critical thinking and reasoning skills.⁶

Not only does integrating problem-based learning activities into the classroom increase student engagement and make the class more enjoyable, it also meets the accreditation standards of the Association to Advance Collegiate Schools of Business (AACSB) on learning and teaching that were adopted in 2013 and revised in 2017.⁷ One such

³ Gedge, *supra* note 1, at 343.

⁴ Marsnik & Thompson, *supra* note 1, at 203.

⁵ *Id.*

⁶ Lucille M. Ponte, *The Case of the Unhappy Sports Fan: Embracing Student-Centered Learning and Promoting Upper-Level Cognitive skills Through an Online Dispute Resolution Simulation*, 23 J. LEGAL STUD. EDUC. 169, 170 (2006).

⁷ *Learning and Teaching Standards, Eligibility Procedures and Accreditation Standards for Business Accreditation*, ASSOC. TO ADVANCE COLLEGIATE SCHOOLS OF BUSINESS, <https://www.aacsb.edu/-/media/aacsb/docs/accreditation/standards/business->

requirement is to utilize “teaching and learning activities . . . that highlight the importance of student engagement and experiential learning.”⁸

B. Accessibility

The benefits of problem-based learning activities are amplified when the activity is based on a real-world scenario that students have experienced.⁹ While the scenarios in the Activity are probably not ones that students have experienced first-hand—wedding planner, pet sitter, house painter, personal trainer, rock band—they are common enough in the popular culture that students can easily explain the basics of the services that each business provides.¹⁰ Even if a student has not ever hired a wedding planner or a pet sitter or a band, they have probably been to a wedding, or have owned a pet, or have been to a concert, and can realistically visualize the services to be performed and the

[accreditation-2017-update.ashx?la=en](#), (last visited May 31, 2018).

⁸ *Id.* at 42.

⁹ Shelley McGill, *The Social Network and the Legal Environment of Business: An Opportunity for Student-Centered Learning*, 30 J. LEGAL STUD. EDUC. 45, 54 (2013).

¹⁰ The popularity of reality-based television shows such as SAY YES TO THE DRESS (TLC 2007), FIXER UPPER (HGTV 2013), FLIP OR FLOP (HGTV 2013), DOG WHISPERER WITH CESAR MILAN (National Geographic Channel 2013), THE BIGGEST LOSER, (NBC 2004) and others show the cultural awareness of these services, and were the inspiration for the scenarios in the Activity.

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potential for things to go wrong.¹¹ In addition, problem-based learning activities based on scenarios that students are familiar with can enhance cognitive development.¹²

The author included this “relatability” parameter because of, ironically, personal experience with another less-relatable contract activity he used. In an earlier attempt to incorporate a problem-based learning activity into the contract law unit, the author adapted an activity presented at an ALSB panel discussion in Boston in 2013.¹³ The activity required students to assume the role of either a corporate purchasing manager looking to purchase laptops for a hospital, or a salesperson for the technology company selling the product. A sample agreement, on which they based their eventual contract, described a non-related Asset Purchase Agreement. The activity required students to draft an agreement, but it turned out to be too sophisticated for first- and second-year undergraduate students. The author observed that the language of the sample agreement

¹¹ See, e.g., Gedge, *supra* note 1 (explaining, for a used-car purchase negotiation exercise, that even if a student has not actually bought a used car, they will most likely have experience operating a car and know the hazards of owning one that is not well-maintained).

¹² Ryan C. Grelecki & Susan L. Willey, *Applying Legal concepts to Business in a legal and Ethical Environment of Business Course: The Build-a-Business Project*, 34 J. LEGAL STUD. EDUC. 89, 96 n.4 (2017).

¹³ The Panel was titled *Innovative Assignments: Beyond Homework, Toward Engaged Learning*, and the materials were presented by Eric Yordy, Northern Arizona University. They are on file with the author.

was too dense and the degree of complexity too high for most students to be able to understand and modify without a disproportionate amount of time and effort spent by both the students and the instructor.¹⁴ The author simplified the structure and the language of the activity semester after semester, but students continued to struggle. Finally, unwilling to give up on the concept, the author decided to create the Activity using simpler scenarios that are more accessible to students.

C. *Sale of Services*

Many of the published problem-based learning activities involving contract negotiation and drafting concern the purchase and sale of goods, thereby invoking the Uniform Commercial Code.¹⁵ At the author's institution, Legal Environment is a required pre-professional course for students who have not yet been admitted to the business school, and the focus in the contract law unit is on common law principles, with a brief nod to the Uniform Commercial Code, which is covered in the upper-level Business Law course. Therefore, the author wanted the Activity to illuminate common law principles that would be applicable to contracts for

¹⁴ *But see* Marsden & Thompson, *supra* note 1 (arguing for more sophisticated scenarios, as this is where students will find themselves after graduation).

¹⁵ *See, e.g.,* Marsden & Thompson, *supra* note 1 (batteries and apfelwein); Gedge, *supra* note 1 (used car); Yordy, *supra* Part 1A and note 13 (laptops with docking stations).

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services.¹⁶ Specifically, the author wanted the Activity to focus on performance and breach, to help students understand both the beauty and misery of the concept of substantial performance, and to show how parties can shape both the definition of performance and the measure of damages through contract execution by continually asking the question “what if?”¹⁷

A second reason to base the scenarios on providing services is to show budding small business owners, many of whom will be in the service sector, that “self-help” law is an option they should consider, and “doing it yourself” is sometimes appropriate.¹⁸ “Learning how to handle one’s own simple legal tasks and problems will be especially helpful to students who become entrepreneurs and small business owners and may have limited resources to hire a lawyer.”¹⁹ Websites like nolo.com offer a suite of legal forms that, while they must be used with caution, can be quite useful to cash-strapped small business owners.²⁰ As a lawyer,

¹⁶ KENNETH W. CLARKSON, ROGER L. MILLER & FRANK B. CROSS, *BUSINESS LAW TEXT AND CASES* 216 (14th ed. 2016).

¹⁷ See Gedge, *supra* note 1, at 347-349 (regarding the pedagogical usefulness of the phrase “what-if” when teaching students about contracts) and Appendix B, *supra*.

¹⁸ Marc Lampe, *A New Paradigm for the Teaching of Business Law and Legal Environment Classes*, 23 J. LEGAL STUD. EDUC. 1, 34 (2006).

¹⁹ *Id.*

²⁰ Nolo.com divides its “Business Suite” offerings into easy to understand categories such as Starting your Business and Running your Business. The Contracts product contains the following pitch: “Whether you’re starting a business, signing

the author is nervous and skeptical about recommending these types of products to students, but as an educator, it seems a disservice not to talk about them, perhaps with an adapted liquor industry warning to “Law Responsibly.”²¹ Nevertheless, an activity that requires students to adapt a generic form to address a particular business scenario can provide students with the confidence and skills to do so in the future if necessary.

D. *Multiple Scenarios*

In a nod to classroom excitement and student engagement, the author wanted the Activity to include different scenarios so that students have some choice as to their assignment, and not all students would be working on the same assignment. This provides four important benefits. First, in the author’s experience, students tend to be more engaged with and attentive to the assignment instructions when they have input into the assignment they will execute.²² Second, the ability

a lease, hiring a new employee or independent contractor, licensing a concept, selling a boat, or contracting for a new fireplace, *Contracts: The Essential Business Desk Reference* can help. A must-have for small business owners, entrepreneurs, lawyers, and law students—and anyone else whose success is built around understanding and negotiating agreements.” <https://store.nolo.com/products/contracts-ctrct.html> (last visited May 25, 2018).

²¹ Perhaps a better analogy would be the preference for advocating for sex education rather than abstinence.

²² See Grelecki & Willey, *supra* note 12, at 95 (stating that having students choose their own topics connects them more personally with the project).

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to choose their scenario encourages them to be more creative, as they can bring their own knowledge about a particular scenario to bear on the negotiation and drafting.²³ Third, there is a reduced chance that less-motivated students can simply “borrow” ideas from their more industrious classmates. Fourth, and most importantly, the availability of multiple scenarios alerts students to the universality of contract law: they will collectively be applying the same legal principles to very different sets of circumstances.

E. Individual and Group Components

Student preparation is necessary for any negotiation activity to be successful, and the author has found that giving an individual preparatory assignment without an associated grade is an exercise in futility. Therefore, as some authors have also concluded, the Activity should include a graded individual preparatory component to be completed before the negotiation.²⁴ However, the preparation must be more than a cursory planning form; the author wants students to have thought about the situation in depth, and, to reduce the free-rider problem, to have put forth the effort to write a proposed contract individually before the negotiation

²³ *Id.*

²⁴ See, e.g., Marsnick & Thompson, *supra* note 1, at 212 (students must individually email the instructor); Page & Mukherjee, *supra* note 1, at 73 (students individually submit a planning sheet); Yordy, *supra* Part 1A and note 13 (students individually submit a planning sheet).

itself. Furthermore, the grade for the individual contract must be as important as for the group contract to insure students take the preparation seriously.

F. Writing

The Activity should include a writing component to help students understand that formal agreements need to be clear, internally consistent, and accurately reflect the will of the parties.²⁵ It should impress upon students that this is not an easy task, and requires close attention to logic and detail after the verbal agreement is negotiated. The author wanted the Activity to require students to practice accurately describing performance requirements, and incorporating foreseeable contingent “what-if” consequences.²⁶

The author began using a precursor to the Activity many years ago as an introduction to the unit on contract law, with the goal of showing students the big picture before immersing them in the details of the common law rules. The students were assigned a scenario (then one of three), asked to

²⁵ For an excellent discussion of what business students should learn about writing contracts from a problem-based learning activity, *see* Klaw, *supra* note 1, at 51-52 (clearly identify rights and obligations for breach determination, mutual promises, thorough, easily understandable, logically organized); *see also* Jones, *supra* note 1, at 77 (advantage of written contracts over oral ones, need for attorney’s review, awareness of ability to negotiate terms, and improved comprehension of offer and acceptance in a negotiation).

²⁶ Gedge, *supra* note 1, at 347-349.

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negotiate during class time, and then each group would briefly report to the class the broad elements of their agreement in a friendly, casual exchange.²⁷ This activity, while enjoyable and useful, did not have a writing component and therefore failed to highlight the importance and difficulty of using clear and consistent language when creating an agreement.

The question of whether or not the Activity should include a template for students to model and adapt is an interesting one. Some published activities refer students to sample contracts in the course textbook to use as a guide.²⁸ Others ask students to draft the agreement from scratch, with instructions as to what should be included.²⁹ Still others encourage students, with appropriate warning, to seek out samples on the internet.³⁰ The author decided on a middle-ground: the Activity should include a curated generic Sample Service Agreement (Appendix C, *infra*) which students modify to reflect their chosen scenario and negotiated agreement. There are several reasons for this decision.

First, the author wanted to modulate the level of difficulty of the assignment. Students in the author's Legal Environment course are generally freshmen and sophomores, and the author has found

²⁷ This technique is great for a first-day ice-breaker. *Id.* at 346-347 (citing Michael R. Koval, *Step Away From the Syllabus: Engaging Students on the First Day of Legal Environment*, 30 J. LEGAL STUD. EDUC. 179, 189 n.29 (2013)).

²⁸ Marsden & Thompson, *supra* note 1, at 214.

²⁹ Denbo, *supra* note 1, at 163-164; Jones, *supra* note 1, at 83-84; Barken, *supra* note 1, at 76.

³⁰ Klaw, *supra* note 1, at 44.

that, regardless of the writing assignment, they perform best when given a model. They want to know what the deliverable should look like. Second, the Sample Services Agreement mimics what students might find if engaging in self-help law later in their careers, as discussed in Part I.C., *supra*, but without the risk. Adapting “found” documents to their own purposes is completely natural to our students, and providing the sample ensures their adaptations will point in the right direction. Third, by curating a sample contract, the instructor can choose the language to include that best serves the objectives of the course, without risking that students become overwhelmed and confused by trying to understand legal language that is irrelevant to the scenarios being negotiated. The instructor can also scaffold the sample contract by including prompts that alert the students to consider what language might be needed in particular sections of their contracts.³¹ Finally, the choice to include a sample contract is a bit selfish. It is difficult, if not painful, for a lawyer to read legal documents—even student-generated ones— that do not follow the expected

³¹ See Diane May, *Using Scaffolding to Improve Student Learning in Legal Environment Courses*, 31 J. LEGAL STUD. EDUC. 233, 235 (2014) (“Scaffolding in teaching . . . provides a structure to support students in the completion of a task they might not be able to do for themselves . . . the instructor provides the scaffold to support a student and guide that student through an activity to accomplish the goal. . . The instructor typically guides the student with prompts, hints, cues, partial solution, direct instructions, or other means.”) (internal citations omitted).

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norms of the legal profession.³² Providing students with a sample to follow allows them to conform to these norms and results in submissions that are more professionally palatable, allowing the instructor to focus on the content rather than be distracted by the jarring presentation.³³

G. Ease of Implementation

Finally, the author's Legal Environment course is jam-packed, and every minute is precious, so the Activity needed to be easy to manage

³² Michael R. Koval & R. Michael Garner, *I Don't Do Writing: A Model for Overcoming Faculty Resistance to Using Writing Assignments in the Classroom*, 15 Atlantic L.J. 120, 135 (2013) ("Because of the technical specificity of the legal field, knowledge about how lawyers write within their discipline is of paramount importance in a Legal Environment course if the instructor is to use writing assignments as measures of academic achievement. Lawyers and judges create different types of writings, or genres . . . and each genre employs its own analytical structure and rhetorical techniques. Therefore, in order for a writing assignment to be a successful pedagogical tool in a Legal Environment course, the student must recognize these legal genres, and understand how they are structured and how they are used.").

³³ *Id.* ("Specific types of legal writing that lawyers and legal scholars commonly use . . . have expected structures, styles, and flow which, if deviated from, cause a jarring response in the lawyer-reader, and therefore would be viewed in the community as mediocre or poor examples [regardless of the content]. The student writer, then, must identify the parameters of the each genre, understand the purpose, and utilize the required structure and style in order to create a successful writing that will be graded positively by the instructor.").

regardless of the number of students participating and the amount of class time available. The explanation and assignment of roles could take no more than thirty minutes of class time, the negotiation should be able to occur in or outside of the classroom, as dictated by the course schedule, and deliverables should be able to be created without additional instructor guidance or input.

II. THE DYOC MATERIALS

The Activity consists of five business scenarios set forth in Appendix A, *infra*, which require students to create mutually acceptable contracts between a service provider and a client: 1) a wedding planner and a somewhat happy couple; 2) a pet-sitter and harried dog owner; 3) a house painter and perfectionist homeowner; 4) a protective manager of a temperamental rock band and a club owner; and 5) a newly-certified personal trainer and a gym owner. Each role has associated with it an information sheet with objectives to be incorporated into the contract the parties negotiate and create. As described in Part I.B., *supra*, these scenarios were chosen because most students are familiar with the services described in the agreements, can imagine themselves as parties to the contracts, and have an intuitive sense of the problems that could arise. In addition, all of the scenarios involve a contract for services, so that common law contract principles that

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we discuss in class apply, and the Activity will therefore reinforce the course material.³⁴

There are two other important documents for the students to use. The first is the Assignment Description, shown in Appendix B, *infra*, and the second is the Sample Service Agreement, found in Appendix C, *infra*. The Assignment Description gives the students a detailed explanation of requirements, deliverables, and process. The Sample Service Agreement provides a template from which the students can draft their own contracts.

Using these materials, students choose (or are assigned if time prohibits) a scenario and a role, and then, working from the Sample Service Agreement, individually draft their own proposed contract. A negotiation follows, and the group then prepares a final agreement acceptable to both sides. The methodology is explained fully in Part III, *infra*.

III. IMPLEMENTATION

A. Objectives

The overall purpose of this activity is to show students how the common law contract principles covered in class connect to real-world business situations. In the process, they will be developing other skills as well. Upon completing the activity, the student should be able to:

³⁴ See Part I.C., *supra* (discussing the rationale for using service agreements).

- Analyze a business scenario to determine critical contractual components, and create a contract that accurately includes those components;
- Recognize how the legal concepts of performance and breach can be defined by the parties to a contract;
- Recognize the importance of clear and internally consistent language when drafting business agreements so that someone not familiar with the deal can understand it;
- Understand the limitations of contracts to anticipate every possible problem; and
- Understand how common law rules often define and shape the language that is included in a contract (such as related to consideration, mistake, assignment, and interpretation).

B. Classroom Logistics

The Activity begins with the distribution of the Assignment Description, Appendix B, *infra*. After giving the class about 3 minutes to read the assignment, the instructor summarizes the assignment, and highlights the two requirements: The individual Proposed Contract, and the negotiated Final Agreement to be submitted by the group. The next step is to place students in groups of four. This can be accomplished in various ways, depending on the instructor's preference.³⁵

³⁵ The author establishes four-member groups on the very first day of class, and utilizes them throughout the semester. Some semesters the groups have been randomly assembled, other times they are formed based on seating preferences, and still

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Next, the instructor spends about 15 minutes in class assigning the scenarios and roles. Each group will be assigned one of the five business scenarios. The author has used different methods for this process. A favorite method of the students is to write the cryptic titles of the scenarios on the whiteboard (Happily Ever After, A Dog's Life, Curb Appeal, Let the Music Play, and Sun's Out Guns Out), establish a random order, and allow each group to choose a scenario knowing only the title, using each scenario as equally as possible.³⁶ A popular and entertaining tool to establish a random order can be accessed at wheeldecide.com, which allows the instructor to quickly create a virtual wheel of fortune that adds

other times the author has allowed groups to self-select. There is disagreement in the literature regarding the best way to form effective groups. See Barbara Oakley et al., *Turning Student Groups into Effective Teams*, 2 J. STUDENT CENTERED LEARNING 9, 11 (2004) (recommending instructors should form teams rather than allowing students to self-select in order to, among other things, minimize the propensity for cheating, and to model the lack of control of team placement in the workplace), but see Denise Potosky & Janet Duck, *Forming Teams for Classroom Projects*, 34 DEV. BUS. SIMULATION & EXPERIENTIAL LEARNING 144, 145 (2007) (stating that students who are randomly assigned to teams are generally less satisfied with those teams than those who self-select). If time allows, instructor-guided self-selection of teams based on common interests would be an effective technique. Patricia Sánchez Abril, *Reimagining the Group Project for the Business Law Classroom*, 33 J. LEGAL STUD. EDUC. 235, 246 (2016).

³⁶ Depending on the number of groups, there will be some overlap, and more than one group may be analyzing the same scenario.

drama to the assignment process.³⁷ If time prohibits this interaction, or if the class is so large that the choosing process would be unwieldy, the scenarios can simply be randomly distributed to the groups. Within each group of four, two students will be assigned the role of service provider, and two will be assigned the role of client. To ease the process, the author simply uses seating position to assign these roles. At this point, the students are given the appropriate information sheet based on their scenario and role and given a few minutes to read it. They are asked to not share their information sheet with the other side.

Finally, the Sample Service Agreement is discussed. The instructor explains the general outline of a contract, and emphasizes how the document should be easy to understand, logically constructed, and internally consistent, so that the chance that it will be misinterpreted or contain contradictions is diminished.³⁸ By referring to the Assignment Description, the instructor explains the type of content that should be included in the Recitals, Article 1 (Performance and Pricing), Article 2 (Representations and Covenants), and Article 3 (General Provisions).³⁹ Students are told that most of the work required by the Activity—defining performance—will be reflected in Article 1

³⁷ <https://wheeldecide.com/> (last visited May 30, 2018).

³⁸ Marsden & Thompson, *supra* note 1, at 211.

³⁹ The author has deleted the traditional ‘Definitions’ section from the Sample Service Agreement after finding many students struggle with the concept, as they feel compelled to use the dictionary to define legal terms.

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of their contracts. The amount of class time needed to accomplish the distribution and explanation of the assignment is approximately 30 minutes.

One week later, students submit their individual Proposed Contract, in which they have adapted the Sample Service Contract to reflect the wants and needs of the roles they have assumed in their scenarios. The students are asked to bring a hard copy of their Proposed Contract to class for use in the negotiation phase of the activity, for which the author usually provides class time. The students are first given time to compare their Proposed Contracts with their counterparts in their group (clients or providers) to prepare a list of requirements for the Final Agreement. Then a negotiation period allows the two service providers and two clients to reach a mutually acceptable agreement.⁴⁰ The students discuss their needs with each other and try to reach agreement in the areas of performance, price, quality, and penalties. It should be noted that the scenarios are designed so that reaching an agreement is expected and not difficult, as there are no major roadblocks embedded in the scenarios. As a group, if time permits, the students then begin to draft a Final Agreement that accurately sets forth the terms to which they have agreed. The Final Agreements are submitted approximately one week later, to give the students ample time to complete them. This process is set forth in detail for the students in the Assignment Description in Appendix B, *infra*.

⁴⁰ If class time is not available, the students can accomplish these steps outside of class.

C. *Grading*

The author usually weights the Activity as five percent of a student's total grade, which is 50 points in the author's grading scheme. The individual Proposed Contract is 25 points and is graded based on how well the student modifies the Sample Agreement to incorporate the scenario goals into the contract language. The grading rubric for the Proposed Contract is as follows:

Requirement	Points
Recitals: How well did the student modify the Sample Contract to accurately reflect the parties to and purpose of the contract?	2
Article 1 Performance: Did the student include the performance objectives described in the scenario? Is timing included? How well does the language used accurately describe the performance requirements?	6
Article 1 Pricing: How well did the student describe the price to be paid, the timing, and the method of payment?	6
Article 1 Penalties and Incentives: Did the student include penalties or incentives to address potential failures by the other party? Are they logically presented?	6
Article 2 and 3 Modifications: Did the student modify the Sample Service Agreement to reflect their individual scenario with respect to changes, notice,	3

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relationship, confidentiality and/or assignment?	
Professional Presentation: Spelling, grammar, formatting, etc.	2
Total	25

As evident by the weighting, the description of performance obligations, pricing, and penalties are particularly important to the Proposed Contract. This is because an important objective of the Activity is to have students focus on performance and breach, and to show how parties can shape both the definition of performance and the measure of damages with a contract. The Final Agreement, submitted by the group after the negotiation, is also worth 25 points and graded using the same rubric. Students are free to be creative, and there is no one “correct” way to draft the agreement.⁴¹ They are required, however, to create an agreement that clearly reflects the promises made by the parties and anticipates possible problems.

D. Development Path and Lessons Learned

As discussed in Part I, *supra*, the author began cooking up this Activity many years ago as an introduction to the unit on contracts, and has

⁴¹ Well-crafted problem-based learning activities should be ill structured, authentic, and collaborative, as “business people are rarely confronted by tidy problems with neat solutions.” Marsden & Thompson, *supra* note 1, at 205.

continuously adjusted its various knobs and dials, added and subtracted ingredients, and learned from other chefs, so as not to have it be too hot, or too cold, or too salty, or too bland. The author has been using this recipe for four semesters. It has been used in both small sections of 36 students and in large ones of over 60. It has been used in both 50-minute and 75-minute class periods. Student reaction to the Activity, gleaned from watching the in-class negotiations and from informal conversations with students both in and out of class, has been positive. Most students enjoy the activity and find it to be helpful in understanding the importance of contracts to businesses.

In terms of student engagement, the author has been surprised at how much effort the majority of students put into this activity. Upon observing the negotiations that take place during class, most students are fully engaged in the process, as indicated by active conversation with team members and taking notes as agreement is reached. While the negotiations are not designed to be difficult and all groups finish during the class time, nevertheless there are usually a few heated, if good-natured, arguments during the negotiations. Groups usually begin drafting their Final Agreements during the class period, after 20-30 minutes of negotiation, and the author has noticed that students are generally surprised at how difficult it is to transform the negotiated elements from verbal promises into a formal written agreement.

Student submissions vary greatly in quality as graded according to the rubric presented Part III.C,

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supra, but the group aspect of the activity ensures that quality usually increases from the individual Proposed Contract to the Final Agreement. Over four semesters, with approximately 280 students, the average grade earned on the individual Proposed Contract was 83% and on the group Final Agreement was 90%.

In addition to helping students understand performance and breach, the author has found the Activity to be useful when teaching other common law principles. At the end of the contract law unit, particular paragraphs from the Sample Service Agreement are referenced to reinforce certain legal concepts and demonstrate how they apply. For example, paragraph 3.1 “Entire Agreement”⁴² is highlighted to illustrate how the parol evidence rule prohibits parties from introducing evidence outside the agreement to change its clear meaning, with an admonition to all future purchasing managers to focus on the language in the contract and not the words of the salesperson.⁴³ Paragraph 3.2, “Successors and Assigns,”⁴⁴ is explained as a way to

⁴² “This Agreement contains the entire agreement and understanding of the Parties with respect to the subject matter hereof and supersedes all prior written or oral agreements and understandings between the Parties.”

⁴³ CLARKSON ET AL., *supra* note 16, at 303.

⁴⁴ “This Agreement is not assignable by either Party without the other Party’s prior written consent. This Agreement is binding upon and inures to the benefit of the Parties and their successors and permitted assigns. Nothing in this Agreement, expressed or implied, is intended or will be construed to confer upon any Person other than the Parties and their

avoid the common law rule of assignability to third parties.⁴⁵ In Paragraph 3.3, Interpretation,⁴⁶ the author points out that the parties can instruct the judge to bypass the common law judicial interpretation rule of strict construction against the drafter.⁴⁷ As time permits, the Activity can be used as a touchstone throughout the entire contracts unit.

IV. CONCLUSION

The author has found the DYOC Activity to be an engaging and enjoyable assignment for Legal Environment students. As a problem-based learning activity, it encourages critical thinking and helps students see the importance of contract law concepts to business. It fosters a practical understanding of performance and breach and the need for clear language and logical structure, and it provides students the opportunity to practice applying contract law to real-world business scenarios. The Activity can be incorporated into an existing Legal

respective successors and permitted assigns any right, remedy, or claim under or by reason of this Agreement.”

⁴⁵ CLARKSON ET AL., *supra* note 16, at 311-312.

⁴⁶ “Articles, titles, and headings in this Agreement are inserted for convenience of reference only and are not intended to be part of or affect the meaning or interpretation of this Agreement. This Agreement has been mutually prepared, negotiated, and drafted by the Parties. The provisions of this Agreement shall be construed and interpreted against each Party in the same manner, and no provision shall be construed or interpreted more strictly against one Party on the assumption that an instrument is to be construed more strictly against the Party that drafted the Agreement.”

⁴⁷ CLARKSON ET AL., *supra* note 16, at 228.

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Environment course with very little modification and without taking up much class time, and is relatable to most students because they intuitively understand the issues. The author is looking forward to fine-tuning the recipe and expanding the buffet in the coming semesters, until the Activity is 'just right.'

APPENDIX A – BUSINESS SCENARIOS

Scenario 1: “Happily Ever After”

Wedding Planner

You are a successful and sought-after wedding planner, and you and your assistant are meeting with a couple to work out the details about signing them on as clients. You have met with them several times already, and are confident about closing the deal to plan every aspect of their wedding, from invitations to rehearsal, rehearsal dinner, and wedding day. You want to sign them on, but have some nagging doubts as to whether this wedding will really take place after seeing the couple interact with each other. Also, they seem to be very demanding, and while you welcome the challenge, you aren't sure about the profitability of this job, given the amount of time you will have to spend trying to satisfy their every whim. Therefore, you want to make sure your contract contains an hourly rate for your time spent. You also want to make sure the clients pay all vendors directly, rather than you being reimbursed.

Your task is two-fold.

First, list all the goals you want to achieve from this relationship, and mark each one as “REQUIRED” or “DESIRED.”

Second, draft a Proposed Contract that incorporates your goals, and defines as precisely as possible the

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promises, expectations, obligations, and responsibilities of you and your new client. You should also include a description of what happens if things don't go as planned.

Please do not share this handout with your team members. During negotiations, you can divulge as much or as little you see fit.

Your Proposed Contract (not your list) is due via Turnitin Monday, September 26 at 10:00 am. Bring a hard copy to class with you that day as well for our in-class negotiations.

Happy Couple

You and your fiancé are meeting with an A-list wedding planner to work out the details about hiring her company to plan every aspect of your wedding, from invitations to rehearsal, rehearsal dinner, and wedding day. You have verified her references, and this planner is by far the most professional one you have met. You want to hire her, but have some nagging doubts about her ability to provide you with exactly what you want. You are afraid she will take too much control and turn your “perfect day” into whatever works for her bottom line. Given her exorbitant fee, you feel your every desire should be met perfectly. You have also been fighting with your fiancé lately, and aren't even 100% sure that you are going to actually go through with the wedding, so

you want to make sure you don't lose too much money if the wedding is cancelled.

Your task is two-fold.

First, list all the things you want to accomplish from this business relationship, and mark each one as "REQUIRED" or "OPTIONAL."

Second, draft a Proposed Contract that incorporates your goals, and defines as precisely as possible the promises, expectations, obligations, and responsibilities of you and your wedding planner. You should also include a description of what happens if things don't go as planned.

Please do not share this handout with your team members. During negotiations, you can divulge as much or as little you see fit.

Your Proposed Contract (not your list) is due via Turnitin Monday, September 26 at 10:00 am. Bring a hard copy to class with you that day as well for our in-class negotiations.

Scenario 2: "A Dog's Life"

Pet-Sitter

You are a sole proprietor of a pet-sitting business. You have made a good living providing general pet care services to pet owners who need help caring for their pets. You provide dog-walking, feeding, home check-

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ins, exercise and play time; whatever the client needs to keep their pets happy and healthy. Your business is purely travel-based. You do not have a facility for caring for pets away from the client's home. You typically charge by the hour, including travel time, and your rate varies based on the amount of work and/or attention required by the client and their pet. You also provide dog training services, which, as a certified pet whisperer, you can charge a lucrative fee.

You are going to meet with a potential client who just bought two Labrador retriever puppies for his kids, and needs someone to check on them and let them outside during the day while he is at work. You sense from speaking to him on the phone that he is overwhelmed and could also use some training sessions, but you're not sure what his financial situation is. To that end, you want to get paid up front, preferably a month in advance, before agreeing to provide services for him. However, his home is adjacent to a current customer, and adding him to your daily route would be quite easy.

Your task is two-fold.

First, list all the goals you want to achieve from this relationship, and mark each one as "REQUIRED" or "DESIRED."

Second, draft a Proposed Contract that incorporates your goals, and defines as precisely as possible the promises, expectations, obligations, and responsibilities of you and your new client. You should also include a

description of what happens if things don't go as planned.

Please do not share this handout with your team members. During negotiations, you can divulge as much or as little you see fit.

Your Proposed Contract (not your list) is due via Turnitin Monday, September 26 at 10:00 am. Bring a hard copy to class with you that day as well for our in-class negotiations.

Dog Owner

You are a single dad of two young boys, and for Christmas you foolishly bought them each a Labrador retriever puppy. You are realizing that this was not a smart idea. You are a nurse and work shifts at the local hospital. While your mom is willing to take the boys to her house when you work nights, she refuses to help with the dogs. (She told you it was a bad idea.) You know you should get rid of the dogs, but the boys would be heartbroken.

You have contacted a local pet-sitting company to see if they can help you. You need someone dependable to come to the house while you are at work to check on the dogs and let them outside. Sometimes this will be in the mornings, and sometimes in the late evening. You also need someone to train the dogs, and are hoping that the pet-sitter could do some training while they are there, because right now they are destroying everything in sight. You do not have much disposable income right

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now, and are afraid to see how much this will cost, but you don't know what else to do.

Your task is two-fold.

First, list all the goals you want to achieve from this business relationship, and mark each one as "REQUIRED" or "DESIRED."

Second, draft a Proposed Contract that incorporates your goals, and defines as precisely as possible the promises, expectations, obligations, and responsibilities of you and your pet-sitter. You should also include a description of what happens if things don't go as planned.

Please do not share this handout with your team members. During negotiations, you can divulge as much or as little you see fit.

Your Proposed Contract (not your list) is due via Turnitin Monday, September 26 at 10:00 am. Bring a hard copy to class with you that day as well for our in-class negotiations.

Scenario 3: "Curb Appeal"

House Painter

You are a sole proprietor of a painting and handyman business that you have been operating for five years. You are going to talk to a potential client about painting

the exterior of her old 1920s house. She said on the phone she is interested in having the house restored to its historically significant condition, and wants someone who will be true to its original look by using materials and colors appropriate to the time period. While you admire her vision, you have several concerns about working with this client. Your impression over the phone is that she will be very hard to please, and you fear the job could end up being less than profitable because of the time you will have to spend pleasing her. That being said, you have a big hole in your schedule, as a big job you were planning for was cancelled. If you take the job, however, you will have to be sure that you will be paid fairly for your work, and that the quality of your work will be objectively appraised. Also, you need to be able to assign the work to other painting companies if a more profitable job at Springfield University, which you are hoping to get, materializes.

Your task is two-fold.

First, list all the goals you want to achieve from this relationship, and mark each one as “REQUIRED” or “DESIRED.”

Second, draft a Proposed Contract that incorporates your goals, and defines as precisely as possible the promises, expectations, obligations, and responsibilities of you and your new client. You should also include a description of what happens if things don’t go as planned.

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Please do not share this handout with your team members. During negotiations, you can divulge as much or as little you see fit.

Your Proposed Contract (not your list) is due via Turnitin Monday, September 26 at 10:00 am. Bring a hard copy to class with you that day as well for our in-class negotiations.

Homeowner

You are a Springfield University history professor, and have recently purchased an old home that you are meticulously restoring to its 1920s original condition. Restoring old homes has become an obsession for you, and you can't wait to finish this project. All that is left is the exterior painting. You are meeting with a local painter with a good reputation to see if he is right for the job. While you want to keep the price reasonable, you are more concerned about hiring someone who is willing to restore the house to its historical significance, paying attention to colors, materials, and workmanship that would have been used in the 1920s. You want it to be perfect, and need someone who shares your vision. In addition, you are on a rather tight time schedule, as your daughter is getting married on April 1 and you are planning to have the wedding and reception at your newly-painted home. Therefore, the job **MUST** be completed by March 15. If it is not, you will have to move the wedding on very short notice, and this could be quite costly. Finally, you have recently spent a lot of money on landscaping around your house and yard,

and want to make sure that any painter you hire will not damage any of your new plants.

Your task is two-fold.

First, list all the goals you want to achieve from this business relationship, and mark each one as “REQUIRED” or “DESIRED.”

Second, draft a Proposed Contract that incorporates your goals, and defines as precisely as possible the promises, expectations, obligations, and responsibilities of you and your new painter. You should also include a description of what happens if things don’t go as planned.

Please do not share this handout with your team members. During negotiations, you can divulge as much or as little you see fit.

Your Proposed Contract (not your list) is due via Turnitin Monday, September 26 at 10:00 am. Bring a hard copy to class with you that day as well for our in-class negotiations.

Scenario 4: “Let the Music Play”

Club Owner

You and your assistant manager are meeting with the agent for an up-and-coming band, the Traumatiks, to work out the details about having them play an extended gig at your nightclub in Washington DC, the 9:30 Club.

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This band is hot, and you really want to sign them, but you have heard rumors from other club owners that they are temperamental, unprofessional, demanding, and unreliable. On the other hand, they would pack your club with patrons for weeks so long as they actually showed up and played. You are envisioning having them share each night with one or two other bands, in case they don't show. You also are not interested in a one or two night gig; to cover your costs of producing this show, you need at least a two-week commitment.

Your task is two-fold.

First, list all the goals you want to achieve from this relationship, and mark each one as "REQUIRED" or "DESIRED."

Second, draft a Proposed Contract that incorporates your goals, and defines as precisely as possible the promises, expectations, obligations, and responsibilities of you and the band. You should also include a description of what happens if things don't go as planned.

Please do not share this handout with your team members. During negotiations, you can divulge as much or as little you see fit.

Your Proposed Contract (not your list) is due via Turnitin Monday, September 26 at 10:00 am. Bring a hard copy to class with you that day as well for our in-class negotiations.

Band's Agent

You have been hired as an agent for the Traumatiks, a popular local rock band that is just on the cusp of hitting the big time. They have been mentioned in all the right places, and club owners and promoters are starting to take notice. The band wants to capitalize on this new popularity as quickly as possible. To that end, you and your assistant are meeting with the owner of the 9:30 Club, a popular DC nightclub known for catapulting many local bands into famous careers.

Your band has instructed you to keep the gig in DC as short possible – they want to be able to get to NYC quickly if the opportunity arises. Also, being a good agent, you recognize that the band is all about the music and the creative process; they do not have very good business judgment. The members are temperamental, and have often refused to play under circumstances they didn't like. Therefore, you always try to protect them when negotiating with club owners.

Your task is two-fold.

First, list all the goals you want to achieve from this relationship, and mark each one as "REQUIRED" or "DESIRED."

Second, draft a Proposed Contract that incorporates your goals, and defines as precisely as possible the promises, expectations, obligations, and responsibilities of you and club owner. You should also include a

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description of what happens if things don't go as planned.

Please do not share this handout with your team members. During negotiations, you can divulge as much or as little you see fit.

Your Proposed Contract (not your list) is due via Turnitin Monday, September 26 at 10:00 am. Bring a hard copy to class with you that day as well for our in-class negotiations.

Scenario 5: "Sun's Out Guns Out"

Personal Trainer

You have recently completed your exercise science degree from Springfield University and are looking to start a career as a personal trainer. You have a meeting with the manager of Powerhouse Gym to explore the possibility of working there as a trainer. You don't yet have your professional certifications, but plan to obtain them in the near future, as soon as you have the money to pay for the courses and travel required. You want to work as an independent contractor so that you can have flexible hours, because you often have to take care of your disabled mother, with whom you live. Because you have grown up in the area and were active in high school athletics, you are confident you can attract clients pretty quickly. You are not sure yet what the going rate for personal training sessions is, but you want to make sure you keep at least 80% of each client payment for

yourself, with no more than 20% going to the gym, since you will have to pay for your own liability and health care insurance, as well as self-employment taxes. You are also hoping for a relatively long-term relationship, because you know personal trainers need to be viewed as stable and reliable in order to grow their client base.

Your task is two-fold.

First, list all the goals you want to achieve from this relationship, and mark each one as “REQUIRED” or “DESIRED.”

Second, draft a Proposed Contract that incorporates your goals, and defines as precisely as possible the promises, expectations, obligations, and responsibilities of you and the gym owner. You should also include a description of what happens if things don’t go as planned.

Please do not share this handout with your team members. During negotiations, you can divulge as much or as little you see fit.

Your Proposed Contract (not your list) is due via Turnitin Monday, September 26 at 10:00 am. Bring a hard copy to class with you that day as well for our in-class negotiations.

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Gym Owner

You have been successfully operating Powerhouse Gym for 15 years, and business is good. You currently have a position open for certified head trainer, and want to hire someone full-time. The trainer would have his or her own clients, but would also manage the entire training program, including your 4 employee trainers. You have recently ended your relationship with two trainers who were independent contractors because they were unprofessional and undependable, and you suspected they were involved in illegal performance-enhancing drug use. You would rather have the extra expense of trainers as employees so that you can more closely control their schedule, behavior, and client interactions. You are meeting with a recent exercise science graduate from Springfield University (your alma mater) and are hoping she will be interested in the job, because finding good people has become more and more difficult, and your members are starting to complain about the lack of good trainers.

Your task is two-fold.

First, list all the goals you want to achieve from this relationship, and mark each one as “REQUIRED” or “DESIRED.”

Second, draft a Proposed Contract that incorporates your goals, and defines as precisely as possible the promises, expectations, obligations, and responsibilities of you and your new trainer. You should also include a

description of what happens if things don't go as planned.

Please do not share this handout with your team members. During negotiations, you can divulge as much or as little you see fit.

Your Proposed Contract (not your list) is due via Turnitin Monday, September 26 at 10:00 am. Bring a hard copy to class with you that day as well for our in-class negotiations.

APPENDIX B – ASSIGNMENT DESCRIPTION

This Project contains two components: an individual Proposed Contract, and a negotiated Final Agreement. Your group will be assigned one of seven different business scenarios in which you will be negotiating with each other to provide/purchase services. For each group of four students, two of you will play the role of the service provider, and two will play the role of client.

