NORTH EAST JOURNAL OF LEGAL STUDIES

Volume Forty-Three Spring 2023

NORTH EAST JOURNAL OF LEGAL STUDIES

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An official publication
of the
North East Academy of Legal Studies in Business
ISSN: 1545-0597

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Articles should be submitted by October 1st each year. The review process takes up to 8 weeks. Notice to authors will occur between November 15th and December 1st. Accepted articles must be corrected and revised up to February 1st and submitted in the proper format by email. Articles will be published on or before May 1st on the NEALSB website.

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THE HISTORY AND POWER OF TAXATION IN AMERICA

by

Bernadeth Prentice*

I. INTRODUCTION

There was a tremendous shift in the U.S. tax system from the 18th to the 19th century.[1] Between 1870 and 1912, the U. S. had no income tax, but this changed between 1913 and 1946; two World Wars and the Great Depression, as well as the advent of wage and payroll taxation and the growth of estate and corporation taxes, all wreaked havoc on the economy.[2] By 1947, the U.S. economy had entered a new era marked by higher taxation and government spending for the foreseeable future. The highest marginal income tax rate was 66% from 1947 to 2000, and government taxes averaged about 18% of Gross Domestic Product.[3] In addition, high marginal tax rates were levied on estate and corporation income by the federal government, and state-level taxes increased dramatically above previous years.[4] Conversely, the two World Wars and the Great Depression seemed to be the catalyst for the genesis of taxation on taxpayers' income.

The content of this historical perspective focuses on understanding the United States Government power of taxation

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and the emergence of the current tax system in the U.S. This article also describes how the U.S. government has enacted tax policies from the early 16th century to the 20th century and how these changes have influenced taxpayers. The history of the U.S. Power of Taxation, Colonial Tax System, Post-Independence Day Tax System, and Present-Day Tax Systems in the United States are also discussed.

II. POWER OF TAXATION

According to the 1954 Internal Revenue Code preceding section 1 note 2, the integral purpose of the United States Federal Government's income tax law is to raise revenue so it can have constant stream of income for its daily governance.[5] Historically, the Federal Government used its power of taxation to raise revenue to pay its immediate debts and other obligations.[6] There was an average $2.7 billion[7] increase in federal tax revenue from tax years 2015 to 2018. Many individual taxpayers feel that Federal Government is too greedy because it takes a considerable portion of their hard-earned income by imposing income taxes on them based on their tax brackets.[8] Additionally, many taxpayers feel that the Federal Government does not have the right to tax their income and as such, some have evaded paying taxes by not paying taxes on income they earned.[9]

According to the IRS, the failure of its citizens to pay taxes or file a required tax return is tantamount to tax evasion and such citizens can face criminal liability.[10] This position was reverberated in section 7206(1) of the IRC which defines tax evasion as when an individual willfully fail to file a tax return, file a false tax return or fail pay taxes.[11] Consequently, some taxpayers have faced criminal liability for tax evasion as affirmed in the infamous cases, *United States v McKinney* and

United States v Heckman. In said case, McKinney was found guilty of tax evasion because he failed to report over $10,000 of income, he received from an illegal real estate scheme.[12] Conversely, many taxpayers have learned that it is better to pay their fair share of taxes and to submit accurate documents because the IRS tax agents performs audits to review and corroborate the information on tax returns filed with their agency. As litigated in *United States v. Heckman*, Mr. James Heckman filed false documents with the IRS which the Court opined that he in fact violated Code 26 Section 7206 of the United State Constitution and therefore he committed tax evasion.[13]

It is well established that the Federal Government's power to assess taxes and to collect taxes from its citizens is enshrined in the United States Code of Services Article1, section 8 clause. According to said code, "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common defense and general welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States"[14] Basically, Congress via its taxing agency, the IRS, has the right to impose taxes on goods and services and it has the right to collect such taxes to pay its obligations. Also, in its efforts to generate maximum revenue, pursuant to Article 1, section 8 clause 1, Congress has the right to impose a surtax on income which is an extra tax[15] on other sources of revenue such as interest, dividends, capital gains and net income from individuals and business establishments.

These incidental sources of revenue are sometimes called a surtax so some companies have strongly opposed the surtax as seen in *Helvering v National Grocery Co.*[16] In the case, National Grocery Co. accumulated all of its net profits and gains that was generated instead of distributing them as dividend income to it only shareholder, Kohl. The Revenue Commissioner presented

evidence to show that the accumulation of the profits and gains prevented a surtax to be assessed on said income. Additionally, the court opined that National Grocery did violate section 104 of the Revenue Act.[17]

A. Sources of Revenue

According to Section 61of the Internal Revenue Code, revenue is considered gross income derived from various sources such as gains, net income, interest, salaries, wages, all business income, rents, dividends, etc.[18] Pursuant to Article I section 8 of the United States Constitution [hereinafter "the Taxing and Spending Clause"], Congress has the power to tax any and all sources of revenue within its jurisdiction, regardless where they were derived.[19] Below details how Congress utilizes its power of taxation to impose taxes on interest, dividends, capital gains, excise tax, and salaries and wages. Furthermore, Congress raises revenue by delegating its power of tax collection to the Internal Revenue Service (IRS) (often referred to as the Federal Government) herein.