Part 1 – Proposed Contract (25 points)

After reading your scenario, you will individually write an agreement (draft a contract!) that you would like to govern the upcoming business relationship. The purpose of the agreement is to manage the risk inherent with any business relationship and ensure that the results of the business transaction are acceptable to you. It should address issues such as:

- What services will be provided, exactly? How, when, and where?
- What level of quality will be required? Who decides?
- When will payment(s) be made? How? *What if* a payment is late or not made?
- In addition to services, price, and timing, are there other issues that are important to you?
- *What happens if* the provider can't complete the project as promised?

- *What happens if the client is not happy with the services? Changes his/her mind?*
- *What could possibly go wrong, and how can you minimize the risk with the contract?*

Your Proposed Contract should take the form of a legal agreement. Refer to the Sample Contract, and modify it for your purposes. It will have four parts:

1. The Recitals describe the general nature of the deal and why the parties are entering into the contract. Note that you do not identify the parties as “Provider” and “Client.” You can call them whatever makes sense, as long as you are consistent.
2. Article 1 describes the substance, or “meat” of the deal. This is where all the promises about the transaction should be described, including exactly what services are being provided, when they will be provided, and how and when payment will be made. This is also where any performance standards and penalties should be included, describing what happens if promises are not kept.
3. Article 2 deals with the process of the deal, and describes how the parties will work with each other in completing the promises described in Article 1. Where Article 1 describes the *substance*, Article 2 describes the *process*. Pay particular attention to how the parties are to notify each other, and whether the contents of the contract are to remain confidential.

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4. Article 3 is the “legalese.” It describes how the parties would want a judge to interpret the contract if there was a dispute at a later date. Without these provisions, a judge would rely on common law rules that may not be what the parties wish. Business people usually don’t involve themselves with Article 3. They leave it to the lawyers. However, you may have to adapt the Sample Contract to your needs here if needed for your situation. Pay particular attention to whether or not the contract is assignable.

The Sample Contract was created by adapting a generic online form. It is meant to show you how a contract is put together, and help you think about issues you need to agree on with your partners. You will have to adapt the Sample Contract to your specific situation. This requires thought and effort. Some of the paragraphs will apply with no editing, some will have to be adapted to your situation, and some may need to be deleted altogether. You will also have to add additional paragraphs to address your specific situation. You will need to think critically about what each paragraph in the Sample Contract means in order to determine which ones you should use “as is,” which need to be changed or deleted, and what other issues unique to your situation should be included.

Your individual Proposed Contract is due Monday, September 26 at 10am. You should submit it via Turnitin. Late submissions will not be accepted, so plan accordingly. It should be clear, error-free,

internally consistent, and thoroughly explain all important details that you want to be included in the upcoming business relationship. Make sure to use proper spelling and grammar, and submit a final product that you are proud of.

Part 2 – Negotiation and Final Agreement (25 points)

In class on Monday, September 26, the Providers and the Clients in your group will negotiate with each other to reach a final agreement based on the work you have done in your individual contracts. Based on the outcome of the negotiations, you will as a group draft a Final Agreement, adhering to the legal form of the Sample Contract.

Your group's Final Agreement is due Friday, September 30 at the beginning of class. You should submit one stapled hard copy, with all group members' names clearly typed at the end of the contract. The contract should also be signed by all group members. By signing the contract, you are indicating to me that you made a significant contribution to the creation of the agreement. Late submissions will not be accepted, so plan accordingly. All group members will receive the same grade for this portion of the assignment.

The Final Agreement should be clear, error-free, internally consistent, and thoroughly explain all important details of the upcoming business relationship to which both the Providers and Clients

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agree. Make sure to use proper spelling and grammar, and submit a final product that you are proud of.

APPENDIX C – SAMPLE SERVICE AGREEMENT

Sample Service Agreement

This Agreement is made on <DATE> between [the Client] ("Client") residing at <address>; and **[the Service Provider] ("Provider")** headquartered at <address>, collectively referred to as the "Parties".

RECITALS

WHEREAS Provider is in the business of _____;

WHEREAS the Client wishes to be provided with the Services (defined below) by the Provider and the Provider wishes to provide the Services to the Client on the terms and conditions of this Agreement;

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

ARTICLE 1. PERFORMANCE AND PRICE

1.1 Services to be Provided

The Provider shall provide the following services ("Services") to the Client in accordance with the terms and conditions of this Agreement:

[Insert a complete description of the Services here; list all details that are important to the Parties. This should include any quality standards, and who

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judges the quality. Use sub-headings for each important detail]

1.2 Delivery Schedule

Start date: The Provider shall commence the provision of the Services on *[insert date here]*.

Completion date: The Provider shall complete/cease to provide (*delete as appropriate*) the Services by/on (*delete as appropriate*) *[insert date here]* ("Completion Date").

Milestone Dates: The Provider agrees to provide the following parts of the Services at the specific dates set out below: *[insert dates here]*

1.3 Price and Payment

As consideration for the provision of the Services by the Provider, the price for the provision of the Services is *[insert price here]* ("Price").

The Client agrees to pay the Price to the Provider on the following dates and in the following manner: *[if appropriate]*:

[Specify whether the price will be paid in one payment, in installments or upon completion of specific milestones. These details should be specified here. Also specify how payment should be made]

1.4 Quality Requirements

[Describe any specific quality requirements, if applicable]

1.5 Penalties

[Describe penalties for failure to perform by both parties, and how these penalties will be implemented, if applicable]

ARTICLE 2. REPRESENTATIONS AND COVENANTS

2.1 Warranties

The Provider represents and warrants that it will perform the Services with reasonable care and skill; and

[Describe any additional warranties, such as of quality of workmanship offered, or insurance coverage requirements by the Provider]

2.2 Organization

Provider represents that it is duly organized and operating in good standing under the laws of the state of its existence.

2.3 Best Efforts

Each of the Parties shall use its best efforts to take or cause to be taken, do or cause to be done, and assist and cooperate with the other Party in doing, all things necessary, proper, or advisable to consummate and make effective the transactions contemplated by this Agreement in the most expeditious manner practicable.

2.4 Changes or Modifications

Any additions to or changes to the Services as defined in Section 1.1 above that are requested by the Client shall be addressed as follows:

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*[Insert description of process for changes/additions,
including writing and notification requirements]*

2.5 Notices

Any notice or consent which may be given by a Party under this Agreement shall be deemed to have been duly delivered if delivered by hand, first class post, or electronic mail to the address of the other Party as specified in this Agreement: Any such communication shall be deemed to have been made to the other Party, if delivered by:

<List contact information for both parties>

2.6 Relationship of the Parties

The Parties acknowledge and agree that the Services performed by the Provider, its employees, agents or sub-contractors shall be as an independent contractor and that nothing in this Agreement shall be deemed to constitute a partnership, joint venture, agency relationship or otherwise between the Parties.

2.7 Confidentiality

No Party shall issue any press release or other public announcement concerning this Agreement or the transactions contemplated hereby, except to the extent the Party shall be so obligated by Law; provided, that the Party obligated by law to make such disclosure shall, to the extent commercially reasonable, give the other Party prior notice of such press release or other public announcement.

ARTICLE 3. GENERAL PROVISIONS

3.1 Entire Agreement

This Agreement contains the entire agreement and understanding of the Parties with respect to the subject matter hereof and supersedes all prior written or oral agreements and understandings between the Parties.

3.2 Successors and Assigns

This Agreement is not assignable by either Party without the other Party's prior written consent. This Agreement is binding upon and inures to the benefit of the Parties and their successors and permitted assigns. Nothing in this Agreement, expressed or implied, is intended or will be construed to confer upon any Person other than the Parties and their respective successors and permitted assigns any right, remedy, or claim under or by reason of this Agreement.

3.3 Interpretation

Articles, titles, and headings in this Agreement are inserted for convenience of reference only and are not intended to be part of or affect the meaning or interpretation of this Agreement. This Agreement has been mutually prepared, negotiated, and drafted by the Parties. The provisions of this Agreement shall be construed and interpreted against each Party in the same manner, and no provision shall be construed or interpreted more strictly against one Party on the assumption that an instrument is to be construed more strictly against the Party that drafted the Agreement.

3.4 Waivers

Any provision of this Agreement may be waived, or the time for its performance may be extended, pursuant to a written action by the Party or Parties entitled to the provision's benefit. Any waiver will be validly and sufficiently authorized for purposes of this Agreement if, as to any Party, it is authorized in writing by an authorized representative of that Party. The failure of either Party to enforce any provision of this Agreement shall not be construed to be a waiver of that provision, nor in any way to affect the validity of this Agreement or any of its parts or the right of any Party to subsequently enforce each and every provision. No waiver of any breach of this Agreement shall constitute a waiver of any other or subsequent breach.

3.5 Partial Invalidity

Whenever possible, each provision of this Agreement will be construed in a manner as to be effective and valid under applicable law, but in case any such provision is, for any reason, held to be invalid, illegal, or unenforceable in any respect, that provision will be ineffective only to the extent of that invalidity, illegality, or unenforceability without affecting the remainder of that provision or any other provisions in this Agreement.

3.6 Mediation Requirement

In the event of any controversy or claim arising out of or relating to this agreement, or a breach thereof,

the Parties shall first attempt to settle the dispute by mediation, administered by the American Arbitration Association under its Mediation Rules. If settlement is not reached within sixty days after service of a written demand for mediation, any unresolved controversy shall be settled by arbitration. Mediation and arbitration services will be administered by the Conflict and Dispute Resolution Center at Springfield University. <STATE> law shall apply. Judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Any costs associated with this requirement will be divided evenly by the parties.

3.7 Governing Law

This agreement is governed by and shall be construed in accordance with the internal laws of the State of <STATE>, without giving effect to its conflicts of law principles.

IN WITNESS WHEREOF, the Parties have executed this Agreement on the date first written above.

CLIENT:

PROVIDER:

<NAME>

<NAME>

<TITLE>

<BUSINESS NAME>

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THE DRIP STARTED THE WATERFALL

MARY NOE*

Finances can be like a bad tooth; if it's bad, it only gets worse with time. That seems to be the case for the investors of Fannie Mae and Freddie Mac (Fannie, Freddie). But investors are not the only ones affected by Fannie and Freddie. Their tumultuous finances have had a significant effect on our economy. This paper will unravel the history of Fannie and Freddie, including its takeover, a review of a recent Fannie, Freddie D.C. Circuit case¹ and an analysis of what went wrong.

I. GOING DOWN FINANCIAL MEMORY LANE

The combination of banks, mortgages, people and government is best viewed as the Hans Christian Andersen fairy tale, *The Princess and the Pea*. That is, a tiny pea (bad mortgage loans) lies beneath piles of mattresses (banks, Fannie and Freddie mortgage-back securities, governmental agencies and regulations, etc.). In the 1928 presidential election the candidate Herbert Hoover promised a “chicken in every pot and a car in every garage” but never quite

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¹ *Perry Capital LLC v. Mnuchin*, 864 F3d 591 (D.C. Cir. 2017).

delivered. In 1932, in response to the Depression and to stave off home foreclosures, President Hoover proposed the Federal Home Loan Bank Act. Unfortunately, it was too little too late.² In 1938 President Franklin D. Roosevelt also responding to the Depression asked Congress to create Fannie Mae, a Government Sponsored Enterprise (GSE),³ as an

² Federal Home Loan Bank Act of 1932, Pub. L. No. 72-304, 47 Stat. 725 (1932).

³ The president of the United States appoints five of the 18 members of the organizations' boards of directors. See Jonathan G.S. Koppell, *Hybrid Organizations and the Alignment of Interests: The Case of Fannie Mae and Freddie Mac*, 61 Pub. Admin. Rev. 468, 469 (2001). To support their liquidity, the secretary of the Treasury is authorized, but not required, to purchase up to \$2.25 billion of securities from each company. See Amanda Maher, *Fannie and Freddie, Part 1: Understanding their role in the housing market*, BUILDIUM (Oct. 4, 2016), <https://www.buildium.com/blog/understanding-fannie-and-freddie-part-1/>. Both companies are exempt from state and local taxes. See Government Sponsored Enterprise – GSE, INVESTOPEDIA, <https://www.investopedia.com/terms/g/gse.asp>. Both companies are regulated by the Department of Housing and Urban Development (HUD) and the Federal Housing Finance Agency (FHFA). See Federal Housing Finance Agency – FHFA, INVESTOPEDIA, <https://www.investopedia.com/terms/f/fhfa.asp>. The FHFA regulates the financial safety and soundness of Fannie Mae and Freddie Mac, including implementing, enforcing and monitoring their capital standards, and limiting the size of their mortgage investment portfolios; HUD is responsible for Fannie and Freddie's general housing missions. See U.S. Department of Housing and Urban Development – HUD, INVESTOPEDIA, <https://www.investopedia.com/terms/u/us-department-housing-urban-development-hud.asp>.

administrative agency. Fannie would purchase mortgages from banks to increase liquidity for bank loans to low or middle income home buyers.⁴

In the 1960s banks refused to lend money to buyers who were purchasing homes in neighborhoods where house values were risky investments, even if the borrower had good credit. This became known as redlining. The bank's reasoning was that if the mortgage was foreclosed, the bank would become the property owner in undesirable neighborhoods. The government's response was fast and furious to eradicate the past and future discrimination in mortgage practices: the Fair Housing Act of 1968,⁵ the Equal Credit Opportunity Act of 1974,⁶ the Home Mortgage Disclosure Act of 1975 (HMDA),⁷ and the Housing and Community Development Act of 1977.⁸ This is not a complete list of the many federal programs for potential home buyers.

In 1968 President Lyndon Johnson burdened with debt from the Vietnam war, converted Fannie Mae into a publicly traded company.⁹ In 1970

⁴ Banks and Banking, Declaration of purposes of subchapter, 12 U.S.C. § 1716 (1934).

⁵ Administrative Enforcement; preliminary matters, 42 U.S.C. § 3610 (2012).

⁶ Commerce and Trade, Scope of prohibition, 15 U.S.C. § 1691 (2012).

⁷ Banks and Banking, 12 U.S.C. §§ 2801–2811 (2012).

⁸ Congressional findings and statement of purpose, 42 U.S.C. § 5301 (2012).

⁹ Partition of Federal National Mortgage Association into Federal National Mortgage Association and Government National Mortgage Association; assets and liabilities; operations, 12 U.S.C. § 1716b (2012).

Congress created another similar agency, Freddie Mac¹⁰ (GSE) to compete with Fannie Mae under the same statute Fannie was created. In 1989 Freddie was converted to a publicly traded corporation under Virginia corporate law. Under HMDA, lending institutions were required to report statistics on the amount of mortgage money loaned and the neighborhoods, not the type of loan or credit information about the borrower. In 1980 the HMDA now required information such as race, sex and income of the borrower. Lenders responded by making their underwriting criteria more “flexible.” One result was that more borrowers received loans without the pristine credit record previously required. Additionally, sub-prime loans were issued to those borrowers who would have difficulty making payments on loans with terms that were less desirable.¹¹ This was viewed by critics as “predatory lending.”

In 1999 Fannie's chairman and chief executive officer, Franklin D. Raines directed that Fannie Mae Corporation ease credit requirements on loans that it purchased from banks and other lenders.

¹⁰ Freddie Mac History, FUNDINGUNIVERSE, <http://www.fundinguniverse.com/company-histories/freddie-mac-history/>.

¹¹ Depository Institution Deregulation and Monetary Control Act of 1980, 12 U.S.C. § 1735f-7 (2012). DIDMCA included a clause effectively barring states from limiting mortgage interest rates. *Id.* See also, Alternative Mortgage Transaction Parity Act, 12 U.S.C. § 3801 (2012). The act made it possible for lenders to offer exotic mortgages, rather than the plain-vanilla 30-year, fixed-rate loan that had been offered for decades. *Id.*

The purpose was to encourage banks to extend home mortgages to individuals whose credit was generally not good enough to qualify for conventional loans.¹² Borrower's income, assets and debt information was no longer verified. These loans became known as "no-doc" or liar loans.¹³

II. THE FANNIE AND FREDDIE DEBACLE

Banks were writing adjustable and high interest rate mortgages for "no doc" loans. The loans were then sold to Fannie and Freddie. The banks profited from the origination fee and mortgage points. Fannie and Freddie bought these sub-prime loans, repackaged them and sold the securities guaranteed by mortgages known as "mortgage-backed securities."¹⁴ Because Fannie and Freddie have an aura of government insured and guaranteed, the ill-fated securities were easy to sell to capital investors. Fannie and Freddie retained a portfolio of mortgages and purchased various mortgage-related

¹² Steven A. Holmes, *Fannie Mae Eases Credit To Aid Mortgage Lending*, N.Y. TIMES (Sept. 30, 1999), <http://www.nytimes.com/1999/09/30/business/fannie-mae-eases-credit-to-aid-mortgage-lending.html>.

¹³ Liar Loan, INVESTOPEDIA, https://www.investopedia.com/terms/l/liar_loan.asp.

¹⁴ Fannie Mae's loan acquisitions were: 62% negative amortization, 84% interest only, 58% subprime, 62% required less than 10% down payment; Freddie Mac's consist of: 72% negative amortization, 97% interest only, 67% subprime, 68% required less than 10% down payment. Ronald W. Spahr & Mark A. Sunderman, *The U.S. Housing Finance Debacle, Measures to Assure its Non-Recurrence and Reform of the Housing GSEs*, (Jan. 3, 2013), <http://tinyurl.com/mte2d2t>.

securities including their own from the capital markets.

In May of 2006 the Office of Federal Housing Enterprise Oversight (OFHEO) issued a report on Fannie. The acting director of OFHEO, James B. Lockhart, said:

Our examination found an environment where the ends justified the means. Senior management manipulated accounting [reports], reaped maximum undeserved bonuses [hundreds of millions of dollars], and prevented the rest of the world from knowing.¹⁵

Shortly after, in 2008 Fannie and Freddie would crash. Fannie's 10-K filing in 2008 listed a net loss of more than 59 million.¹⁶ The same year Freddie's

¹⁵ Marcy Gordon, *Report: Fannie Mae Manipulated Accounting*, WASH. POST (May 23, 2006 9:21 PM), http://www.washingtonpost.com/wp-dyn/content/article/2006/05/23/AR2006052300655_pf.html. Former Fannie Mae chief Franklin Raines and two other top executives agreed to a \$31.4 million settlement with the government over their roles in a 2004 accounting scandal. Fannie Mae was fined \$400 million, \$350 million levied by the Security and Exchange Commission to compensate the people who bought stock in Fannie Mae based on false accounting. *Id.*

¹⁶ Federal National Mortgage Association Form 10-K, U.S. SEC. & EXCH. COMM'N, http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2008/form10k_022609.pdf.

10-K filing indicated a loss of more than 30 million.¹⁷ However, the government would not allow these giant GSEs to fail.

The Government rescued the shareholders of Fannie and Freddie by enacting the Housing and Economic Recovery Act (HERA) creating the Federal Housing Finance Agency (FHFA) as conservator or receiver of Fannie and Freddie. FHFA assumed conservatorship with "...all rights, titles, powers and privileges belonging to Freddie and Fannie as well as their stockholders, officers or directors..."¹⁸ On the day of the enactment of HERA, Treasury Secretary Paulson entered into agreements with Fannie and Freddie to make available \$100 billion from the Treasury to each GSE in return for one billion in senior preferred stock and the right to purchase 79% of outstanding common stock. The preferred stock paid an annual dividend of 10% in cash or if not paid became a deferred obligation with 12% interest.¹⁹

The subprime loans held by Fannie and Freddie contributed to the housing market collapse. Homeowners owed more on their mortgage loans than the value of the homes. From 2009 through 2012 Fannie and Freddie had negative net income.

¹⁷ Federal Home Loan Mortgage Corporation Form 10-K, U.S. SEC. & EXCH. COMM'N, https://pro-freddie.com/investors/er/pdf/10k_031109.pdf.

¹⁸ Housing and Economic Recovery Act of 2008, Pub. L. No. 110 – 289, 122 Stat. 2654 (2008).

¹⁹ Mortgage Market Note 08-4, FED. HOUS. FIN. AGENCY, https://www.fhfa.gov/PolicyProgramsResearch/Research/PaperDocuments/20081205_MMNote_08-4_N508.pdf.

III. THE THIRD AMENDMENT

On August 17, 2012, FHFA Acting Director, Edward J. Demarco entered a Third Amendment, known as the “net worth sweep” with the U.S. Secretary of Treasury, Timothy F. Geithner. This Amendment allowed the Treasury to take most of their profits. The loans would never be repaid, the stockholders would never see a dime and the government would continue to run this publicly traded company. Ironically in 2012 Fannie and Freddie posted a profit.²⁰

IV. WHAT HAPPENED TO FANNIE AND FREDDIE’S STOCKHOLDERS?

On or about 2013, the shareholders, as individuals and as a class brought a suit against FHFA in the District of Columbia. However, the language of the statute restricts court review of legal actions against FHFA.²¹ The District Court found no jurisdiction over the plaintiffs’ claims. On appeal, the majority Court found the language of the statute blocks court review of all claims for declaratory, injunctive, or other equitable relief including any administrative agency actions. However, the court entertained whether FHFA, as conservator had

²⁰ Federal National Mortgage Association Form 10-K, U.S. SEC. & EXCH. COMM’N, http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2012/10k_2012.pdf.

²¹ Authority over critically undercapitalized regulated entities, 12 U.S.C. § 4617(f) (2012).

authority to enter into the Third Amendment that benefits only the Treasury and keeps Fannie and Freddie as a shell company.

The majority opinion answered “yes” based on the statutory language. The statute states, first, the conservator is appointed for the purpose of “...winding up the affairs of a regulated entity;”²² second, FHFA has the authority “which the Agency determines to act in its own best interest *** the Agency;”²³ third, FHFA “immediately succeed[ed] to * * * all rights, titles, powers, and privileges of any stockholder, officer, or director of such regulated entit[ies]...”²⁴

The dissenting opinion answered “no” based on the statutory language. The statute states the conservator has the authority to “take such action as may be (i) necessary *to put the regulated entity in a sound and solvent condition*; and (ii) appropriate to carry on the business of the regulated entity and *preserve and conserve the assets and property of the regulated entity*.”²⁵ Additionally, FHFA acted beyond the scope of a conservator as stated in the statute.²⁶ And the dissent found support in the common law meaning of “conservators,” which forbids acting for the benefit of the conservator himself or a third party.²⁷ The dissent then places a distinction between the role of a conservator and

²² *Id.* at § 4617(a)(2).

²³ General powers, 12 U.S.C. § 4617(b)(2)(J) (2012).

²⁴ *Id.* at § 4617(b)(2)(A)(i).

²⁵ *Id.* at § 4617(b)(2)(D) (emphasis added).

²⁶ *Id.* at § 4617 (b)(2)(D)-(E).

²⁷ *RTC v. CedarMinn Bldg. Ltd. P’ship*, 956 F.2d 1446 (8th Cir. 1992).

receiver stating the FHFA cannot be both. In the Third Amendment, the dissent opines FHFA jumped from a conservator to a receiver.

Obviously, the statute contains contradictory language as to the rights and duties of the conservator. The statute also precludes judicial review or interpretation of its contradictory language.²⁸ Both the majority and the dissent compare HERA to a similar statute, the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA).²⁹ FIRREA contains similar contradictory language. The majority opinion cites to the sections that support its position;³⁰ whereas the dissenting opinion cites to the sections that support its position.

V. ANALYSIS

Capitalism, the private ownership of business is the cornerstone of our economic system. Private land ownership is an important part of the same system. When the government created Fannie and Freddie the traditional “capitalist system” became corrupted. Fannie and Freddie, originally a government agency used taxpayers’ money for a traditional capitalist business, mortgage loans. Then the government flips the agency into a publicly traded company with stockholders but with the strings of the government’s agenda and oversight.

²⁸ Judicial review of Director action, 12 U.S.C. § 4623(d) (2012).

²⁹ *RTC*, 956 F2d. at 1446.

³⁰ *Id.*

Banks profit on undocumented loans. Unscrupulous borrowers take 14 billion dollars in fraudulent loans.³¹ And before the collapse, the government once again interjects with taxpayer money. However this time, the government cannot flip it back into an agency so they do the next best thing, have a federal agency (FHFA) run the publicly traded company. Congress in creating this statute recognized the contradiction of it all and built in a “hands off” by the courts. Now that Fannie and Freddie are back in the green, the taxpayers benefit. But what of those stockholders? Have we morphed into a hybrid capitalist economic system? Are the taxpayers the guarantors of the largest financial companies?³² Can the traditional capitalist system still endure? Or is politics now intervening whenever possible.³³

In a United States Supreme Court decision, Chief Justice Roberts wrote:

³¹ Mortgage Fraud Report 2010, FBI, <https://www.fbi.gov/stats-services/publications/mortgage-fraud-2010>.

³² For example, AIG received \$67,835,000,000. *See Bailout Recipients*, PROPUBLICA, <https://projects.propublica.org/bailout/list> (last updated Apr. 9, 2018).

³³ The net worth sweep is consistent with the Obama Administration's “commitment ... that the GSEs will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form.” Jerome Corsi, *Exclusive Docs: Obama Destroyed Middle Class Mortgages to Prop Up Obamacare Looting Scheme*, INVESTORSHUB (Mar. 6, 2017), http://investorshub.advn.com/boards/read_msg.aspx?message_id=129370954.

Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.³⁴

There cannot be a great deal of sympathy for the stockholders whose stock in Fannie and Freddie had no value in 2008, but through government intervention became valuable in 2012. Now instead of the stockholders profiting from the stock, the taxpayers are profiting. However, it is a slippery slope when the government rescues a publicly traded company along with the stockholders and converts the traditional company into an agency, without any statutory authority to do so; and in the process the stockholder is stripped of any recourse in the courts.

VI. CONCLUSION

There were no winners in this case. In *Perry Capital LLC v. Mnuchin*,³⁵ Judge Brown's dissent raises both the quintessential questions and answers:

³⁴ Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 538 (2012).

³⁵ Perry Capital LLC v. Mnuchin, 864 F3d 591 (D.C. Cir. 2017).

“Who is at fault? The borrowers? The lenders? The government? The financial markets? The answer is yes. All were responsible and many were irresponsible.”³⁶ In this case, at the very lowest denominator, there is a conservator appointed to manage a failing business. In 2013 Fannie and Freddie together paid the Treasury \$130 billion in dividends, and \$40 billion in 2014. FHFA’s purpose as a conservator came to an end once Fannie and Freddie became solvent. But this statute was built as a shield for the conservator to act independently and escape court review. Fannie and Freddie cases continue to pour into the courts where investors try to recoup from mortgage backed securities with underlying fraudulent loans.³⁷ It is time for Congress to decide if government is to run private companies with stockholders. As my mother would say, “you can’t have it both ways.” As of the writing of this paper, the Senate Banking Committee has met on how to revamp the companies.

³⁶ *Id.* at 648 (quoting THOMAS SOWELL, *THE HOUSING BOOM AND Bust* 28 (2009)).

³⁷ *See e.g.*, *U.S. Bank, Nat’l Ass’n v. UBS Real Estate Sec. Inc.* 205 F.Supp.3d 386 (S.D.N.Y. 2016).

THE DRIP STARTED THE WATERFALL

**THE DE-FEDERALIZATION GAMBLE: A
WORKABLE ANTI-COMMANDEERING
FRAMEWORK FOR STATES SEEKING TO
LEGALIZE CERTAIN VICE AREAS**

GREGORY R. BORDELON^{*}

INTRODUCTION

“The States are separate and independent
sovereigns. Sometimes they have to act like it.”
– John Roberts, Chief Justice of the United States
Supreme Court¹

It was likely never contemplated in 1787 that the balance of power between the states and the central government would be debated in the nature it is today. While debate was considerable as to whether we should embrace an institutional structure of either broad federalism or narrow federalism, the Framers of the Constitution likely knew that the power-sharing structure of federalism would endure because it “offers an expedient way to harmonize separate smaller governments to achieve larger goals, especially to foster more commerce and better

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¹ Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 579 (2012).

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military security.”² In fact, many scholars believe that it was *only* the Constitution’s grant of interstate commerce authority to the new national government that was a “significant exception to this general division of authority between the national and state governments.”³

But what is to be done when Congress’s seemingly unlimited authority to regulate commerce necessarily and functionally implicates a state to act in furtherance of federal directive? What if the field of law, however slight or incidental its effect on interstate commerce, is one that a state seeks to legalize but does not know whether that action is or is not against the federal government’s prerogative to enforce? Would it matter if this was an area of law over which the state traditionally had authority?

States are subject to a paradoxically shifting and yet-to-be definitive standard of federalist power-sharing under the guise of the anti-commandeering principle. Generally speaking, the anti-commandeering principle prevents the federal government from using states as intermediaries to implement or execute federal law. It is a principle grounded in the Tenth Amendment of the U.S. Constitution. Relative to other rules of federalism espoused by the Supreme Court, it is a young doctrine, only becoming an affirmed rule of

² DAVID BRIAN ROBERTSON, *FEDERALISM AND THE MAKING OF AMERICA* 2 (2012).

³ John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27, 30 (1998).

precedent from the 1992 case of *New York v. United States*.⁴ Aside from one other case fleshing out the principle to extend to both the legislative and executive branches of state government in 1997,⁵ the doctrine has been untouched by the U.S. Supreme Court for over twenty years. It has routinely been ignored by lower federal courts or always contextualized as exceptions to general rules of order where the federal government is supreme under Congress's commerce authority, and the states must obey. While the anti-commandeering principle is just one aspect of the myriad of issues involving the balance of power between the federal government and the states, the recent advent of the attempted legalization and regulation of sports wagering in New Jersey, the proliferation of daily fantasy sports contests and the continued legalization and decriminalization of the recreational use of marijuana reveal broad criminal vice fields being targeted and upsetting the traditional balance of federalism. This work theorizes that states will be able to continue their path of legalizing these fields even in the face of express federal prohibition due to an expanded interpretation of the anti-commandeering principle which will then have an impact on a much larger constitutional rule of federalism, the interstate commerce power.

A sub-theory of anti-commandeering will buttress this eventuality: the anti-coercion principle.

⁴ 505 U.S. 144 (1992).

⁵ The case was *Printz v. United States*, 521 U.S. 898 (1997). Because of the seminal nature of these two cases, they are thoroughly presented in this article.

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Shifting social norms about matters like recreational drug use and gambling make legalization of these areas easier than in the past. There is also an opportunity for states to tax and therefore generate revenue off of these things. As states recognize the fiscal realities of tightening budgets and the need for new sources of revenue, decriminalization of previously prohibited conduct now seems like a possibility. In a constitutional sense, the states' reliance on revenue streams justified by their citizens' legal use of previously illegal substances may trigger an application of the anti-coercion rule. Grounded in the Spending Power of Congress,⁶ the anti-coercion rule prevents the federal government from conditioning funding arrangements to the states in ways that would compel the states to adopt federal law. The principle was applied most robustly in the first major challenge to the Affordable Care Act in *National Federation of Independent Business v. Sebelius*.⁷

On December 4, 2017, the U.S. Supreme Court heard oral arguments in *Christie v. National Collegiate Athletic Association*,⁸ a case which will have significant implications for federalism. The case could expand the Court's rule on anti-

⁶ U.S. CONST. art. I, § 8, cl. 1.

⁷ 567 U.S. 519 (2012).

⁸ Since Chris Christie is no longer governor of New Jersey, the case will be decided under the name, *Murphy v. NCAA*. Phil Murphy succeeded Chris Christie as governor of New Jersey on January 16, 2018. The case will be referred to as the “*Christie*” case throughout this work.

commandeering and decide that federal laws cannot prevent states from modifying or repealing their own internal laws. In doing so, that holding would provide a gateway for states to pursue avenues of legalization previously unavailable to them. As more time passes, and states realize more revenue from these delegatized areas, the anti-coercion principle could also become a more viable argument for the states.

With the rise of wagering on both professional and amateur sporting events augmented by the popularity of daily fantasy sports contests, states are at a quixotic crossroads with respect to their authority to legalize these things and more importantly, in times of uncertain state financial conditions, regulate and monetize them.

However, the *Christie* case could rule against New Jersey and find that the federal government preempts states' attempts to modify their own laws. If that were to occur, states would be left with little constitutional recourse under the Court's line of anti-commandeering cases. In light of that possibility, a refocus on how the Commerce Clause operates within the federalism rubric needs to be evaluated. This work seeks to craft a workable test whereby the anti-commandeering principle can be reconciled in a consistent manner with Congress's ability to regulate interstate commerce. Using the *Christie* case and gambling as fulcrum points, it looks to the federal government's interest in regulating a specific field of historically state-regulated area of law – namely, vice areas, and develops a judicial test so that states may be able to circumvent presumed plenary federal

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commerce authority in the face of an unclear or incomplete anti-commandeering principle. It then will justify this rationale with the assumption that states' reliance on funding from these legalized vice areas coupled with evidence of the federal government's either direct decision or practice in reality not to prosecute creates a rebuttable presumption of "funding acquiescence," and as such the anti-coercion principle would mitigate against later federal government enforcement practices in these areas.

The article will first address the federalism debates at the time of ratification of the Constitution and how those arguments morphed into tensions which played out through cases of the Supreme Court before the Court formally established the anti-commandeering principle in *New York v. United States*. The analysis will turn to the subsidiary theory of anti-commandeering that states have often times relied upon, conditional spending and anti-coercion. It will then analyze in detail the path of the *Christie* case and New Jersey's battle to legalize sports wagering due to this case's portending power to allow broader state protections for more vices than just sports wagering. Since the *Christie* case's framework involves sports wagering, gambling as a vice area will be the main focus, but an attendant discussion of other states' legalization of recreational marijuana and the controversy surrounding daily fantasy sports will round out the analysis to show how the theorized framework can apply to these areas as well. Finally, the test will be proposed, first

as to how courts can review these matters and then how it should be applied vis-à-vis a Commerce Clause basis for state action constitutional legitimacy.

I. THE ANTI-COMMANDEERING PRINCIPLE

A. *Through the Historical Looking Glass of Dual Sovereignty*

Federalism, as a general proposition, is the sharing of power between the central government and the states. Scholars have widely debated the meaning of it in the American legal context, arguing that its “compound” nature, as envisioned by the authors of the *Federalist Papers*, is a system that does not simply delineate powers for one side or another.⁹ Rather, the Constitution’s framework proposes a power sharing subject to both the strictures of the document’s provisions as well as the political necessities of the two systems’ vitality. With this backdrop, it is important to see the evolution of the concept broadly before specifically analyzing the precepts established by the Supreme Court that could impact modern day vice areas.

The waning days of the Constitutional Convention showed that concerns of centralized power would allow a narrow federalism interpretation to seemingly win out. In fact, the Committee of Detail’s final drafts squarely “placed the onus on the national government to prove that it

⁹ See, e.g., Martin Diamond, *Commentaries on the Federalist*, 86 YALE L. J. 1273, 1275 (1977).

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required specific powers to pursue the national interest. States would retain prerogatives not granted to the national government.”¹⁰ The give and take resulted in several key victories on both sides, an enumeration of central power in Article I, § 8 to protect the states but two “firmly established”¹¹ express provisions of federal supremacy in the Supremacy Clause¹² and the Necessary and Proper Clause.¹³ Early on, the Supreme Court established the primacy of these two provisions as a grounding force in an otherwise amorphous federalism balance.¹⁴

Diffusion of power horizontally (three separate independent branches) as well as vertically (the federalist structure) ensured that the country could flourish both economically and politically,

¹⁰ DAVID BRIAN ROBERTSON, *FEDERALISM AND THE MAKING OF AMERICA* 27 (2012).

¹¹ *Id.* at 28.

¹² U.S. CONST. art. VI, ¶ 2.

¹³ U.S. CONST. art. I, § 8, cl. 18.

¹⁴ *See* *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). A unanimous Supreme Court, in the context of an attempt by the U.S. government to build a national bank, established an important foundation of deference to the national government and allowed the federal government to execute enumerated powers with unstated ones. “The power being given; it is the interest of the Nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.” *Id.* at 408.

with concentrations of power difficult to achieve by simply, institutional design.

In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.¹⁵

Although debated now in a historical and theoretical perspective, it was evident that the *states* would retain “independent sovereignty,”¹⁶ a sovereignty that was pronounced in recommending original adoption of the Articles of Confederation.¹⁷ The thought of removing powers from the states in the interest of solidifying national authority was not considered viable at the time; the delegation of powers to the central government, as espoused by James Madison, were to be “few and defined” with those “remain[ing] in the state governments, . . . numerous and indefinite.”¹⁸ This is not to say that

¹⁵ THE FEDERALIST NO. 51 (James Madison).

¹⁶ RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* 26 (1987).

¹⁷ *Id.* at 26–27.

¹⁸ THE FEDERALIST NO. 45 (James Madison).

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leading “federalist” thinkers trusted the states to perpetually promote the common good for their inhabitants; there was debate as to how flexible central power should be interpreted in the interest of protecting people from deleterious state governments.¹⁹ A concession was that while the federal government would be one of enumerated powers, certain elasticity to the balance of power would be afforded it²⁰ in the Constitution’s Necessary and Proper Clause.²¹ Courts would keep the balance of power moderated.²² Any further delineation of federal power seemed unnecessary to Hamilton and other federalists because of this judicial barrier, a construct reaffirmed when John Marshall indicated fifteen years later that “it is

¹⁹ THE FEDERALIST NO. 33 (Alexander Hamilton). “[T]he danger which most threatens our political welfare is, that the state governments will finally sap the foundations of the union; and might therefore think it necessary, in so cardinal a point, to leave nothing to construction.” *Id.*

²⁰ *Id.* “If there be anything exceptionable, it must be sought for in the specific powers, upon which this general declaration is predicated. The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless.” *Id.*

²¹ U.S. CONST. art. I, § 8, cl. 18.

²² Alexander Hamilton clearly saw that the inherent sovereignty of the states (as well as the people) would be protected by a “complete independence of the courts of justice . . . peculiarly essential in a limited constitution.” THE FEDERALIST NO. 78 (Alexander Hamilton).

emphatically the province and duty of the judicial department to say what the law is.”²³

Before Marshall’s landmark pronouncement, however, certain Convention delegates did not trust the rationale of Hamilton’s argument and were concerned with the unchecked centralization of power in the new government. These “anti-federalists” proposed a slate of amendments shortly after ratification of the Constitution with two principal aims, first limiting “the authority of the central government over individuals” and secondly, a set of amendments aimed at the institutional structure of the new government, concerned about the “centralizing tendencies inherent in the new government.”²⁴ While affirmative rights of the people were at the core of these amendments,²⁵ this Bill of Rights included two amendments that reinforced the idea that delineation of rights and liberties should not be construed in an exhaustive fashion. The Ninth Amendment reads, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”²⁶ and while not having been considered by the federal judiciary for the larger part of the country’s history, it has been firmly established that individual rights not expressly

²³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

²⁴ *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 297 (Richard Beeman et al. eds., 1987).

²⁵ The first eight amendments established individual liberty interests upon which the newly created central government could not exert its power. *See* U.S. CONST. amends. I – VIII.

²⁶ U.S. CONST. amend. IX.

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mentioned in the first eight amendments are not excluded from the calculus of contemplating other constitutionally protected rights.²⁷ The other one, the Tenth Amendment, reads, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”²⁸ The Tenth Amendment’s seemingly innocuous inclusion of the phrase, “to the States respectively” has become a call to arms by which states attempt to assert the independent sovereignty implicit in the federalist structure. To be sure, the U.S. Supreme Court, acting under the authority given long ago by Marshall, has indicated that:

The Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine . . . whether an incident

²⁷ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 491 (1965) (holding with respect to finding a constitutional privacy right in marriage: “The Ninth Amendment to the Constitution may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.”).

²⁸ U.S. CONST. amend. X.

of state sovereignty is protected by a limitation on an Article I power.²⁹

The balance between the federal government's presumed constitutional authority, whether express or implicit and the state's "police powers" under the Tenth Amendment represented a constant tension, often remedied by pronouncements of the Supreme Court. The self-executing presumptions of the Supremacy Clause and the Necessary and Proper Clause are only realized through these Supreme Court decisions, and in the context of federalism, it has been one that has ebbed and flowed. In the transition between the nineteenth and twentieth centuries, the Court deferred to the individual in a manner that chilled economic regulation at both the state and federal level.³⁰ The fallout from decisions like *Lochner* resulted in an era where states could not increase revenue and would remain in such a confused state until the entire country experienced the most significant economic depression in its history in the 1930s. Several of these decisions touched upon the tension inherent in

²⁹ *New York v. United States*, 505 U.S. 144, 157 (1992).

³⁰ For example, in *Lochner v. New York*, 198 U.S. 45 (1905), the Court struck down a New York state law that placed restrictions on how many hours bakery employees could work. The five-justice majority held that the laws prevented individuals' freedom of contract and grounded the analysis as a liberty interest in the Due Process Clause of the Fourteenth Amendment. Justice Oliver Wendell Holmes' dissent warned of the danger of the majority's decision and it has been derided as one of the most controversial decisions of the Court.

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one of the federal government's most expansive powers: the interstate commerce power. After the Great Depression, the Court adjusted its jurisprudence to nationwide economic realities and overturned earlier decisions that seemingly limited federal action, helping the states themselves recover from the brink of economic disaster.³¹ Since the debates on expansive vs. narrow federalism began³² with the exception of the *Lochner* decision at the turn of the twentieth century, the U.S. Supreme Court has evolved a virtually plenary Commerce Clause

³¹ It would take thirty years after the *Lochner* decision for the Court to take pragmatic steps to lift the country out of the Depression in a series of holdings that granted government rights to the detriment of individuals' economic liberty interests. Slowly, it gave states the right again to regulate certain areas (contradicting the individual freedom presumptions of *Lochner*, see *Nebbia v. New York*, 291 U.S. 502 (1934), before functionally overruling *Lochner* in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Then, it extended that denial of a perceived *Lochner* liberty in favor of national government regulation (by prohibiting individuals from regulating even the incidental, instrumentalities of local commerce when those actions have an effect on interstate commerce). See *Wickard v. Filburn*, 317 U.S. 111 (1942). Many scholars pin *Wickard* as the beginning of a consistent deference to federal power in the realm of federal-state economic arrangements.

³² Cf. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Chief Justice John Marshall indicated, on behalf of a unanimous Court, that "*among* the several states" allows the federal government absolute authority over the instrumentalities of interstate commerce. *Id.*

authority of Congress³³ and has, in evaluating that authority, sided in favor of federal authority in virtually all interstate commerce cases before it.³⁴

The rigidity of “dual federalism” remained outside of the reach, however, of cases not directly involving interstate commerce, and the gray area between what economic arenas constituted “commerce” and what was a fiscal forum legitimate for the states to regulate would propel the Court into the anti-commandeering realm. Cases involving states setting labor regulations, minimum wage and hour rules, etc. seemed to not prove controversial in many litigated cases after the Depression era. However, these cases slowly crept into the jurisprudence of the Supreme Court and revealed an inconsistent reasoning on the proper division of power in the field of labor relations and state employees’ rights.³⁵ An inability to reconcile where interstate commerce power stops and where state authority begins would lead the Court to its landmark anti-commandeering pronouncements in *New York*

³³ Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1403 (1987).

³⁴ Cf. *Nat’l League of Cities v. Usery*, 426 U.S. 833, 840 (1976) (“It is established beyond peradventure that the Commerce Clause of Art. I of the Constitution is a grant of plenary authority to Congress.”).

³⁵ See, e.g., *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (involving a Tenth Amendment challenge to the Fair Labor Standards Act as to the coverage of state and local employees); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (involving Tenth Amendment and Equal Protection challenges to Missouri’s mandatory retirement age for state judges).

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and *Printz*, reiterating from the Founding Era that “the principal benefit of the federalist system is a check on abuses of government power.”³⁶ The question of compelling the states was the key question since the national government could exercise proper authority under the Commerce Clause so long as it did not compel state action; to do so would not violate the Tenth Amendment.³⁷ The ability of the federal government to regulate commerce directly, while perhaps plenary, was not so unfettered that it could do so by using the states as instrumentalities of federal law. It could not “regulate state governments’ regulation of interstate commerce.”³⁸ The question was when did that occur?

It would not be until the mid-1990s, that the United States Supreme Court would create a “new jurisprudence of commandeering purport[ing] to define an area of total state (and local) immunity from federal intervention.”³⁹ The seminal case of *New York v. United States*⁴⁰ decided in 1992, along with *Printz v. United States*⁴¹ five years later, ushered

³⁶ *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

³⁷ *See, e.g., United States v. Kenney*, 91 F.3d 884, 891 (7th Cir. 1996).

³⁸ *Printz v. United States*, 521 U.S. 898 (1997) (quoting *New York v. United States*, 505 U.S. at 166 (1992)).

³⁹ Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, *Printz*, and *Yeskey*, 1998 SUPREME CT. REV. 71, 72 (1999).

⁴⁰ 505 U.S. 144 (1992).

⁴¹ 521 U.S. 898 (1997).

in a new “‘autonomy model’ of federalism”⁴² holding that Congress could not impose federal regulatory programs upon the states nor commandeer the states’ officers into federal service. While Congress’s power to regulate interstate commerce is vast, it cannot be executed using the state as an intermediary; to regulate commerce “among the Several States,”⁴³ however local, Congress must do so directly upon individuals. Compelling the states “to enact and enforce a federal regulatory program . . . has never been understood to lie within the authority conferred upon Congress by the Constitution.”⁴⁴ The cases that the Supreme Court heard before *New York* and *Printz* are analyzed below to fully understand the historical context of the anti-commandeering principle and the struggles that the Court encountered in crafting a rule.

B. *Pre-New York v. United States Treatment*

Although the U.S. Supreme Court did not expressly establish the anti-commandeering principle in its jurisprudence before *New York*,⁴⁵ several cases seemed to be mindful of the limits of

⁴² Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1004 (1995).

⁴³ U.S. CONST. art. I, § 8, cl. 3.

⁴⁴ *New York v. United States*, 505 U.S. 144, 176 (1992).

⁴⁵ “[W]e were at last confronted squarely with a federal statute that unambiguously required the States to enact or administer a federal regulatory program[.]” *Printz v. United States*, 521 U.S. 898, 926 (1997) (citing *New York v. United States*, 505 U.S. 144 (1992)).

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Congress's power and state sovereignty guarded by the Tenth Amendment. At the same time that state treasury coffers began requiring a more amiable relationship both with other states and the federal government, the idea of parity between states and equal treatment by the federal government became popular. This "equal footing" doctrine (or "equal sovereignty") provided the initial steps towards an anti-commandeering jurisprudence which would explode in the immediate aftermath of the 1980s devolutionary period of power back to the state.

As a condition of Oklahoma's admission to the Union, Congress required, in 1906, to not allow the state to move its capital city from Guthrie to another city in Oklahoma until 1913. The state legislature attempted to move the capital from Guthrie to Oklahoma City by proposed state legislation dated December 29, 1910. The Supreme Court found this condition by Congress overreaching as a violation of Oklahoma's inherent state sovereignty.

The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen states could now be shorn of such powers by an act of Congress

would not be for a moment entertained.⁴⁶

Recognizing the origins of the states and the central government as dual operating sovereigns, the Supreme Court in *Coyle* strongly chastised Congress to place instructions of state governance matters as conditions to state admission. “[T]he people of each state compose a state, having its own government, and endowed with all the functions essential to *separate and independent existence*. The states disunited might continue to exist. . .” (emphasis added).⁴⁷

Sixty-five years later, the Court struggled with how “plenary” the commerce authority could be in the context of regulating labor relations for state and local public employees in *National League of Cities v. Usery*.⁴⁸ Amendments to the federal Fair Labor Standards Act⁴⁹ in 1974 mandated existing regulations of overtime pay and minimum wage rules applicable only to certain private employers now to apply to public state and local employers. The non-profit National League of Cities, along with many states and cities, challenged the amendments arguing that the labor market of state employees is to be left to the sovereign capacity of the states and as such is a reserved power under the Tenth Amendment. The Court, in a 5 to 4 decision, ruled in favor of the

⁴⁶ *Coyle v. Smith*, 221 U.S. 559, 565 (1911).

⁴⁷ *Id.* at 580 (1911) (citing *Lane Cty. v. Oregon*, 74 U.S. (7 Wall.) at 76 (1869)).

⁴⁸ 426 U.S. 833 (1976).

⁴⁹ 29 U.S.C. §§ 201 *et. seq.*

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National League of Cities and the states holding that the Tenth Amendment prohibits Congress from regulating states in this manner. “The challenged amendments operate to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3.”⁵⁰ Only nine years later, however, in a case with almost identical facts, and also in a 5 to 4 decision, the Court overruled *National League of Cities* finding that the framework of establishing an employment relationship in the public sector as a “traditional governmental function” would prove unworkable and too subjective.⁵¹ This distinction between what the state does in its sovereign capacity and what it does as a quasi-commercial or market actor was a critical preliminary step in the anti-commandeering cases to come.

*C. The 1990s – Shift in Federal-State Relationship
with New York and Printz*

The federal judiciary was staid in an era of separate and distinct “dual federalism” for the larger part of the twentieth century. The increased intermingling of federal revenue models devolved to the states in the form of categorical and block grants, starting in the 1960s. Cases like *South Dakota v.*

⁵⁰ 426 U.S. 833, 852 (1976).

⁵¹ *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

*Dole*⁵² ushered in a new, amorphous era many scholars refer to as “cooperative federalism.”⁵³ Congress gave to the states permissive, conditional grant funding. The general principle of contract couched in terms of sovereign parties best represents this arrangement; so long as Congress was exerting its spending power under Article I to promote the “general Welfare” (the Spending Clause)⁵⁴ and the states were ready and willing to accept federal funds, the federal courts generally saw no constitutional concerns. This consideration of funding and the related offer and acceptance would become the cornerstone of cooperative federalism, allowing the federal government to tread into historically exclusive state regulatory grounds such as social welfare (as in *Dole*) and education.⁵⁵ Where the Spending Clause would not give way, Congress exerted its plenary authority under the Interstate

⁵² 483 U.S. 203 (1987).

⁵³ While “cooperative federalism” has come to be embraced in the political science research, the Supreme Court acknowledged the shifting sands of its federalism jurisprudence in a legal context, attempting to define it. For example, in *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981), the Court defined a state regulatory process as “establish[ing] a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.” 452 U.S. 264, 289 (1981).

⁵⁴ U.S. CONST. art. I, § 8, cl. 1.

⁵⁵ See, e.g., No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

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Commerce Clause to regulate.⁵⁶ In short, in the latter part of the twentieth century, Congress realized that, in the interest of efficiency, the states could assist in the implementation of federal regulatory schemes for larger policy concerns, and it used either money (the Spending Clause) or authority over interstate activity (the Commerce Clause) to achieve federal goals.

1. *New York v. United States*

In an effort to curtail an increasing radioactive waste disposal problem, the Low-Level Radioactive Waste Policy Act of 1980⁵⁷ allowed states to enter into interstate compacts restricting “the use of their disposal facilities to waste generated within member States.”⁵⁸ Congress believed that this would encourage a wide cross section of states across

⁵⁶ However, the Supreme Court, in two instances during the 1990s, recognized for the first significant time, that Congress was limited in its direct-regulation commerce authority. In *United States v. Lopez*, the Court held that the 1990 Gun-Free School Zones Act, prohibiting people from knowingly carrying a firearm in a state-designated school zone, exceeded Congress’s authority to regulate interstate commerce. *Lopez*, 514 U.S. 549 (1995). Five years later, the Court did not find a connection to interstate commerce to allow Congress to provide damages remedies for civil causes of action to individuals who were victims of gender-motivated violence in *United States v. Morrison*, 529 U.S. 598 (2000).

⁵⁷ Pub. L. No. 96-573, 94 Stat. 3347, 1985 amendments at Pub. L. No. 99-240, 99 Stat. 1842, codified at 42 U.S.C. §§ 2021b *et seq.*

⁵⁸ *New York v. United States*, 505 U.S. at 151 (1992).

the country to formalize regional agreements to determine amongst themselves the best way to dispose of the waste. When only three approved compacts had operational disposal facilities by 1985, giving the majority of states no viable disposal alternatives to low level radioactive waste, Congress amended the 1980 law to incentivize the majority of states to provide some mechanism to dispose of waste generated within their respective state borders. The 1985 Amendment Act developed three such incentives. One was a series of surcharges on the previously sited states placed in an escrow account and awarded to new states coming to terms amenable by Congress, either directly or via a regional compact. The second “involved the denial of access to disposal sites”⁵⁹ already created by compacted states with a series of surcharges for deadlines missed preceding ultimate access denial. The third “incentive” mandated that if a state or compact would not comply by January 1, 1996, it would simply take ownership of all radioactive waste within its borders and be liable for any damages therefrom.

Two counties in the state of New York, Allegany and Cortland, challenged Congress’s ability to enact the 1985 Amendments. Despite complying with measures preemptively, citizens in these two counties expressed vehement opposition to the siting of radioactive waste sites in their home counties. New York thus challenged the three-incentive structure, arguing that “the Act is inconsistent with the Tenth Amendment” of the

⁵⁹ *Id.* at 153.

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Constitution.⁶⁰ The Supreme Court upheld the first two incentives. The first structure being reaffirmed by the Spending Power as elucidated in *Dole*, that however onerous conditional restrictions may be on the states, Congress “may attach conditions on the receipt of federal funds”⁶¹ and those restrictions, once the funds are accepted by the state, may legitimately influence a state’s policy choices. The second incentive structure simply provided a choice to nonsited states to:

[E]ither regulate the disposal of radioactive waste according to federal standards by attaining local or regional self-sufficiency, or . . . be subject to federal regulation authorizing sited States and regions to deny access to their disposal sites. The affected States are not compelled by Congress to regulate, because any burden caused by a State’s refusal to regulate will fall on those who generate waste and find no outlet for its disposal, rather than on the State as a sovereign.⁶²

⁶⁰ *Id.* at 154.

⁶¹ *Id.* at 167 (referencing *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)).

⁶² *Id.* at 174.

Justice O'Connor reasoned that this was simply a conditional exercise of Congress's Commerce authority which would ultimately incentivize individuals to make conscious policy decisions concerning radioactive waste disposal. Because of this, the regulation was directly on the individual with merely an incidental impact on the state, an action legitimate under Congress's interstate commerce power.

As to the third incentive, O'Connor acknowledged that the previous Tenth Amendment jurisprudence of the Court was not consistent (particularly in the *National League of Cities v. Usery* and *Garcia* vein). She began her reasoning as to this incentive (the "take title" provision) with the observation that most of the cases "interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws" and "case[s] where Congress has subjected a State to the same legislation applicable to private parties."⁶³ The new question of law, though, was how to handle "the circumstance under which Congress may use the States as implements of regulation."⁶⁴ Citing *Hodel* and *Coyle*, buttressed by the historical references to our federalist system, the Court indicated that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions."⁶⁵ The power in the federal system

⁶³ *Id.* at 160.

⁶⁴ *Id.* at 161.

⁶⁵ *Id.* at 162 (referencing *Coyle v. Smith*, 221 U.S. 559, 565 (1911)).

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allows Congress, most notably through the Commerce Clause, to regulate interstate economic activity directly, but “it does not authorize Congress to regulate state governments’ regulation of interstate commerce.”⁶⁶ In the “take-title” provision, “Congress has crossed the line distinguishing encouragement from coercion.”⁶⁷ The option to either take ownership of the waste or regulate according to congressional instruction was found to be illusory; either choice, standing alone, “would ‘commandeer’ state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution’s division of authority between federal and state governments.”⁶⁸ Recognizing the federal nature of our government, O’Connor ended with powerful words:

States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government’s most detailed organizational chart. The Constitution instead “leaves to the

⁶⁶ *Id.* at 166.

⁶⁷ *Id.* at 175.

⁶⁸ *Id.*

several States a residuary and inviolable sovereignty,” The Federalist No. 39, p. 245 (C. Rossiter ed. 1961), reserved explicitly to the States by the Tenth Amendment.⁶⁹

The “take-title” provision of the 1985 Amendment Act was found unconstitutional as a violation of the Tenth Amendment and outside Congress’s authority, but it was severed from the first two incentive provisions which were maintained as part of the overall regulatory scheme.

While *New York* was significant in its own right to firmly establish the anti-commandeering principle in the Court’s federalism jurisprudence, its holding was limited to Congress taking actions to compel state *legislatures* to be called into the service of federal regulation (*i.e.*, by being forced to pass state laws). It would take another decision of the Court, only five years later, to extend the anti-commandeering principle to state *executives*.

2. *Printz v. United States*

After Reagan Press Secretary James Brady was nearly killed during an assassination attempt on the president by John Hinckley, Jr. in 1981, he became an ardent support of stricter gun control regulation. In 1994, the Clinton Administration was successful in enacting such regulation and honored the former press secretary by giving his name to the legislation. Among other provisions, the Brady

⁶⁹ *Id.* at 188.

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Handgun Violence Prevention Act⁷⁰ required “the Attorney General of the United States to establish a national background-check system by November 30, 1998.”⁷¹ The process by which these background checks were to take place before that date was what was at issue in the *Printz* case. Before the time that the U.S. Attorney General could establish a federal regulatory scheme for conducting the background checks, local (state) “chief law enforcement officers” (CLEOs) would perform these background checks. A handgun dealer would not have to subject a purchaser to a background check only in two instances: (1) if he possessed a state handgun permit issued after a background check or (2) if state law provided for an instant background check.⁷² States that had neither of these two pre-existing options would have to appoint CLEOs to perform the Brady Bill mandated background checks. CLEOs from Montana and Arizona challenged the constitutionality of the interim provision. In separate district court actions in their respective states, the obligation of CLEOs to perform background checks was declared unconstitutional but deemed severable from the rest of the law.⁷³ A consolidated case before the United States Court of Appeals for the Ninth Circuit reversed those decisions, finding no

⁷⁰ Pub. L. 103-159 (codified at 18 U.S.C. §§ 921, 922).

⁷¹ *Printz v. United States*, 521 U.S. 898, 902 (1997).

⁷² *Id.* at 903.

⁷³ *Id.* at 904.

constitutional infirmity with the interim background check provision.⁷⁴

When the Supreme Court heard the case, the five-justice majority began by acknowledging the federalist infirmity of the CLEO background check arrangement. “From the description set forth above, it is apparent that the Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme.”⁷⁵ Once again (as in *New York*) acknowledging the scant precedent on anti-commandeering, The Court analyzed the petitioners’ claims in three purviews: “in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.”⁷⁶ The respondent national government, shared with the view from the four dissenting justices, argued that, in historical perspective, the background check arrangement is nothing new since state judges were, since the beginning of the Union, charged with enforcing federal laws. The majority distinguished this proposition indicating that these were merely judicial functions flowing logically from the Supremacy Clause and preemptive power of federal law.

None of the early statutes directed to state judges or court clerks required the performance of functions more appropriately characterized as

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 905.

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executive than judicial . . . [I]t is unreasonable to maintain that the ancillary functions of recording, registering, and certifying . . . were unalterably executive rather than judicial in nature.⁷⁷

Justice Scalia continued to distinguish a series of federal laws through the nineteenth and early twentieth centuries from the mandatory intent of the Brady Act, referencing the words such as “*enter into contracts* with such State”⁷⁸ and “in implementing the Act President Wilson did not commandeer the services of state officers, but instead requested the assistance of the States’ Governors.”⁷⁹ Finding no evidence of state executive officer commandeering “by almost two centuries of apparent congressional avoidance of the practice,”⁸⁰ the majority then turned to an analysis of the CLEO background check in the structural framework of the Constitution.

The majority stressed the “dual sovereignty” nature of the nation but extrapolated on the democratic principles for this emanating from the defects of the Articles of Confederation. Using the states as instruments of federal regulation proved

⁷⁷ *Id.* at 908 n.2.

⁷⁸ *Id.* at 916 (emphasis in original) (concerning an act of Congress dated August 3, 1882 enlisting state officials to assist at its ports with immigration).

⁷⁹ *Id.* at 917 (concerning the states’ role in implementing the World War I selective draft law).

⁸⁰ *Id.* at 918.

unsuccessful under the Articles, “provocative of federal-state conflict.”⁸¹ The liberty afforded individuals in the American democracy required the Framers of the Constitution to diffuse power across as many planes as possible while still maintaining the political integrity of the two sovereigns of the central government and the state. To the vertical plane of federalism, Scalia warned that “[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service — and at no cost to itself — the police officers of the 50 States.”⁸² To the horizontal plane of separation of powers within the central government, he stressed that Article II, §3 directs the President (and his assigns) to “take Care that the Laws be faithfully executed. . . . The Brady Act effectively transfers this responsibility to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control.”⁸³ The argument that the Necessary and Proper clause would allow the background checks was also found to be unpersuasive; citing *New York*, the elastic clause’s limits are those in the enumerated powers and since Congress’s Commerce power is limited by the Tenth Amendment when it is used to regulate states, the Necessary and Proper Clause would be of no effect.

Finally, with respect to the commandeering jurisprudence of the Court, Scalia acknowledged it as

⁸¹ *Id.* at 919.

⁸² *Id.* at 922.

⁸³ *Id.*

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a “novel phenomenon”⁸⁴ and walked the majority’s analysis through *Hodel* and *FERC v. Mississippi*,⁸⁵ indicating that the Court took great care in ensuring the federal regulatory schemes at issue in those cases “did not require the States to enforce federal law.”⁸⁶ The majority inevitably latched on to the decision in *New York* to find how the Brady Act violated the anti-commandeering principle. The dissent and respondents argued that the distinction was that the “take title” provision in *New York* was an impermissible commandeering of a state’s legislative process because it impeded a state’s ability to develop policy. The CLEOs performing background checks under the Brady Act was simply a “final directive” pursuant to a “clear legislative solution that regulates private conduct” created by Congress.⁸⁷ However, the majority was hesitant to parse such a fine line concerning policymaking, reasoning that the state’s purview in its own policy could be impeded by a command to its *executive* officers to implement federal law just as easy as it could from the original standpoint of the *legislative* process. Lastly, the idea that the two cases could be distinguished based upon the idea that *Printz*’s burden to CLEOs is addressed to individuals and not “the State itself” (as the “take title” provision in *New York* was) proved to not be a “constitutionally

⁸⁴ *Id.* at 925.

⁸⁵ 456 U.S. 742 (1982).

⁸⁶ *Printz v. United States*, 521 U.S. 898, 925 (1997).

⁸⁷ *Id.* at 926–27.

significant” distinction.⁸⁸ “It is directed to them in their official capacities as state officers; it controls their actions, not as private citizens, but as the agents of the State.”⁸⁹ Reiterating and solidifying the anti-commandeering rule as a precept of federalism jurisprudence, the Court struck down the requirement for state and local CLEOs to perform, even temporarily, the background checks, extending to the state executive what *New York* did to protect state legislatures. It did so in a categorical manner, not subject to resetting of interests for every new case. “It matters not whether policymaking is involved, and *no case-by-case weighing of the burdens or benefits is necessary*; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.”⁹⁰

3. Transitioning to *Reno v. Condon* – A Shift
Away from the *New York* and *Printz* Strictures
on Anti-Commandeering

New York and *Printz* have been the only two instances where the United States Supreme Court has struck down a federal law under the anti-commandeering principle, but it has not been the last time the Court has heard a case argued under the theory. What we take from these two cases are the important ideas that Congress is prohibited from commandeering both state legislative and executive function when regulating the states in such a manner

⁸⁸ *Id.* at 930.

⁸⁹ *Id.*

⁹⁰ *Id.* at 935 (emphasis added).

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is exclusive (*i.e.*, only the states are being regulated, not both states and individuals) and in their capacity as sovereigns. We learn also that the principle is not subject to any ad hoc balancing or case-by-case readjusting, irrespective of the relative impact (economic or otherwise) on the states or Congress's interest in asserting the command. Further, while both *New York* and *Printz* dealt with affirmative commands (as opposed to negative prohibitions) on states, the relevancy was not directly brought into discussion in either majority opinion. Lastly, both decisions presuppose that the prohibition on commandeering rests on a cost-shifting and political accountability concern, that the central government should not usurp the state governmental apparatus for free to implement a federal *regulatory* scheme. Does this logic presuppose that there must be such a scheme in place?

Anti-commandeering would be revisited by the Court three years after *Printz* in *Reno v. Condon*.⁹¹ Congress enacted the Driver's Privacy Protection Act (DPPA) in 1994⁹² to prevent states from selling their residents' personal information (such as "name, address, telephone number, vehicle description, Social Security number, medical information, and photograph")⁹³ culled from state department of motor vehicle databases as a condition

⁹¹ 528 U.S. 141 (2000).

⁹² Pub. L. No. 103-322, 108 Stat. 2099 (codified at 18 U.S.C. §§ 2721–25).

⁹³ *Reno v. Condon*, 528 U.S. 141, 143 (2000).

of obtaining a state-mandated driver's license or registering a motor vehicle. States were selling this information to "generate significant revenues for the States."⁹⁴ Drivers would be able to opt-out to a state DMV's sale of the information to third parties but only by affirmatively doing so; otherwise, the state would consider the data for sale. South Carolina challenged the DPPA on the grounds that it violated the state's rights under the Tenth Amendment. The United States District Court for the District of South Carolina struck down the DPPA as a violation of the anti-commandeering principle as espoused in *New York* and *Printz*. The district judge found that:

In enacting the DPPA, Congress has chosen not to assume responsibility directly for the dissemination and use of these motor vehicle records. Instead, Congress has commanded the States to implement federal policy by requiring them to regulate the dissemination and use of these records. In order to comply with Congress's directive, the States are forced by the threat of administrative penalty to take measures to prohibit access by their citizens to the motor vehicle records. This command

⁹⁴ *Id.* at 144 (noting that, for example, the Wisconsin Department of Transportation was receiving approximately \$8 million each year from the sale of motor vehicle information).

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clearly runs afoul of the holdings of
New York and *Printz*.⁹⁵

The district court judge rejected the proposition by the United States that the states were not being regulated in the sovereign capacity but rather as economic actors in that determining what could or could not be done with driver information was not a function of state government. The United States Court of Appeals for the Fourth Circuit affirmed.⁹⁶ A strongly worded dissent by Judge Phillips argued that the DPPA, “considered in light of the harm generated by the States’ own actions at which it is aimed, distinguish this case from [*New York* and *Printz*] and compels the conclusion that the Act is consistent with both substantive and structural limitations on the exercise of federal power.”⁹⁷ He reasoned that federal law which regulates the states directly and not the states as conduits of regulation of third parties was permissible; when a federal law does not seek to determine the manner by which states can regulate its citizens, there is no commandeering. “In fact, the DPPA does not require that states act at all. Its provisions only apply once a State makes the voluntary choice to enter the interstate market created by the release of personal information in its files.”⁹⁸ The Supreme Court gave

⁹⁵ *Condon v. Reno*, 972 F. Supp. 977, 984–85 (D.S.C. 1997).

⁹⁶ *Condon v. Reno*, 155 F.3d. 453 (4th Cir. 1998).

⁹⁷ *Id.* at 465 (4th Cir. 1998).

⁹⁸ *Id.* at 468 (4th Cir. 1998).

weight to Judge Phillips's arguments and unanimously reversed⁹⁹ the appellate court, reasoning that the DPPA did not commandeer states as sovereign actors but rather as owners of a commodity (here the databases of drivers' information) seeking to place that commodity into the market. As such, federal regulation of the state, as market participants when regulating private individuals to the same degree, was permissible.

D. Anti-Commandeering vs. Anti-Coercion: Dole and the Recently Discovered Modification of "Conditional Spending" in NFIB v. Sebelius

The legal question yet to be addressed by any of the above cases was what to do when the federal government attached money to its prohibitions. Would the same rule from *New York* and *Printz* hold when states refused federal commands if funding was conditioned on the state's adherence? This question was addressed in *South Dakota v. Dole*.¹⁰⁰ In the context of expenditure restriction and pursuant to its authority under the Spending Clause,¹⁰¹ Congress opted to withhold a certain amount of federal transportation funds for those states that did not have a minimum drinking age of 21. The state of South Dakota argued that the restriction impermissibly impeded the states' sovereign authority to regulate drinking age, a historical area reserved to the states under the Tenth Amendment.

⁹⁹ *Reno v. Condon*, 528 U.S. 141 (2000).

¹⁰⁰ 483 U.S. 203 (1987).

¹⁰¹ U.S. CONST. art. I, § 8, cl. 1.

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Chief Justice Rehnquist, writing for the 7 to 2 majority, indicated that “Congress may attach conditions on the receipt of federal funds.”¹⁰² However, he prefaced that the conditional spending must not be coercive when considering the amount of funds at issue. Further, the area of state-law restricted by the conditional grant of federal funds should be related to that restriction. “[T]he condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended – safe interstate travel.”¹⁰³ Justice O’Connor disagreed on the relationship between the federal withholding of funds and the state’s historical area of regulating drinking age in her dissent by stating, “establishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose.”¹⁰⁴

The debate between Rehnquist and O’Connor in *Dole* was significant in the larger debate of federalism. On the heels of the lack of a legal standard from the *National League of Cities* and *Garcia* cases, the majority opinion in *Dole* seemed to allow the federal government some latitude in making a connection between federal grants to states and the two sovereigns’ relative spheres of authority. Where Congress would not reasonably foresee an express grant of authority from most likely the

¹⁰² *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

¹⁰³ *Id.* at 208.

¹⁰⁴ *Id.* at 213–14 (O’Connor, J., dissenting).

Commerce Clause, it would use the Spending Power to “promote the General Welfare” and use money with an expansive *Dole* reasoning to blur the lines of federalism that was left unclear with *National League of Cities* and *Garcia*.

It seemed that *South Dakota v. Dole* imbued Congress with broad discretion under its Spending Power in Article I, § 8. This idea was supported by the Court, in *New York*, consciously indicating that financial incentives of virtually any sort in encouraging states to effectively handle their own radioactive waste problems were upheld. Regulations outside the scope of Congress’s enumerated powers, into the traditional purview of the states, “may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.”¹⁰⁵ *Dole* allowed only minimal restrictions on Congress’s conditional grant spending leverage over the states: general welfare, unambiguous expression of conditional funding and a relatedness to some “federal interest.” To perhaps foreshadow a federalism arrangement based on a dissonant bargaining position between a well-funded central government and a state starving for federal funds, the Court in *Dole* provided an “opt-out” by stating that “other constitutional provisions may provide an independent bar to the conditional grant of federal funds”¹⁰⁶ significantly “less exacting than those on [Congress’s] authority to regulate directly.”¹⁰⁷ Congress would be given great latitude

¹⁰⁵ *Id.* at 207 (1987).

¹⁰⁶ *Id.* at 208.

¹⁰⁷ *Id.* at 209.

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in the use of its conditional spending power, with the Court intuiting that nothing short of inducing the “States to engage in activities that would themselves be unconstitutional.”¹⁰⁸ Only in the rarest of circumstances (and losing 5% of federal highway funds was considered not such) would financial inducement be considered “so coercive as to pass the point at which ‘pressure turns into compulsion.’”¹⁰⁹ The opportunity to revisit this variant of the anti-commandeering principle in this context of spending, known as “anti-coercion,” would come in the legal challenges to the Affordable Care Act (ACA).¹¹⁰

The ACA, enacted in 2010 and well over 850 pages, impacted hundreds of parts of the United States Code. The potential impact it had on federalism was directly through the requirements of states to set up health exchanges and accept changes in Medicaid funding structures called for by the law. Health care reform was to be a joint operation, with the states being “critical players in implementing reform and in establishing state-based health care exchanges.”¹¹¹ The perceived mandate to set up a healthcare exchange was challenged as violating anti-commandeering in an action filed in the United States District Court for the Western District of Virginia, almost immediately after the act was signed

¹⁰⁸ *Id.* at 210.

¹⁰⁹ *Id.* at 211.

¹¹⁰ Pub. L. 111-148 (2010).

¹¹¹ MICHAEL DOONAN, *AMERICAN FEDERALISM IN PRACTICE: THE FORMULATION AND IMPLEMENTATION OF CONTEMPORARY HEALTH POLICY 2* (2013).

by the president.¹¹² However, the district judge ruled (and the appellate court affirmed in an unpublished opinion) that states were given the choice of either adopting the federal standards for healthcare exchanges or pass a state law to implement the standards. While the latter would have certainly run afoul of anti-commandeering, the option of allowing the federal government to operate the exchange within the state estopped a Tenth Amendment argument. In essence, the states' option to be preempted saved the ACA's constitutionality on this ground.

Notwithstanding the multi-fronted challenges to the ACA,¹¹³ the Court has rendered an important decision in the realm of this study with respect to Medicaid funding to the states but has not clearly formed a framework for anti-coercion claims. The ACA provides "significant funding to expand Medicaid for qualified [state] residents . . . [and] is expected to cover 17 million newly insured people. . . ."¹¹⁴ Medicaid was originally enacted in 1965 and:

¹¹² *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. 2010).

¹¹³ Legal challenges to various provisions of the ACA continued well after the initial decision addressed here. For example, in the 2013 Term, the Court struck down, 5 to 4, mandating health coverage for contraception as a violation of an organization's religious freedom under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.*, and the Free Exercise Clause of the First Amendment. *See* *Sebelius v. Hobby Lobby Stores, Inc.*, 573 U.S. ____ (2014).

¹¹⁴ MICHAEL DOONAN, *AMERICAN FEDERALISM IN PRACTICE: THE FORMULATION AND IMPLEMENTATION OF CONTEMPORARY HEALTH POLICY* 123 (2013).

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[O]ffers federal funding to States to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care. In order to receive that funding, States must comply with federal criteria governing matters such as who receives care and what services are provided at what cost. By 1982 *every State* had chosen to participate in Medicaid. Federal funds received through the Medicaid program have become a *substantial part* of state budgets, now constituting over 10 percent of most States' total revenue.¹¹⁵

The ACA expansion of Medicaid required current “state programs to provide Medicaid coverage to adults with incomes up to 133 percent of the federal poverty level.”¹¹⁶ The pre-ACA funding levels were much lower for some states. Although the federal government would cover most of these increased costs under the ACA, states would have had to bear some of the additional costs. If a state refused to comply with the ACA’s Medicaid coverage expansions, “it may lose not only the federal funding for those requirements, but *all* of its federal Medicaid

¹¹⁵ Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 541–542 (2012) (emphasis added).

¹¹⁶ *Id.* at 542.

funds” even those funds pre-dating the passage of the ACA.¹¹⁷

The Court found that the ACA “dramatically increase[d] state obligations under Medicaid.”¹¹⁸ The Court acknowledged its jurisprudence, particularly *Dole*, in considering Congress’s wide latitude in the conditional granting of federal funds for state acquiescence in federal policy. However, it also recognized a limitation. “Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as *independent sovereigns* in our federal system.”¹¹⁹ The Court ultimately found that the threat of withdrawing all existing Medicaid funding for a state in the ACA’s Medicaid expansion scheme was tantamount to “a power akin to undue influence”¹²⁰ because of the history and comprehensiveness of past state reliance on the Medicaid structure. To withdraw all of that structure, as it has developed as an integral part of state budgets, would move from conditioning to coercing under *Dole*. The threat to withdraw the level of Medicaid funding that has become an obligatory part of state budgets¹²¹ coupled with the uncertainty in how states would fund the

¹¹⁷ *Id.* (emphasis added).

¹¹⁸ *Id.* at 575.

¹¹⁹ *Id.* at 577.

¹²⁰ *Id.* (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937)).

¹²¹ The Court stated that, “Medicaid spending accounts for over 20 percent of the average State’s total budget, with federal funds covering 50 to 83 percent of those costs.” *National Federation of Independent Business*, 567 U.S. at 581 (2012).

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expanded version of it under the Act, the Court reasoned, could not be considered a simple condition. “When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.”¹²² Mere bargaining leverage in financial inducement turns to impermissible coercion when the States have “no choice” but to adopt the federal regulatory scheme. In the case of Medicaid expansion, the five-justice majority equated the threat to take all existing funding as a “gun to the head” of the States.¹²³ “The threatened loss of over 10 percent of a State’s overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.”¹²⁴ In striking down the Medicaid expansion provision as unconstitutional, the Court did not establish a new test in the context of *Dole* to determine what facts such level of funding, particular policy area, or state historical reliance on federal funds were relevant. The Court did not determine definitively when conditions become coercive. “We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it. Congress may not simply ‘conscript state [agencies] into the national bureaucratic army.’”¹²⁵

¹²² *Id.* at 580.

¹²³ *Id.* at 581.

¹²⁴ *Id.* at 582.

¹²⁵ *Id.* at 585.

NFIB v. Sebelius is significant, from an anti-commandeering perspective, not so much for its holding but for the analysis the Court employed in reaching its conclusion. While *Dole* and *NFIB* have claims that emanate from a different constitutional source than that of *New York, Printz* and *Reno* (i.e., the Spending Clause as opposed to the Commerce Clause), the reasoning the Court used in all of these cases can be plugged in as analytical components in a workable framework for states seeking to gain revenue by legalizing traditional vice prohibitions. The decision by the majority in *NFIB* seemed to find that conditional spending coaxing became something more because of the states' *reliance* on federal funds, more so, for our purposes, on the importance of state revenue and budgets. Further, the connection between that budgetary importance and the ability of such to influence state policy seems to be mindful of states' economic conditions – that state governments should not be penalized in determining their own policy initiatives, and what is best for their residents, to an extent such penalties would deleteriously impact a state's fiscal health. Whether or not that premise turns upon pre-existing reliance on a federal program or the federal government's disproportionate spending ability vis-à-vis the states is what the new era of anti-commandeering jurisprudence should be mindful of, particularly in the field of regulating vice, an historically state-centric purview.

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*E. Contemporary Treatment in the Federal
Judiciary – Anti-Commandeering Claims in the
Federal Intermediate Appellate Courts*

Of the approximately 100 cases in the federal appellate courts that have addressed a direct claim of anti-commandeering since the decision in *New York v. United States* twenty-five years ago, courts have not struck down a federal act under the anti-commandeering principle.¹²⁶ The issues in these cases focus on a host of disputes between federal law and state action, but three common areas arise from the cases: state and local government employment practices under the Fair Labor Standards Act (FLSA),¹²⁷ mandated registration as a sex offender required by the Sex Offender Registration and

¹²⁶ The only exception to this is the decision of the United States Court of Appeals for the Fourth Circuit in *Reno v. Condon* which was overturned by the U.S. Supreme Court. See *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998).

¹²⁷ Fair Labor Standards Act, 29 U.S.C. §§ 201–19. The close decisions in both *National League of Cities v. Usery* and *Garcia v. San Antonio Metropolitan Transit Authority* (both 5 to 4) reveal how lower courts continued to struggle well after *Garcia* with federalism principles involving the Fair Labor Standards Act. Cf. *West et al. v. Anne Arundel Cty.*, Maryland, 137 F.3d 752 (4th Cir. 1998). However, time and again, lower courts find that FLSA is a law of “general applicability” applicable incidentally to states as well as private actors and does not regulate states as “separate and distinct sovereign entities.” See, e.g., *Robertson v. Morgan Cty.*, 1999 U.S. App. LEXIS 95 (10th Cir. 1999).

Notification Act (SORNA),¹²⁸ and certain civil liberty protections of prisoners under the Religious Land Use and Institutionalized Persons Act (RLUIPA).¹²⁹ Lower federal courts seem to be readily distinguishing the facts of both *New York* and *Printz* from these cases by focusing on the degree to which an affirmative burden (if any) is placed on states in their respective sovereign capacities. If a law equally and generally applied to both states and individuals (labor and employment laws), it would not commandeer. Further, to the extent a “burden” would be simply administrative (prison regulations) or of a reporting nature (sex offender registry), it could impose a slight burden on the state but not one so much that would bend away from the federal mandate. What these appellate cases seemed to have narrowed (and could shape for the U.S. Supreme Court) is the question as to what federal law would constitute commandeering: It would take a federal

¹²⁸ Sex Offender Registration and Notification Act, 42 U.S.C. §§ 16911 *et seq.* See, e.g., *United States v. White*, 782 F.3d 1118 (10th Cir. 2015); *United States v. Johnson*, 632 F.3d 912 (5th Cir. 2011).