B. Interest

Interest is a lucrative source of income from which the Federal government can raise revenue. Most individual taxpayers dabble into passive or active activities like buying stocks, bonds or other investment-type securities or depositing their cash into their bank checking or saving accounts. According to the Internal Revenue Service (IRS) the interest that is derived from such activities where taxpayers have unfettered rights to remove money from their accounts, that interest, in the form of cash, is considered taxable interest income and must be reported on a taxpayer's annual tax return.[20] Section 61 of the Internal Revenue Code (IRC) defined interest as gross income regardless the source where it originated.[21] Interest income can

be taxable or nontaxable. Examples of common interests that are considered as taxable include:

1. Interest income from certified deposit (CD) accounts
2. Interest income from bank accounts
3. Interest income from money market accounts
4. Interest income from federal tax refund
5. Interest income federal stocks and bonds[22]

Individual taxpayers who received these types of interest income are required to report them on their tax return annually upon the receipt of the 1099INT tax form from the issuer of the interest.[23] The IRS still requires that individual taxpayers prepare Schedule B to report all taxable interest income which will eventually be reported on line 8a and line 2b on the 2017 and 2018, 1040 annual tax returns respectively. Interest income is included as a component of total gross income. Some taxpayers have been audited by the IRS for failing to include interest income as taxable gross income on their tax returns and have disputed the IRS' audit findings.

This was clearly seen in the *Hoang v. Commissioner*, T.C. Memo 2013-127 (2013), where the plaintiff disputed the defendant's findings that he failed to include the $2,301 interest income that he received in tax year 2001 from Bank One. In this case, Hoang claimed that since he was an accrual basis taxpayer, he was allowed to report the interest in the year it was earned rather than the year it was received. Moreover, the Court rejected Hoang's assertion and ruled that the interest income should have been included as income in his 2001 tax return because the plaintiff was not an accrual basis taxpayer and the defendant was correct with their findings.[24]

Alternatively, not all interests are taxable, with some being exempt from income taxation. Examples of some interests that are tax exempt include (1) interest from investing in municipal bonds, (2) interest from series EE bonds (debt security investment vehicle which allows the interest income derived to be exempt from state and local taxes)[25] which were acquired after 1989, and were solely used qualified for educational purposes and (3) interest derived on dividends income deposited with the federal Government Veteran Affairs.[26] Even though these interests are not taxable, the issuer of these interests must provide the taxpayer with a 1099INT for tax reporting purposes. Tax exempt interest income are reported on line 8a and line 2a of the 2017 and 2018, 1040 tax return for informational purposes. However, because they are not taxable, the amount is not included in the calculation of total gross income.

C. Dividends

Section 115(a) of the Internal Revenue Code defines dividends as any distributions, either in cash or property, given by a corporation to its shareholders without taking into consideration its profits or earnings.[27] Dividends are the most common type of distribution from a corporation.[28] C-corporations are the lager types of business structures formed in the United States.[29] Per Section 1361(a)(1) of the IRC, small corporations are known as S-corporations. According to Section 1361 (a)(2), regular corporations which are not S-corporations are also known as C- corporations. All C-corporations are faced with a “double taxation” dilemma when they distribute dividends to their shareholders or owners because these dividends have potential tax consequences to both the shareholder and the entity (corporation).[30]

The “double taxation” dilemma means that when a domestic C-corporation distributes a dividend, both the shareholder and the C-corporation can be taxed on said

distribution. The shareholder is taxed on the distributed dividends up to 20% just like capital gains. Therefore, the shareholder will be taxed on the amount of dividend received in accordance with her marginal income tax rates and the C-corporation will be taxed on its taxable income in accordance with its corporate tax rate.[31]

This dilemma was litigated in *United States v. Goodyear Tire & Rubber Co.*, 493 U.S. 132 (1989). In this case, the defendant (Goodyear Tire), a domestic corporation whose foreign subsidiary paid taxes to the British tax agency on its accumulated profits for tax years 1970 and 1971 and claimed a tax refund from the IRS when it filed its U.S. income tax return. The IRS denied their refund claim based on the defendant's assertion that its foreign subsidiary's accumulated profits should have calculated under the British law instead of U.S. law, so they sought certiorari from the Supreme Court.