¹²⁹ Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq.* State and local prison officials repeatedly pressed that prisoners’ civil liberty protections required by this Act impermissibly commandeered their ability to administer prison policy. However, intermediate appellate courts have never held so. “*New York* and *Printz* are simply not applicable . . . because RLUIPA does not require the states to enact or administer a federal program. The Act does not demand that states take any affirmative action at all. To the contrary, RLUIPA requires states to refrain from acting in a way that interferes with inmates’ exercise of religion....” *Cutter v. Wilkinson*, 423 F.3d 579 (6th Cir. 2005).

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law that (1) regulates *only* a state, (2) in its sovereign capacity, (3) burdening it with significant affirmative obligations imposed by that federal law (4) not of merely a reporting or administrative nature (5) without consent to preemption, financial subsidy or option to opt out. It is only in the very recent past, in the context of immigration debates and the Trump administration's policies towards so-called "sanctuary cities," that federal district courts have found some credence of an anti-commandeering remedy.¹³⁰ Even this field, however, does not show a consistent line of reasoning in the context of the area of law vis-à-vis anti-commandeering nor have appeals on the merits been taken from these cases.¹³¹

¹³⁰ See, e.g., *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497 (N.D. Cal. 2017) (finding anti-commandeering against an Executive Order that sought to make immigration detainers mandatory and oblige local law enforcement to execute these federal laws without discretion).

¹³¹ Although the *County of Santa Clara* case found a direct violation of the anti-commandeering principle, other federal districts, even while striking down the application of the same "Sanctuary Cities" Executive Order, have found plaintiffs' anti-commandeering claims inapplicable. See, e.g., *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744 (W.D. Tex. 2017) and *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017).

II. REGULATION OF GAMBLING AS VICE WITHIN THE U.S. FEDERALIST SYSTEM

A. *Vice: States' Prerogatives over Criminal Laws*

When the Constitution was ratified, certain areas of law were considered to always remain with the realm of the states, particularly those areas not involving national security, interstate commerce or foreign relations. As scholars of the country's history agree, the Constitution was not an abdication of state sovereignty *ab initio*, regardless of how the federal judiciary would come to interpret the balance of power after ratification. Matters of “everyday governing, that is, to retain most of the policy tools for governing everyday American life”¹³² were to be retained by the states. These policy areas included authority over “taxes, militias, *criminal law*, property, and contracts, ‘corporations civil and religious,’ and the creation of cities, counties, courts, schools, [etc.].”¹³³ Included in the power to regulate the criminal law was the power to “regulate *vice*,”¹³⁴ that behavior which was considered socially unacceptable and punishable by generally applicable laws with the threat of enforcement. “Vice” is defined, according to the Oxford English Dictionary, as “[d]epravity or corruption of morals; evil, immoral, or wicked habits or conduct; indulgence in

¹³² DAVID BRIAN ROBERTSON, *FEDERALISM AND THE MAKING OF AMERICA* 30 (2012).

¹³³ *Id.* (emphasis added).

¹³⁴ *Id.* (emphasis added).

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degrading pleasures or practices.”¹³⁵ States, as the guardians of individuals’ safety, health, welfare and morals, were charged with developing criminal codes to determine the parameters of abhorrent behavior which would justify punishment by the sovereign in the interest of protecting all. This proved to be a very amorphous endeavor, with states’ criminal laws varying dramatically. Of course, there was consensus on major offenses against the person such as murder, rape, battery, theft, etc. as well as many major offenses against property including burglary, arson, and the like. However, the federal divide devised by the Constitution and substantiated by the Tenth Amendment left the states with broad discretion to determine what conduct could be defined as criminal; in such realm, it was presumed the federal government could not intervene.¹³⁶

Variations among the states across social and economic lines would justify how some states proceeded to regulate moral habit, how it regulated the vice crime. As such, criminalizing vice would very much depend on a state’s economic condition, on the macro level of balancing the consequences of legalizing an activity as opposed to the benefits of making it legal. States would also assess the individualistic determination of regulating vice: is

¹³⁵ *Vice*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

¹³⁶ The Supreme Court said as much in *United States v. Lopez* indicating that state criminal statutes that have nothing to do with interstate commerce are outside the regulatory authority of Congress. 514 U.S. 549, 561 (1995).

this a rational choice that vice-afflicted individuals are making? If so, is the more proper remedy retribution or rehabilitation? As micro-level social problems exacerbated the macro-level concerns, states started exploring the idea of the relative benefits of legalizing or decriminalizing vice. How this exploration will fare in this face of some of the categorical rules of U.S./state relations (*e.g.*, anti-commandeering) and the preemptive role of the central government is proving to be a driving force in federalism as states struggle with budgeting concerns and continue to seek non-traditional yet consistent streams of revenue.

B. Regulating Gambling as a "Vice"

From the moralistic ideal of regulating gambling as "vice," states have faced a dilemma — a "moral confusion [that] has plagued the whole long history of gambling in the United States."¹³⁷ The game of chance, the betting of money for the opportunity to win something more, was ambiguous in the American moral consciousness and hence difficult to regulate and more difficult to enforce. "The many ambiguities that have barred gambling from the pantheon of great social vices have made it both difficult to suppress and difficult to study."¹³⁸ Regulating gambling was, at some level, disingenuous when taken in conjunction with America's burgeoning aggressive capitalistic

¹³⁷ ANN FABIAN, CARD SHARPS, DREAM BOOKS, & BUCKET SHOPS 7 (1990).

¹³⁸ *Id.* at 5.

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economy, making it difficult for some state legislatures “to assert a moral difference between stock markets and gambling casinos.”¹³⁹ It would be this legality disparity – between prohibited games of chance and permitted “investing,” – that would define many of the early securities laws of the United States and would justify a strong interest in regulation so as not to lose Americans’ hard earned money to the underground world of gambling. As Ann Fabian, the renowned historian wrote (from an economic theory perspective):

[T]he economists’ model of human nature meant that “homo faber, man the doer, took precedence over man the believer, man the thinker, man the contemplator – even man the sinner. It was man the *speculator*, however, who preserved something of man the thinker, man the contemplator, and, in an economic universe geared to actual production, something of man the sinner. The gambling evil that clung to speculation came, not only from flirtation with risk, a flirtation finally celebrated in the folklore of capitalism, but from a refusal to

¹³⁹ *Id.* at 7.

“launder” money by passing it through a productive economy.¹⁴⁰

It is important to have this theoretical background in mind and the dilemma over gambling at the forefront when discussing the history of federal regulation of gambling. As economically attractive as the regulation of gambling is for states, there are a handful of federal laws, still in force, that presumably operate within Congress’s legitimate Commerce power that have not been challenged or at least, as described below, challenged only recently. With respect to interstate transportation of state lottery tickets, for example, the Supreme Court established that only the connection to interstate commerce of such items could be regulated by Congress (as opposed to the rules of play and winnings allowed by state law). In doing so, Congress

has not assumed to interfere with the completely internal affairs of any State, and has only legislated in respect of a matter which concerns *the people of the United States*. As a State may, for the purpose of

¹⁴⁰ ANN FABIAN, CARD SHARPS, DREAM BOOKS, & BUCKET SHOPS 167 (1990). Fabian partially quoted Joyce Appleby in this passage from the work, CAPITALISM AND A NEW SOCIAL ORDER (1984). Interestingly, Fabian also acknowledges that Max Weber’s social theory of economic rationality is at the heart of many state legislatures’ battles over legalizing gambling. She goes so far, also, as to infuse the still relevant argument with notions of Protestantism and that religion’s basis for vice versus virtue.

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guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the ‘widespread pestilence of lotteries’ and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another.¹⁴¹

The history on the subject, through the nineteenth and twentieth centuries, is rich indicating at many times how regulation of gambling and other games of chance schemes have been intrinsically tied to a state’s economic condition. The economic progress of the state of Nevada would be a bellwether in that regard as it has the most open state laws to allow the most types of gambling – casino table games of chance, machine games of chance (*e.g.*, slot machines, video poker), horse betting and sports wagering. This does not include the several random areas of state regulation that have allowed isolated forms of gambling such as horse racing in New York (and the early origins of the Saratoga Springs track), Indian reservation casinos, various state lotteries

¹⁴¹ *Champion v. Ames*, 188 U.S. 321, 357 (1903) (emphasis added to stress the idea that Congress, when it legislates, presumably on the borders of its commerce authority, does so in its capacity as a separate sovereign than the states, to protect the interests of all Americans, regardless of state residency).

(and ensuing compact agreements involving those – such as Powerball and MegaMillions), riverboat casino gaming in Mississippi and Louisiana and land-based casino exceptions to the general norm in places like Biloxi, Mississippi; New Orleans, Louisiana; and Atlantic City, New Jersey.

Statutes regulating gambling at the federal level are few. They include general criminal prohibitions of gambling involved in interstate commerce,¹⁴² regulations on interstate horseracing,¹⁴³ a comprehensive regulatory framework to protect Indian reservations that wish to engage in gambling activities,¹⁴⁴ prohibitions on states' creating sports wagering schemes,¹⁴⁵ and a smattering of criminal statutes in Title 18 of the United States Code that prohibit illegal gambling businesses¹⁴⁶ and the interstate transportation of wagering paraphernalia.¹⁴⁷ It has been the rise in offshore internet gambling that has caused Congress to revisit federal gambling restrictions in the last decade. It has also been some states' call for deregulation in the field to explore the possibility of legalizing gambling that is restricted by the federal government. The conflict arises in the commercial nature of the vice regulation. Gambling is an inherently financial activity, and because cash or other promissory methods of paying are backed by

¹⁴² The Wire Act, 18 U.S.C. §§ 1081 *et seq.*

¹⁴³ 15 U.S.C. §§ 3001 *et seq.*

¹⁴⁴ Indian Gaming Regulation, 25 U.S.C. §§ 2701 *et seq.*

¹⁴⁵ The Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701 *et seq.*

¹⁴⁶ 18 U.S.C. § 1955.

¹⁴⁷ 18 U.S.C. § 1953.

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the federal government, transactions involved with gambling involve themselves (arguably intrinsically) in interstate commerce.

Whether federal authority to regulate in this area (much like that of regulating drugs) should be premised upon enforcement remains somewhat of an open question. The Supreme Court has held that in areas with *express* federal authority, evidenced by substantial and consistent federal enforcement, a state must give way to that authority, even if the state also has a substantial interest in that field of law.¹⁴⁸ With respect to vice domains based in the criminal law, it is, in part, however, a lack of enforcement that could potentially strengthen a state's argument that existing federal prohibitions violate state sovereignty under the Tenth Amendment. Whether states will choose to pursue that strength to replenish their state coffers through the courts by possibly using the anti-commandeering principle and confirming specific contours of the federal commerce power can be analyzed through two gambling area case studies: sports wagering and daily fantasy sports.

¹⁴⁸ See, e.g., *Arizona v. United States*, 567 U.S. 387 (2012) (holding, in part, that the federal government has exclusive authority to enforce its immigration laws and states cannot enact contradictory laws to that authority).

C. Sports Wagering, the New Jersey Case Study

Congress passed the Professional and Amateur Sports Protection Act (PASPA) in 1992¹⁴⁹ to “curtail the growth of teenage gambling and to protect the integrity of our national pastimes by suppressing the development of sports gambling.”¹⁵⁰ The law “made it illegal for any government entity to participate in or sponsor sports betting. . . .”¹⁵¹ When PASPA was enacted, it allowed all states with existing sports wagering to retain their schemes (but not be able to augment them); these four states were Nevada, Montana, Oregon and Delaware. All other states had one year from the enactment of the legislation to essentially “opt-in” if they wanted to entertain a permissible sports wagering scheme. New Jersey did not do so. As revenues from Atlantic City declined dramatically around the time of the Great Recession, the state began to explore other options to increase gambling revenue. In a popular statewide referendum on November 8, 2011, voters approved the following language by a vote of 63.9% in favor and 36.1% against:¹⁵²

¹⁴⁹ Pub. L. 102-559, 106 Stat. 4227 (1992).

¹⁵⁰ Dylan Oliver Malagrino, *Off the Board: NCAA v. Christie Challenges Congress to “Move the Line” on the Professional and Amateur Sports Protection Act*, 118 PENN. ST. L. REV. 375, 378 (2013).

¹⁵¹ Thomas L. Skinner, III, *The Pendulum Swings: Commerce Clause and Tenth Amendment Challenges to PASPA*, 2 UNLV GAMING L.J. 311 (2011).

¹⁵² 2011 Election Information, STATE OF N.J. DEP’T OF STATE, <http://www.state.nj.us/state/elections/2011->

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Shall the amendment to Article IV,
Section VII, paragraph 2 of the
Constitution of the State of New
Jersey, agreed to by the Legislature,
providing that it shall be lawful for
the Legislature to authorize by law
wagering at casinos or gambling
houses in Atlantic City and at current
or former running and harness horse
racetracks on the results of
professional, certain college, or
amateur sport or athletic events, be
approved?¹⁵³

The amendment was promptly placed into the laws of New Jersey as the New Jersey Sports Wagering Law, effective January 17, 2012.¹⁵⁴ Various athletic associations, including the NCAA, NFL and representatives of Major League Baseball sued to enjoin the state's sports wagering law for fear that gambling on sporting events would substantially impact the integrity of athletics, both professional and collegiate, in the state and would lead to corruption, interests originally put forth by Congress in enacting PASPA twenty years prior. After finding that the sports associations had standing to sue, the district court judge ruled in favor of them and against

results/2011-official-gen-elect-public-question-results.pdf (last visited June 21, 2017).

¹⁵³ *Id.*

¹⁵⁴ N.J.S.A. §§ 5:12A-1 *et seq.*

the state, holding that, among other things, PASPA did not violate the anti-commandeering principle and was therefore constitutional. The district court stressed the rule that “Congress cannot, via the Commerce Clause, force States to engage in *affirmative* activity.”¹⁵⁵ Since there was not an affirmative command on a state here, the district court found that the prohibitions on PASPA were simply a necessary function of Congress’s authority under the Commerce Clause. The displacement of New Jersey’s traditional realms of legislation (*e.g.*, making certain vice activity legal) was also not impeded.

Congress has chosen through PASPA to limit the geographic localities in which sports wagering is lawful. It does no more or less. . . . The fact that gambling might be considered an area subject to the States’ traditional police powers does not change this conclusion.¹⁵⁶

Citing *Ames*, and dismissing New Jersey’s argument that the “equal footing” doctrine in *Coyle* as cited in *New York* should hold here, the district court went on to say that

Congress has the power to regulate gambling. . . . State authorized sports

¹⁵⁵ Nat’l Collegiate Athletic Ass’n v. Christie, 926 F. Supp. 2d 551, 570 (D.N.J. 2013).

¹⁵⁶ *Id.* at 571.

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wagering cannot reasonably be described as purely pertaining to the internal policies of a state. Because sports wagering's effects are felt outside the state, and the ability to regulate gambling is within the purview of Congress, Congress's restriction of such does not violate or constrain any attributes essential to [New Jersey's] equality in dignity and power with the other states.¹⁵⁷

New Jersey's Sports Wagering Law was found to violate PASPA and therefore also violated the Supremacy Clause.

The Christie Administration appealed the decision to the U.S. Court of Appeals for the Third Circuit. On September 17, 2013, a divided three-judge panel affirmed the decision of the district court.¹⁵⁸ The appeals court majority made it clear in analyzing both *New York* and *Printz* that the subject matter of those cases dealt with affirmative burdens, forcing states to expend their own funds and take overt actions in furtherance of federal regulatory objectives. It was the subtle difference between telling a state to take an action versus prohibiting it from changing its own laws to allow an action that was enough for the two-judge majority. “[W]e see much daylight between the exceedingly intrusive

¹⁵⁷ *Id.* at 572.

¹⁵⁸ *NCAA v. Christie*, 730 F.3d 208 (3d Cir. 2013).

statutes invalidated in the anti-commandeering cases and PASPA's much more straightforward mechanism of stopping the states from lending their imprimatur to gambling on sports."¹⁵⁹ The majority buttressed this distinction with the *Reno* decision from 2000 which held in favor of federal government action. Judge Vanaskie gave a carefully worded concurrence and dissent and upheld the majority's (and the district court's) equal footing analysis but questioned the anti-commandeering argument, seeing matters of first impression in the case. "PASPA is no ordinary federal statute that directly regulates interstate commerce. . . . Instead, PASPA prohibits states from authorizing sports gambling and thereby directs how *states* must treat such activity."¹⁶⁰ The U.S. Supreme Court denied the writ of certiorari on June 23, 2014.¹⁶¹

Once the United States Supreme Court denied review, New Jersey amended its sports wagering law to do what it believed the Third Circuit decision allowed it to do – allow sports wagering by repealing laws in part that sought to regulate it. In October of 2014, four months after the U.S. Supreme Court denied review, New Jersey enacted SB 2460 which sought to repeal certain specific regulatory guidelines on sports gambling "to the extent they apply or may be construed to apply at a casino or gambling house operating in this State in Atlantic

¹⁵⁹ *Id.* at 240.

¹⁶⁰ *Id.* at 241 (Vanaskie, J., dissenting).

¹⁶¹ 573 U.S. ____ (2014), *cert. denied* on 13-967 (*Christie v. NCAA*), 13-979 (*NJ Thoroughbred Horsemen's Assn. v. NCAA*) and 13-980 (*Sweeney v. NCAA*).

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City or a running or harness horse racetrack in this State.”¹⁶²

In almost identical procedural fashion to the first time PASPA’s authority was challenged, the athletic leagues filed suit to enjoin enforcement of SB 2460 arguing that a partial repeal effectively is regulation. The district court agreed, reasoning that it “necessarily results in sports wagering with the State’s imprimatur.”¹⁶³ Both the initial three-judge panel of the Third Circuit, on appeal, as well as the *en banc* circuit decision reaffirmed this central point, that the 2014 state law, by selectively choosing where to prohibit sports wagering expressly by statute, implicitly allows it in other places, effectively regulating it – authorizing it by law. The state seemed to redouble efforts on the commandeering claim this second time around, but the same result was reaffirmed by the *en banc* Third Circuit: “Our prior conclusion that PASPA does not run afoul of anti-commandeering principles remains sound despite Appellants’ attempt to call it into question using the 2014 Law as an exemplar.”¹⁶⁴ While the Third Circuit wanted to make it abundantly clear to New Jersey that the 2014 partial repeal is not valid under PASPA, the majority opinion did not really give the state further drafting guidance when it stated:

¹⁶² N.J. Pub. L. No. 2015, c. 62, codified at N.J. Stat. Ann. §§ 5:12A-7 to -9.

¹⁶³ *NCAA v. Christie*, 832 F.3d 389, 395 (3d Cir. 2016).

¹⁶⁴ *Id.* at 399.

To be clear, a state's decision to *selectively* remove a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators is, in essence, "authorization" under PASPA. *However*, our determination that such a selective repeal of certain prohibitions amounts to authorization under PASPA does not mean that states are not afforded sufficient room under PASPA to craft their own policies.¹⁶⁵

In dissent, Judge Fuentes argued that semantically it was too much to infer that the language of the partial repeal constituted an authorization. "It is merely a repeal – it does not, and cannot, authorize by law anything . . . There is no explicit grant of permission in the 2014 Repeal for any person or entity to engage in sports gambling."¹⁶⁶ He argued that the partial repeal was simply a self-executing deregulation and to infer anything more would be to improperly assume the states could not take an otherwise allowed action. Judge Vanaskie, once again dissenting (as he did in the first time the case went to his court), took the semantic argument of Judge Fuentes even further saying that the option given to the state in both lines of these cases was too narrow,

¹⁶⁵ *Id.* at 401 (emphasis added).

¹⁶⁶ *Id.* at 405 (Fuentes, J., dissenting).

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revealing an inherent anti-commandeering problem with PASPA as interpreted by the majority opinion. “PASPA is a statute that directs States to maintain gambling laws by dictating the manner in which States must enforce a federal law. The Supreme Court has never considered Congress’s legislative power to be so expansive.”¹⁶⁷ He reaffirmed his concern in the closing paragraph of his opinion by stating:

I dissented in *Christie I* because the distinction between repeal and authorization is unworkable. Today’s majority opinion validates my position: PASPA leaves the States with no choice. . . . The anti-commandeering doctrine, essential to protect State sovereignty, prohibits Congress from compelling States to prohibit such private activity.¹⁶⁸

Applying federal law (here, PASPA) to the absence of state regulation, not by direct permission *via* state regulation, but by implication of negative omission could be construed as a form of commandeering worse than the affirmative action requirement in *New York* and *Printz*. Emboldened by the dissent’s anti-commandeering framing, New Jersey once again petitioned for certiorari before the U.S. Supreme

¹⁶⁷ *Id.* at 411 (Vanaskie, J., dissenting).

¹⁶⁸ *Id.* (Vanaskie, J., dissenting).

Court; that petition was granted¹⁶⁹ and will be decided in the Court's 2017 Term.¹⁷⁰ The oral arguments, held on December 4, 2017, revealed an interest by some of the justices on how a ruling in favor of New Jersey would impact the federal government's commerce power and the extent of a federal regulatory scheme required to prevent commandeering. To the former point, recognizing that finding an anti-commandeering violation here would necessarily implicate the federal government's authority over interstate commerce, Justice Breyer posited to Paul Clement, representing the NCAA, "[T]here is no interstate policy [in this instance] other than the interstate policy of telling the states what to do."¹⁷¹ To the latter point, Justice Kagan posed the question to Ted Olson, representing the state of New Jersey, "When do we know that [the federal government has] enacted a sufficiently comprehensive regulatory scheme in order to allow preemption of state rules?"¹⁷²

Legislatively, Frank Pallone of the Sixth Congressional District of New Jersey has advocated

¹⁶⁹ *Christie v. Nat'l Collegiate Athletic Ass'n*, cert. granted, 582 U.S. ____ (U.S. June 27, 2017) (No. 16-476, *vide* 16-477).

¹⁷⁰ The question presented before the Supreme Court is whether a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commanders the regulatory power of States in contravention of *New York v. United States*, 505 U.S. 144 (1992).

¹⁷¹ Transcript of Oral Argument at 48, *Christie v. NCAA*, No. 16-476, *vide* 16-477 (U.S. Dec. 4, 2017).

¹⁷² Transcript of Oral Argument at 9, *Christie v. NCAA*, No. 16-476, *vide* 16-477 (U.S. Dec. 4, 2017).

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for the repeal of PASPA¹⁷³ and has introduced legislation seeking to allow states to operate legal schemes under it (by extending the time period to file for an exception) in the event it is not repealed.¹⁷⁴ Alternatively, Representative Pallone has also introduced a bill immunizing states and individuals from federal liability and outright repealing PASPA.¹⁷⁵ There are media reports that, despite their appearance as parties in the *Christie v. NCAA* case, many of the major professional sports association support the path to allowing states to legalize and regulate sports wagering.¹⁷⁶

D. The Regulation of Daily Fantasy Sports

In recent years, most specifically from late 2012 to 2016, states have examined the possibility of regulating daily fantasy sports (DFS). Grounded in the old-style “roisserie” leagues, DFS involves an arrangement whereby participants select a roster of

¹⁷³ Will Hobson, *New Jersey Congressman Aims to Legalize Sports Betting*, WASH. POST (May 25, 2017), https://www.washingtonpost.com/news/sports/wp/2017/05/25/new-jersey-congressman-aims-to-legalize-sports-betting/?utm_term=.43d65c2f7c22.

¹⁷⁴ Sports Gaming Opportunity Act, H.R. 783, 115th Cong. (2017).

¹⁷⁵ Gaming Accountability and Modernization Enhancement Act of 2017, H.R. 4530, 115th Cong. (2017).

¹⁷⁶ Daniel Roberts, *NBA Lawyer: Legal Sports Betting in America 'Is the Best Place to End Up,'* YAHOO FINANCE (Nov. 17, 2017), <https://finance.yahoo.com/news/nba-lawyer-legal-sports-betting-america-best-place-end-134208447.html>.

athletes from various real-world professional teams in a given sports league to compete in virtual competitions based on the athletes' playing statistics of a participant's selected roster. Participants win when the stats for their combined virtual team total higher than other participants' teams. Early iterations of online fantasy sports competitions were tracked parallel to a season-long real-world sport schedule. However, when online speed of updating player performance after every game began to become easy, intermediary companies shortened the time frame of these contests to essentially the weekly or few days' schedule that took place in the professional real world.¹⁷⁷ Two companies, DraftKings and FanDuel, became the foremost provider of an online platform to facilitate daily fantasy sports, providing individuals who paid an entry fee to select their fantasy teams and compete against others for a large sum of money at the end of each game. During the fall of 2014, television advertisements for these two companies could hardly be escaped, often playing at each commercial intercession of Sunday NFL games. As a point of reference, and with no substantive discussion of regulation, both organizations spent \$107 million on advertising revenue in the month of September 2015 alone.¹⁷⁸

¹⁷⁷ Although these contests are collectively referred to as "daily fantasy sports," the payout periods realistically center around the real-world teams' schedule of individual games – no longer season long, but not every exact 24 hours either.

¹⁷⁸ Anthony Crupi, *Fantasy Sports Sites DraftKings, FanDuel September Spend Tops \$100 Million*, ADVERTISING AGE (Sept.

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State regulators began to take notice around this time. DFS was operating on a virtually unregulated platform, but opponents argued that the action of taking entry fees for a combined award was gambling wherein an “entry fee” was a wager and the “award” was a jackpot. Thus began the months-long debate in several states on whether DFS was gambling and subject to prohibition or a particular state’s excepted level of gaming regulation¹⁷⁹ or whether it was an activity based in skill that fell outside the purview of state gambling laws. In a flurry of political debates in late 2015, some states outright forbade the activity classifying it as gambling, while others took action through their executive to have DFS entities self-regulate and acquiesce to the practical reality of facilitating gambling.¹⁸⁰ New Jersey, already an epicenter of

30, 2015), <http://adage.com/article/media/draftkings-fanduel-spe/300658/>.

¹⁷⁹ Nevada initially indicated it would allow DFS in early 2015, but then indicated in October of 2015 that it was a form of gambling and no operators applied for a state gaming license. A smaller DFS outfit, USFantasy, was approved for a license in June of 2016. See Matt Youmans, *Fantasy Sports Again A Reality in Nevada*, LAS VEGAS REVIEW-JOURNAL (June 23, 2016), <https://www.reviewjournal.com/sports/sports-columns/matt-youmans/fantasy-sports-again-a-reality-in-nevada/>.

¹⁸⁰ After the widely publicized decision by the New York state Attorney General to prosecute DFS providers for false advertising which resulted in a six-million-dollar settlement imposed on each DraftKings and FanDuel, New York eventually passed a state law regulating DFS. See Dustin

modern gaming law activity with the ongoing sports wagering court battle, held hearings in November of 2015 to examine what a regulatory framework of DFS would look like. The direct legal question was not whether what level of government could regulate DFS, it was first whether DFS was gambling at all, the battle of skill versus chance resonating through the early part of 2016. New Jersey would ultimately sign legislation legalizing and regulating DFS in July of 2017, becoming the sixteenth state to do so.¹⁸¹

So the threshold question remains for DFS: is it gambling? The federal law which makes illegal internet gambling specifically excepts DFS¹⁸² but does not opine as to whether it is skill or chance. The anti-commandeering conundrum with respect to DFS comes to the fore, ironically, if there is a consensus that DFS is, in fact, chance and not skill. Since the basis of the games in DFS are sports, if the states allowed it by law, it would then be considered sports wagering and could fall within the prohibitions of PASPA. Taken in the context of the tension in the *Christie v. NCAA* line of cases and how to interpret

Gouker, *Once A Daily Fantasy Sports Opponent, New York AG Schneiderman Defends Law in New Filing*, LEGAL SPORTS REP. (Jan. 13, 2017), <https://www.legalsportsreport.com/12650/schneiderman-and-fantasy-sports/>.

¹⁸¹ Dustin Gouker, *New Jersey Gov. Christie Signs Fantasy Sports Bill; 16th State to Enact Law for DFS*, LEGAL SPORTS REP. (Aug. 24, 2017), <https://www.legalsportsreport.com/15238/new-jersey-fantasy-sports-law/>.

¹⁸² 31 U.S.C. § 5362(1)(E)(ix). Unlawful Internet Gambling Enforcement Act (UIGEA) (2006), Pub. L. No. 109-347, 120 Stat. 1884 (codified at 31 U.S.C. §§ 5361 *et seq.*).

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the interaction between PASPA and the states, “state efforts with respect to daily fantasy sports leagues are likely in a binary state – they can be banned, but not legalized or regulated.”¹⁸³ If the Court rules in favor of New Jersey when *Christie v. NCAA* is decided, not only will traditional sports wagering likely proliferate but DFS will as well.¹⁸⁴ By the end of 2017, nineteen states have approved by law some form of DFS, another ten states have pending legislation, thirteen states have legislation that failed, and eight states have no laws on the books or are currently considering regulating DFS.¹⁸⁵

III. THE ANTI-COMMANDEERING PRINCIPLE AND REGULATING VICE

What we can learn from the lessons of sports wagering and DFS is that states are taking aggressive

¹⁸³ Richik Sarkar, *Daily Fantasy Sports: A Regulatory Dilemma Worth Resolving*, Consumer Financial Services Committee Newsletter; ABA BUS. LAW SECTION (March 2016).

¹⁸⁴ The federal government would seemingly have less of an argument against DFS from a purely statutory interpretation standpoint. Since the law excepting DFS from unlawful internet gambling was enacted 14 years after PASPA, it is assumed that Congress knew of the existing prohibitions of PASPA when it passed the UIGEA and intended it to be exempt, therefore allowing states to regulate it as they see fit.

¹⁸⁵ Dustin Gouker, *Legislative Tracker: Daily Fantasy Sports*, LEGAL SPORTS REP. (Jan. 1, 2018), <https://www.legalsportsreport.com/daily-fantasy-sports-blocked-allowed-states/>.

steps to remedy their budget concerns, steps that are either an affront to the preemptive authority of the national government or are being implemented on very shaky federalist ground. The argument will be made that the combination of the anti-commandeering rules, as thus far defined by Supreme Court jurisprudence, along with acquiescence by the federal government in enforcing federal law on the matter will converge to usher in a new era of federalism by eroding traditional adherence to the national government's interstate commerce plenary power, mindful of allowing the states to regulate certain areas historically prohibited as vice crimes to have discretion in determining state revenue streams. Analogies to the legalization of recreational marijuana use can be made as a sister-vice category.

The possession, use, and sale of marijuana remain illegal under federal law for any purpose.¹⁸⁶ The Supreme Court has held that when the federal government does choose to enforce its authority in the arena of drug laws, that authority preempts contrary state law.¹⁸⁷ However, eight states (and the District of Columbia) have legalized recreational marijuana use by popular referendum,¹⁸⁸ and

¹⁸⁶ 21 U.S.C. § 812.

¹⁸⁷ *Gonzales v. Raich*, 545 U.S. 1 (2005) (ruling that federal drug prohibitions trump California's allowance of medicinal marijuana).

¹⁸⁸ Eight states (at the time of this writing) have approved the recreational use of marijuana (subject to a wide variety of state regulations on amount, location of sale and consumption, etc.). Those states are: Alaska, California, Colorado, the District of Columbia, Maine, Massachusetts, Nevada, Oregon and

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authorities in another fourteen states have decriminalized the possession of small amounts of marijuana.¹⁸⁹ Vermont became the first state to legalize possession of small amounts of recreational marijuana by legislative vote on January 23, 2018.¹⁹⁰ The executive branch of the federal government has sent mixed signals to the states on its decision to enforce federal drug laws.¹⁹¹ The Trump administration took a bold step by directing the Attorney General to revert back to enforcement guidelines in place before the Obama

Washington. No less than twenty more states are considering similar measures. *Marijuana Overview*, NAT'L CONFERENCE OF STATE LEGISLATURES (Aug. 30, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>.

¹⁸⁹ *Id.*

¹⁹⁰ Katie Zezima, *Vermont Is the First State to Legalize Marijuana through Legislature*, WASH. POST (Jan. 24, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/01/23/vermont-is-the-first-state-to-legalize-marijuana-through-legislature/?utm_term=.5e10d96676ce.

¹⁹¹ For example, the Obama administration consistently communicated federal policy acquiescence to those states with legalized marijuana use. See David G. Savage, *Obama Considers Easing Up Federal Marijuana Regulation*, LOS ANGELES TIMES (Dec. 14, 2012), <http://articles.latimes.com/2012/dec/14/nation/la-na-obama-legal-marijuana-20121215>. However, the Trump administration has signaled to the contrary. See Evan Halper and Patrick McGreevy, *Trump Administration Signals A Possible Crackdown on States Over Marijuana*, LOS ANGELES TIMES (Feb. 23, 2017), <http://www.latimes.com/politics/la-na-pol-trump-marijuana-20170223-story.html>.

administration.¹⁹² In response, fifty-four members of Congress sent a letter to President Trump encouraging him to reinstate the policy of the Obama administration.¹⁹³ Could the federal government be running the risk of losing the ability to effectively enforce its authority in this field? Without active cooperation of state law enforcement, the majority of offenses go unprosecuted across the country because the federal government simply “lacks the resources to undertake such an effort on its own.”¹⁹⁴ On the judicial front, no court has yet ruled directly that these states do not have a right to legalize recreational marijuana. In fact, the few cases that have come before federal courts have been dismissed without getting to the merits of a federalism issue,¹⁹⁵

¹⁹² U.S. DEP’T OF JUSTICE, OFF. OF PUB. AFFAIRS, JUSTICE DEPARTMENT ISSUES MEMO ON MARIJUANA ENFORCEMENT (Jan. 4, 2018).

¹⁹³ Dan Adams, *Led by Warren, Lawmakers Urge Trump to Overrule Sessions on Pot*, BOSTON GLOBE (Jan. 25, 2018), https://www.bostonglobe.com/metro/2018/01/24/led-warren-lawmakers-urge-trump-overrule-sessions-pot/2kts0xCwqtG69TkSCkpyTN/story.html?p1=Article_Recommended_ReadMore_Pos6.

¹⁹⁴ Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 BOSTON U. L. REV. 1, 3 (2015).

¹⁹⁵ See, e.g., *Safe Streets Alliance, et al. v. Hickenlooper, et al.*, 859 F.3d 865 (10th Cir. 2017) (dismissing claims by Colorado, Kansas and Nebraska sheriffs and county attorneys ruling that Colorado’s legalization of recreational marijuana is preempted by federal law on the grounds that the parties’ federal substantive rights were not violated).

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even one filed under the original jurisdiction of the Supreme Court.¹⁹⁶

A 2010 comprehensive study by the CATO institute revealed that total government expenditures would be cut by approximately \$41.3 billion per year if drugs were legalized, \$25.7 billion of this going to state governments; approximately \$8.7 billion of these savings would be from legalization of marijuana.¹⁹⁷ Revenue from taxation of sports wagering in New Jersey is estimated to bring in millions of dollars.¹⁹⁸ Sports wagering could significantly increase revenue for New Jersey's already in place online gambling arrangement. While online gambling in New Jersey did not initially yield the high revenues that the state anticipated when reporting began by the state Division of Gaming Enforcement in November of

¹⁹⁶ See *Nebraska and Oklahoma v. Colorado*, 577 U.S. ____ (2016), where the relevant question to this analysis was: Whether the Court will grant Nebraska and Oklahoma leave to file an original action to seek a declaratory judgment stating that Sections 16(4) and (5) of Article XVIII of the Colorado Constitution are preempted by federal law, and therefore unconstitutional and unenforceable under the Supremacy Clause, Article VI of the U.S. Constitution. The Court dismissed the motion for leave to file a bill of complaint.

¹⁹⁷ Jeffrey A. Miron & Katherine Waldoock, *The Budgetary Impact of Ending Drug Prohibition*, CATO INSTITUTE, 2010.

¹⁹⁸ Michael McCann, *All Bets Are Off: Supreme Court to Review Sports Betting Ban*, SPORTS ILLUSTRATED (June 27, 2017), <https://www.si.com/nfl/2017/06/27/supreme-court-review-sports-betting-gambling-ban-new-jersey-chris-christie>.

2013, mandated revenue reports estimate a continuous albeit slight upward trend.¹⁹⁹

*A. Judicial Review of the Matter to Develop the
Constitutional Principle – Policy
Considerations for the Benefit of States*

New York and *Printz* dealt with the federal government's relationship to state legislatures and state executives, respectively. The logistical matter of what type of obligations arise in *state* judiciaries is not the direct study of this paper; however, it is well settled that by the simple statement of the Supremacy Clause and the inherent function of all courts, state courts could be charged with having to decide these weighty matters of federal relations just as much as federal courts may decide them.²⁰⁰ This special duty of the judiciary, an extrapolation of

¹⁹⁹ At the time of this writing, five entities are authorized to facilitate online gambling in the state of New Jersey: Borgata, Caesar's, Golden Nugget, Tropicana and ResortsDigital (which was approved a casino license on August 12, 2015). All of these except ResortsDigital facilitated online gambling sites for the full calendar years of 2014, 2015 and 2016. The year over year total revenue increase from these four entities was approximately 28.5% from 2014 to 2015 and 16% from 2015 to 2016. *Monthly Internet Gross Revenue Reports*, DIVISION OF GAMING ENFORCEMENT, OFFICE OF THE ATTORNEY GENERAL, STATE OF NEW JERSEY, <http://www.nj.gov/lps/ge/igrtaxreturns.html> (last visited July 25, 2018).

²⁰⁰ U.S. CONST. art. VI, ¶ 2. *See also* *Testa v. Katt*, 330 U.S. 386 (1947); Tonya M. Gray, *Separate but Not Sovereign: Reconciling Federal Commandeering of State Courts*, 52 VAND. L. REV. 143 (1999).

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Hamilton's exultation of that branch in Federalist No. 78,²⁰¹ raises courts above the fray of the political institutions and arguably places them in a better position to articulate a constitutional standard for states attempting to legalize vice. State courts, in addition to lower federal courts will look to precedent to determine how to apply a rule when an anti-commandeering case comes before them. It is difficult to determine what that rule, even from *Christie v. NCAA*, would be. If PASPA is ruled unconstitutional under the anti-commandeering principle because the Court decides to flesh out what a "regulatory program" is, it will severely limit how federal policy is shaped and the calculation of federal resources to further such regulatory programs. If, under a theory of political accountability, the concern is that voters would not be able to determine "who to blame" for a law that does not end up raising revenue and instead increases crime, poverty and a disproportionate burden of the state social welfare resources, the rule should defer to the states as they are in the best proximity to those voters to justify the cost-benefit of such laws. The national constituency on matters of what constitutes a vice revealed trouble in the federalist model historically as alluded to at the time of the Convention and in the *Federalist Papers* and those same concerns of centralization are present now. Even under an expansive reading of Congress's underlying Commerce Clause power, the anti-commandeering principle seeks to acknowledge

²⁰¹ See *supra* p. 5.

that in the dual sovereign system, Congress cannot have the states shoulder the burden of federal policy. This intuitive design of the government is not only viable from a fair reading of the Constitution and the Tenth Amendment, but it is supported by *New York* and *Printz* and should be expressly stated by the Supreme Court in light of how the principle was fleshed out in the unanimous decision in *Reno*. *NCAA v. Christie* is the perfect opportunity to do so, to say that when the federal government seeks to prohibit a state (and the state alone, not individuals), in its capacity as a political actor accountable to its people (and not as a market participant), from enacting laws that the state believes are in the best interest of its people and does so without calling for a federal regulatory scheme to justify the prohibition, the action runs afoul of the Tenth Amendment. While the Commerce Clause allows the federal government to directly regulate individuals, the dual sovereignty system acknowledges such a presumably intrusive action (as the expansive manner in which the Court has interpreted Congress's Commerce power) because it is assumed that Congress will expound its *own* resources to effectuate the policy.

When a field of regulation, such as the field of legalizing drug use, becomes so pervasive that the federal government and local law enforcement agencies spend billions of dollars in investigation, trial and incarceration, it would be disingenuous to later foist that cost onto the states *qua* states. The longer time passes with states allowing legalized recreational drug use or gambling, the less likely it is that a court will see the federal government's

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prohibitions as legitimate. What *NFIB v. Sebelius* adds, albeit in a quite murky way, is the idea that with state referenda determining the will of individuals who want these vices legalized, with continuous lack of federal executive enforcement, and with states getting their fiscal house in order due to yields from (and regulation of) legalized vices, even federal financial incentives may not prove enough in whatever amount as they once did under the *Dole* line of conditional spending cases. If states want an alternative source of revenue, of their own making, neither the anti-commandeering principle as currently inscribed nor the danger of developing state policy with entrenched federal funding should be a concern which would later not be available to the states. Fleshing this out, though, will take an action of the U.S. Supreme Court since the federal intermediate appellate courts and lower federal district courts seem, post *New York*, disinclined to find commandeering violations in most federal/state relationships. Inconsistent application throughout the nation of a principle under which states justify law making and revenue raising would be precarious.

What are states to do in the wake of the relatively young and not-well-developed anti-commandeering and anti-coercion doctrines from the jurisprudence of the Supreme Court? Will an eventual rule of law emerge from *Christie v. NCAA* that can be used broadly, one that could be applied to other traditional areas of state criminal vice regulation, like legalizing marijuana or making other forms of gambling legal? A broad rule from such a

case would be helpful to states seeking to maximize revenue in the wake of broad-based economic pressures on state treasuries. States would be able to justify such expansive initiatives by arguing that their relative political proximity to individuals places them in the better position to bear the brunt of any democratic push-back on these matters. This is the crux of the political accountability theory that found its origins in *New York* and that underlies the few cases that find in favor of state authority. “It is those relations [with constituents] that better enable state governments collectively to respond to heterogeneous national preference.”²⁰² Such decentralization from federal policy will likely represent more accurately constituent preference and “end up with fewer dissatisfied citizens.”²⁰³ For that reason, political accountability actually incentivizes federal deregulation of marijuana, because if power is shifted to the states, “that is assumed to empower local constituencies, with whatever risks and benefits that poses, because the relation between those constituencies and state governments is taken as given.”²⁰⁴

²⁰² Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 BOSTON U. L. REV. 1, 21 (2015).

²⁰³ Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

²⁰⁴ Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 BOSTON U. L. REV. 1, 23 (2015).

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*B. Reconciling Anti-Commandeering and the
Federal Commerce Power to Allow States
Discretion in Regulating Vice*

Whether operating as laboratories for possible future federal policy or in their own immediate best interests, the revenue impact of legalizing vice should be included in the calculus of anti-commandeering cases. Modifying the standard to be less categorical (and perhaps revisiting “integral operations in areas of traditional government functions” elements of *National League of Cities*)²⁰⁵ would be in the best interest of states as they continue to struggle with annual budgeting woes. It would not be the state as a “market participant” but as a sovereign actor charged with generating public revenue for state services; thus, the problem in *Dole* would not present itself.

The anti-commandeering principle should, at a minimum, include an express statement from the Supreme Court as to: (1) whether an affirmative action requirement is implicit in the analysis of *New York* and *Printz*, or whether preventing a state from making something legal is also prohibited (*i.e.*, a duty *not* to act) (2) to what extent (and what is the definition of) a federal “regulatory scheme” needs to be in place to have a bearing on an anti-commandeering analysis (*i.e.*, does it need to appear to at least justify the ability to enforce), and lastly (3) what are the definitive limits by which Congress can

²⁰⁵ See *supra* p. 10.

condition funds in the context of an anti-coercion matter.²⁰⁶ The confluence of economic events in states' tenuous expansion of regulating sports wagering should place a significant impetus on the Court to interpret the anti-commandeering principle in *Christie v. NCAA* in such a way that fills in some of these gaps and provides states with a clear path to regulating vice in a measured, systematic method to support state legislative approaches to new public revenue streams.

This innovation in the Court's anti-commandeering statement could inevitably carve a substantial piece out of the expansive authority of the federal government under the Commerce Clause,²⁰⁷ an exception that may be subject to political attack if the calculus is not carefully and consistently applied. The framework above therefore, when specifically dealing with a state's express attempt at legalization of a traditionally defined vice area, should be this: When considering whether federal law commandeers states in the context of the latter regulating an area of historically criminalized vice for the stated purpose of state revenue increase, courts should consider a balance of interests. *Any* connection to commerce should be analyzed secondarily to whether the state's

²⁰⁶ *NFIB v. Sebelius* did not really address what the test should be when federal funding pressures move from mere coaxing to impermissible coercion but found that it was violated by the Medicaid expansion provision in that particular case. In a case such as this where federal action stops state revenue flowing from a previously legalized state vice domain, a court can include in its calculus a measure of revenue lost as a result of the federal enforcement.

²⁰⁷ U.S. Const. Art. I, § 8, cl. 3.

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justification for the action, in measured and predetermined express enforcement and active attempts to confine regulation of the vice activity within state lines, outweighs the relationship of the regulated activity to any incidental contact to interstate commerce. This variable is then further balanced with evidence of the federal government's willingness to enforce a particular field of vice. If evidence shows (whether through statement of executive actors, executive orders indicating a willingness not to enforce or even statements to the media indicating a preference not to enforce federal law) a desire not to enforce, courts should bend towards the state's position and allow the legalization to proceed without constitutional infirmity.

Generally speaking, sovereign actors are allowed to operate with some discretion in enforcing their own laws based on available resources. This resource-allocation argument allows political actors in the respective spheres of government in our federal system to prioritize prosecutions relative to societal need through the expression of democratic will. However, the unique American federal system, in its compound, power sharing structure with a default of reserve power to the states, should not be staid to a point where state lawmakers are chilled in action waiting for federal lawmakers to decide whether or not to act. Implementation and enforcement have impacts on the federalist balance of power. The federal government, whether directly, through mixed signals or by continuous disregard of

enforcing federal law, could be giving the courts a justification for shaping a new federal balance of power and then buttressing a resource allocation argument for states to say that random or isolated prosecution of certain federal vice proscriptions (like PASPA) is not only arguably unfair (with perhaps attendant Due Process concerns) but commandeering. If states are unsure when (and if) federal law touching on historical state purview will be enforced, states could argue that *any* enforcement is a violation of the state's right because it commandeers the state's legitimate assumption about enforcing its own laws. If there is a state law on the books that (1) legalizes a vice that was presumably illegal under federal law and (2) the federal government knew or had reason to know of the passage of this law and took no steps (at least informally) to make statements of constitutional merit against this law during its passage, courts should consider that under a Tenth Amendment challenge if the federal government later asserts a preemption claim. The longer enforcement of the federal law is non-existent and the longer the state comes to rely on the revenue from legalized vices as a result of lack of federal enforcement of a contradictory national law, the less likely it would be for a court to find a federalism concern. Diagram 1 (in the Appendix to this article) represents a timeline of how these activities would play out.

The Commerce Clause authority argument is secondary to that theory but necessary. Since the federal government's interstate commerce authority has been decreed virtually plenary by the Court,

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states are somewhat chilled here too in lawmaking in the face of the federal government's decision not to prosecute federal law. They do not know whether they can or cannot proceed, an artificial existence not conducive to the reserve, police powers of the states. Thus, courts should consider that (1) if a state passes a law that although facially violates the existing valid constitutional legitimacy of the federal government's commerce authority and (2) it is a law with (a) the stated purpose of raising state revenue, (b) includes a comprehensive enforcement framework that seeks to prevent or, within the state's due diligence, mitigate impact²⁰⁸ on the interstate stream of commerce, and (c) involves an opportunity in the law-making process for thorough vetting on the federalism and Commerce Clause principles discussed herein, then taken with an eye towards the resources required to enforce that law and an evidence-based observation over time of the federal government's decision not to enforce its own laws on

²⁰⁸ History reveals that states can invest the resources to monitor and thus prevent the interstate nature of these commercial activities. For example, legal online gambling in New Jersey has created several safeguards to not run afoul of the UIGEA, and more states are looking to it as a model for their own state-based online gambling arrangements. Massachusetts, New York and Pennsylvania have all expressed interest in state-based online gambling arrangements. See, e.g., Steve Ruddock, *Analysts Predict up to Three States Could Legalize Online Gambling in 2017*, ONLINE POKER REP. (Feb. 6, 2017), <https://www.onlinepokerreport.com/23763/eilers-krejcik-states-legalization-online-gambling/>.

the subject matter, the state law legalizing vice should be allowed to stand. To do otherwise would violate the anti-commandeering principle even with an impact on interstate commerce. For those states that have been realizing revenue the longest on certain facially illegal vice activities (e.g., Colorado's tax revenue²⁰⁹ from legalized, regulated recreational marijuana sales) under federal law but legal under state law, the courts may include a factor of reliance on that revenue, one where later, subsequent enforcement of the federal law could be construed as *compelling* or *coercing* the states to give up a revenue stream and therefore, also an anti-coercion concern.

IV. CONCLUSION

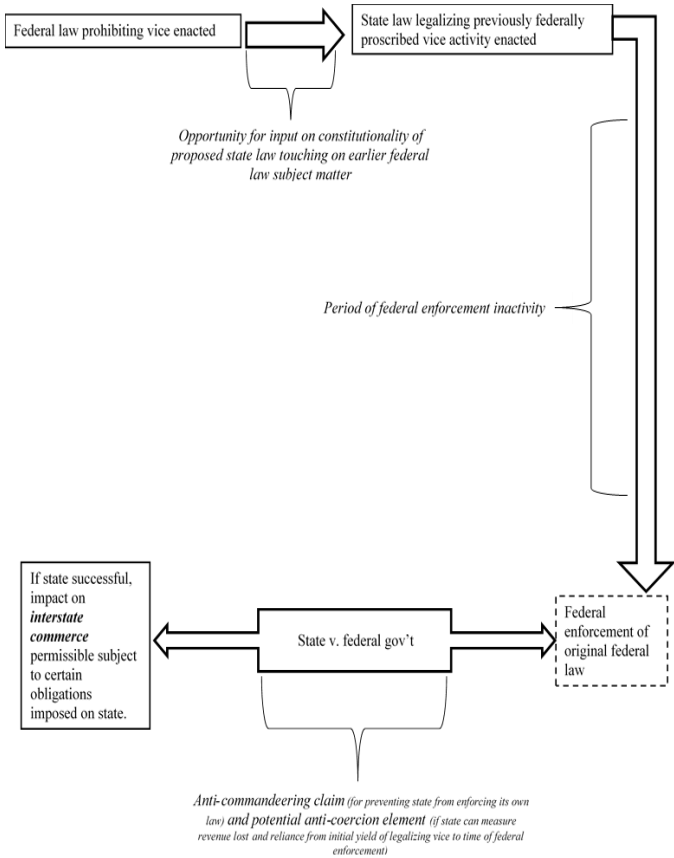
If the judiciary does not articulate a more workable framework for states in *Christie* to regulate vice areas, the inevitable calls by states for congressional action to either repeal or modify federal laws prohibiting either more forms of gambling or marijuana will increase. The judicial test espoused above, of course, does not apply to *legislative* action on the matter, but it presupposes

²⁰⁹ Since recreational marijuana was legalized in Colorado in 2014, the state has realized \$506 million in revenue and put a substantial part of that money back into the state's public education system. See, e.g., Katelyn Neman, *Milestoned: Colorado Pot Tax Revenue Surpasses \$500M*, U.S. NEWS AND WORLD REP. (July 20, 2017), <https://www.usnews.com/news/best-states/colorado/articles/2017-07-20/colorado-pot-tax-revenue-surpasses-500-million>.

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that effective judicial interpretation of the matter, either in federal courts or state courts, defers to action in the political arena. Both the district court judge and the appellate majority in both rounds of *NCAA v. Christie* referred to this possibility in ruling against the state, that the best way to allow states to legalize the state regimes of which they seek to take benefit is through the political process; effectively, they stated that the courts were limited by the categorical constructs of the federalism jurisprudence on the books, especially in the confluence of anti-commandeering and commerce. But is the matter safer in the legislative arena than in the judicial arena? Some scholars have alluded to the fact that legislative action on the matter, if not clear in the form of a pure repeal of the preemptive statutes, will only cause further confusion and either chill actions of states or delay the progress of vice legalization and place the states in a holding pattern waiting for ultimate resolution of litigation. This is more the reason for the Court to decide these important, unanswered questions on anti-commandeering in *Christie*. It would be not only to grant satisfaction on the merits directly for New Jersey, its sports wagering laws and the future of its other options for legalized gambling, it is also to determine a framework by which states *should* proceed when contemplating the legalization of any traditional vice areas for purposes of raising state revenue.

APPENDIX – DIAGRAM 1



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PREDICTABILITY ABOUT PERSONAL
JURISDICTION TO MAKE PROPERLY
INFORMED COMPLIANCE AND RISK
ASSESSMENTS?**

ORRIN K. AMES III*

I. INTRODUCTION

One essential element of creating a meaningful ethics initiative within an organization and making or evaluating an effective compliance and ethics program is to make an informed and comprehensive risk assessment across the full spectrum of an organization's business. This would include strategic, financial, operational, and compliance dimensions.

While there are many dimensions of an organization's risk assessment, one dimension that should not be overlooked is the developing law on an organization's exposure to personal jurisdiction. This highly problematic area factors into not only risk assessment, but the choice of business models. It also factors into how organizational personnel are

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trained in compliance and ethics about the ways that they do business. Therefore, an examination of the Supreme Court's developing jurisprudence on personal jurisdiction is essential for organizational leaders and their counsel when doing their risk assessment and developing effective compliance and ethics programs.¹

On June 19, 2017, the U.S. Supreme Court decided the case of *Bristol-Myers Squibb Company v. Superior Court of California, San Francisco County*.² That decision, along with the Court's 2011 decision of *J. McIntyre Machinery, Ltd. v. Nicastro*³ and its 2014 decision of *Walden v. Fiore*,⁴ serve as

¹ See generally, Casandra Burke Robertson & Charles W. "Rocky" Rhodes, *The Business of Personal Jurisdiction*, 67 CASE W. RES. L. REV. 775 (2017); Stanley E. Cox, *Personal Jurisdiction for Alleged Intentional or Negligent Effects, Matched to Forum Regulatory Interests*, 19 LEWIS & CLARK L. REV. 725 (2015); Lee Goldman, *From Calder and Beyond: The Proper Application of the "Effects Test" in Personal Jurisdiction Cases*, 52 SAN DIEGO L. REV. 357 (2015); Allen Erbsen, *Personal Jurisdiction Based on the Local Effects of Intentional Conduct*, 57 WM. & MARY L. REV. 385 (2015); Julie Cromer Young, *The On-Line Contacts Gamble After Walden v. Fiore*, 19 LEWIS & CLARK L. REV. 753 (2015); Comment, Adam Balinski, *Wonky Walden: The Dizzying New Personal Jurisdiction Rule*, 2016 B.Y.U. L. REV. 683 (2016); Simona Grossi, *Personal Jurisdiction: A Doctrinal Labyrinth with No Exit*, 47 AKRON L. REV. 617 (2014).

² *Bristol-Myers Squibb Co. v. Super. Ct. Cal., S.F. Cty*, 137 S.Ct. 1773 (2017).

³ *J. McIntyre Mach., Ltd. V. Nicastro*, 564 U.S. 873 (2011).

⁴ *Walden v. Fiore*, 571 U.S. 277 (2014).

catalysts to examine the concepts of general and specific personal jurisdiction as those concepts are being formulated by the present Roberts Court. Such an examination is necessary not only because personal jurisdiction is a fundamental topic in all litigation,⁵ but because personal jurisdiction is especially important to businesses that operate throughout the United States and globally. Therefore, the focus of this article is not on theoretical or jurisprudential criticisms of the emerging personal jurisdiction doctrines, but on whether the emerging jurisprudence of personal jurisdiction provides business entities and their counsel with some sense of predictability.

II. DISCUSSION

A. *The Jurisdictional Posture of Bristol-Myers*

In *Bristol-Myers*, *certiorari* was granted by the U.S. Supreme Court to address the issue of personal jurisdiction over Bristol-Myers in a California state court. The personal jurisdiction issue was postured because both California residents and non-California residents sued Bristol-Myers, an out-of-state company, in the California court alleging that Bristol-Myers' drug Plavix had damaged their

⁵ See *Dutch Run-Mays Draft, LLC v. Wolf Block, LLP*, 164 A.3d 435, 438 (N.J. Super. Ct. App. Div. 2017) ("A fundamental question in every legal action is whether a given court has jurisdiction to preside over a given case. Absent personal jurisdiction over the parties, a judge has no authority to proceed.").

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health. Bristol-Myers is incorporated in Delaware. It has its corporate headquarters in New York. It maintains substantial operations in New York and New Jersey. It also engages in business activities in California, to include selling Plavix there. There were, however, no activities of Bristol-Myers in California that involved creating or developing a marketing plan for Plavix in California nor did it do any regulatory approval work for Plavix there.

In contrast to the California resident plaintiffs, the non-California plaintiffs' injuries occurred in their home states and not in California. Their commonality with the California plaintiffs was that they were all injured in the same ways and that they had responded to the same advertising that was national in scope.⁶

Most cases that address whether a state court has personal jurisdiction over an out of state defendant (business or individual) involve a state resident trying to sue an out of state defendant in the plaintiff's forum-friendly court. In *Bristol-Myers*, however, the facts were different. That case involved the jurisdictional issue of whether non-California resident plaintiffs could sue an out-of-state defendant, Bristol-Myers, in California where the California plaintiff residents had been injured, but where the non-California plaintiffs had not. While the physical injuries to the California and Non-California plaintiffs were essentially the same, the

⁶ *Bristol-Myers*, 137 S.Ct. at 1784 (J. Sotomayor dissenting).

non-California plaintiffs did not allege that they bought Plavix in California, that they were injured by Plavix in California, or that they had received any medical care in California for their alleged injuries.

The jurisdictional issues in Bristol-Myers triggered the applicability of six earlier major U.S. Supreme Court decisions dealing with personal jurisdiction: *Asahi Metal Industrial Co. v. Superior Court of California, Solano County*; ⁷ *World-Wide Volkswagen Corp. v. Woodson*; ⁸ *International Shoe Co. v. Washington*; ⁹ *Calder v. Jones*; ¹⁰ *Burger King Corp. v. Rudzewicz*; ¹¹ and *Helicopteros Nacionales de Columbia, S.A. v. Hall*.¹² They also directly involved four more recent decisions from the Roberts Court that seem to have now set the present tone for personal jurisdiction analysis in the future. In the order in which those decisions were rendered, they are: *J. McIntyre Machinery, Ltd. v. Nicastro*; ¹³ *Goodyear Dunlop Tires Operation, S.A. v. Brown*; ¹⁴

⁷ *Asahi Metal Industry Co., Ltd. v. Super. Ct. Cal., Solano Cty.* 480 U.S. 102 (1987).

⁸ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

⁹ *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310 (1945).

¹⁰ *Calder v. Jones*, 465 U.S. 783 (1984).

¹¹ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

¹² *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

¹³ *J. McIntyre Mach., Ltd. V. Nicastro*, 564 U.S. 873 (2011) (addressing the *stream of commerce* analysis).

¹⁴ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011) (addressing general jurisdiction and the concept of *at home*).

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Daimler AG v. Bauman,¹⁵ and *Walden v. Fiore*.¹⁶ In an opinion written by Justice Alito, the *Bristol-Myers* Court took the opportunity to address the earlier decisions, but primarily to address the four new decisions to develop what appears to be the Roberts Court's present and emerging personal jurisdiction jurisprudence.

B. Jurisdiction Analysis

Because most litigation in which personal jurisdiction questions are implicated involves corporate defendants, this article will primarily use corporate defendants to discuss personal jurisdiction. For a forum court to have personal jurisdiction over a corporation (or person) that is outside of that state, the test is described in Constitutional Due Process terms. The out-of-state corporation must have *sufficient minimum contacts* with the forum state so that a forum court's attempt to exercise jurisdiction over that corporation will comport with Due Process and make it fair to require the out-of-state corporate defendant to come to the forum state to defend itself. Since jurisdiction is based on Due Process, defendants must also have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign."¹⁷ The minimum

¹⁵ *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

¹⁶ *Walden v. Fiore*, 571 U.S. 277 (2014) (addressing the *Calder effects test*).

¹⁷ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

contacts of the non-resident corporation must be made by the non-resident corporation and not what the plaintiff or a third party might do. The Court has held that it would not be fair to ask a non-resident corporation to come to a state to defend itself when the presence in the forum state was due to the actions of a third party.¹⁸

Because of Due Process, the courts are also concerned with whether it is fair to ask the non-resident corporation to come to the foreign forum to defend itself; the plaintiff's interest in obtaining relief that is convenient and effective; the interest of the interstate judicial system in efficiency; and the shared interests of states in furthering social policies.¹⁹

The burden is on a forum plaintiff to establish in the pleadings a *prima facie* case of jurisdiction over the defendant. Once a plaintiff establishes sufficient minimum contacts to "permit specific jurisdiction, the burden shifts to the defendant to prove that the exercise of jurisdiction is not fair or

¹⁸ See generally, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) ("[U]nilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction.").

¹⁹ *Bristol-Myers Squibb Co. v. Super. Ct. Cal., S.F. Cty*, 137 S.Ct. 1773, 1786 (2017) (J. Sotomayor dissenting) (citation omitted) (internal quotations omitted).

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reasonable.”²⁰ The trial court will then examine factors like the ones set out above.²¹

Contacts with the forum state can be general contacts and/or specific contacts. General contacts give rise to general personal jurisdiction. Specific contacts give rise to specific personal jurisdiction.

1. General Personal Jurisdiction

With general personal jurisdiction, a forum court can hear any and all claims against a non-resident defendant.²² The cause of action can be “entirely distinct from” the activities in a forum state.²³ The test in earlier cases used the concept that the contacts had to be both “continuous and systematic.”²⁴ However, now for the Roberts Court, the focus for general personal jurisdiction, as developed in *Goodyear* and reinforced in *Daimler*, does not seem to solely require the fact-intensive *continuous and systematic* analysis, but the inquiry is now focused on the concept of domicile. If the defendant is a corporation, the present analogy is to

²⁰ Clement Group, LLC v. EDT Services, LLC, No. 4:16-cv-00773, 2017 WL 2972877, at *4 (E.D. Tex. July 12, 2017) (citation omitted).

²¹ *Id.* (citing *Burger King*, 471 U.S. at 477) (setting out factors considered by the Supreme Court).

²² See generally, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

²³ *Daimler AG v. Bauman*, 571 U.S. 117, 128 (2014).

²⁴ *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n. 9, 415 (1984).

where the corporation “is fairly regarded as at home.”²⁵

What was the former “continuous and systematic” analysis, has been changed from being the central criteria for determining general personal jurisdiction to factors that are relevant to the “at home” determination, to considerations that do not independently define it. In point of fact, the Court in *Daimler* clearly held that a corporation is not “at home” in a forum state, even though it “engages in a substantial, continuous, and systematic course of business”²⁶ in that forum state. Therefore, the former “continuous and systematic contacts” are not independently determinative, but they are now relevant as factors in determining if a corporation is “at home” in the forum state. As the Court said in *Goodyear*, contacts are relevant “when [a defendant’s] affiliations with the State are so ‘continuous and systematic’ [that they render the defendant] essentially at home in the forum State.”²⁷ A Federal District Court in Texas stated this very well: “The inquiry is not whether a corporation’s ‘in-forum contacts can be said in some sense ‘continuous and systematic,’ it is whether that corporation’s affiliations with the State are so ‘continuous and

²⁵ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011).

²⁶ *Daimler*, 571 U.S. at 138 (rejecting the Plaintiffs’ (Respondents’) formulation).

²⁷ *Goodyear*, 564 U.S. at 919 (citation omitted). *See also*, *Daimler*, 571 U.S. at 139.

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systematic’ as to render [it] essentially at home in the forum State.’ “²⁸

The New Jersey Supreme Court in *Dutch Run-Mays*,²⁹ observed that this form of “at home” general personal jurisdiction “‘is a difficult one to meet’”³⁰ and that the concept of general personal jurisdiction has, over the years, diminished in importance. That trend will probably continue in light of the *at home* focus articulated by the Roberts Court in *Goodyear* and reinforced in *Daimler*.³¹ Unless there are unusual circumstances, for general

²⁸ Clement Group, LLC v. EDT Services, LLC, No. 4:16-cv-00773, 2017 WL 2972877, at * 3 (E.D. Tex. July 12, 2017).

²⁹ *Dutch Run-Mays Draft*, LLC v. Wolf Block, LLP, 164 A.3d 435 (N.J. Super. Ct. App. Div. 2017).

³⁰ *Id.* at 445 (citations omitted). *See also*, Monkton Ins. Svcs. v. Ritter, 768 F.3d 429, 432 (5th Cir. 2014) (noting it is “incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business.”).

³¹ *Daimler*, 571 U.S. at 128 (“Since *International Shoe*, ‘specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role.’ “) (citing *Goodyear*, 564 U.S. at 919, 931). *See also*, Robertson, *supra* note 1 at 781 (“*Daimler* utterly upended the structure of personal jurisdiction.”). *But cf.*, Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1140 (2015) (opining that the Roberts Court’s new focus on the concept of at home brings the general jurisdiction doctrine more in line with the “internationally accepted idea that domicile . . . reflects a valid basis for jurisdiction.”). *See generally*, William Grayson Lambert, *The Necessary Narrowing of General Personal Jurisdiction*, 100 MARQ. L.REV. 375 (2016)..

jurisdiction, *at home* will most likely be where a corporation is incorporated or where it has its principal place of business.³² To emphasize this and, therefore leaving virtually little if any room for exceptions, the Court in *Daimler* sent the signal that if one can make an argument that the contacts with the forum made it at home there, the forum state contacts must not be significantly outweighed by the corporation's actions somewhere else.³³

2. Specific Personal Jurisdiction

In contrast, specific personal jurisdiction requires not only that the defendant “have ‘certain minimum contacts’ [with the state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice,’”³⁴ but there is the additional requirement for authority to adjudicate that the lawsuit and the allegations in the suit *arise out of or relate to the defendant's contacts with the forum*.³⁵ Furthermore, for specific personal jurisdiction, the required minimum contacts must relate to the cause of action.³⁶ There must be an “affiliation between the forum and the underlying

³² *Daimler*, 571 U.S. at 121.

³³ *Id.* at 140, n. 20.

³⁴ *Walden v. Fiore*, 571 U.S. 277 (2014). As will be addressed, the *Walden* Court made it clear that the contacts must be between the defendant and the forum; not the defendant and the plaintiff who resides in the forum. *Id.*

³⁵ *See, Daimler*, 571 U.S. at 127 (citation omitted).

³⁶ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–75 (1985).

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controversy, principally, [an] activity or an occurrence that takes place in the forum State.”³⁷

Different language has been used by the courts to symbolize this linkage and causal relationship between the contacts generated by the defendant and the cause of action. Examples of such language are: “related to”;³⁸ “arises out of or results from”;³⁹ “related to”;⁴⁰ “arising from or related to”;⁴¹ “arises out of”;⁴² and “deriving from, or connected with.”⁴³

In addition to the requirement for minimum contacts, the requirement that the cause of action arise out of the relations to those contacts, and that there be an affiliation between the forum and the controversy, there are two additional elements that

³⁷ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). As will be discussed, what the term “affiliation” means will be a key focus of the lower courts in trying to apply this concept after the recent Roberts Court’s decisions.

³⁸ *Clement Group, LLC v. EDT Services, LLC*, No. 4:16-cv-00773, 2017 WL 2972877, at * 4 (E.D. Tex. July 12, 2017).

³⁹ *Id.*

⁴⁰ *Peavy v. Axelrod*, No. 17-0142-KD-MU, 2017 WL 3444747, at * 5 (S.D. Ala. June 27, 2017) (citing *Consolidated Dev. Corp. v. Sherrill, Inc.*, 216 F.3d 1286, 1292 (11th Cir. 2000), *cert. denied*, 534 U.S. 827 (2001)).

⁴¹ *Daimler AG v. Bauman*, 571 U.S. 117, 129 (2014). *See also, Peavy* 2017 WL 3444747 at *5 (citations omitted).

⁴² *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (citation omitted).

⁴³ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (citation omitted).

courts articulate for specific personal jurisdiction purposes. They are: *purposeful availment* of the privilege of doing business in the forum state so that a defendant will have a *reasonable expectation* of being drawn into a forum court to defend itself. The Roberts Court does not seem to have abandoned those Due Process criteria. What is happening with the Roberts Court is that the emerging question will be what facts will the Court require to meet those tests?

Two important areas have recently been addressed by the Roberts Court: (1) the placing of products in the *stream of commerce* from outside locations resulting in injury to plaintiffs in forum states;⁴⁴ and (2) “intentional” torts committed outside of forum states that injure plaintiffs in forum states.⁴⁵

⁴⁴ See, *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011) (finding a foreign manufacturer of a metal shearing machine that came from Britain to New Jersey through the stream of commerce, did not engage in conduct purposely directed at New Jersey).

⁴⁵ See, *Walden v. Fiore*, 571 U.S. 277 (2014); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); and *Calder v. Jones*, 465 U.S. 783 (1984). See also, Balinski, *supra* note 1 (discussing criticisms of *Walden v. Fiore*). *Walden* “might have been viewed as a relatively significant decision, but it was overshadowed by the Court’s other personal jurisdiction case of the term, *Daimler AG v. Bauman*.” Robertson, *supra* note 1 at 781. However, *Walden* takes on a heightened importance in *Bristol-Myers*, especially with Justice Sotomayor’s dissent. See, discussion *infra* Section II.C.

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3. The Stream of Commerce Perspective

Preserving the minimum contacts and purposeful availment concepts and dealing with the stream of commerce concept, the Court in *Nicastro* addressed a product liability (metal-shearing machine) injury that occurred in New Jersey from a product that was made by a company in Britain (J.M. McIntyre Machinery). The British company sold its products to an independent distributor in Ohio which then sold the products in the U.S. market. J.M. McIntyre did not directly sell in the U.S. market, but the independent distributor did. However, J.M. McIntyre acknowledged that it wanted to reach the U.S. market generally, but maintained that it did not target any particular state.⁴⁶ In point of fact, its machines had been installed in Illinois, Iowa, Kentucky, Virginia, and Washington.⁴⁷

The Court produced a plurality opinion written by Justice Kennedy and concurred in by Chief Justice Roberts and Justices Scalia and Thomas. Justice Breyer wrote an opinion *concurring in the judgment* that was joined by Justice Alito. This is very important because the status of a plurality opinion and Justice Breyer's concurrence have produced varying perceptions in the lower courts

⁴⁶ *Nicastro*, 564 U.S. at 897 (J. Ginsburg dissenting). See also, Note, Robert M. Pollack, "Not of Any Particular State": *J. McIntyre Machinery, Ltd. v. Nicastro and Nonspecific Purposeful Availment*, 89 N.Y.U. L. REV. 1088 (2014).

⁴⁷ *Nicastro*, 564 U.S. at 896 (J. Ginsburg dissenting).

about what is the governing rationale emanating from *Nicastro*.

Addressing the *stream of commerce* doctrine and referring to it as a *metaphor* “that has its deficiencies as well as its utility,”⁴⁸ the plurality rejected Justice Brennan’s “pure stream of commerce” plurality opinion in *Asahi* which stated that a defendant could be liable in any state when it puts its product in the *stream of commerce* and it was *foreseeable* that the product would reach the forum state. In *Nicastro*, Justice Kennedy described this view as being predicated on “fairness and foreseeability.”⁴⁹ While the plurality in *Nicastro* rejected this view, it also did not specifically adopt Justice O’Connor’s opinion in *Asahi* that something more than putting a product into the stream of commerce was required.⁵⁰ Her perspective had become known as the *stream of commerce plus* approach.

Nevertheless, some dimension of a *plus* component seems to be essentially what the plurality analyzed in *Nicastro*. It refocused the inquiry, not on the stream of commerce, but on the need for evidence of *minimum contacts* and their relationship to the purposeful availment of a defendant with a forum

⁴⁸ *Id.* at 881.

⁴⁹ *Id.* at 882.

⁵⁰ Neither the four justices nor Justice Bryer, who concurred in the judgment, and who explicitly did not choose either test from *Asahi*, produced a rationale that adopted Justice O’Connor’s test. See, *State of Washington v. LG Electronics, Inc.*, 375 P.3d 1035, 1042 (Wash. 2016) (*cert. denied sub nom Koninkije Phillips N.V. v. State of Washington*, 137 S.Ct. 648 (2017)).

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state, or in contrast as in *Nicastro*, the lack of purposeful availment of the privilege of doing business in New Jersey by the lack of minimum contacts.

The facts which showed that only one of McIntyre's products had reached New Jersey, not necessarily just the plurality's use of them, was a central factor in the holding that needed Justice Breyer's concurrence in the judgment. The plurality with the concurrence held that there had been no contacts established by McIntyre with New Jersey nor had McIntyre targeted New Jersey in any way. Therefore, there was no personal jurisdiction over J. McIntyre Machinery in New Jersey.⁵¹ However, because the *Nicastro* facts showed that only one product reached New Jersey, it has been observed by the State of Washington Supreme Court that *Nicastro* "did not foreclose an exercise of personal jurisdiction over a foreign defendant where a substantial volume of sales took place in a state as part of the regular flow of commerce" and that their interpretation of *Nicastro* was "consistent with that of other courts."⁵²

⁵¹ While there was no evidence of any effort by McIntyre to "serve directly or indirectly the market for its products" in New Jersey, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985), the dissent focused on McIntyre's acknowledgement of its desire to reach the U.S. market generally and the foreseeable nature of the sale in New Jersey to observe that the dissent would have found enough for jurisdiction.

⁵² *LG Electronics*, 375 P.3d at 1040. *See also*, *Brown Bottline Group*, 159 F.Supp.3d 1308 (M.D. Fla. 2016); *King v. General*

Justice Breyer felt that the plurality had stated strict rules that limited jurisdiction when a defendant does not intend to submit to the power of a state and has not targeted the state.⁵³ Breaking from what he perceived to be the plurality's strict rules approach, he observed that the case could be decided on precedent and not on strict rules. He observed that he would "not go further"⁵⁴ because the case "did not implicate modern concerns, and because the factual record leaves many open questions."⁵⁵ He further opined that "this is an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules."⁵⁶

It is on the status of the plurality opinion, and Justice Breyer's concurrence, that some lower courts have held that "Justice Breyer's concurring opinion [is] the holding because he concurred in the judgment on only the narrowest of grounds."⁵⁷

Motors, No. 5:11-cv-2269-AKK, 2012 WL 1340066 (N.D. Ala. April 18, 2012).

⁵³ *Nicastro*, 564 U.S. at 890.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Hatton v. Chrysler Canada, Inc.*, 937 F.Supp.2d 1356, 1366 (M.D. Fla. 2013). *See also*, *Johnson v. Chrysler Canada, Inc.*, 24 F.Supp. 3d 1118 (N.D. Ala. 2014); *Simmons v. Big # 1 Motor Sports, Inc.*, 908 F.Supp.2d 1224 (N.D. Ala. 2012); *Hinrichs v. General Motors of Canada, Ltd.*, 222 So.3d 1114 (Ala. 2016); *Noll v. American Biltrite, Inc.*, 395 P.3d 1021, 1027 (Wash. 2017) ("There we concluded that Justice Breyer's concurring opinion in *J. McIntyre* represents the Supreme Court's most recent holding.").

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4. Cases of Intentional Torts

In cases where an out-of-state defendant's actions injure a plaintiff in a forum state, the present position of the Roberts Court is that the plaintiff's location alone will not confer jurisdiction on the forum state unless something else generated or created by the defendant links the defendant to the forum state in some meaningful way. This concept was at the heart of *Nicastro* with respect to product liability law which does not necessarily involve purposeful, knowing, or reckless (intentional) tortious acts or omissions and, therefore, it now appears to be a unifying theme for the Roberts Court in all cases.⁵⁸ As will be shown, this approach also carried over to the *Bristol-Myers* decision.

This theme drove the *Walden* decision which evidences a watershed statement from the Roberts Court on specific personal jurisdiction in "intentional tort" cases. *Walden* involved an arrest of the plaintiffs by DEA agents in the Atlanta Airport on their return trip to Nevada after having gambled. A large amount of money was seized from them and impounded. The defendant Walden, who participated in the seizure, was a police officer serving on a DEA Task Force in Georgia. Walden then helped to prepare and file a false affidavit regarding probable cause for the seizure resulting in the plaintiffs' inability, after returning to Nevada, to

⁵⁸ See *e.g.*, *Walden*, 571 U.S. at ___, 134 S.Ct. at 1122–24.

get their money back. Once the falsity of the affidavit was disclosed, they got their money back. They then sued Walden and the other agents in Nevada for the improper seizure and for filing the false affidavit in Georgia.

All of the tortious activities of Walden and the agents took place in Georgia. There was no evidence that the defendants purposely targeted Nevada, but Walden certainly knew that the plaintiffs were headed back to Nevada and that “all of the currency was in route to Nevada.”⁵⁹ The foreseeable consequences of the actions of Walden and the other agents, especially the preparation of the false probable cause affidavit, in Georgia would certainly foreseeably result in the holding up of any release of the money and, therefore, causally adversely affect the plaintiffs in Nevada when they could not, initially, get their money back. In this context, the Court addressed the issue of whether the Nevada courts had specific personal jurisdiction over the Georgia defendants. This necessitated a reconciling of what was referred to as the “effects” doctrine.

In 1984, the Supreme Court had decided the case of *Calder v. Jones*⁶⁰ which involved a newspaper article in the *National Enquirer* which had national circulation and that contained a defamatory article about the actress Shirley Jones who lived in California. The defamatory article was

⁵⁹ Erbsen, *supra* note 1 at 409. See also, Allen Erbsen, *Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather Than Liberty After Walden v. Fiore*, 19 LEWIS & CLARK L. REV. 769 (2015).

⁶⁰ *Calder v. Jones*, 465 U.S. 783 (1984).

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written by two *National Enquirer* reporters. Shirley Jones sued the *Enquirer*, the authors of the article, and the Editor in California. Because the *Enquirer* had national circulation, it did not contest personal jurisdiction.⁶¹ However, the authors and the other defendants knew that the impact of what they wrote would be felt by Shirley Jones in California. That type of knowledge is certainly part of most defamation cases.

The Court upheld personal jurisdiction in California and appeared to hold that, if an *intentional* tort is committed in one state, but a plaintiff feels the effects of that tort in another state, the forum state in which the plaintiff is present when injured has personal jurisdiction over the out-of-state defendant. This came to be known as the *effects test*.⁶²

That same year, the Court had decided *Keeton v. Hustler Magazine*⁶³ which involved the publication of a defamatory article in *Hustler* magazine which had a national circulation, to include extensive circulation in New Hampshire where Keeton felt the effects of the defamatory article and where the effects of the defamation were also external to Keeton. Emphasizing that external impact, the Court upheld jurisdiction noting that

⁶¹ *Id.* at 785.

⁶² *But cf.*, *Mobile Anesthesiologists Chi., LLC v. Anesthesia Associates of Hous. Metroplex, P.A.*, 623 F.3d 440, 445 n.1 (7th Cir. 2010) (“We believe the phrase ‘express aiming test’ – is more faithful to *Calder*.”).

⁶³ *Calder*, 465 U.S. at 770.

“[f]alse statements of fact harm both the subject of the falsehood and *the readers of the statement*.”⁶⁴

Lower courts had interpreted the *Calder* effects test in two ways. One is more restrictive; the other is not. With respect to the more restrictive interpretation, even when a defendant knows that its intentional act will affect a forum resident, the defendant must actually “target the forum itself.”⁶⁵ In contrast, other courts found the sufficient express aiming at a forum state when an out-of-state defendant targeted a forum resident.⁶⁶

Attempting to reconcile the *Calder effects test* and the *Keeton* rationale with the Court’s developing jurisprudence, the Court in *Walden* said: “The crux of *Calder* was that the reputation-based effects of the alleged libel *connected the defendants to California*, not just the plaintiff. The *strength of this connection* was largely a function of the nature of the libel tort.”⁶⁷ *Focusing on the effects of libel*, the damage to the reputation of a plaintiff in a plaintiff’s community, and the effects of being exposed to a libelous publication on the forum state and its citizens, which are external to the plaintiff, the Court found the connection to the forum state through the external damage to reputation and not just the personal injury to a plaintiff. Because this connection was external to the plaintiff, it served as

⁶⁴ *Id.* at 776 (emphasis added).

⁶⁵ Goldman, *supra* note 1 at 359. *See also, Mobile Anesthesiologists*, 623 F.3d at 445, n.1.