The Supreme Court agreed with the IRS and held that even though Section 902 of the Internal Revenue Code[32] was designed to prevent double taxation between corporations and their subsidiaries, the accumulated profits by said foreign subsidiary should have been taxed based on domestic tax law. Thus, since Goodyear was deemed as a U.S. domestic corporation, it should have been taxed on the accumulated profits of its subsidiary after it distributed a dividend to them as evinced in this esteemed case law.[33]

It is important to note that Section 902 was amended by Section 14223 of the TCJA when TCJA was implemented in tax year 2018.[34] Section 14223 states that shareholders of surrogate foreign corporation will not be allowed to reduce the amount of dividends they received.[35] A corporation is deemed as a surrogate foreign corporation if a non-domestic corporation acquires properties of a domestic corporation.[36] Conversely, S-corporations are not subjected to this "double taxation" dilemma

because they are exempt from paying federal income taxes. Distributions by S-corporations are considered tax-free dividend to the shareholders if the amount distributed does not exceed the shareholders' stock tax basis.[37] However, per Section 1368(a)(2) of the Internal Revenue Code, shareholders of the S corporation can be taxed on distributions they received from said corporations if they exceed their stock tax basis.[38]

Notably, S-corporations are widely referred to as "flow thru entities" because all taxable consequences "flow" or pass down to the shareholders who assume those tax consequences on their tax return (1040).[39] *Jones v. Commissioner*, T.C. Memo 1997-400 (1997), portrayed the appropriate example where a shareholder who received a distribution from an S-corporation was told by the court he in fact had to pay taxes on the distributions he received. The distributions between Jones' two C-corporations, two S-corporations and he were deemed as taxable dividends because the loan transfers amount between Mr. Jones who was the sole shareholder and his corporations exceeded his basis in the stocks.[40] Deciding whether to form a C-corporation or an S-corporation business structure can be difficult because of the tax ramifications. Most taxpayers may opt to form S-corporations because they are not subjected to the double taxation rule. However, there are strict limitations and qualifying requirements surrounding the formation of S-corporations.

Tax experts know that a distribution from a C-corporation to a shareholder will only be treated as a dividend for tax purposes if the distribution is paid out of current profits or accumulated earnings. *Blair v United States* settled this assertion where it was held that if a corporation had sufficient earnings and profit in the current taxable year to pay any dividends that were previously declared, then that distribution was taxable as a dividend to the stockholders who received the distribution.[41] A distribution can cause a partial or a complete

liquidation of the corporation. Regardless of the type of liquidation, both the shareholder and the corporation must take into consideration the tax consequences of such liquidation, if any.

Section 115(c) of the Internal Revenue Code states:

> Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock[42].

A complete liquidating dividend is not paid out of the corporation's earnings or profit but instead it is paid out by completely distributing the entire adjusted basis or the capital investment in the stock. Conversely, a partial liquidating dividend is paid out by only distributing a portion of the basis in the stock. These types of liquidating dividends can create a nontaxable event for the shareholder if the dividend reduces its adjusted basis in the stock because they are simply a return of the stockholder's investment in the stock. This is sometimes called a return of capital. Therefore, the stockholder does not have to pay any taxes if the distribution reduces his adjusted basis in the stock to zero. *Patty v Helvering* buttressed this assertion when the Tax Board of Appeal reversed its decision and deemed the dividends to be a liquidating dividend instead of a cash dividend, thereby allowed the Petitioner, Patty to escape paying taxes on the distribution pursuant to the facts stated above.[43]

It is important to note that there are four general classes of dividends distributed by C-corporations.[44] They are cash dividends which are distribution of cash only, property dividends which are any distributions other than cash, stock dividends which are distribution of only stocks and liquidating dividends.[45] The information illustrates how the Federal

Government raises revenue by imposing taxes on cash dividends, property dividends and stock dividends received by taxpayers and also discusses the tax consequences for individual taxpayers and corporations upon the receipt of such dividends.

D. Cash Dividends

As stated above, the Federal Government can impose a tax on income derived from sources like cash dividends received by individuals or business from distributions by corporations. A cash dividend is simply a distribution made by a corporation to its shareholders in the form of cash only.[46] According to Title 26 of the IRC Section 404(k)(1), a C-corporation is permitted to deduct the amount of cash dividends that it distributes to its stockholders in any given taxable year to reduce its corporate taxable income.[47] Also, Section 243(a) of the Internal Revenue code permits a C-corporation to deduct a certain percentage of a dividend it receives from another corporation if it has an equity investment in that corporation.

These types of deductions are called Dividend Received Deductions (DRDs). According to the 2017 tax rules promulgated by section 243 of the Internal Revenue Code, a domestic corporation who owns twenty (20%) percent or less of another domestic corporation and received dividend income distributed by said acquired corporation was allowed to deduct seventy (70%) percent of the dividend distributed to them.[48] Also, Section 243 stated that a domestic corporation who owned more than twenty (20%) but less than eighty (80%) of a domestic corporation was entitled to deduct eighty (80%) percent of the dividend received. Additionally, domestic corporations who received dividend income from their affiliated subsidiaries were allowed to deduct one hundred (100%) of the dividends received from said affiliated subsidiaries.[49] An affiliated subsidiary is a corporation whose stocks are owned eighty percent (80%) or more by another corporation who is now deemed as its parent.[50]