⁶⁶ Goldman, *supra* note 1 at 359.

⁶⁷ *Walden*, 571 U.S. at ___, 134 S.Ct. at 1123–24 (emphasis added).

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a linkage to the forum state and its citizens. The Court said that, “[a]ccordingly, the reputational injury caused by the defendants’ story *would not have occurred but for* the fact that the defendants wrote an article for publication in California that was read by a large number of California citizens. . . . [and that] the “ ‘effects’ caused by the defendants’ article – *i.e.* the injury to the plaintiff’s reputation in the estimation of the California public – connected the defendants’ conduct to *California*, not just to a plaintiff who lived there.”⁶⁸

Therefore, *Walden* provided a delineation that seems to require that *effects* of an intentional tort that will be considered sufficient to create the linkage of a defendant to a forum state must be to the forum state or its citizens and not just to a plaintiff, even if a defendant targets a plaintiff and knows that a plaintiff will be injured, or that it is foreseeable that the plaintiffs will be injured. Linkages to a plaintiff, either directly or through foreseeability, will, under the Roberts Court, no longer be sufficient to create jurisdiction unless the defendant’s acts or omissions are aimed at a forum state and *cause* effects in the forum state or to its citizens because it is only then that it can be concluded that a defendant *purposely availed* himself of a forum state and can be said to *reasonably anticipate* that he will be brought before

⁶⁸ *Id.* at 1124 (emphasis added).

the courts of that state. This paradigm is also essential to understanding *Bristol-Myers*.⁶⁹

This external linkage to, and targeting of, Nevada were not present in *Walden* where the inability of the plaintiffs to get their money back only affected them. They could have been anywhere and experienced the same effects. Their physical presence in Nevada was not related to the tort, but was merely fortuitous. Whether that is in keeping with the *ratio decidendi* of the *Calder* decision and the precedent emanating from it has been questioned.⁷⁰

The Court in *Walden*, therefore, refocused its analysis of the *effects* from the effects on an individual plaintiff who is in a forum state to *effects* on a forum state and the impact on the forum state or its residents. The Court did not technically discard the *effects test*. It simply refocused the *effects* from the plaintiff to the forum state and its residents. This focus on the forum state also still includes the relevance of evidence that a defendant purposefully directed activities to or at a forum state. Both will show the required linkage to a forum state.

In attempting to find this harm to the forum state or its residents as a factor distinguishing *Calder* and *Keeton* from the situation of the plaintiffs in *Walden*, and using these external effects and not just

⁶⁹ Whether this “purposeful” state of mind is really purposeful in the true sense, i.e. purposeful as to the resulting connection to, or effects on, or circumstances concerning the forum state or knowing, reckless or negligent as to the forum state is, it is submitted, not yet clear.

⁷⁰ See generally, Belinski, *supra* note 1.

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the effects on a plaintiff, the Roberts Court held that it is not the relationship of the intentional tortfeasor to the plaintiff that governs jurisdiction, but the relationship between the defendant tortfeasor and the forum state which governs. This refocus of the relationship of effects from the plaintiff who was injured to the relationship to the forum state arguably represents a shift in the court's analysis, but it seems to be consistent with the Roberts Court's developing jurisprudence of focusing on the relationship between a defendant and a forum state, and not a relationship between a defendant and a plaintiff. This focus was carried forward in *Bristol-Myers*.

While a statement of emerging principles might seem rather unencumbered, the reality is that, because of the tremendous variety of factual circumstances, it is not. As the Seventh Circuit has observed: "[t]he question whether harming a plaintiff in the forum state creates sufficient minimum contacts is more complex."⁷¹ For instance, courts have found forum state jurisdiction when the defendants knew that servers from which they stole trade secrets were in the forum states or the defendants, as a result of their employment, had extensive contacts with the companies in the forum states. These specific and unique facts were exactly what the Seventh Circuit meant when it observed that the issue of harm to a forum state plaintiff is a much

⁷¹ *Advanced Tactical Ordinance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 802 (7th Cir. 2014).

more complex fact-oriented question than just stating a rule or principle. The concept of *purposeful direction* can, therefore, be a seminal issue which is demonstrated by a wide variety of fact patterns.⁷²

An equally important element of jurisdiction that was carried forward in *Bristol-Myers* was the Court's emphasis from *Goodyear* and *Walden* that there had to be an adequate causal link between the forum state and the nonresidents' claims. The Court in *Bristol-Myers* described this as an "'affiliation between the forum and the underlying controversy. . . .'"⁷³ It further noted that the California Supreme Court had found jurisdiction "without identifying

⁷² See *eg.*, *Vivint, Inc. v. Craig Bailie*, No. 2:15-cv-685-DAK, 2017 WL 396655 (D. Utah. Jan. 30, 2017) (showing defendant accessed servers in Utah knowing that they were in Utah); *Neopart Transit, LLC v. Mgt. Consulting*, No. 16-3103, 2017 WL 714043 (E.D. Pa. Feb. 23, 2017) (holding out-of-state trade secret theft defendants' activities were related to their employment with a Pennsylvania company); *IPOX Schuster, LLC v. Kikko Asset Mgmt. Co., Ltd.*, 191 F.Supp.3d 790 (N.D. Ill. 2016) (discussing the Lanham Act claim that defendant traded on the established name and good will of the plaintiff in the forum state); *Enertrade, Inc. v. General Capacitor Col, Ltd.*, No. 16-cv-02458-HSG, 2016 WL 7475611 (N.D. Cal. 2016) (finding defendants' trade secret theft activities were purposely directed at their California employer). See *also*, *Acorda Therapeutics Inc. v. Mylan Pharm. Inc.*, 817 F.3d 755, 760 (Fed. Cir. 2016) (*cert. denied*, 137 S.Ct. 625 (2017)) (upholding jurisdiction in patent infringement case where defendant filed an Abbreviated New Drug Application indicating its "*purpose of engaging in [conduct that would cause injury in and be deemed wrongful marketing] in Delaware.*").

⁷³ *Bristol-Myers Squibb Co. v. Super. Ct. Cal., S.F. Cty*, 137 S.Ct. 1773, 1781 (2017).

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any adequate link between the State and the nonresidents' claims."⁷⁴ The Court cited *Goodyear* which had used the term, "“deriving from, or connected with”"⁷⁵ to describe the link between the forum state and the plaintiff's claims. This adequate linkage requirement is, therefore, clearly part of the *ratio decidendi* of the Roberts Court's decision in *Bristol-Myers* and its developing jurisdiction jurisprudence.⁷⁶

The District Court in the Northern District of California in *Dubose v. Bristol-Myers Squibb Company, et al.*,⁷⁷ decided after the Supreme Court's decision in *Bristol-Myers*, explained this linkage by echoing the Supreme Court's "but for" language in *Walden* saying: "In this Circuit, courts apply a 'but for' test to determine whether a claim arises out of a defendant's forum activities. . . . The question is, but for [a defendant's] conduct in California, would [the plaintiff's] injury have occurred?"⁷⁸

⁷⁴ *Id.* (quoting *Goodyear*, 364 U.S. at 919).

⁷⁵ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (citation omitted).

⁷⁶ *But see* Justice Sotomayor's dissent in *Bristol-Myers*, in which she seems to dispute this saying that *Walden* did not have this as part of its rationale. *Bristol-Myers*, 137 S.Ct. at 1787 (J. Sotomayor dissenting).

⁷⁷ *Dubose v. Bristol-Myers Squibb Co.*, No. 17-cv-00244-JST, 2017 WL 2775034 (N.D. Cal. June 27, 2017).

⁷⁸ *Id.* at *3.

*C. Application of the Roberts Court's
Jurisprudence to Bristol-Myers*

With the exception of Justice Sotomayor's lone dissent, the Court in *Bristol-Myers* was able to produce a near unanimous opinion written by Justice Alito. While the fact pattern in *Bristol-Myers* might seem like an anomaly, it served Justice Alito well when he used it to reinforce the specific personal jurisdiction doctrine being developed by the Roberts Court which gives a renewed focus to the key requirement for minimum contacts that have to be established by a defendant with the forum state or its residents and not the plaintiff or the plaintiff's fortuitous location, plus a sufficient causal linkage between those contacts and the plaintiff's injuries.

Justice Alito emphasized that the plaintiffs, who were the focus of *Bristol-Myers*' lack of jurisdiction argument, were non-California residents. This immediately put them in a different posture than the California residents who arguably had causes of action and specific personal jurisdiction of *Bristol-Myers* in California. What differentiated these non-California plaintiffs who were at issue is that they were not injured in California and they did not respond to *Bristol-Myers*' advertising in California,⁷⁹ they did not receive any medical care in California, and "as in *Walden*, all of the conduct giving rise to the nonresidents' claims occurred

⁷⁹ While they might have in their various states, they did not do so in California where they were trying to sue.

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elsewhere.”⁸⁰ In short, they were not connected or linked to California in any way.

The lower courts had held, in accordance with *Daimler*, that there was no general personal jurisdiction over Bristol-Myers. Therefore, the issue postured before the Court was whether there was specific personal jurisdiction. In his opinion, Justice Alito stressed the following concepts that had developed from the preceding cases: (1) for specific personal jurisdiction, the suit must arise out of or relate to the defendant’s (not the plaintiff’s) contacts with the forum state; (2) there must be an affiliation between the foreign state and the underlying controversy; (3) specific jurisdiction must involve issues that derive from, or that are connected with, the controversy that establishes jurisdiction; (4) a defendant’s relationship with a plaintiff or a third party is an insufficient basis for jurisdiction; (5) conduct occurring in another state that affects a plaintiff in a forum state will not suffice to establish jurisdiction. In short, Justice Alito found that Bristol-Myers had not, even though it marketed and sold Plavix in California and that the same advertising that was used nationally and to which both groups of plaintiffs responded in buying Plavix, established contacts with the State of California and the non-California plaintiffs’ injuries sufficient to create the necessary *affiliation* between the non-California plaintiffs’ injuries and California. The

⁸⁰ *Bristol-Myers*, 137 S.Ct. at 1782.

foregoing themes are now unifying principles that run through and make up the present Roberts Court's specific personal jurisdiction jurisprudence.

In her dissent, Justice Sotomayor began by observing: "Three years ago, the Court imposed substantial curbs on the exercise of general jurisdiction in its decision in *Daimler AG v. Bauman*. . . . Today, the Court takes its first step toward a similar contraction of specific jurisdiction by holding that a corporation that engages in a nationwide course of conduct cannot be held accountable in a state court by a group of injured people unless all of those people were injured in the forum State."⁸¹

Justice Sotomayor emphasized the nationwide activities, advertising, etc. by Bristol-Myers in California and in states where the non-residents resided. She advanced her primary theme and observed that "[a] core concern in this Court's personal jurisdiction cases is fairness and there is nothing unfair about subjecting a *massive corporation* to suit in a State for a *nationwide course of conduct* that injures both forum residents and nonresidents alike."⁸² Where the focus of the majority was not on a fairness rationale, hers was.⁸³

⁸¹ *Id.* at 1784 (J. Sotomayor dissenting). The ultimate effects of this dimension of the Roberts Court's jurisprudence on class action litigation remains to be seen. *See, Id.* at 1783–84. *See also*, *Weisheit v. Rosenberg & Associates, LLC*, No. JKB-17-0823, 2018 WL 1942196 at * 4–5 (D. Md. Apr. 25, 2018) (distinguishing *Bristol-Myers*, a state case from potential federal class actions).

⁸² *Bristol-Myers*, 137 S.Ct. at 1784.

⁸³ Arguably one underpinning of the Roberts Court's jurisprudence is the concept of legal formalism that favors

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Justice Sotomayor focused on Bristol-Myers' nationwide advertising and distribution efforts. She observed that the nationwide advertising was on television, in magazines, and on the Internet. She observed that "[a] consumer in California heard the same advertisement as a consumer in Maine about the benefits of Plavix,"⁸⁴ that Bristol-Myers distribution "proceeded through nationwide channels,"⁸⁵ and that it "relied on a small number of wholesalers to distribute Plavix throughout the country."⁸⁶ She further observed that all of the claims of the in-state and out-of-state plaintiffs were "'materially identical'"⁸⁷ and that Bristol-Myers had conceded that it was subject to suit in California by the in-state plaintiffs.

Her dissent was predicated more on the concept of fairness because she believed that Bristol-Myers' nationwide activities were sufficient to show purposeful availment; that all of the plaintiffs' injuries arose out of that purposeful availment in virtually every state; that the plaintiffs' injuries were common; and that it was *fair* to hold Bristol-Myers

more identifiable jurisprudential boundaries than are part of a more ambiguous test, such as Justice Sotomayor's fairness test. *See* J. McIntyre Mach., Ltd. V. Nicastro, 564 U.S. 873, 883 (2011) (Observing, via Justice Kennedy, that "[j]urisdiction is in the first instance a question of authority rather than fairness. . . .").

⁸⁴ *Bristol-Myers*, 137 S.Ct. at 1784.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

accountable in California even though the non-resident plaintiffs were not from California. She felt that the commonality of the sales and marketing practices of such a nationwide corporation made it fair to do so. She criticized the majority for not focusing on fairness, but for focusing more on federalism.⁸⁸ Nevertheless, eight other Justices disagreed with her perspectives.

III. CONCLUSION

Whether the Court has modified jurisdiction precedent or clarified it in the context of cases that provided the factual settings to do so, the reality is that the jurisprudence of personal jurisdiction that has emerged from the Roberts Court and its recent series of cases appears to be somewhat more predictable for businesses and their counsel because of its formalistic underpinnings than more nebulous tests such as the “continuous and systematic” test, foreseeability concepts, and a fairness perspective advanced by Justice Sotomayor. Whether a plaintiff is injured by a product that makes its way to a forum state through the stream of commerce or whether a defendant targets a forum state resident through out-of-state intentional tortious acts or omissions, the jurisdictional principles established by the Roberts Court work to provide some guidance to businesses and their counsel about their forum state exposure when they and their counsel are making risk assessments, selecting business models, and training organizational personnel.

⁸⁸ *Id.* at 1788.

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There must be sufficient minimum contacts with a forum state created by the defendant itself and not the plaintiff or a third party. The defendant's relationship with the plaintiff and a plaintiff's fortuitous location in a forum state will not, by themselves, be enough to establish jurisdiction in the forum state. The relationship demonstrating purposeful availment must be between the defendant and the forum state. While the word *purposeful* in *purposeful availment* is a key word, what state of mind must accompany the defendant's creation of those contacts and consequences has not been fleshed out by the Court. Furthermore, the term "created" can be accompanied by various states of mind. Whether various states of mind, as they relate to these dimensions of jurisdiction, will become substantively relevant in this jurisdiction equation remains to be seen.

The other central requirement is the required causal linkage between those contacts and the plaintiff's injuries. The Court's reference to "but for" causation in *Walden* and the Ninth Circuit's use of that causation analysis is effective and workable. Would the plaintiff's injuries have occurred "but for" the contacts created by the defendant with the forum state? This causation analysis fits with the Court's use of language such as, *arising out of*, *derived from* or *connected with*, etc. It must be noted, however, that such language has produced many problems, especially in the area of insurance coverage, and it remains to be seen what kinds of refinements the

Court, or the lower courts, will place on that language.

With these caveats, the developing and/or refined personal jurisdiction jurisprudence from the Roberts Court does appear to offer *some* greater level of predictability than was historically provided. From the standpoint of businesses, this greater predictability factors into risk assessments, the choice of business models, and compliance programs with effective and essential training components of those programs.

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**EMPOWERING BUSINESS POLICY &
STRATEGY THROUGH IMPROVED
COLLABORATION BETWEEN MANAGERS
AND IN-HOUSE COUNSEL**

EVAN PETERSON*

Managers who marginalize and ignore the contributions of in-house counsel to business success are an unfortunate component of every organization.¹ Such an outlook, aside from writing off the link between law and competitive advantage,² reflects a misapprehension of the emerging challenges that

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¹ Robert C. Bird, *Law, Strategy, and Competitive Advantage*, 44 CONN. L. REV. 62, 62 (2011); Robert C. Bird & David Orozco, *Finding the Right Corporate Legal Strategy*, <http://sloanreview.mit.edu/article/finding-the-right-corporate-legal-strategy/> (last visited Sept. 3, 2017); Justin W. Evans & Anthony L. Gabel, *Legal Competitive Advantage and Legal Entrepreneurship: A Preliminary International Framework*, 39 N. C. J. INT'L L. & COMM. REG. 334, 335 (2014).

² CONSTANCE E. BAGLEY, *MANAGERS AND THE LEGAL ENVIRONMENT: STRATEGIES FOR THE 21ST CENTURY* (2015); Constance E. Bagley et al., *Who Let the Lawyers Out? Reconstructing the Role of the Chief Legal Officer and the Corporate Client in a Globalizing World*, 18 UNIV. PENN. J. BUS. L. 420 (2016); David Orozco, *Strategic Legal Bullying*, 13 N.Y.U. J. L. & BUS. 137 (2016).

legal developments will place upon organizations over the next few years. For instance, cybersecurity and data protection issues represent chief concerns in the areas of compliance, risk management, and business litigation.³ The conceivable damage to innovation, global trade, and economic growth posed by cybercrime will force in-house counsel, managers, executives, and technology experts to work collaboratively on creating proactive approaches to cyber security risk-management practices.⁴ Intellectual property law protections will become increasingly important to the generation of organizational value.⁵ Organizations will need to nurture collaboration between managers and lawyers to attend to these shifting trends and challenges.

In spite of the threat of such challenges, managers often hold viewpoints that marginalize contributions of the legal profession in the corporate

³ DLA PIPER, *Top 10 Litigation, Risk Management, and Compliance Trends for 2016*, <https://www.acc.com/chapters/chic/upload/RNS-Powerpoint-Presentation-ACC.pdf> (last visited Sept. 3, 2017).

⁴ MCAFEE (June, 2014) *Net Losses: Estimating the Global Cost of Cybercrime*, <http://www.mcafee.com/us/resources/reports/rp-economic-impact-cybercrime2.pdf>; Scott J. Shackelford, *Business and Cyber Peace: We Need You!* 59 BUS. HORIZONS 539 (2016); GREGORY J. TOUHILL & JOSEPH C. TOUHILL, *CYBERSECURITY FOR EXECUTIVES: A PRACTICAL GUIDE* (2014).

⁵ Elena Holodny, *The 'Fourth Industrial Revolution' Will be Great for Lawyers*, <http://www.businessinsider.com/fourth-industrial-revolution-great-for-lawyers-2016-3> (last visited Sept. 3, 2017).

setting.⁶ As managers will routinely execute a growing number of business decisions in the years ahead requiring an appreciation of legal strategy initiatives,⁷ organizations will face an escalating need to reexamine and adjust managerial attitudes toward the law within the corporate setting.

This paper begins with a brief background on a Delphi study conducted to build consensus among in-house general counsel working across business industries in the United States with regard to techniques that will alter unreceptive managerial viewpoints toward the strategic value of law within the corporate setting. The discussion in the present article will center on one of the five categories that emerged from the final study results: the relationships between lawyers and non-lawyer managers. Next, I provide a general overview of the Delphi Method and a review of the academic literature involving relationships between lawyers and non-lawyer managers. I then describe the study procedures and the resulting findings. Finally, I conclude with an examination of the study's significance and recommendations for future research.

⁶ Steven L. Lovett, *The Employee-Lawyer: A Candid Reflection on the True Roles and Responsibilities of In-House Counsel*, 34 J. L. & COMM. 113, 131 (2015).

⁷ Bird & Orozco, *supra* note 1; Evans & Gabel, *supra* note 1, at 335; GEORGE J. SIEDEL & HELENA HAAPIO, PROACTIVE LAW FOR MANAGERS: A HIDDEN SOURCE OF COMPETITIVE ADVANTAGE (2016).

I. DELPHI STUDY BACKGROUND

The Delphi research design is an iterative process for developing a consensus among a panel of experts through the distribution of questionnaires and feedback.⁸ Delphi takes place through a series of iterations (rounds), beginning ordinarily with the distribution of broad, open-ended questions in the first round and concluding with the development of consensus in the final round.⁹ The Delphi method is geared toward the formation of consensus among a group of experts in circumstances where a deficiency of existing scholarship exists relative to a given research topic.¹⁰ The method was pioneered by the RAND Corporation in the 1950s as a means to generate forecasts in connection with military technological innovation.¹¹

⁸ Arash Habibi et al., *Delphi Technique Theoretical Framework in Qualitative Research*, 3 INT'L J. ENG'G & SCI. 8, 8 (2014); Heiko A. von der Gracht, *Consensus Measurement in Delphi Studies: Review and Implications for Future Quality Assurance*, 79 TECH. FORECASTING & SOC. CHANGE 1525, 1525 (2012).

⁹ Gayle Kerr et al., *Someone Should do Something: Replication and an Agenda for Collective Action*, 45 J. ADVERT. 4, 7 (2016).

¹⁰ Ali R. Afshari, *Selection of Construction Project Manager by Using Delphi and Fuzzy Linguistic Decision Making*, 28 J. INTELLIGENT & FUZZY SYS. 2827, 2829 (2015); Kelly L. Wester & DiAnne Borders, *Research Competencies in Counseling: A Delphi Study*, 92 J. COUNSELING & DEVELOPMENT 447, 447 (2014).

¹¹ HAROLD A. LINSTONE & MURRAY TUROFF, *THE DELPHI METHOD: TECHNIQUES AND APPLICATIONS* (1975).

Four principal characteristics characterize the Delphi design: (a) participant selection is grounded on predefined qualifications; (b) participants communicate solely with the study facilitator and stay anonymous to other participants; (c) information is gathered and redistributed to study participants by the study facilitator through a series of rounds, and (d) the responses of individual participants are combined by the study facilitator into a collective group response.¹² Rigor is central to the Delphi method, wherein researchers commonly use rating scales to evaluate panelists' responses along four key dimensions: desirability, feasibility, importance, and confidence.¹³ The Delphi method offers numerous benefits, including the gathering of varied experts from isolated geographical locations, the minimization of biases stemming from face-to-face interaction, the abolition of prolonged face-to-face meetings, and supporting greater inclusion of individuals from diverse groups in academic research.¹⁴ Scholars have applied the Delphi method

¹² Casey G. Cegielski et al., *Evaluating Adoption of Emerging IT for Corporate IT Strategy: Developing a Model Using a Qualitative Method*, 30 INFO. SYS. MGMT. 235, 238 (2013).

¹³ Linstone & Turoff, *supra* note 11.

¹⁴ Shane R. Brady, *Utilizing and Adapting the Delphi Method for Use in Qualitative Research*, 14 INT'L J. QUALITATIVE METHODS 1, 2 (2015); Cegielski et al., *supra* note 12, at 238; Lily Lai et al., *Developing Clinical Practice Guidelines for Chinese Herbal Treatment of Polycystic Ovary Syndrome: A Mixed-Methods Modified Delphi Study*, 23 COMPLEMENTARY THERAPIES MED. 430, 431 (2015).

to address problems in medicine, government, environmental studies, and business research.¹⁵

I conducted a three-round Delphi study to address the general problem concerning limitations placed on organizational ability to derive strategic value from the law due to the lack of integration between legal strategy and business strategy. The specific problem that I addressed centered on unreceptive managerial viewpoints toward the strategic value of law within the corporate setting.¹⁶ Although in-house general counsel working across business industries in the United States stand in a position to develop techniques for altering unreceptive managerial viewpoints toward the law, a lack of consensus exists among them with regard to the techniques best suited to addressing such viewpoints. The purpose of my study was to build this consensus.¹⁷

During the first round, I distributed an electronic questionnaire containing six broad, open-ended questions to a study panel comprised of in-house general counsel working across business industries in the United States. During the second round, I distributed an electronic questionnaire consisting of theme statements derived from panelists' responses to the first round questionnaire.

¹⁵ Kay de Vries et al., *An Examination of the Research Priorities for a Hospice Service in New Zealand: A Delphi Study*, PALLIATIVE & SUPPORTIVE CARE 1, 3 (2015).

¹⁶ Evans & Gabel, *supra* note 1, at 335.

¹⁷ I conducted this Delphi study for my doctoral dissertation in partial fulfillment of the requirements for a Ph.D. in Management program.

Panelists rated each theme statement against two separate five-point Likert scales: desirability and feasibility. Any statement where the collective frequency of panelists' top two responses (rating of four or five) was 70% or higher for both scales passed to the third round.¹⁸ For the third and final round, I distributed an electronic questionnaire containing only statements carried over from the second round. Panelists rated each statement on the third round questionnaire against two other scales: importance and confidence. The statements where the collective frequency of panelists' top two responses (rating of four or five) was 70% or higher on both scales formed a consensus on techniques that will alter unreceptive managerial viewpoints toward the law within the corporate setting.

The final list of twenty-five techniques generated by the study panel in the third round encompassed the following categories: (a) managerial attitudes toward lawyers and the law; (b) relationships between lawyers and non-lawyer managers; (c) leadership in the legal profession; (d) role and functions of in-house general counsel, and (e) law, legal strategy, and competitive advantage. The discussion in the present article will focus on the second major category: relationships between lawyers and non-lawyer managers.

¹⁸ Setting the level of consensus at 70% set a relatively high bar indicating that a substantial majority of the panelists leaned toward consensus.

II. LITERATURE REVIEW

A firm comprehension of the relations between lawyers and managers within the organization will propel efforts to bridge the gap between managers' and attorneys' mental models and promote the advancement of collaborative relationships.¹⁹ This section contains a brief summary of the tensions between managers and lawyers, as well as a discussion of the benefits of managing relationships between these distinct groups of organizational employees.

A. Tensions between Lawyers and Managers

Numerous factors drive tensions between lawyers and managers. Tensions derived from variances in individual decision-making styles hinder efforts to achieve cooperative decision-making.²⁰ The ability to recognize and assimilate diverse viewpoints is a critical catalyst for business success.²¹ In recognition of this connection, scholars have examined the effect of gender diversity, racial diversity, cultural diversity, and value diversity on

¹⁹ William W. Fisher III & Felix Oberholzer-Gee, *Strategy Management of Intellectual Property: An Integrated Approach*, 55 CAL. MGMT. REV. 157, 157 (2013).

²⁰ Ben W. Lewis et al., *Difference in Degrees: CEO Characteristics and Firm Environmental Disclosure*, 35 STRAT. MGMT. J. 712, 712 (2014).

²¹ CELIA DE ANCA & ANTONIO VAZQUEZ, *MANAGING DIVERSITY IN THE GLOBAL ORGANIZATION: CREATING NEW BUSINESS VALUES* (2016).

team performance.²² Failing to manage diversity may hinder communication by fostering biases that lead individuals to discount and ignore others' contributions.²³ Applying this concept to in-house legal departments, in-house counsel will encounter major challenges in their efforts to cultivate intra-organizational collaborative partnerships with employees outside of their departments.²⁴ Despite in-house counsels' acknowledgment of the central need to work collaboratively with different types of business professionals, hindrances to interdisciplinary collaboration will continue to encompass the use of discipline-specific professional language, differences in skills and subject matter

²² S. M. Hoogendoorn et al., *The Impact of Gender Diversity on the Performance of Business Teams: Evidence from a Field Experiment*, 59 MGMT. SCI. 1514, 1514 (2013); Jasmin Joecks et al., *Gender Diversity in the Boardroom and Firm Performance: What Exactly Constitutes a "Critical Mass?"* 118 J. BUS. ETH. 61, 61 (2013); Bo B. Nielsen & Sabina Nielsen, *Top Management Team Nationality Diversity and Firm Performance: A Multilevel Study*, 34 STRAT. MGMT. J. 373, 373 (2013); Anne N. Pieterse et al., *Cultural Diversity and Team Performance: The Role of Team Member Goal Orientation*, 56 ACAD. MGMT. J. 782, 782 (2013); Matthias Schneid et al., *The Influence of Cultural Context on the Relationship between Gender Diversity and Team Performance: A Meta-Analysis*, 26 INT'L J. HUM. RES. MGMT. 733, 733 (2015); Daan van Knippenberg et al., *Diversity Mindsets and the Performance of Diverse Teams*, 121 ORG. BEHAVIOR & HUM. DECISION PROCESSES 183, 183 (2013).

²³ Pieterse et al., *supra* note 22, at 782.

²⁴ Susie Lees et al., *Stop Putting out Fires and Start Working Proactively with your Client*, 31 ACC DOCKET 73, 77 (2013).

expertise, perspectives on teamwork, and stances on risk aversion.²⁵

The effect of such tensions is observable in company lawyers' relationships and interactions with other organizational employees. Given her position as company counsel, an in-house lawyer will need to maintain equilibrium between competing requirements and interests that will often lead to conflicts between obligations to the company and obligations to the legal profession.²⁶ In-house lawyers may support aggressive business policies to satisfy certain members of the organization.²⁷ General counsel may find themselves facing an impasse: breach attorney-client privilege to perform their duties as chief compliance officers, or breach their fiduciary duties to their organizations but perform their roles of chief legal strategists to the best of their abilities.²⁸

The tensions between lawyers and managers will also affect lawyers' abilities to perform their

²⁵ K. B. C. Ashipu & Gloria M. Umukoro, *A Critique of the Language of Law in Selected Court Cases in Nigeria*, 5 MEDITERRANEAN J. SOC. SCI. 622, 622 (2014); Yi-Min Chen, Hsin-Hsien Liu, Yu-Siang Liu, Huei-Ting Huang, *A Preemptive Power to Offensive Patent Litigation Strategy: Value Creation, Transaction Costs and Organizational Slack*, 69 J. BUS. RESEARCH 1634, 1634 (2016).

²⁶ Ronit Dinovitzer et al., *Corporate Lawyers and their Clients: Walking the Line between Law and Business*, 21 INT'L J. L. PROF. 3, 7 (2014).

²⁷ Dana A. Remus, *Out of Practice: The Twenty-First-Century Legal Profession*, 63 DUKE L. J. 1243, 1275 (2013).

²⁸ Lawrence A. Hamermesh, *Who Let You into the House?* 2012 WIS. L. REV. 360, 365 (2012).

jobs effectively. The requirement for an in-house lawyer to occupy multiple organizational roles affects her decision-making ability by imposing a series of psychological pressures.²⁹ Kim asserted that the diverse pressures experienced by in-house counsel, including obedience pressures, conformity pressures, and alignment pressures, offer a prospective justification for the failure of some in-house lawyers to disclose illegal behavior.³⁰ Internal pressures may lead in-house lawyers to instinctively disregard critical facts that may affect key decisions. To encourage perceptions that she is a team player; a company lawyer will regularly face pressures to champion the decisions or activities of her non-lawyer colleagues.³¹ Because of such pressures, Hamermesh acknowledged potential restrictions to the ability of in-house general counsel to act in the best interests of the organization in circumstances where senior managers' actions are contrary to such interests.³²

The combined influence of such pressures will affect the behavior of in-house counsel within the organization. Nelson and Nielsen studied how lawyers' perceptions of managers' attitudes toward

²⁹ Sung H. Kim, *Inside Lawyers: Friends or Gatekeepers?* 84 FORDHAM L. REV. 1867, 1871 (2016).

³⁰ *Id.*

³¹ Eli Wald, *In-House Risk* (U Denver Legal Studies Research Paper No. 15-51), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2667157##

³² Hamermesh, *supra* note 28, at 365.

the law affect lawyers' work performance.³³ Lawyers manage the tensions between lawyers and managers by tailoring legal advice directly to business executives' legal acumen and personal views of the legal system.³⁴ Dinovitzer et al. observed that the behaviors characterizing corporate lawyers' relationships with non-lawyers fall along two axes: (a) degree to which a lawyer relies on prior experience or legal knowledge in support of her decisions and actions, and (b) degree to which a lawyer frames her role in terms of membership in a collective group or in terms of individual action.³⁵ Dinovitzer et al. outlined the diverse profiles for four types of in-house lawyers:³⁶

- Team lawyer: Places priority on legal considerations over business considerations similar to the lawyers' lawyer, but gives greater deference to personal experience in decision-making.
- Team player: Places greater emphasis on experience rather than legal knowledge while demonstrating an appreciation of firm collectivity.
- Lawyers' lawyer: Places primary emphasis on her legal knowledge during the decision-

³³ Robert L. Nelson & Laura B. Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 L. & SOC. REV. 457, 468 (2000).

³⁴ *Id.*

³⁵ Dinovitzer et al., *supra* note 26, at 688.

³⁶ *Id.*

making process. Although such lawyers are familiar with their clients' business objectives, legal considerations take precedence over business considerations.

- Lone ranger: References law in decision-making but places primary emphasis on personal experience. Identity is individual-focused rather than collective-focused.

B. Benefits of Managing Relationships between Lawyers and Managers

Any fragile relationships between lawyers and managers will also have an effect at the organizational level. A conflict between managers and lawyers may result in managers paying scant consideration to law as a strategic resource.³⁷ The efforts of in-house counsel to assist management in grasping the strategic aspects of legal decision-making, as well as the efforts of in-house counsel to promote the corporate legal department as an internal strategic partner, will face significant challenges over the next few years.³⁸ Numerous benefits are connected to improving relationships between lawyers and managers. The mitigation of conflict between managers and lawyers will require integrating the abilities and knowledge of both

³⁷ Evans & Gabel, *supra* note 1, at 364.

³⁸ David Orozco, *Legal knowledge as an Intellectual Property Management Resource*, 47 AM. BUS. L. J. 687, 688 (2010).

groups through communication and collaboration.³⁹ Many organizational employees interact with in-house counsel on a routine basis.⁴⁰ By encouraging an organizational culture that prizes proactive partnerships, in-house counsel will have the capacity to further strengthen relationships by understanding organizational needs and providing proactive strategic advice to achieve the associated goals.⁴¹ In-house general counsel will stand in a strong position to organize resources, manage risk, and create value when they work collaboratively as strategic partners with managers.⁴²

The improvement of lawyer-manager collaborative relationships has larger implications for the efficiency and effectiveness of organizational legal strategy. As managers' attitudes toward attorneys sway an organization's susceptibility toward legal strategy, in-house counsel will need to dispel the stereotype that the legal department represents an impediment to the value creation process.⁴³ To achieve this objective, in-house counsel will need to engineer a shift in perspective so that managers will begin viewing the law as a valuable strategic resource for the organization.⁴⁴ Established mental frames represent a significant

³⁹ Helena Haapio, *Business Success and Problem Prevention through Proactive Contracting: A Proactive Approach*, 49 SCAND. STUD. L. 149, 180 (2015).

⁴⁰ Lovett, *supra* note 6, at 131.

⁴¹ Lees et al., *supra* note 24, at 77.

⁴² Bagley et al., *supra* note 2, at 431.

⁴³ Bird, *supra* note 1, at 81.

⁴⁴ *Id.*

hurdle to accomplishing this goal.⁴⁵ Mental frames, if left unchallenged and unchecked, will obstruct innovation by rendering it nearly impossible for an individual to consider options outside the status quo. Recognizing and challenging cognitive biases toward the law will help organizations modify policies and approaches to legal strategy to facilitate the improved delivery of business services.⁴⁶

The identification of existing viewpoints represents an essential first step in the change process. Upon the identification of managerial mental frames and biases toward the law, the legal department may begin to reduce the divide between managerial and legal perspectives. Managers' attitudinal variables may lead to either the deterrence or the promotion of legal strategy.⁴⁷ Attitudinal variables denote the perspectives and opinions of a person that may affect her behavior, values, and decisions.⁴⁸ The attitudinal variables held by key organizational decision-makers will have the potential to manipulate company strategy.⁴⁹

In summary, the tensions between lawyers and managers originating from differences in perspective and behavior will have a visible effect on the organization in the following areas: (a)

⁴⁵ William D. Henderson, *Letting Go of Old Ideas*, 112 MICH. L. REV. 1111, 1129 (2014).

⁴⁶ Nancy B. Rapoport, *'Nudging' Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms*, 4 ST. MARY'S J. L. ETH. & MALPRACTICE 42, 42 (2014).

⁴⁷ Bird, *supra* note 1, at 81.

⁴⁸ *Id.*

⁴⁹ *Id.*

interactions and collaborative relationships between lawyers and managers; (b) lawyers' abilities to perform their jobs, and (c) the overall capacity to pursue legal strategy at a companywide level. The detriments of poor relationships and the benefits of improved relationships alike between lawyers and managers highlight the need to develop leadership skills among members of the legal profession.

III. RESEARCH DESIGN AND METHODOLOGY

A. Panelist Selection

The selection of suitable experts to serve as study participants is a critical component of the Delphi design.⁵⁰ Participants in this study needed to meet four eligibility criteria: (a) possess a juris doctor degree from an ABA-accredited law school located in the United States; (b) possess a license to practice law in at least one state; (c) possess at least five years of business industry experience, and (d) currently serve in the role of in-house general counsel for an organization headquartered in the United States.⁵¹ I

⁵⁰ Sinead Keeney et al., *A Critical Review of the Delphi Technique as a Research Methodology for Nursing*, 38 INT'L J. NURS. STUD. 195, 196 (2001) (Rather than selecting participants using representative random samples, Delphi researchers select participants based on their expertise with the issue(s) involved in the study).

⁵¹ To preserve participants' confidentiality, a requirement of the Delphi method, I did not collect demographic data about the panelists or their organizations beyond the minimal data necessary to ensure Delphi panel eligibility. An acknowledged

identified participants for this study using the professional networking site LinkedIn. Nineteen in-house general counsel who satisfied the study eligibility criteria participated in the study.⁵²

B. Data Collection and Data Analysis

1. The First Round

To address the topic of relationships between lawyers and non-lawyer managers, I asked panelists to provide recommendations in response to the following open-ended question in the first round: What activities will help improve workplace collaboration between in-house lawyers and managers? Using thematic content analysis to analyze and code participants' first round recommendations, I developed eight statements spanning the following sub-categories: involvement and participation, knowledge, relationship

delimitation of the study is that a different composition of panelists may have led to different results.

⁵² Nineteen is a suitable panel size for a Delphi study. See Ivan R. Diamond, et al., *Defining Consensus: A Systematic Review Recommends Methodologic Criteria for Reporting of Delphi Studies*, 67 J. CLINICAL EPIDEMIOLOGY 401, 403 (2014) (Out of 100 Delphi studies, 40% had between 11 and 25 panelists in the final round). As this was not a quantitative study, a random sample representative of the target population was unnecessary. It should also be noted that the descriptive statistics noted in this article are representative of the collective panelists' views, not the views of U.S. in-house general counsel at large. The findings do, however, lay the potential groundwork for more in-depth, comprehensive quantitative studies on the subject.

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management, communication, and training and education.⁵³ Table 1 contains an overview of the relevant Round 1 results.

Table 1. First Round Coding Results

CODE CATEGORY/DESCRIPTION	FREQUENCY
Involvement/participation	
Lawyer/manager actively support the other in all stages of business process	21
Knowledge	
Access to knowledgeable legal counsel	11
Relationship management	
Lawyer/manager work to understand concerns/focus/perspectives of the other	14
Lawyers build rapport through approachability and socialization	4
Managers view lawyers as valued partners rather than road blocks/deal killers	27
Communication	

⁵³ The instructions asked panelists to provide a minimum of 3 – 5 recommendations in response to the question, along with a short description for each recommendation. The study panelists generated 94 recommendations in response to the open-ended question.

Open disclosure and timely access to legal department	12
Use of information technology and other tools to support company processes	3
Training/education	
Risk management training techniques	2

2. The Second Round

The second-round questionnaire included the eight statements derived from panelists' responses to the first round questionnaire. Panelists rated each statement on the second round questionnaire against two separate five-point Likert scales: desirability and feasibility.⁵⁴ Any statement where the collective frequency of panelists' top two responses (rating of four or five) was 70% or higher on both the desirability and feasibility scale would pass on to the third round.⁵⁵ The instructions also asked panelists to explain their reasoning if they applied a rating of one or two to a statement on either the importance or the confidence scale. As indicated in Table 2, six of the eight statements satisfied the 70% threshold and passed to the third round. The

⁵⁴ The scale measuring desirability ranged from (1) highly undesirable to (5) highly desirable, whereas the scale measuring feasibility ranged from (1) definitely infeasible to (5) definitely feasible.

⁵⁵ The instructions asked panelists to explain their reasoning if they applied a rating of 1 or 2 to a statement on either the desirability or the feasibility scale.