The parent and the subsidiaries are now called affiliated (related) groups because the subsidiaries are owned by the same parent by virtue of the parent's 80% ownership percentage.[51] However, Section 13002 of TCJA reduced the seventy (70%) dividend received deductions to fifty (50%) and the eighty (80%) DRD to sixty-five (65%) for tax years 2018 through 2025.[52]

As seen in the infamous case, *Ragland Investment Co. v. Commissioner*, Petitioner Ragland sought relief from the court to allow them to claim a DRD that the IRS disallowed on their tax return because they, in fact, had an equity investment in the corporation that distributed the dividends; and the court ruled in their favor and allowed them to deduct 85% of the dividend received.[53] Section 149 of the Revenue Act states that all corporations that are subject to taxes imposed on payment of dividends to their shareholders are legally obligated to furnish to the IRS, the shareholders names, shareholders addresses, the number of shares owned by shareholders and the dollar amount of the dividend received by shareholders.[54] Conversely, a shareholder has to report as gross income on his/her tax return the amount of the cash dividend received from the C-corporation.[55] Additionally, the cash dividend consists of the total amount the corporation distributed from its current earnings and accumulated earnings or profits. It is important to understand that the main goal of the taxing body (IRS) is to ensure that it receives its rightful share of all income derived from dividends distributions, regardless of who received the distributions. In essence, individual taxpayers and all business structures including corporations should assess their tax exposure when distributing or receiving cash dividends.

E. Property Dividends

Another source of income from which the federal government can raise revenue is by taxing the income derived from property dividends. Property dividends can be defined as a

distribution of property made by C-corporations to its shareholders.[56] Furthermore, Section 317(a) defines property as investments, money and other property except stocks distributed by corporations.[57] Generally, C-corporations distribute appreciated property other than cash when distributing property dividends to its shareholders. Appreciated property simply is real property like land and buildings whose fair market value is higher than the adjusted basis or tax basis of the property given.[58] The fair market value is a very important variable, because it is the threshold for which corporations or shareholder tax consequences are predicated. Section 301(b) affirmed that the fair market value of the property distributed as a dividend is determined on the date the dividend was distributed. Therefore, the formula to calculate the fair market value is equal to the fair market value of the property received minus any liability assumed by the shareholder immediately upon distribution.[59] Also, the tax basis of the property dividend received by shareholders is the same as the fair market value of the property received. Resultantly, the receipt of such dividend is taxable as gross income to the shareholder.[60] The tax consequences for distributions of property dividends can be complex.

F. Stock Dividends

In layman's terms, stock dividends are distributions to shareholders in the form of stocks instead of cash or property dividends.[61] Per Section 115(f) of the Revenue Act, a distribution of stocks by corporations do not create a taxable event for both the shareholder and the corporation.[62] *Helvering v. Gowran* illustrated that shareholders receiving only stocks in the form of dividends regardless of the class of stocks they received shall not be taxed upon such distributions.[63] Notably, stock distributions can be taxed as dividend income to shareholders if the distribution has the potential to change their

ownership percentage. For example, if the distributing corporation gives the shareholders a choice to receive cash in lieu of stocks, then by the virtue of having this choice, the stock distribution will be taxable to the shareholders as ordinary dividend income to the extent of the corporation's current earnings and profit. Additionally, the amount of said dividend received should be reported as gross income on Schedule B so it can be included on the shareholders tax return (1040).[64]

G. Capital Gains

Capital gains are another lucrative source of income from which the IRS can collect revenue to help run the Federal Government's daily operation. Section 101(c) of the Revenue Act defines capital gains as any excess amount that is subjected to be taxed if it was received from selling or exchanging of the taxpayer's capital asset.[65] Conversely, a capital loss is the opposite of a capital gain because a loss or deficit occurs when the taxpayer sells or exchanges capital assets. Furthermore, the loss is deductible instead of taxable.[66] It is important to understand the definition of a capital asset because the character of the gain or loss will be determined by the taxpayer's use of the asset or property. Section 1221 (a) of the IRC defines capital asset as any property that the taxpayer may or may not use in a trade or business as long as that property does not include stocks, real property, accounts receivable etc., that are normally used in a trade or business,[67] Simply put, capital assets are those that are used for personal use, investment purposes or to generate income for the taxpayer. As stated above, the asset's use determines the classification of the gain or loss.

Under Internal Reveune Code section 1222, gains or losses can be classified as ordinary, short term and long term.[68] Additionally, ordinary gains (income) or losses are derived from selling assets that are normally used in a trade or business for less than (shorterm) one year and such assets were not

considered as capital assets or §1231 property[69]. Short term capital gains or losses result from selling capital assets that one owns for less than one year and long term capital gains or losses are generated if the taxpayer sold capital assests owned for more than one year. Moreover, §1231, §1245 and §1250 gains or losses are derived either from selling depreciable assets or land that were used in a business or trade for more than a year[70], or selling personal residence[71] and selling amortizable assets like patents and copyrights or recapturing depreciaton for real estate[72] sold by corporations respectively.

Calculating the gain or loss is of utmost importance because the character and classification of the gain can have dire tax consequences. The gain is calculated by subtracting the amount realized or cash received plus the fair market value of the property from the adjusted based basis of the property sold.[73] If the amount realized exceeds the adjusted basis, then a taxable gain exists. Conversely, a capital loss exists if the adjusted basis exceeds the realized amount from the sale of property.[74] The connection between the type of asset sold, the time period held for the asset, the use of the asset and the character of the gain examples are illustrated below:

1. If a taxpayer sold a property that was normally used in a business, the realized ($100,000) amount exceeded the adjusted ($70,000) basis and that property was owned (held) for twelve months or less, then that taxpayer will recocognize an ordinary $30,000 ($100,000 minus $70,000) dollar gain or income. An ordinary gain is recognized because ordinary assets were used in a busiess were sold, held for less than one year and the amount realized exceeded the propery's tax basis.[75] *Commissioner v. Gillette Motor Transport, Inc*., 34 U.S. 130 (1960) masterfully illustrated what is ordinary income and how the property was used in the business to

charaterize the gain as ordinary gain. In that case, the United Supreme Court ruled that the income derived from Gillette's operation was considered ordinary income because Gillette's facilities were used for normal business purposes since it did not have the right to use the facilities as a capital asset.[76] It is important to determine the character of the gain because upon the sale of the facilities for an amount that exceeds its adjusted basis, an ordinary gain will be recognized.

2. If a taxpayer sold a property that was used for personal activities, the realized ($50,000) amount exceeded the adjusted ($40,000) basis and that property was owned (held) for twelve months or less, then that taxpayer will recognize a $10,000 ($50,000 minus $40,000) dollar short term capital gain because the property was used for personal activities thus deemed as a capital assets, held for less than one year and the amount realized exceeded the property's tax basis when sold.[77] (See capital asset definition above for further reference). Based on this fact pattern, it is fair to conclude that properties that are used for personal "use" generate taxable capital gains. However, if personal use capital assets were sold at a loss, then said loss is not allowed to be deductible by the taxpayer because they are personal.[78]

3. If a taxpayer sold a depreciable property that was used in a business for more than a year, the realized amount exceeded the adjusted basis and that property was owned (held) for more than twelve months, then that taxpayer will recognize a §1231 gain.[79] A §1231 gain is recognized because depreciable assets used in business or trade for more than one year were sold and the realized amount exceeded the adjusted basis. It is important to note that this §1231 gain will eventually be classified as

a long term gain. Alternatively, if a loss is recognized then the loss will be classified as an ordinary loss.[80]

4. If a taxpayer sold a property that was used for personal activities or uses, the realized amount exceeded the adjusted basis and that property was owned (held) for more than twelve months, then that taxpayer will recognize a long term capital gain because personal capital assets were sold that were held for more than one year. This concept is laid out in Section 1222 of the Internal Revenue Code.[81] The landmark case *Commissioner v. Brown* encapsulated the concept of long term capital gains as illustrated in example #4 above. In the *Brown* case, the Supreme Court of the United States agreed with the lower court decision that the proceeds Brown received from the sale of stocks were in fact long term capital gains and should have been accounted for under Section 1222 (3) of the Internal Revenue Code.[82]

After all gains are classified into categories as mentioned above, taxpayers and corporations have to determine the tax consequences for capital gains and losses whether short term or long term from the sale or exchange of properties. In most cases, the tax rules allow short term and long term capital losses to be netted against short term and long term capital gains to arrive at the net capital gain or net capital losses.[83]

Net short term capital gains and losses and net long term capital gains and losses are taxed differently for individual taxpayers and corporations. The TCJA did not change the tax rates for long term capital gains for invidual taxpayers so the rates remained the same as previous tax years. As result, lower and middle-income taxpayers are taxed at zero (0%) percent to fifteen (15%) percent preferential tax rates depending on the amount of long term gain and threshold taxable income.

However, high-income taxpayers are taxed at a twenty (20%) percent tax rate.[84] For short term capital gains, individuals are taxed based on their personal marginal income tax rate.[85] Section 1211 of the IRC placed a limitation on how much loss individuals taxpayers can deduct for net capital losses for tax years 2017 and previous tax years. According to Section 1211, only $3,000 of the net capital loss can be used to offset ordinary income and the remainder can be carried forwardly indefinitely until the losses are exhausted.[86] Corporations are not afforded the preferential tax rates treatment for capital gains but instead they are taxed based on their corpoarate tax rate. Note, the TCJA reduced the corporate tax rate from 35% to a flat 21 percent.[87] Moreover, corporations are not allowed to offset short term losses against its ordinary income but can offset losses against gains from property sold.[88]