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panelists in the second round also provided a diverse assortment of optional comments and explanations of their reasoning (see Appendix A).

Table 2. Second Round Ratings

STATEMENT	DESIRABILITY RATING %	FEASIBILITY RATING %
Improving workplace collaboration between in-house counsel and managers <i>by involving in-house counsel in company business processes.</i>	100%	83%
Improving workplace collaboration between in-house counsel and managers <i>by ensuring managers have access to knowledgeable legal counsel.</i>	96%	87%
Improving workplace collaboration between in-house counsel and managers <i>by helping lawyers and managers to understand each other's concerns and perspectives.</i>	100%	74%
In-house counsel undertaking to improve workplace collaboration	100%	91%

between in-house counsel and managers <i>through building rapport w/managers.</i>		
Improving workplace collaboration between in-house counsel and managers <i>by helping managers to view lawyers as valued partners rather than deal killers.</i>	96%	61%
Improving workplace collaboration between in-house counsel and managers <i>by fostering easy-access, open communication between managers and in-house counsel.</i>	100%	96%
Improving workplace collaboration between in-house counsel and managers <i>by fostering their joint use of information technology and other support tools.</i>	70%	43%
Improving workplace collaboration between in-house counsel and managers <i>through training on legal risk management techniques.</i>	91%	91%

3. The Third Round

The third-round questionnaire included the six statements that carried over from the second round. The panelists rated each statement against the other two scales: importance and confidence.⁵⁶ The instructions once again asked panelists to explain their reasoning if they applied a rating of one or two to a statement on either the importance or the confidence scale. As indicated in Table 3, five of the six statements satisfied the 70% threshold for both importance and confidence. Similar to the second round, the panelists in the third round provided a diverse assortment of optional comments and explanations of their reasoning (see Appendix A).

Table 3. Third Round Ratings

STATEMENT	IMPORTANCE RATING %	CONFIDENCE RATING %
Improving workplace collaboration between in-house counsel and managers <i>by involving in-house counsel in company business processes.</i>	89%	84%
In-house counsel undertaking to improve workplace	74%	79%

⁵⁶ The scale measuring importance ranged from (1) most unimportant to (5) very important, whereas the scale measuring confidence ranged from (1) unreliable to (5) certain.

collaboration between in-house counsel and managers <i>through building rapport w/managers.</i>		
Improving workplace collaboration between in-house counsel and managers <i>through training on legal risk management techniques.</i>	68%	68%
Improving workplace collaboration between in-house counsel and managers <i>by fostering easy-access, open communication between managers and in-house counsel.</i>	95%	89%
Improving workplace collaboration between in-house counsel and managers <i>by helping lawyers and managers to understand each other's concerns and perspectives.</i>	84%	74%
Improving workplace collaboration between in-house counsel and managers <i>by ensuring managers have access to knowledgeable legal counsel.</i>	79%	74%

C. Exploring the Results

The findings suggest that organizations seeking to improve workplace collaboration between in-house lawyers and managers should aim to foster easy-access, open communication between managers and in-house counsel, as well as assist lawyers and managers in understanding each other's concerns and perspectives, ahead of efforts geared toward legal risk management training. A review of non consensus items (items failing to reach the 70% consensus threshold on at least one scale) must fall alongside the final consensus items, as both sets of items highlight the areas where organizations should direct limited time and resources in conjunction with efforts to improve workplace collaboration between in-house lawyers and managers.

1. Involvement and Participation

The collective ratings supplied by the panelists in the second and third round indicated high levels of agreement with the desirability, feasibility, importance, and confidence of involving in-house counsel in company business processes to improve workplace collaboration between in-house counsel and managers.⁵⁷ These findings lend potential

⁵⁷ *High level agreement* indicates the collective ratings supplied by the panel met or exceeded the 70% measure of consensus established for the Delphi study. *Low level of agreement* indicates that the collective ratings supplied by the panel did not meet or exceed the 70% measure of consensus established for the Delphi study.

support to the assertion by Orozco that collaboration between in-house counsel and managers will lead to group learning and the generation of advanced legal knowledge.⁵⁸ The findings also support assertions by Bird that group learning will channel the further creation of collaborative solutions to complex business processes.⁵⁹ Among these findings, however, is the important consideration that employees at numerous organizational levels will likely view the presence of in-house counsel with suspicion or trepidation. Managerial perspectives of in-house counsel include perceptions that attorneys have unwarranted authority over decisions affecting the employer-employee relationship, including demotions, promotions, access to benefits, inter-departmental transfers, and terminations.⁶⁰ It is also worthy to note the possibility that some in-house counsel may hold the viewpoint that business processes are not their responsibility. A final consideration, as one panelist noted, is that participation by in-house counsel in business processes alone is insufficient; counsel must also offer targeted advice.

2. Access to Knowledgeable Legal Counsel

The collective ratings supplied by the panelists in the second and third round demonstrated high levels of agreement with the desirability,

⁵⁸ Orozco, *supra* note 38, at 688.

⁵⁹ Robert C. Bird, *The Many Futures of Legal Strategy*, 47 AM. BUS. L. J. 575, 581 (2010).

⁶⁰ Lovett, *supra* note 6, at 131.

feasibility, importance, and confidence of providing managerial access to knowledgeable legal counsel. These findings support research by Haapio who advocated the importance of in-house counsel possessing business knowledge alongside legal knowledge.⁶¹ Despite the favorable ratings, however, several panelists expressed concerns toward the feasibility of access to knowledgeable counsel in large corporations. Another panelist commented that organizations do not want managers to deal with outside counsel without the involvement of in-house counsel. This comment speaks to the work by Haapio who noted that some managers may view their own legal knowledge as sufficient for contract negotiation purposes, and that to involve company counsel in such negotiations would be unnecessary.⁶² Such situations may lead to organizational conflict in instances where in-house counsel interject themselves, whether by their own initiative or at the request of others, in contract negotiations facilitated by company managers.

3. Relationship Management

The collective ratings supplied by the panelists in the second round denoted feelings of high desirability but low feasibility in connection with the statement that helping managers to view lawyers as valued partners rather than deal killers will improve workplace collaboration between in-

⁶¹ Haapio, *supra* note 39, at 168.

⁶² *Id.*

house counsel and managers. The feasibility ratings are consistent with research by Evans and Gabel, who noted that managers may view the law as a hindrance to organizational growth.⁶³ One panelist noted that in-house counsel must work to generate solutions rather than merely identifying problems and that circumstance exist where risk/reward may require abstention from a particular deal. This comment possibly reflects the pressures placed upon in-house counsel to constantly support higher level decisions. Such stresses may also lead in-house lawyers to disregard critical factors that may affect strategic decisions. The ratings and comments supplied by the panelists may emphasize the possibility that it is the position held by in-house counsel, rather than an absence of knowledge or desire related to teamwork, that requires advocating the cessation of certain deals. In-house lawyers cannot escape the deal-killer personification without sacrificing their obligations to examine the risk and reward tradeoff connected to deals pursued by the organization.

The collective ratings supplied by the panelists in the second and third round revealed high levels of agreement with the desirability, feasibility, importance, and confidence of in-house counsel undertaking to improve workplace collaboration between in-house counsel and managers through building rapport with managers. These results are consistent with research by Mottershead and Magliozzi who noted that emotional intelligence, collaboration, and the ability to build relationships

⁶³ Evans & Gabel, *supra* note 1, at 335.

and work with people are among the core competencies necessary for success in corporate legal practice.⁶⁴ Despite the high ratings provided by the panel, the comments serve as a note of caution. One panelist noted that rapport building behaviors by themselves may not influence managerial opinions of legal department staff. Although rapport building behaviors may lead to a more pleasant working environment, they may lack the force necessary to alter some of the factors that drive interpersonal conflict between lawyers and managers.⁶⁵

The collective ratings supplied by the panelists in the second and third round reflected high levels of agreement with the desirability, feasibility, importance, and confidence of improving workplace collaboration between in-house counsel and managers by helping lawyers and managers to understand each other's concerns and perspectives. The findings are consistent with research by Lees *et al.* who noted that fostering a corporate culture of proactive partnership will help members of the legal department to cultivate and strengthen relationships with other members of the organization.⁶⁶ The

⁶⁴ Terri Mottershead & Sandee Magliozzi, *Can Competencies Drive Change in the Legal Profession?* 11 UNIV. ST. THOMAS L. J. 51, 61 (2013).

⁶⁵ See generally Stephen Betts & William Healy, *Having a Ball Catching on to Teamwork: An Experiential Learning Approach to Teaching the Phases of Group Development*, 19 ACAD. EDUC. LEADERSHIP J. 1 (2015); Nancy J. Knauer, *Learning Communities: A New Model for Legal Education*, 7 ELON L. REV. 193 (2015).

⁶⁶ Lees *et al.*, *supra* note 24, at 77.

findings are also consistent with research by Bagley *et al.* who noted that effective resource allocation, risk management, and value creation are easier to achieve when in-house counsel work collaboratively as strategic partners with managers.⁶⁷ One panelist noted, however, that although these concepts may constitute core values to an organization, they are contingent on in-house lawyers' and managers' desires. Both sides will need to overcome a multitude of factors that lead to interpersonal conflict, including perspectives on risk aversion, views on the importance of teamwork, and the use of discipline-specific language.⁶⁸

4. Communication

The collective ratings supplied by the panelists in the second round pointed to feelings of high desirability but low feasibility in connection with the statement about improving workplace collaboration between in-house counsel and managers by fostering their joint use of information technology and other support tools. One panelist noted, "I might be a bit of a luddite, but I am generally skeptical of using IT in place of face to face connections." Due to the increased use of information technology stemming from changing

⁶⁷ Bagley *et al.*, *supra* note 2, at 431.

⁶⁸ Evans & Gabel, *supra* note 1 (risk aversion); Betts & Healy, *supra* note 65 (importance of teamwork); Ashipu & Umukoro, *supra* note 25 (use of discipline-specific language).

business models,⁶⁹ the expressed reticence by general counsel toward the joint use of information technology represents an interesting divergence between managers and lawyers. Organizational change agents who consider initiatives aimed at fostering the joint use of information technology will need to address the opposition to such initiatives potentially posed by in-house counsel. Although these findings do not necessarily discredit prior research that understanding information technology is an essential skill for general counsel,⁷⁰ the findings do highlight the considerations and challenges relative to the collaborative use of information technology by managers and in-house counsel. These considerations and challenges may, in turn, pose difficulties for the re-design of legal systems and for the collaboration between legal counsel, corporate executives, and technology experts.⁷¹

⁶⁹ J. Mark Phillips, *Entrepreneurial Esquires in the New Economy: Why All Attorneys should Learn about Entrepreneurship in Law School*, 8 J. BUS.

ENTREPRENEURSHIP & L. 59 (2014); Rapoport, *supra* note 46.

⁷⁰ ASSOCIATION OF CORPORATE COUNSEL (December 9, 2013), *Skills for the 21st Century General Counsel*, <http://www.acc.com/legalresources/resource.cfm?show=1356049>; ASSOCIATION OF CORPORATE COUNSEL (January 29, 2014), *ACC Chief Legal Officers 2014 Survey*, <http://www.acc.com/legalresources/resource.cfm?show=1358895>; ASSOCIATION OF CORPORATE COUNSEL (January 29, 2015), *ACC Chief Legal Officer (CLO) 2015 Survey*, <http://www.acc.com/legalresources/resource.cfm?show=1389463>

⁷¹ Thomas D. Barton, *Re-Designing Law and Lawyering for the Information Age*, 30 NOTRE DAME J. L. ETHICS & PUB.

The collective ratings supplied by the panelists in the second and third round showed high levels of agreement with the desirability, feasibility, importance, and confidence of efforts to improve workplace collaboration between in-house counsel and managers through the use of open communication between managers and in-house counsel. The prevention and mitigation of organizational conflict between lawyers and managers will require the integration of the knowledge and abilities of each group through communication and collaboration.⁷² The ratings may signify acknowledgment by the panel that perceptions of open and honest communication may alleviate some managers' feelings of mistrust toward company attorneys.

5. Training and Education

The collective ratings from the second round indicated high levels of agreement with the desirability and feasibility, but low levels of agreement with the importance and confidence, of improving workplace collaboration between in-house counsel and managers through legal risk management training. The panelists asserted that although training may allow in-house lawyers to demonstrate their awareness of the value of cooperation, a difference exists between awareness training and expertise. In-house lawyers cannot

POL'Y 1 (2016); McAfee, *supra* note 4; Shackelford, *supra* note 4.

⁷² Haapio, *supra* note 39, at 180.

overwhelm managers with discussions of hazards that may lead to the unintentional stifling of managerial creativity. This suggests a potential limitation on efforts to expand law-related risk management training to individuals outside the legal department.

IV. SIGNIFICANCE OF THE STUDY

Despite the growth of scholarship in recent years highlighting the significance of law to business strategy, scholars have largely failed to identify the techniques needed to put the concepts generated by such discussions into practice. Understanding the interactions between lawyers and managers within the organization will constitute a critical component to bridging the gap between attorneys' and managers' mental models, as well as to the development of collaborative relationships between the two groups.⁷³ Managers and in-house counsel will stand in a better position to work together as strategic partners if corporate managers recognize the importance of law and legal strategy to economic success.⁷⁴

The results of the present study represent a consensus by the study panel on activities for improving workplace collaboration between in-house lawyers and managers. The activities for improving workplace collaboration between in-house lawyers and managers, in turn, represent a subset of possible recommendations for altering

⁷³ Fisher & Oberholzer-Gee, *supra* note 19, at 157.

⁷⁴ Bagley et al., *supra* note 2, at 431.

unreceptive managerial viewpoints toward the strategic value of law within the corporate setting. The findings provide in-house counsel with new perspectives on increasing interdisciplinary collaboration and interprofessional collaboration among diverse individuals, workgroups, and departments across the organization. The general counsel, as a senior member of the corporate legal department, stands in a unique position to work across organizational boundaries and bridge the gap between the legal and non legal spheres of the company.⁷⁵

The results of this study also have significant implications to the development of theory. Traditional scholarship in the respective fields of law and management occupied distinct, non intersecting segments of academic literature.⁷⁶ The results of this study assist in bridging this gap by building new theory within the combined fields of law and management. The consensus-oriented nature of the Delphi design supports the building of practice theory.⁷⁷ By highlighting the positions of consensus between experts through successive waves of data collection, the Delphi study design facilitates the

⁷⁵ Bird & Orozco, *supra* note 2; Karen Cochran, *Leadership and Law: An In-House Counsel's Perspective*, 32 DEL. LAWYER 24 (2014); Dinovitzer et al., *supra* note 26.

⁷⁶ Haapio, *supra* note 54 (Legal scholars historically placed a primary emphasis on risk management and litigation strategy, largely ignoring the relationship between business and law); Bird, *supra* note 73 (Management scholars rarely incorporated analyses of legal issues in their examinations of the critical success factors driving effective business strategies).

⁷⁷ Brady, *supra* note 14, at 2.

formulation of testable theoretical tenets, supports the identification of gaps in the literature requiring further research in follow-up studies, and avoids disagreements among experts that may impede theory building research.⁷⁸

The results of this study also have the potential to affect positive social change at multiple organizational levels. Incorporating the recommendations identified in this study into the development of team building sessions, coaching practices or other collaborative exercises may lead to: (a) reduced anxiety stemming from organizational conflict between managers and in-house counsel; (b) decreased managerial burnout, absenteeism, and turnover due to organizational conflict with in-house counsel; and, (c) decreased workplace resistance between managers and in-house counsel. As noted by Lovett, managerial perspectives of in-house counsel include perceptions that attorneys have excessive authority over decisions affecting the employer-employee relationship, including access to inter-departmental transfers, promotions, benefits, demotions, and terminations.⁷⁹ The implementation of some of the activities for improving workplace collaboration between in-house lawyers and managers identified in this study may help to reduce managerial stress and anxiety by clarifying the roles and responsibilities of in-house counsel with respect to authority over decisions affecting the employer-employee

⁷⁸ *Id.*

⁷⁹ Lovett, *supra* note 6, at 131.

relationship. The mitigation of these managerial concerns may, in turn, lead to a reduction in organizational conflict between managers and in-house counsel. The improvements to employee satisfaction stemming from clarifications of the roles and responsibilities of in-house counsel may help to decrease managerial burnout, absenteeism, and turnover due to organizational conflict with in-house counsel.

Scholars may wish to conduct additional Delphi studies to compare and contrast the results of the present research. As the eligibility criteria in this study confined potential participants to individuals who possessed an ABA-accredited law degree, researchers may wish to seek the views and opinions of attorneys who earned a law degree outside the United States. Further modifications to panel eligibility criteria may include requiring industry-specific experience, a minimum amount of experience in a specific position, or prior professional and academic publications. Scholars may also wish to conduct policy Delphi studies with panels comprised entirely of managers, or combinations of managers and general counsel, to examine any opposing viewpoints between managers and in-house counsel on the study topic. The results of such studies would provide invaluable points of comparison with the results of the present study.

V. CONCLUSION

This study addressed the specific problem of unreceptive managerial viewpoints toward the strategic value of law within the corporate setting.

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Although in-house general counsel working across business industries in the United States stand in a position to develop techniques for altering unreceptive managerial viewpoints toward the law, a lack of consensus exists among them with regard to the techniques best suited to addressing such viewpoints. I asked panelists to provide recommendations in response to the following open-ended question in the first round of the Delphi study: What activities will help improve workplace collaboration between in-house lawyers and managers? The final list of statements refined by the panel in the third round encompassed the following in order of perceived importance: (a) fostering easy-access, open communication between managers and in-house counsel; (b) involving in-house counsel in company business processes; (c) helping lawyers and managers to understand each other's concerns and perspectives; (d) ensuring managers have access to knowledgeable legal counsel; (e) building rapport w/managers, and (f) training on legal risk management techniques. Because of the diverse complexities and challenges inherent to improving collaboration, the results of this study provide valuable insights by highlighting the areas where organizations should direct limited time and resources in conjunction with prioritizing efforts aimed at improving workplace collaboration between in-house lawyers and managers. The findings suggest that organizations seeking to improve workplace collaboration between in-house lawyers and managers should aim to foster easy-access, open communication between managers and

in-house counsel, as well as assist lawyers and managers in understanding each other's concerns and perspectives, ahead of efforts geared toward legal risk management training.

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APPENDIX A

Round 2. Optional Comments

STATEMENT	OPTIONAL COMMENT GENERATED BY PANELIST
Improving workplace collaboration between in-house counsel and managers <i>through training on legal risk management techniques.</i>	May be too dry if presented just as training.
Improving workplace collaboration between in-house counsel and managers <i>by fostering their joint use of information technology and other support tools.</i>	Feasibility depends on the business, technology, and desired outcomes.
Improving workplace collaboration between in-house counsel and managers <i>by fostering their joint use of information technology and other support tools.</i>	I might be a bit of a luddite, but I am generally skeptical of using IT in place of face to face connections
Improving workplace collaboration between in-house counsel and managers <i>by fostering their joint use of information technology and other support tools.</i>	May run the risk of managers thinking that if they use the tech or tools then what they do will always pass legal muster.
Improving workplace collaboration between	Not a 5 because it is a horse to water issue you

in-house counsel and managers <i>by fostering their joint use of information technology and other support tools.</i>	can't always compel people to use shared tools.
Improving workplace collaboration between in-house counsel and managers <i>by ensuring managers have access to knowledgeable legal counsel.</i>	May be tricky in very large companies.
Improving workplace collaboration between in-house counsel and managers <i>by ensuring managers have access to knowledgeable legal counsel.</i>	Similar to #16, just providing access without more affirmative effort to encourage the interaction is unlikely to improve the amount of collaboration. Managers may see that as simply an extra step in their process.
Improving workplace collaboration between in-house counsel and managers <i>by ensuring managers have access to knowledgeable legal counsel.</i>	Presume this is reference to in-house counsel . . . Do not want managers dealing with outside counsel without in-house counsel involvement.
Improving workplace collaboration between in-house counsel and managers <i>by ensuring managers have access to knowledgeable legal counsel.</i>	To differentiate between 17 and 18, I took 18 to mean the in-house counsel themselves. Not all departments have access to either the strength in numbers or skill level to be the knowledgeable

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	legal base for all topics. However being able to secure that knowledge base in a way that provides total coverage at the agreed cost level is the value proposition
Improving workplace collaboration between in-house counsel and managers <i>by involving in-house counsel in company business processes.</i>	See comments for #2 and #9
STATEMENT	OPTIONAL COMMENT GENERATED BY PANELIST
Improving workplace collaboration between in-house counsel and managers <i>by helping lawyers and managers to understand each other's concerns and perspectives.</i>	Only feasible if the business folks heed to the advice of the legal team, and the lawyers understand business' needs.
Improving workplace collaboration between in-house counsel and managers <i>by helping lawyers and managers to understand each other's concerns and perspectives.</i>	Depends on both parties skill level and desirability to grow
Improving workplace collaboration between	Should be a part of the value proposition though

in-house counsel and managers <i>by fostering easy-access, open communication between managers and in-house counsel.</i>	there will always be some variability in skill level even with training of lawyers
Improving workplace collaboration between in-house counsel and managers <i>by helping managers to view lawyers as valued partners rather than deal killers.</i>	Clearly part of the value proposition that we find solutions rather than obstacles but sometimes the risk/reward criteria requires some deals to be killed and often organizations want the lawyer to be willing to do that
Improving workplace collaboration between in-house counsel and managers <i>by helping managers to view lawyers as valued partners rather than deal killers.</i>	this doesn't offer any suggestion on how to change managers opinion and/or shift their view.

Round 3. Explanations of Reasoning

STATEMENT	EXPLANATION OF REASONING GENERATED BY PANELIST
Improving workplace collaboration between in-house counsel and managers <i>by involving in-house counsel in</i>	Depends on the nature of the business and the skills and experience/competence of attorney

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<i>company business processes.</i>	
Improving workplace collaboration between in-house counsel and managers <i>by fostering easy-access, open communication between managers and in-house counsel.</i>	Building channels of communication, by itself, will not resolve the issue.
Improving workplace collaboration between in-house counsel and managers <i>by helping lawyers and managers to understand each other's concerns and perspectives.</i>	Managers probably don't care about lawyers' perspective regarding the business
Improving workplace collaboration between in-house counsel and managers <i>by helping lawyers and managers to understand each other's concerns and perspectives.</i>	Fostering collaboration, by itself, will not resolve the issue.

Round 3. Optional Comments

STATEMENT	OPTIONAL COMMENT GENERATED BY PANELIST
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Improving workplace collaboration between in-house counsel and managers <i>by involving in-house counsel in company business processes.</i>	Advice must be proactive, to the point and unequivocal. Give clear choices.
Improving workplace collaboration between in-house counsel and managers <i>by involving in-house counsel in company business processes.</i>	Of need for lawyer to be successful but also adds value for company
Improving workplace collaboration between in-house counsel and managers <i>through training on legal risk management techniques.</i>	Awareness training, not expertise. Don't overload them with hazards and stifle their ability to make decisions.
Improving workplace collaboration between in-house counsel and managers through training on legal risk management techniques.	Training is one of the ways lawyers can show managers the value of integrated cooperation
Improving workplace collaboration between in-house counsel and managers <i>by fostering easy-access, open communication between managers and in-house counsel.</i>	Also a key value area as lawyers need to be open and available and insert themselves into the business and not act as the book on the shelf or tht they are separate from the business actions.
Improving workplace collaboration between in-	Dialogue is always helpful but doing the

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house counsel and managers <i>by helping lawyers and managers to understand each other's concerns and perspectives.</i>	work is still more important.
Improving workplace collaboration between in-house counsel and managers <i>by ensuring managers have access to knowledgeable legal counsel.</i>	Having access is meaningless unless there is also rapport and confidence that counsel will provide timely, concise and practical advice.
Improving workplace collaboration between in-house counsel and managers <i>by ensuring managers have access to knowledgeable legal counsel.</i>	If you are not competent or available you are of no value.

“WHACK-A-MOLE” REGULATION: CORPORATE INVERSIONS

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This article examines corporate inversions (1989-2017), considering industry sector, the applicable Treasury regulations and the overseas earnings of corporate inverters to make the following findings: (1) inversions have moved from the islands to the continent with the United Kingdom and Ireland benefitting the most since 2010, (2) the oil and gas industry accounted for the majority of inversions pre-2010 but has been replaced by pharmaceuticals and services, and (3) the various attempts at regulation, from the initial challenge of the IRS to the maneuver as tax evasion, have all failed to provide a permanent solution. Recommendations to policy makers are included.

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INTRODUCTION

Tax experts concede that the U.S. tax code has resulted in a confused web of associated regulations. Congress has been reluctant to, some say incapable of, simplifying matters. In chaos lies opportunity,¹ so through the adept navigation of this confused web, individuals and corporations alike have avoided taxation by the U.S. government. While technically legal, “tax avoidance,” the kinder gentler twin of “tax evasion” done especially by the wealthiest members of a nation, undeniably places a drain on government revenues. Governments have been frustrated by their inability to collect a fair share of taxes. The 2013 Congressional Hearings involving the CEO of Apple, Tim Cook, resulted in a feeble accusation that Apple was being unpatriotic by not paying its fair share of income taxes to the U.S. in spite of the concession of no illegal conduct.²

The U.S. had one of the highest statutory corporate tax rates when compared to its sovereign peers.³ Combine that rate with the U.S. rule of taxing

¹ Commonly attributed to Sun Tzu, Chinese General and Philosopher, (544-496 B.C.)

² *Offshore Profit Shifting and the U.S. Tax Code-Part 2 (Apple Inc.): Hearing Before the Homeland Security & Governmental Affairs Permanent Subcomm. on Investigations* (May 21, 2013),

http://www.hsgac.senate.gov/subcommittees/investigations/hearings/offshore-profit-shifting-and-the-us-tax-code_-part-2.

³ While the Tax Cuts and Jobs Act of 2017 permanently lowered the corporate tax rate to 21% from 35% and moved the US closer towards a territorial taxing system, its long-term impact on issues raised in this paper remain to be seen.

all income no matter where earned, and problems arise for multinational corporate taxpayers. Although the U.S. attempts to resolve these problems through devices such as tax treaties and foreign tax credits, fuzziness remains. A recent tactic of corporate tax avoidance is the inversion. An inversion allows a U.S. corporation to purchase a foreign corporation in a tax friendly domicile and invert the new entity to be a taxpayer in that friendlier jurisdiction. All the while, both corporations continue to conduct business as usual.⁴

The practice of inversions began in 1982, after Davis, Polk & Wardwell partner John Carroll Jr. proposed a simple yet unconventional solution to his client's taxation problems: To keep the profits at their untaxed level, the client would transform their foreign subsidiary into the parent company through various transactions that flipped the corporate structure. A Bloomberg analyst described it thus: "There was something screwy about the plan, like a daughter legally adopting her own mother, and the details were staggeringly complicated, involving share swaps, dividends, and debt guarantees."⁵ The now foreign parent would pay taxes in the foreign

⁴ Maria S. Domingo, *Corporate Inversions: The Unfolding Battle between the IRS and Multinational Corporations*, 5 ROCKY MOUNTAIN L. J. 7 (2016); Eric L. Talley, *Corporate Inversions and the Unbundling of Regulatory Competition*, 101 U. VA. L. REV. 1650 (2015).

⁵ Zachary Mider, *The Greatest Tax Story Ever Told*, BLOOMBERG BUSINESSWEEK (Dec. 18, 2014, 4:00 AM), <http://www.bloomberg.com/news/features/2014-12-18/i-hear-america-singing-never-pay-taxes-the-inversion-operetta>. Mr. Mider won a Pulitzer Prize for this story in 2014.

jurisdiction at a lower corporate rate. The exploitation of this loophole was termed the “Panama Scoot” and the “Flip Flop,” finally becoming an “inversion.” It was a brave step into the realm of tax law by this unlikely corporate hero.⁶ The IRS fought back over seven years challenging the maneuver, but the inversion procedure was ultimately deemed legal and flourished in the mid-1990s. The subsequent tax code revisions following this first inversion only made the loopholes more intricate and challenging for lawyers to exploit.⁷

This paper will examine inversions as to frequency, regulatory “whacks” (i.e. attempts at regulation), nationality of the firms involved, the countries benefitting from the inversions and finally the retained earnings of a few key U.S. companies seeking inversions. Observations will be drawn from a review of this data and conclusions made as to the efficacy of U.S. attempts to “whack the mole,” i.e. stop inversions.

⁶ John Carroll is described in the Mider piece as the inventor of the currency swap and an anti war activist who penned an operetta performed in his Manhattan apartment to celebrate his inversion victory over the IRS. *See id.* He has over 28,000 followers on Twitter and edits his own biotech investment news site analyzing big pharmaceuticals involvement in inversions. *See* John Carroll (@JohnCendpts), TWITTER, <https://twitter.com/JohnCendpts> (last visited Aug. 1, 2018).

⁷ 2004 law designed to keep CEOs from switching corporate headquarters for taxation avoidance purposes.

I. INVERSIONS EXPLAINED

In an inversion, the operational structure of the corporation remains virtually unchanged. The company merely alters its “home address” or residence, and the inversion is completed through a series of transactions that transfer ownership, via purchases of both shares and other assets often carried out by the shareholders of the parent company.⁸ Corporations are still obligated to pay taxes on income earned in the United States, but can now avoid the expatriation taxes on earnings from other countries and generally only pay the new country’s taxes on earnings. For this reason, countries like Bermuda and Ireland are the international hot spots for relocation due to their very low corporate tax rates.⁹

Clearly, the nature of inversions gives corporations a number of incentives. Many claim inversions are necessary to stay competitive with other multinationals, a dubious justification given the

⁸ Kyle Pomerleau, *Everything You Need to Know About Corporate Inversions*, TAX FOUNDATION (Aug. 4, 2014), <http://taxfoundation.org/blog/everything-you-need-know-about-corporate-inversions>.

⁹ Ireland, for example, is willing to engage in ‘sweetheart deals’ with large multinational corporations and give them even lower corporate rates in exchange for local investment: e.g. their agreement with Apple reduces Apple’s tax rate from 12.5% to 6.5%. See Lee Sheppard, *The EU Case Against Apple’s Irish Tax Deal*, FORBES (Sept. 5, 2016, 7:02 PM), <http://www.forbes.com/sites/leesheppard/2016/09/05/the-eu-case-against-apples-irish-tax-deal/#1f31c7a57e2b>.

trend of rising corporate profits across the board.¹⁰ Corporate taxpayers also cite lower tax rates and avoiding taxation on foreign earnings as the principal motivators to divorcing themselves from the U.S. tax code. A major long-term strategy of inversions also relies on the taxation structure of deferred earnings. Once the inversion is complete, corporate taxpayers are often able to access and withdraw these billions of dollars in deferred earnings without incurring U.S. taxes.¹¹ By delaying access of U.S. based earnings until the company gains legal citizenship in a tax haven, these untaxed earnings can then be strategically used by the former U.S. entity, all while avoiding the U.S. tax.

II. INITIAL “WHACKS”

Since the first “Flip Flop,” there have been approximately 90 inversions.¹² The initial spurt occurred between 1983 and 2004. The first whack

¹⁰ Alexandra Thornton, *The Skinny on Corporate Inversions*, CTR. FOR AMER. PROGRESS (Sept. 25, 2014, 12:35 PM), <https://www.americanprogress.org/issues/economy/reports/2014/09/25/97827/the-skinny-on-corporate-inversions/>.

¹¹ It has been statistically proven that inversions give companies an economic boost in terms of their increased profit margins: “[A]n analysis of the returns associated with those inversions that occurred between 1993 and 2013 suggests that these reorganizations were associated with statistically and economically significant abnormal returns on the order of 225% above market returns over the same period.” See Elizabeth Chorvat, *Expectations and Expatriations: A Long-Run Event Study* (Univ. of Chicago Public Law Working Paper), Sept. 20, 2015.

¹² See Figure 1, attached herein the Appendix.

involved the IRS challenging the practice, however that failed.¹³ Regulators then made it much more difficult for a corporation to transfer its citizenship. The second whack came in the form of the American Jobs Creation Act of 2004; here, continuity of ownership rules were implemented on inversions so that the new entity, if 80% owned by the US parent, could not escape U.S. taxes.¹⁴ The “mole” soon reappeared in the “decade of inversions,” and multiple corporations successfully completed inversion transactions between 2004 and 2014.¹⁵

In 2014, the proposed inversion of Tim Hortons and Burger King garnered significant public attention. With this merger, Burger King Worldwide Inc. (U.S.) sought to purchase Tim Hortons Inc. (Can.), relocating its headquarters to Canada in order to take advantage of the significantly lower corporate tax rate. This deal “re-ignited the controversy over American companies moving their headquarters abroad to secure lower tax rates.”¹⁶ Even though pharmaceutical companies were also engaged in inversions during this period, it was the public familiarity with Burger King that served as the catalyst for tax reform. Burgers and fries are what America “runs on,” with donuts a close second, so

¹³ *Bhada v. Comm’r*, 892 F.2d 39 (6th Cir. 1989).

¹⁴ 2004 TNT 202-33 amending the 1986 Tax Reform Act.

¹⁵ See Figure 1, attached herein the Appendix.

¹⁶ Jessica Glenza & Heidi Moore, *Burger King Faces Tax Controversy after \$11bn Tim Hortons Purchase*, THE GUARDIAN (Aug. 26, 2014), <http://www.theguardian.com/business/2014/aug/26/burger-king-tim-hortons-11bn-deal>.

the Burger King inversion brought the full force and effect of public scrutiny to the transaction: compare this to pharmaceutical companies who engage in inversions with protestations mostly coming from regulators and investors. Pfizer, as addressed later, is a notable exception.

In the announcement of the transaction, Burger King cited access to more competitive menu items, heightened revenue streams, and alignment with their international expansion model, all as valid business reasons to acquire Tim Hortons. In reality, the advantage it would gain from lowered tax rates had to be an equally, if not more of an important motivator, “the company’s foreign profits come to around \$98.15 million. This profit is taxed again at U.S. corporate tax rate of 35%, which amounts to \$34.35 million in taxes.”¹⁷ These taxes would be saved through inverting the corporate structure. By bringing awareness of inversions to the general public, the Burger King transaction sparked regulatory action. On September 22, 2014, barely a month after the merger announcement, the Treasury Department released its comprehensive rules designed to prevent exploitative inversions.¹⁸

¹⁷ Trefis Team, *Burger King-Tim Hortons Cross-Border Merger Much More Than Tax Inversion*, FORBES MAG. (Aug. 29, 2014), <http://www.forbes.com/sites/greatspeculations/2014/08/29/burger-king-tim-hortons-cross-border-merger-much-more-than-tax-inversion/>.

¹⁸ Notice 2014-52, *Rules Regarding Inversions and Related Transactions*, INTERNAL REVENUE BULLETIN: 2014-42 (Oct. 14, 2014), https://www.irs.gov/irb/2014-42_IRB/ar07.html.

III. COMPREHENSIVE ‘WHACK’: TREASURY REGULATORY CHANGES OF 2014

The goal of these regulations was to close the loopholes that fueled inversions over the last decade. By issuing regulations covering ongoing inversions as well as planned inversions, the Treasury hoped to ‘whack the mole’ on the front end and should the mole escape, catch it on the back end. Specifically aimed at sections 7874 and 367 of the Internal Revenue Code (“IRC”), this reform changes parts of sections 304(b)(5)(B), 367, 956(e), 7701 (I), and 7874, as discussed below.

A. Regulations During Inversion Transactions

1. Domestic (U.S. based) corporations avoid taxation on the domestic corporation by reducing the reported “inversion gain” that occurs when they are acquired by a foreign corporation. Section 7874 outlines the formula that determines what will be included and excluded from the taxable inversion gain. Previously, nonqualified property¹⁹ could be exchanged during acquisition transactions in order to reduce the ownership fraction.²⁰ Because the

¹⁹ The term nonqualified property means (i) cash or cash equivalents, (ii) marketable securities, (iii) certain obligations, or (iv) any other property acquired in a transaction related to the acquisition with a principal purpose of avoiding the purposes of section 7874.

²⁰ Under section 7874(c)(2)(B) (statutory public offering rule), stock of the foreign acquiring corporation that is sold in a public offering related to the acquisition described in section 7874(a)(2)(B)(i) is excluded from the denominator of the

ownership fraction determines the taxable income of the corporation, its reduction also results in a reduction of taxes.

To “whack this mole,” nonqualified property of the foreign corporation will now be excluded from the equation generating the ownership fraction, as long as the nonqualified property constitutes more than 50% of the foreign corporation’s property.²¹ This should generate a higher taxable income and therefore higher U.S. taxes.

2. Section 367 concerns the transfer of property from a United States person to a foreign corporation. In order to record the gain of the transfer, the foreign corporation is considered a person.²² The classification of the foreign

fraction used for purposes of calculating the ownership percentage described in section 7874(a)(2)(B)(ii) (ownership fraction). The statutory public offering rule furthers the policy that section 7874 is intended to curtail transactions that allow the benefits of an inversion but "permit corporations and other entities to continue to conduct business in the same manner as they did prior to the inversion."

²¹ If the 50 percent threshold is satisfied, the portion of the stock of the foreign acquiring corporation that will be excluded from the denominator of the ownership fraction is the product of (i) the value of the stock of the foreign acquiring corporation... and (ii) a fraction (foreign group nonqualified property fraction), the numerator of which is the gross value of all foreign group nonqualified property, and the denominator of which is the gross value of all foreign group property.

²² If a United States person transfers property to a foreign corporation in an exchange described in section 332, 351, 354, 356, or 361, the foreign corporation shall not be considered a corporation for purposes of determining the extent to which the United States person recognizes gain on such transfer.

corporation as a person is dependent on passing several tests, namely the substantiality test. This test requires that the fair market value of the foreign corporation be equal to, if not greater than, the fair market value of the domestic company.²³ Because reducing the value of the domestic corporation is paramount to completing the inversion, there exists the incentive to underestimate its value. To reduce the fair market value of the domestic corporation in order to balance (or rather unbalance) the scale in comparison to the foreign acquiring corporation, property may be distributed to former shareholders or partners.²⁴ This reduces the ownership fraction and allows the inversion transaction to proceed.

The Treasury will now more carefully scrutinize the distribution of property during the 36-month period preceding the inversion. By comparing distributions within this period to past percentages of distributions, some will be excluded from the calculation of the ownership fraction thus impacting the substantiality test and reducing the income attributed to the foreign company.

3. Section 7874 of the IRC also regulates the transfer of stock from the foreign corporation to the domestic corporation owned by the U.S. parent.

²³ The substantiality test is satisfied if, at the time of the transfer, the fair market value of the transferee foreign corporation is at least equal to the fair market value of the U.S. target company.

²⁴ A domestic entity may distribute property to its former shareholders (within the meaning of §1.7874-2(b)(2)) or former partners (within the meaning of §1.7874-2(b)(3)), in order to reduce the ownership fraction by reducing the numerator.

Customarily, the parent will transfer the stock of the domestic corporation to the foreign corporation in exchange for the foreign corporation's stock. The foreign stock, however, is excluded from the ownership fraction for the parent company and thus remains a foreign corporation. To get around this exclusion, the foreign corporation stock is instead transferred to a former partner or shareholder during the acquisition.²⁵ In particular, the foreign stock can be transferred to minority shareholders as well as the parent corporation. This skews the ownership fraction, and the foreign corporation can now be considered domestic.

To counter this, the 2014 Treasury regulations include the stock of the foreign corporation in both the numerator and denominator of the ownership fraction.²⁶ This creates a zero net effect due to the foreign corporation's status, while still recognizing the transfer of stock between

²⁵ Section 1.7874-5T addresses the effect on the numerator of the ownership fraction when former shareholders or former partners of the domestic entity receive stock of the foreign acquiring corporation by reason of holding stock or a partnership interest in the domestic entity and then transfer that stock to another person

²⁶ If stock of the foreign acquiring corporation described in section 7874(a)(2)(B)(ii) (that is, stock of the foreign acquiring corporation held by reason of) is received by a former corporate shareholder or former corporate partner of the domestic entity (transferring corporation), and, in a transaction (or series of transactions) related to the acquisition, that stock (transferred stock) is subsequently transferred, the transferred stock is not treated as held by a member of the EAG for purposes of applying the EAG rules

entities. Although the aforementioned provisions are designed to discourage inversions, some of the regulations accept that inversions have or will occur and offer more disincentives after the fait accompli.