As a consolation, corporations are permitted to carry (deduct) the losses back three years from income earned in those preceeding years and carry forward any of the remaining losses five years and exhaust those losses against net capital gains earned during those five future years.[89] This "carryback and carryforward" concept was firmly affirmed in *United States v. Foster Lumber Co.* when the case was relitigated because the IRS initially did not allow Foster Lumber Corporation to carryback (deduct) the net operating loss (NOL) it sustained in 1968 to 1966 income to offset the loss.[90] However, the court reversed the lower court decision, ruled against the IRS and allowed Lumber to carryback the NOL.[91] Individual taxpayers report capial gains and losses on schedule D which will eventually be included as part of gross income on the 1040, (the individual' tax return) to arrive at total gross income.[92] Conversely, corporations should report capital gains or losses on a schedule D and attach said schedule to their 1120 (C corporation tax return) when they file the return with the IRS.[93]

H. Excise Tax

The Taxing and Spending Clause of the United States Constitution gives the Federal Government the absolute power to lay and collect on taxes on import, duties and excises.[94] Therefore, pursuant to this statutory power, excise, duties and imposts tax impositions are other viable sources of income from which the Internal Revenue Service can raise revenue. Excise taxes are generally imposed on commodities like fuel, gasoline,alcohol, services, retail and manufacturing goods consummed within the United States jurisdiction.[95] Pursuant to I.R.C Section 700(j), the Federal Government has a right to raise and collect excise tax revenue by imposing an indirect tax on certain goods consumed, services rendered and activities performed by various business who are wholesalers and producers of goods.[96] According to the Tax foundation, in tax year 2019, the Federal Government collected $125 billion in federal excise tax revenues.[97] Most businesses and taxpayers who engaged in the in buying and selling of excise goods and services have a duty to file federal form 720 Quarterly Federal Excise Tax Return with the IRS. By filing this form, the IRS will collect its share of excise revenue.[98] Conversely, duties are legally binding mandatory fees that are due and payable to the Federal Government while imposts are duties that are imposed on imported goods that are consumed in the United States[99] Historically, many businesses and taxpayers have voiced objections to the imposition of excise taxes on excises, imports, and imposts.

These objections were litigated in many court cases like *Dooley v. United States*, where Dooley brought a suit against the Puerto Rican (a U.S territory) tax collector to recover duties that he paid for goods he imported into Puerto Rico from New York.[100] The court ruled that Puerto Rico had a lawful right to impose an excise tax the imported goods in accordance with the provisions enshrined in I.R.C Section 700(j). Despite the ill

feelings and objections about the excise tax by businesses and taxpayers alike, the power to impose excise taxes by the Federal Government is firmly rooted in the Constitution. In fact, it was legal and remains legal today as a source of revenue which the IRS diligently pursues to collect on behalf of the Federal Government.

I. Wages & Salaries

The mere mention of the phrase "income taxation" evokes deep fears and resentment in the hearts of many United States taxpayers. This is because most individual taxpayers believe they are overtaxed by the Federal Government and underpaid by their employers. Regardless of their dispositions, federal taxation of individuals' income was, and still is "the" main staple of the Federal Government source of revenue. To get an understanding of the United States' current methodology of federal taxation of wages and salaries, it is important to understand history. Before 1913, there was no federal income tax assessed on individual or business taxpayers. Tariffs and sales taxes were the main sources of revenue utilized to fund the federal government, but after facing dire financial needs during the Civil war, the Federal Government scrambled to find other ways to raise revenue. The Federal Government flaunted the idea of creating a Civil War income tax by imposing a tax on income to serve as an antidote to solve its low cash flow problem.[101] This idea gained traction in Congress, a legislative bill was proposed, and Congress passed a second income tax law in 1894, which was signed by President Grover Cleveland.[102] Thus, the first income tax law was created which imposed a two (2%) percent tax on income higher than $4,000 annually.[103] However, the Income Tax Act of 1894 was later overturned by the Supreme Court in 1895.[104] However, when President Taft took office in 1909, he proposed a two-tiered tax system resolution where both individuals and businesses will be taxed

based on income they earned.[105] Congress passed Taft's resolution which led to the ratification of the Sixteenth Amendment in 1913.[106]

Shortly after the ratification of the Sixteenth Amendment, the incumbent President (Wilson) lobbied for Revenue Act of 1913 to include the income tax.[107] Since 1913, the United States income tax system has evolved to a progressive tax system.[108] This is because higher tax rates have been applied based on higher levels of income earned[109] rather than the threshold amount of 2% on income more than $4,000 mentioned above. The Sixteenth Amendment gives the Federal Government the power to impose and collect taxes on income of any sources regardless of where it is earned by taxpayers.[110] Additionally, Section 8 of the Sixteenth Amendment defines income as gain derived from capital, from labor, or from both combined.[111] The Federal Government enforced the Sixteenth Amendment provision in the infamous case *United States v. Richards,* when the court opined that wages and salaries are defined the same as income.[112]

The process that enables the IRS to collect its share of tax from employees' compensation begins when the employee renders services and the employer pays an agreed upon amount of compensation. An employee is an individual who renders his skills to one or more employers[113] and the employer is the person or company who received the benefit of the employee's skills.[114] Every pay period before the employee receives his gross wages, the employer is required by the Internal Revenue Code Section 3402, to withhold or deduct a specific monetary amount for federal income tax purposes. This deduction is called "federal income tax withholdings" and it is the responsibility of the employer's payroll department to perform this function. According to Section 3402 of the IRC, every employer is required to withhold a prescribed amount from every employee's wage, based on the IRS tax rates tables.[115]

The W-4 is a very important document that is used to compute the amount of federal income tax withholdings that are eventually deducted from the employee's wages and are reported on line 2 of the W-2 form. During the hiring process, the employee is given a W-4 which requests basic information about the employee like, name, address, filing tax status, number of allowances, and social security number to complete so the employer can calculate the correct amount of withholdings to deduct from the employee's paycheck per pay period.[116]

In addition, these withholdings are viewed as legal involuntary "takings" by the IRS, but many employees view these "takings" as excessive. As a result, many employees resort to elaborate schemes to avoid or minimize paying federal tax withholdings. Employees may increase the number of allowances on their W-4, even if they do not have said allowances, lowering their withholdings to take-home more of their gross wages. However, the IRS identifies this as a fraudulent scheme which defrauds the Federal Government, and those employees can face fraudulent financial penalties or imprisonment. The landmark case *Langston v. Commissioner*, T.C. Memo 2009-65 (2009), illustrated how a taxpayer who fraudulently claimed federal tax withholdings was penalized by the IRS. According to the IRS, the W-2 summarizes the total annual amount of the employee's wages, federal income tax withholdings, and other relevant payroll deductions and it is used to file the employee's annual tax return.[117] The W-2 is a vital document that is used in the annual tax preparation process because it states the amount of wages that employees are required to report as gross income to the IRS.

Federal income tax withholdings are a constant and reliable stream of revenue for the Federal Government because millions of employees actively participate in the United States labor force. Historically, taxpayers have voiced strong objections to the involuntary deductions of federal income tax

withholdings from their wages because they believe them to be unfair and unjust. From an accounting perspective, these tax withholdings are considered as unearned revenue or prepaid income[118] because the IRS receives these payments in advance without taking into consideration the taxpayer's potential tax liability if any.

Notably, if the total amount of federal income tax withholding exceeds the taxpayer's tax liability per the IRS tax tables, the IRS will refund the difference to the taxpayer. Conversely, these tax withholdings are considered as prepayments by the employees because they are paid in advance without taking into consideration the taxpayer's potential tax liability. Moreover, if the prepayments are less than the taxpayer's liability per the IRS tax tables, the taxpayer will owe the IRS. As stated above, employers are required to withhold a portion of the employee's wages for federal income tax withholdings purposes, and are required to remit or give these withholdings to the IRS via the Electronic Federal Tax Payment System (EFTPS) because they are the property of the Federal Government. Employers serve as fiduciaries and tax collection agents for the IRS. There are several instances where employers have willfully failed to collect and/or remit or submit the federal income tax withholdings deducted from employees' wages. Furthermore, employers who have committed such willful acts must pay back the amount they failed to remit or collect from the employees as reverberated in Section 6672 of the Internal Revenue Code.[119] In short, federal income tax withholdings via payroll deduction as a lucrative revenue source for the Federal Government.

J. Colonial Tax System

The United States tax system has evolved over centuries and can be viewed on a continuum predating independence from British colonial rule.[120] Stemming from its involvement in several conflicts with other colonial powers, Britain was desperate for strategies to service its national debt and to offset the expenses of its military. Before its independence, the United States of America experienced minimal taxation from Britain with only high taxes imposed during wartime and tariffs imposed on customs duties for goods imported and exported to and from Britain by the colonies[121]

Tariffs were collected at each port of entry and penalties were implemented for those who refused to comply. This was promulgated as merely a means of regulating colonial trade but there was widespread resistance towards this system by U.S. colonies. Britain could not fathom why there was such resistance when the administrative cost to oversee the affairs of North America exceeded what was required through taxation. American colonies were not fond of taxation and staunchly resisted stamp duties and found various means to elude tax collectors at different ports.[122] Britain, who was grappling with financial woes while simultaneously embroiled in a long protracted war with France, was growing weary of the slow pace at which this indirect form of taxation was gaining momentum.[123] As a result, Britain relaxed the harsh taxation regulations in order to gain the support of the colonies to help Britain with the war with France. This compromise led to the first sign of independence for the colonies.[124]

Britain soon introduced the Stamp Act, intended to help rectify the issue of tax evasion and refusal to pay taxes at the ports.[125] The Stamp Act of 1765 was geared towards raising revenue on all forms of printed material to include wills, deeds,

legal documents, newspapers, ship papers, licenses, among various other documents. This was a form of direct taxation that was instituted without approval from the colony, which they found very much offensive.[126] Additionally, the Stamp Act was introduced to quell the grievances of discrimination that the American colonists felt as compared their British counterparts.