*B. Regulations Pertaining to Completed
Inversions*

1. Section 956 of the IRC is intended to tax earnings of those with a significant share in a controlled foreign corporation (“CFC”).²⁷ In the case of an inversion transaction, the U.S. shareholders of the CFC were able to avoid both a tax on dividends or on investment in U.S. property.²⁸ To prevent this, expatriated subsidiaries are now classified as CFCs. More specifically, the obligations and stock of these inverted corporations will still be

²⁷ Section 957(a) defines a CFC as a foreign corporation with respect to which more than 50 percent of the total combined voting power of all classes of stock entitled to vote or the total value of the stock of the corporation is owned (directly, indirectly, or constructively) by United States shareholders (U.S. shareholders). Section 951(b) defines a U.S. shareholder as a U.S. person that owns (directly, indirectly, or constructively) 10 percent or more of the total combined voting power of all classes of stock entitled to vote of the foreign corporation.

²⁸ Section 956 is intended to prevent a U.S. shareholder of a CFC from inappropriately deferring U.S. taxation of CFC earnings and profits by “prevent[ing] the repatriation of income to the United States in a manner which does not subject it to U.S. taxation.”

considered U.S. property and therefore remain subject to U.S. taxation.²⁹

2. The regulations included in sections 7701,³⁰ 964,³¹ 954,³² and 367,³³ attempt to end an expatriated foreign subsidiary’s classification as a CFC. One method has the foreign acquiring

²⁹ Any obligation or stock of a foreign related person (within the meaning of section 7874(d)(3) other than an “expatriated foreign subsidiary”) (such person, a “non-CFC foreign related person”) will be treated as United States property within the meaning of section 956(c)(1) to the extent such obligation or stock is acquired by an expatriated foreign subsidiary during the applicable period (within the meaning of section 7874(d)(1)).

³⁰ Section 7701(l) provides that “[t]he Secretary may prescribe regulations re-characterizing any multiple-party financing transaction as a transaction directly among any 2 or more of such parties where the Secretary determines that such re-characterization is appropriate to prevent avoidance of any tax imposed [under the Code].”

³¹ Section 964(e)(1) provides that if a CFC sells or exchanges stock in any other foreign corporation, gain recognized on such sale or exchange is included in the gross income of the CFC as a dividend to the same extent that it would have been so included under section 1248(a) if the CFC were a United States person.

³² Section 954(c)(6)(A) provides that, for purposes of section 954(c), dividends, interest, rents, and royalties received or accrued from a CFC which is a related person shall not be treated as foreign personal holding company income to the extent attributable or properly allocable (determined under rules similar to the rules of subparagraphs (C) and (D) of section 904(d)(3)) to income of the related person which is neither subpart F income nor effectively connected income.

³³ Certain exchanging shareholders of the foreign acquired corporation must include in income as a dividend the section 1248 amount (as defined in § 1.367(b)-2(c)(1)) attributable to the stock of the foreign acquired corporation exchanged.

corporation transfer property to the domestic corporation in exchange for at least 50% of the voting stock. As voting stock makes up the defining characteristic of a CFC, the foreign (expatriated) corporation would no longer be classified as a CFC, and U.S. shareholders could even access pre-inversion earnings free from taxation. The regulations reclassify these transactions, which had previously allowed foreign acquiring corporations to dilute and terminate CFCs, thus keeping income and earnings subject to taxation in the U.S. It is no longer possible to transfer stock to a non-CFC related person in order to avoid taxation on the company's earnings as a whole. This also applies to dividends issued by the CFC, which will remain subject to regular taxation. The second portion of the regulation applies to section 367(b)³⁴ and relies on the same principle applied to section 7701(I).

3. Section 304 concerns the distribution of property between owners or shareholders, specifically between a person and either the acquiring or issuing corporation during an inversion.³⁵ This is intended to prevent tax

³⁴ The Treasury Department and the IRS intended to amend the regulations under section 367(b) to provide that an exchanging shareholder described in § 1.367(b)-4(b)(1)(i)(A) will be required to include in income as a deemed dividend the section 1248 amount attributable to the stock of an expatriated foreign subsidiary exchanged in a "specified exchange," without regard to whether the conditions set forth in § 1.367(b)-4(b)(1)(i)(B) are satisfied.

³⁵ The provision prevents the foreign acquiring corporation's E&P from permanently escaping U.S. taxation by being deemed to be distributed directly to a foreign person (i.e., the

avoidance by recognizing that the stock is being passed through an intermediary before being distributed to a person. However, the exchange of property for the stock of the domestic corporation can be used to essentially water down a CFC following an inversion. When the domestic corporation acquired by the foreign company owns a CFC, the acquiring corporation can reduce domestic ownership in the CFC through a series of transactions. This lowers the earnings of the CFC, allowing a greater amount of the CFC’s property and cash to be acquired domestically free from taxation. The earnings of the expatriated issuing corporation (which owns the CFC) are ignored, with the focus instead placed on the newly formed inverted partnership.³⁶ The Treasury Department allows for discretion, specifically when it may appear that the inversion has the *intention* of avoiding taxation, and possibly even tax evasion.

If these 2014 regulations had been effective at whacking the mole, inversions should have ceased. The following section of the paper reviews the

transferor) without an intermediate distribution to a domestic corporation in the chain of ownership between the acquiring corporation and the transferor corporation.

³⁶ The Treasury Department and the IRS intend to issue regulations providing that, for purposes of applying section 304(b)(5)(B), the determination of whether more than 50 percent of the dividends that arise under section 304(b)(2) is subject to tax or includible in the earnings and profits of a CFC will be made by taking into account only the earnings and profits of the acquiring corporation (and therefore excluding the earnings and profits of the issuing corporation).

inversions in place at the time of these regulations to demonstrate any effects, if any.

IV. REPRESENTATIVE INVERSIONS

At the time of the announcement of the 2014 regulations, eleven companies were in the process of completing inversion purchases, included were:³⁷

U.S. Company:	Seeking to purchase:
Applied Materials.....	Tokyo Electron (Netherlands)
Chiquita Brands International.....	Fyffes (Ireland)
Horizon Pharma.....	Vidara Therapeutics (Ireland)
Allergan.....	Valeant (Canada)
Pfizer.....	AstraZeneca (U.K.)
Medtronic.....	Covidien (Ireland)
AbbVie.....	Shire (U.K.)
Walgreen.....	Alliance Boots (Switzerland)
Salix Pharmaceuticals.....	Cosmo Technologies (Ireland)
Burger King.....	Tim Hortons (Canada)
Mylan.....	Abbott (Netherlands)

These became the moles for the effectiveness of the whack of these latest regulations. Even those behind the creation of the regulations noted their limited reach without passage of new legislation.

The 2014 regulations made inversions an important issue to the public and planted the issue squarely at Congress's door. Companies such as Burger King and Mylan successfully completed their transactions; however, these inversions do not necessarily mark the regulations as a failure. For similar reasons, Salix also ceased their inversion transaction in the wake of the new regulations. Hence

³⁷ See Figure 1 attached as an Appendix herein for complete list of inversion transactions.

the conclusion may be drawn that the 2014 whack successfully hit some moles.

V. THE LATEST WHACK: 2016 TREASURY RULES

There have been successful inversions since the 2014 regulations. In terms of inversions completed per year, a direct comparison of the period between 2004 and 2014 (“the decade of inversions”) to the time after the passing of the regulations, through to the present, is instructive.³⁸ From 2004 to 2014, almost five inversions occurred per year for a total of 47, while from September 2014 to August 2016, 13 inversions were completed.³⁹ Clearly, inversions have not slowed since the 2014 regulations.

As recently as April 2016, the Treasury along with the IRS, issued further rules designed to prohibit inversions.⁴⁰ The IRS issued its proposed rulemaking under section 385 designed to further control the characterization of debt in related party transfers.⁴¹ These rules had an almost immediate effect: Pfizer’s mega billion planned merger with

³⁸ See Figure 1, attached herein the Appendix.

³⁹ See Figure 2.

⁴⁰ See *Fact Sheet: Treasury Issues Inversion Regulations and Proposed Earnings Stripping Regulations*, US DEP’T OF THE TREASURY (April 4, 2016), <https://www.treasury.gov/press-center/press-releases/Pages/jl0404.aspx> (describing the extent of the temporary April regulations).

⁴¹ *Reg.-108060-15*, INTERNAL REVENUE BULLETIN: 2016-17 (April 25, 2016), https://www.irs.gov/irb/2016-17_IRB/ar07.html.

Allergan (tax domicile Ireland) and CF Industries, a U.S. fertilizer giant acquisition of European entities from OCI of the Netherlands, both ceased.⁴² The rules targeted firms with a history of inverting and earnings stripping.⁴³ The new rules require that these intra-company transactions be treated as stock based, not debt based, thus removing the interest deduction. They also place a three-year freeze on using the value of the U.S. company to offset any gain, discouraging serial inverters.⁴⁴ The U.S. corporate community took action at this point. The U.S. Chamber decided to challenge this latest set of regulations and on August 4, 2017, along with the Texas Association of Business, filed suit in federal district court arguing that Treasury and the IRS had abused their rulemaking powers in adopting these regulations.⁴⁵

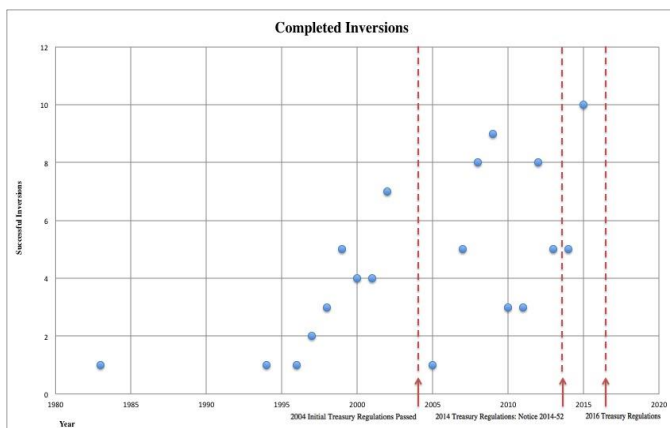
⁴² Chad Bray, *Fertilizer Deal Called off over New Tax Inversion Rules*, N.Y. TIMES (May 23, 2016), http://www.nytimes.com/2016/05/24/business/dealbook/us-netherlands-cf-oci-nitrogen-inversion.html?_r=0.

⁴³ The parties to the inversion, i.e. related entities, enter into loans then use the interest on those loans to offset earnings thus reducing tax liability.

⁴⁴ See *Fact Sheet: Treasury Issues Inversion Regulations and Proposed Earnings Stripping Regulations*, US DEP'T OF THE TREASURY (April 4, 2016), <https://www.treasury.gov/press-center/press-releases/Pages/jl0404.aspx> (describing the extent of the temporary April regulations).

⁴⁵ U.S. Chamber of Commerce and the Tex. Ass'n of Bus. v. U.S. Treasury and the IRS, No. 1:16-CV-944 (W.D. Tex. 2016).

Figure 2: Inversions over time



VI. ANALYSIS OF OVERSEAS EARNINGS

As with most inversions, tax avoidance is the driving force. To establish patterns in corporate behavior, this paper analyzed the overseas earnings and taxes paid of seven corporations engaged in inversion activity: AbbVie, Applied Materials Inc., Burger King Holdings Inc., Chiquita Brands, Medtronic, Mylan N.V. and Pfizer. A clear pattern of rising foreign retained earnings is replicated in all the companies. However, effective tax rates differ. The selected tables below demonstrate the patterns.

A. *AbbVie*

Figure 3

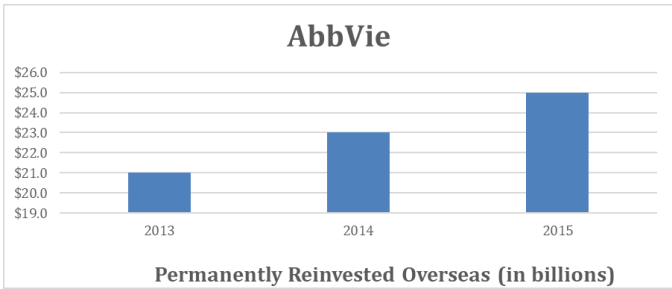
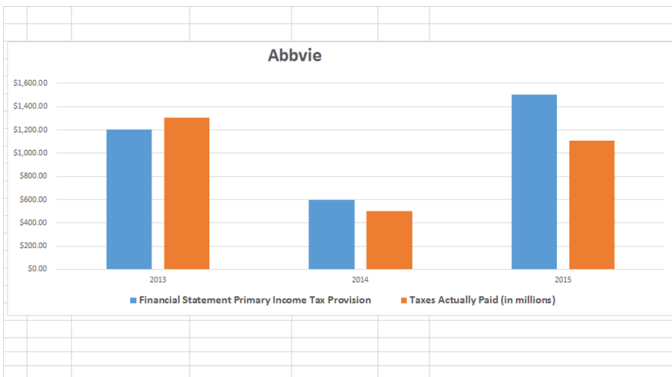


Figure 4

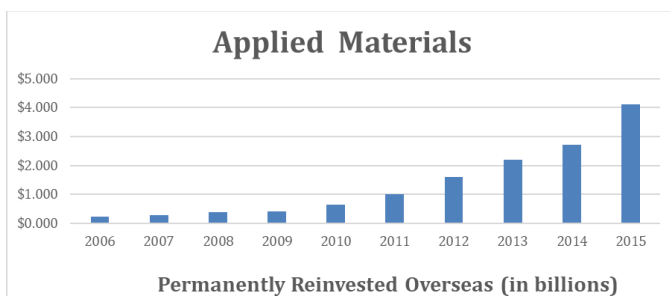


AbbVie Inc. is a U.S. corporation that fell victim to the initial round of regulations. It is a biopharmaceutical company that was trying to buy an Irish corporation, Shire, and reincorporate the new entity in Britain to take advantage of lower corporate

taxes.⁴⁶ AbbVie called a halt to its takeover citing the regulations as the cause. According to AbbVie, the 2014 regulations represented an unacceptable level of risk, and its CEO lashed out at the U.S. tax code, saying, “The unprecedented unilateral action by the U.S. Department of Treasury may have destroyed the value in this transaction, but it does not resolve a critical issue facing American businesses today.”⁴⁷ The critical issue remains the U.S. corporate tax rate.

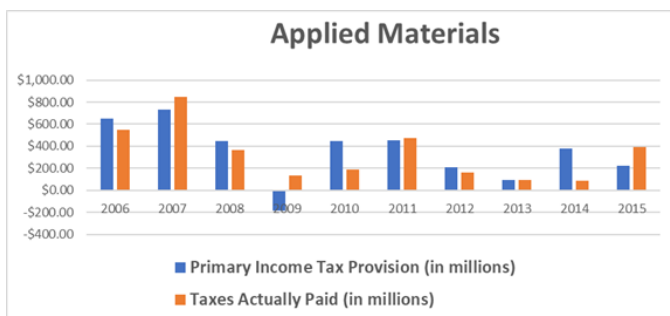
B. Applied Materials Inc.

Figure 5



⁴⁶ Brian Solomon, *Inversion Implosion: AbbVie-Shire Merger Officially Dead*, FORBES (Oct. 20, 2014), <http://www.forbes.com/sites/briansolomon/2014/10/20/inversion-implosion-abbvie-shire-merger-officially-dead/#2598bde344b6>.

⁴⁷ David Gelles, *After Tax Inversion Rules Change, AbbVie and Shire Agree to Terminate Their Deal*, N.Y. TIMES (Oct. 20, 2014), <http://dealbook.nytimes.com/2014/10/20/abbvie-and-shire-agree-to-terminate-their-deal/>.

Figure 6

Applied Materials, a U.S. manufacturer of semiconductors, was negotiating a ten billion dollar merger with Tokyo Electron (Jap). The plan was to incorporate the new entity in the Netherlands taking advantage of lower tax rates. The merger had to be approved by the Department of Justice, who refused to approve the deal claiming it would violate antitrust laws by creating market control in a sector necessary to the production of most, if not all, consumer electronics.⁴⁸ Even though Applied Materials demonstrated the foreign revenue earnings increase as all the corporations did, it had clearly figured out its tax liability. The tax table shows it paid the most in U.S. income tax in 2007 and that recent tax payments are well below its average.

⁴⁸ Jonathan Soble, *Applied Materials and Tokyo Electron Call Off \$10 Billion Merger*, *N.Y. Times* (April 27, 2015), http://www.nytimes.com/2015/04/28/business/dealbook/makers-of-chip-gear-call-off-10-billion-merger.html?_r=0.

C. Pfizer Allergan

The proposed merger of Pfizer with Allergan, both pharmaceutical giants, presented a different case. This deal, valued at approximately \$160 billion, would simultaneously move Pfizer’s tax base to Ireland while also creating the largest pharmaceutical company in the world. Not only did it raise inversion issues, but those of antitrust on both sides of the Atlantic. The analysis of an independent tax expert surmised that, “the deal will likely decrease Pfizer’s tax rate from around 25% to 7.5%. And will probably go lower than that. I think they may end up having one of the lowest effective tax rates of any company on the planet.”⁴⁹

On April 4, 2016, the Treasury passed their most recent regulatory notice, which was largely dedicated towards preventing earnings stripping during inversions. This whack was the final blow to Pfizer and resulted in the ultimate collapse of their deal, but it is much too soon to declare the newest regulations an overwhelming success. Even the regulations indicate they are a “temporary” solution. The Treasury admonishes Congress that its action is the only viable method of long-term reform. Clearly, the Treasury can only whack the mole, Congress will have to exterminate it.

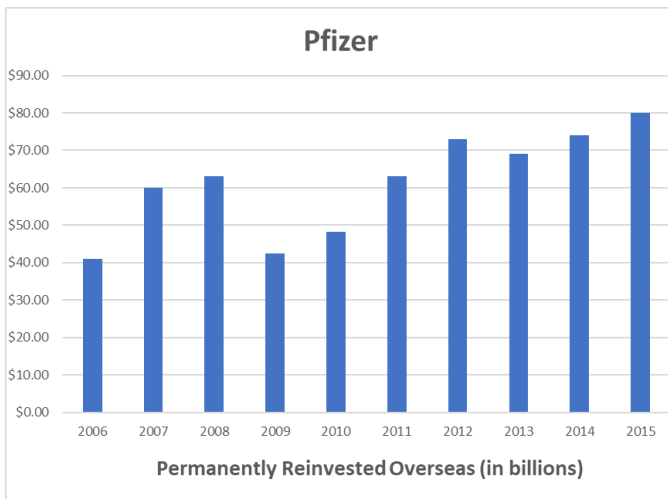
Allergan’s CEO accused the Treasury of issuing unpatriotic rules that place U.S. companies at a disadvantage in the global arena.⁵⁰ It appears to be

⁴⁹ *Id.*

⁵⁰ *Id.* (“Allergan Chief Executive Brent Saunders criticized as ‘un-American’ and ‘capricious’ the new Treasury Department

U.S. policy to offer the stick, rather than the carrot, in order to keep corporations at home. Rather than incentivizing a U.S. tax base, the government has imposed harsh rules that often block outright corporate inversions and the expatriation of tax revenue.

Figure 7



rules that scuttled the tie-up with Pfizer. ‘The rules are focused on the wrong thing: Our government should be focused on making America competitive on a global stage, not building a wall locking companies into an uncompetitive tax situation.’).

Figure 8



D. Burger King Worldwide Inc.

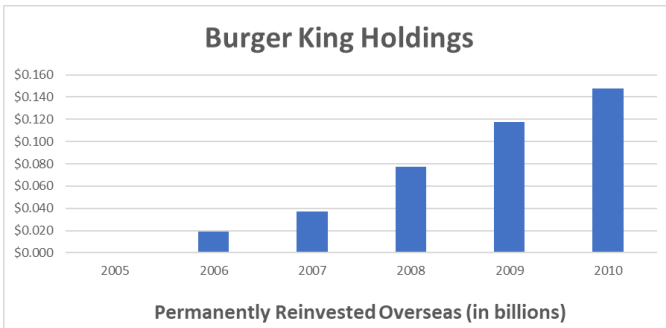
The BK/Tim Hortons merger was valued at \$11 billion and required the approval of the Canadian government before it was finalized in December of 2014.⁵¹ The headquarters of the new entity, New Red Canada Partnership (Can.), are located in Canada for the tax benefits.⁵² BK is estimated to

⁵¹ AMERICANS FOR TAX FAIRNESS, WHOPPER OF A TAX DODGE: BOW BURGER KING’S INVERSION COULD SHORTCHANGE AMERICA (Dec. 2014), <http://www.americansfortaxfairness.org/files/ATF-Burger-King-Report-Whopper-of-a-Tax-Dodge-Dec-8-EMBARGOED.pdf>.

⁵² *Long-awaited Burger King-Tim Hortons Merger Completed*, ZACKS EQUITY RESEARCH (Dec. 15, 2014),

save over \$400 million in tax liability through 2018, and its shareholders could avoid over \$800 million in capital gains tax.⁵³ In a blistering report from Americans for Tax Fairness, the think tank accuses BK of being unpatriotic as BK is the largest provider of burgers and fries to the U.S. military, and BK's failure to pay a fair tax could mean the troops who eat their food will not have the support they need. This inversion is avoiding a substantial amount of U.S. tax through application of the classic inversion moves.

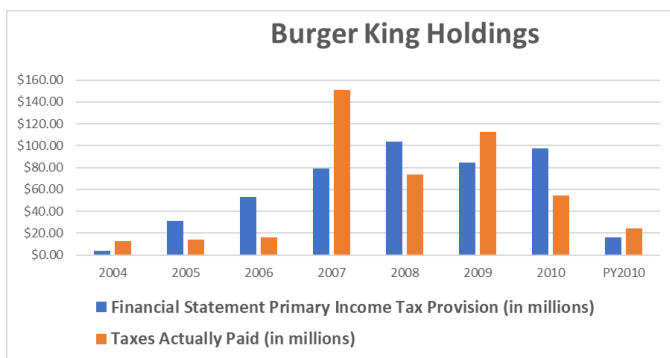
Figure 9



<https://www.zacks.com/stock/news/157418/longawaited-burger-kingtim-hortons-merger-completed>.

⁵³ *Id.*

Figure 10



For all of the companies examined the figures above demonstrate a clear incentive to invert. BK overseas earnings grew at a significant pace from 2004 to 2010. Without a mechanism to repatriate these earnings, BK resorted to the inversion tactic.

VII. FINDINGS

Clearly each whack has stopped some inversions: Applied Materials, Chiquita, Allergan, Pfizer and Abbvie. Nonetheless inversions continue and in fact some who were thwarted have ultimately been successfully completed.⁵⁴ From Figure 1 it is obvious that inversions have not stopped.

A review of the nature of the companies engaged in inversion behavior yields the surprising result that oil, gas and mining has been the

⁵⁴ See *Coca-Cola Bottlers Agree Three-way Europe Merger*, FINANCIAL TIMES, <https://www.ft.com/content/10fd9c9e-3c2a-11e5-bbd1-b37bc06f590c>.

predominant inversion industry up until 2010 at which time pharmaceuticals took over: almost half of the inversions completed since 2010 have involved pharmaceuticals⁵⁵ Since patents are the most valuable assets of pharmaceuticals, paper transactions are expedient.

Similarly, over time one can observe that the destination hub of inversions has moved from the islands (Bermuda, Cayman Islands...) to Europe and Canada. Of the inversions completed since 2010 over 90% have gone to Europe, with the biggest winners the United Kingdom and Ireland tied at ten each. In the ever increasingly competitive global market no one is exempt from becoming a tax haven, not even our friends to the north. The BK Tim Hortons inversion in Canada sparked the most interest and arguably jolted the Treasury to action in adopting the 2014 regulations.

Although inversions are permissible for legitimate and well-articulated business reasons such as product expansion, market penetration, or global efficiency, the underlying suspicion is that they are designed around tax avoidance. In order to test this hypothesis we examined the annual reports of the leading inverters specifically looking at their foreign retained earnings. Foreign retained earnings cannot be repatriated without being taxed at the U.S. corporate rate hence inverters are likely to be sitting on overseas earnings and when they reach a critical point, they invert to get access to those funds. The examination of foreign retained earnings in inverters showed a common pattern of steady growth until the

⁵⁵ See Figure 1 attached herein the Appendix.

inversion attempt. Included here are the graphs of four companies contemplating inversions: Abbvie, Applied Materials, Pfizer and BK.⁵⁶ Of these four, only BK was able to successfully invert—the others falling victim to the ‘whacks’ of regulation.

VIII. THE FUTURE FOR INVERSIONS

Corporations will continue to benefit from incomplete regulations and complete lack of statutory reforms. Inversions are a continuing cause of contention for politicians. It appears unjust, and indeed unfair, that a corporation, which enjoys all of the benefits of being a natural person and U.S. citizen, does not pay its perceived fair share of taxes. The Treasury regulations, however, are not a complete solution. They failed to contain all of the inversions they were designed to prevent. The Treasury customizes its regulations to the impending deal and more often than not can whack that particular mole but others pop up; therefore, comprehensive action is needed.

Profit demands of shareholders and the market both compel corporations to pursue the most profitable strategic alternatives. Academicians have railed at the “do the right thing” stance of Congress arguing that the morality of tax inversions should not be left to CEOs but rather to Congress.⁵⁷ It is clear

⁵⁶ See Figures 3-8 herein.

⁵⁷ Jeff Sommer, *A Tax-Cutting Move That Pfizer Can Hardly Resist*, N.Y. TIMES (Nov. 14, 2015), <http://www.nytimes.com/2015/11/15/your-money/a-tax-cutting-move-that-pfizer-can-hardly-resist.html> (quoting

that tax reform is needed. Two options present themselves: (1) Clear legislation combined with comprehensive administrative enforcement, and (2) change to the U.S. tax rate combined with the global source rule. The U.K., for example, employs a combination of a territorial tax system with a corporate tax rate lower than that of the U.S. The high U.S. corporate tax rate is falling victim to technology, globalization, and the new economy. As it becomes cheaper to do business elsewhere without compromising the quality of that business, the U.S. tax rate becomes a liability. Globalization means companies owe less allegiance to their country of nationality, as they will go where the cost of operation is the cheapest, especially where there are less barriers.⁵⁸ While a territorial tax is the norm for the rest of the world, it is a reform option the U.S. needs to approach with caution. It would certainly reduce the incentive to invert, because companies would no longer have to worry about their foreign profits being taxed at the U.S. rate. However, it

Professor Kevin Hildebrand of University of Southern California).

⁵⁸ The Economist blames the U.S. government for failing to modernize alongside the economy and flow of business: "The heart of the problem is that tax collection has failed to keep pace with business as it has globalized. The main pillars of the international tax system were built nearly a century ago. It treats multinationals as if they were loose collections of separate entities operating in different jurisdictions, giving companies huge scope to move income around the world to minimize their tax liabilities." Special Report, *Company Taxation: The Price Isn't Right*, THE ECONOMIST (Feb. 16, 2013), <http://www.nytimes.com/2015/11/15/your-money/a-tax-cutting-move-that-pfizer-can-hardly-resist.html>.

could backfire by allowing companies to shield their profits by hiding revenue as foreign income. To be effective, a territorial tax system must be carefully considered.

As previously alluded to, intangibles like patents are easily transferred overseas and therefore can easily be manipulated to shift profits overseas.⁵⁹ Profit shifting in this manner erodes the tax base that was discussed earlier, meaning it shrinks the amount of a company’s revenue liable to U.S. taxation. To counteract this, legislation could broaden the definition of intangible property while also taxing the profits from transferring said intangible property to foreign affiliates. This would be a step towards addressing the tax issues of the modern economy, and would especially hamper the tax avoidance efforts of the pharmaceutical industry.

There have been movements by Congress in the past, with multiple iterations of the “Stop Corporate Inversions” bill, which died before making it to the floor.⁶⁰ While the second option will

⁵⁹ There have been recent attempts to adopt similar measures, though they did not make it far in Congress; “the proposal by Chairman Camp of the Ways and Means Committee (The Tax Reform Act of 2014)... would adopt a territorial tax and reduce the corporate tax rate, along with other changes... also contains anti-abuse provisions to tax intangible foreign source income.” Donald J. Marples & Jane G. Gravelle, *Corporate Expatriation, Inversions, and Mergers: Tax Issues*, CONGRESSIONAL RESEARCH SERV. 13, <https://www.fas.org/sgp/crs/misc/R43568.pdf>.

⁶⁰ “A number of legislative proposals were advanced in 2014, when the wave of inversions through merger began. Representative Levin, the ranking Member of the House Ways and Means Committee, has introduced a bill, the Stop

be much more contentious, it is a proposition that has been on the table for many years now. Targeted approaches by Treasury and the IRS have a track record of failure, and there is little optimism that Congress would be any more successful.⁶¹

IX. WHACKING ON HOLD

On April 21, 2017 President Trump signed an executive order asking the Treasury to review all previous tax regulations that might impose “an undue financial burden on United States taxpayers.”⁶² Certainly the anti-inversion regulations are now on the table. Whether or not the new administration will continue to whack this mole or engage in more broad-based strategy is yet to be determined. As corporations become increasingly nebulous in their operations, the strength and reach of regulations are tested. Long-gone are the days when a company’s value rested in its fixed assets, such as a manufacturing plant or equipment. Instead, corporate assets are now largely intangibles. Hence some of

Corporate Inversions Act of 2014 (H.R. 4679), which would reflect the Administration’s proposed changes, retroactive to May 8, 2014.”

⁶¹ Donald J. Marples & Jane G. Gravelle, *Corporate Expatriation, Inversions, and Mergers: Tax Issues*, CONGRESSIONAL RESEARCH SERV.,

<https://www.fas.org/sgp/crs/misc/R43568.pdf>.

⁶² Presidential Executive Order on Identifying and Reducing Tax Regulatory Burdens (April 21, 2017), <https://www.whitehouse.gov/the-press-office/2017/04/21/presidential-executive-order-identifying-and-reducing-tax-regulatory>.

the most active inverters are pharmaceutical companies whose primary assets are the patents they hold on drug formulas. Since 2011, pharmaceutical companies have completed 35.5% of all successful inversions.⁶³ Clearly this industry deserves special attention in the restructuring of the tax code, as the nature of pharmaceutical operations makes inversions attractive and easily achievable. Adding insult to injury, these same pharmaceuticals fund a good deal of research and development costs through U.S. government grants, hence they are awarded all the advantages of government support during their time in the U.S. but avoid what would have been repayment in the form of taxes by inverting.

Tax reform will require a joint effort from the legislative and executive branches. Executive Orders are limited in scope and term and ultimately beg for Congress to act. Inversions are merely a proxy for the lost tax revenue that governments worldwide are experiencing. Any effective check will require an overhaul of the U.S. tax code last overhauled in 1986, a lowering of the corporate tax rate and consideration of a territorial tax system. With these changes must come base-broadening provisions to ensure adequate collection of tax revenue, as well as provisions to prevent abuse through profit shifting and earnings stripping. Instead of piecemeal regulation, comprehensive reform is required.

⁶³ See Figure 1, attached herein the Appendix, for recent inversion data.

APPENDIX

Figure 1

Year of Inversion Transaction	Company Inverting	Industry	New Country of Incorporation
1983	McDermott International	Engineering	Panama
1994	Helen of Troy	Consumer Products	Bermuda
1996	Triton Energy	Oil and Gas	Cayman Islands
1996	Chicago Bridge & Iron	Engineering	Netherlands
1997	Tyco International	Diversified Manufacturer	Bermuda
1997	Santa Fe International	Oil and Gas	Cayman Islands
1998	Fruit of the Loom	Apparel Manufacturer	Cayman Islands
1998	Gold Reserve	Mining	Bermuda
1998	Playstar Corp.	Toys	Antigua
1999	Transocean	Offshore Drilling	Cayman Islands
1999	White Mountain Insurance	Insurance	Bermuda
1999	Xoma Corp.	Biotech	Bermuda
1999	PXRE Group	Insurance	Bermuda
1999	Trenwick Group	Insurance	Bermuda
2000	Applied Power	Engineering	Bermuda
2000	Everest Reinsurance	Insurance	Bermuda
2000	Seagate Technology	Data Storage	Cayman Islands
2000	R&B Falcon	Drilling	Cayman Islands
2001	Global Santa Fe Corp.	Offshore Drilling	Cayman Islands
2001	Foster Wheeler	Engineering	Bermuda
2001	Accenture	Consulting	Bermuda
2001	Global Marine	Engineering	Cayman Islands
2002	Noble Corp.	Offshore Drilling	Cayman Islands

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2002	Cooper Industries	Electrical Products	Bermuda
2002	Nabor Industries	Oil and Gas	Bermuda
2002	Weatherford International	Oil and Gas	Bermuda
2002	Ingersoll-Rand	Industrial Manufacturer	Bermuda
2002	PriceWaterhouseCoopers Consulting	Consulting	Bermuda
2002	Herbalife International	Nutrition	Cayman Islands
2005	Luna Gold Corp.	Mining	Canada
2007	Lincoln Gold Group	Mining	Canada
2007	Western Goldfields Inc.	Mining	Canada
2007	Star Maritime Acquisition Group	Shipping	Marshall Islands
2007	Argonaut Group	Insurance	Bermuda
2007	Fluid Media Networks	Media Distribution	Canada
2008	Tyco Electronics	Industrial Manufacturer	Switzerland
2008	Foster Wheeler	Engineering	Bermuda
2008	Covidien	Healthcare	Ireland
2008	Patch International inc	Oil and Gas	Canada
2008	Arcade Acquisition Group	Financial	Marshall Islands
2008	Energy Infrastructure Acquisition Group	Energy	Marshall Islands
2008	Ascend Acquisition Group	Electronics	Bermuda
2008	ENSCO International	Oil and Gas	United Kingdom
2009	Tim Hortons Inc.	Restaurant Chain	Canada
2009	Hungarian Telephone & Cable Corp.	Telecommunications	Denmark
2009	Alpha Security Group	Security	Bermuda
2009	Alyst Acquisition Group	Financial	British Virgin Islands
2009	2020 ChinaCap Acquirco	Financial	British Virgin Islands
2009	Ideation Acquisition Group	Private Equity	Cayman Islands
2009	InterAmerican Acquisition Group	Business Management	British Virgin Islands

2009	Vantage Energy Services	Offshore Drilling	Cayman Islands
2009	Plastinum Polymer Tech Corp.	Industrial Manufacturer	Netherlands
2010	Valeant Biovail	Pharmaceuticals	Canada
2010	Pride International	Offshore Drilling	United Kingdom
2010	Global Indemnity	Insurance	Ireland
2011	Alkermes, Inc.	BioPharmaceutical	Ireland
2011	TE Connectivity	Industrial Manufacturer	Switzerland
2011	Pentair	Water Filtration	Switzerland
2012	Rowan Companies	Oil Well Drilling	United Kingdom
2012	AON	Insurance	United Kingdom
2012	Tronox Inc	Chemical	Australia
2012	Jazz Pharmaceuticals	Pharmaceuticals	Ireland
2012	D.E. master Blenders	Coffee	Netherlands
2012	Stratasys	Printer Manufacturer	Israel
2012	Eaton Corp.	Power Manufacturer	Ireland
2012	Endo Health Solutions	Pharmaceuticals	Ireland
2013	Liberty Global PLC	Cable Company	United Kingdom
2013	Actavis	Pharmaceuticals	Ireland
2013	Perrigo	Pharmaceuticals	Ireland
2013	Cadence Pharmaceuticals	Pharmaceuticals	Ireland
2013	Tower Group International	Insurance	Bermuda
2014	Theravance Biopharma Inc.	BioPharmaceutical	Cayman Islands
2014	Mallinckrodt Pharmaceuticals	Pharmaceuticals	Ireland
2014	Chiquita Brands	Produce	Ireland
2014	Horizon Pharma	Pharmaceuticals	Ireland
2014	Burger King	Restaurant Chain	Canada
2015	Medtronic	Pharmaceuticals	Ireland
2015	Mylan Inc.	Pharmaceuticals	Netherlands

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2015	CF Industries	Fertilizer	United Kingdom
2015	Arris	Telecommunications	United Kingdom
2015	Terex	Industrial Equipment	Finland
2015	Coca-Cola Enterprises	Beverage	United Kingdom
2015	Civeo Corp.	Oil and Gas	Canada
2015	Steris Corp.	Medical Technology	United Kingdom
2015	Wright Medical Group Inc.	Orthopaedics	Netherlands
2015	Cyberonics Inc.	Medical Technology	United Kingdom
2016	Johnson Controls	Manufacturing	Ireland
2016	IHS	Publishing	United Kingdom
2017	Waste Connections Inc.	Waste Management	Canada

- END OF ARTICLES -

INFORMATION FOR CONTRIBUTORS

Manuscripts submitted to the *Atlantic Law Journal* that scrupulously conform to the following formatting and style rules, including the quick tips below, will be strongly preferred. These revisions are effective for Volume 21 of the *Atlantic Law Journal* and subsequent volumes. In order to simplify the submissions process for authors we have largely conformed the *Atlantic Law Journal* style sheet to the standards of the *Southern Law Journal* with the permission of its editors. We extend our thanks to the *Southern Law Journal* for their gracious permissions.

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- Top and bottom margins - one inch (all pages).
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- Set all “indents” to zero. In WORD 2007, use Paragraph drop box from Home tab. Use a zero indent throughout the manuscript (this is very important!). The only time you should use the indent feature is to set off long quotes (1/2 inch each side).
- Set tab to 1/2 inch. In WORD 2007, use the ruler, or use the Paragraph drop box from Home tab to set “tab stop position” at .5 inch. (1/2 inch is probably your tab set already!).

TITLE PAGE:

- Begin title on the fourth line after three skipped lines (press enter key four times).
- Title is centered, in ALL CAPITAL, using **Bold** letters and 12 point Times Roman font.
- Following the title of the paper, skip a line (press enter key twice).
- Author(s) names are centered in UPPER AND LOWER CASE CAPITAL letters and 12 point Times Roman font. Do not skip a line between author names.
- Identify author's (or authors') graduate degrees, academic rank, and institution name in non-numbered footnotes, denoted by the symbol *. Use the corresponding number of symbols for the corresponding number of authors.

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- Begin text three hard returns (two skipped lines) after the last author.
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- Do NOT skip a line between paragraphs.
- If you wish to emphasize something in the text, do NOT underline or put in quotation marks, use italics or a dash.
- Do NOT number the pages. Numbers will be inserted when the manuscript is prepared for publication.
- Insert two spaces (not one) following the period of each sentence, both in the text and in the footnotes.

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- All footnotes must conform to the Harvard Blue Book Uniform System of Citation (currently in the 20th Edition).
- Footnotes must use auto numbering format of the word processing system. (Do not manually number footnotes)
- Footnotes are to be placed at the bottom of each page in 10 point Times Roman font.
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- Footnote numbers in text and within the footnote should be superscript.
- Footnotes are Single Spaced with Left Justification.

APPENDICES

- Identify all appendices by letter (ex. Appendix A, Appendix B, etc.)

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1. Use Microsoft WORD only (Word 2007 or later strongly preferred).
2. Use the BLUEBOOK! The QUICK REFERENCE: LAW REVIEW FOOTNOTES on the flip-side of the Bluebook Front Cover and the INDEX are much easier to use than the Table of Contents. Use both the QUICK REFERENCE and the INDEX! (The Index is particularly well done). If you don't have the latest version of the Bluebook, buy one!
3. Case Names. Abbreviate case names in footnote citations in accordance with Table 6 (and Table 10) in the BLUEBOOK. Abbreviate case names in textual sentences in accordance with BB Rule 10.2. Note that there are only eight words abbreviated in case names in textual sentences (10.2.1(c)), but more than two hundred words in abbreviated in case names is citations (Table 6 & Table 10). Please pay close attention to case name abbreviations.
4. Statutes: 22 U.S.C. § 2541 (1972). See QUICK REFERENCE (and BB Rule 12) for examples.

5. Constitutions: N.M. CONST. art. IV, § 7. See QUICK REFERENCE (and BB Rule 11) for examples.
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