The enactment of the Stamp Act allowed the government to collect stamp duties from those involved in import/export businesses, as the documents used to carry out their transactions needed to bear appropriate stamps to legitimize their business dealings.[127] The British and U.S. government did not view these taxes to be exorbitant, but there was much contention regarding the way the taxes were implemented. Moreover, it was felt that yielding to the payment of these taxes would open the door for more significant taxes without proper consultation, hence citizens sought to resist as much as possible. The U.S. colonies were perturbed by the fact that they were not consulted on the method and appropriateness of these forms of taxation and rejected the idea of paying taxes without having a say in the matter. Consequently, they concluded that lack of inclusion was in fact taxation without representation and equated to tyranny.[128]

Before the Virginia House of Burgesses' adoption of Patrick Henry's Stamp Act Resolves, most colonists reluctantly paid for the stamps [129] and complained consistently, as they felt there was no other outlet. Patrick Henry's Stamp Act Resolves stipulated that Americans possessed the right to taxation solely by their representatives, as was the case in Britain. This gained traction among Americans, though only four of the seven resolutions were passed. Under the Stamp Act Resolves, Virginians would not be forced to pay any taxes unless approved by their own elected representatives[130]. Word of the resolutions became popular and received the support of many other

Americans who finally found favor in a document that would give them enough power to resist taxation by Britain.

The resistance of the Stamp Act gradually escalated as US citizens moved from eluding tax collectors to more active and aggressive forms of resistance such as protests and attacking stamp duty collectors. “The Sons of Liberty” was one group that mobilized protestors and out rightly rejected the payment of stamp duties.[131] In one instance, they paraded the streets of Boston bearing an image of the Stamp Distributor – Andrew Oliver, which they beheaded and dangled from the liberty tree, coercing the distributor into resignation.[132] Street protests became increasingly popular and angry mobs constantly descended on stamp distributors and collectors, intimidating them with the threat of violence and damage to personal property, forcing them into resignation.[133] Seaports were closely monitored by opponents of the Stamp Act and vessels from England transporting stamp papers were consistently forced into retreat. These acts of resistance made it extremely difficult for Britain to bring the Stamp Act into effect and was ultimately repealed in 1766 by the British Parliament.[134] As a result of the protest and resistance of the provisions set forth in the Stamp Act, the ground work for independence started to emerge.

The repealing of the Stamp Act was not to be taken as a sign that Britain would resign its attempts to have a firm hold on taxation and the general governance of the American colonies. In 1766, the Declaratory Act was legislated and reaffirmed Britain’s position as having authority to rule over the affairs of America, declaring all decisions, rules, and legislation made without the approval of the British Parliament as null and void.[135] Much like tariffs and the Stamp Act, this legislation was met with overwhelming resistance for ten years after its implementation, as Americans viewed the move as tyrannical and echoed their opposition. Since neither party was willing to

yield or come to a consensus, a revolutionary crisis erupted in the United States of America which manifested into the American Revolution of 1775 and saw the U.S. winning its independence from British rule.[136] Conversely, the U.S. won its independence by fighting and refusing to accept those oppressive economic conditions mentioned above which were attributed to Britain's exorbitant taxation regulations.

K. Post-Independence Tax System

As an independent state, the U.S. was mandated to find methods of sustainable self-governance and therefore established for itself a federal government supported by individual states. Until the drafting of the Constitution in 1778 which was ratified in 1789, the federal government was financed by individual states. To facilitate self-efficiency, Congress approved the collection of taxes, excises, imposts, and duties, which were collected at the state level and then handed over to the federal government. During that time, income tax was not yet imposed, and the people conformed to the tax measures implemented, understanding after all that this was what they fought for.[137]

The collection of excise taxes was commonplace in post-independence America until the peace was breached when an attempt was made to charge excise taxes on alcoholic beverages in 1791.[138] This resulted in the Whiskey Revolution, leaving President Washington no choice but to deploy troops to quell the upheaval of an unruly mob of farmers in Pennsylvania, who refused to comply with a request for excise taxes on alcohol.[139] Subsequently, taxes were imposed on personal assets including land and slaves as the federal government moved closer towards direct taxation.[140] This was short-lived, however, as President Jefferson reverted to excise taxes in 1802, nullifying direct taxation.[141] Excise taxes inflated periodically, and other forms

were added, especially considering the 1812 War which saw taxes being imposed on sugar, carriages, and retailers among other items, and represented an estimated 40% of the funding towards the War.[142] The first income tax was introduced during this period but it was not well received by thousands of citizens. These citizens showed their lack of support by refusing to pay the 10% percent federal tax that was imposed on their income.[143]

In the ensuing post-1812 War years, custom duties and the sale of public lands became the primary source of income generation by the federal government.[144] Federal taxation had virtually phased out and the idea was not revisited until over forty years later when the Civil War was on the horizon.[145] The Civil War of 1861 was the hallmark of income taxation, as the federal government saw no other means of funding the impending war encounter.[146] The United States was reeling from indebtedness from financing the Civil War because the money raised from the imposition of excise taxes on every commodity had proven unsustainable and insufficient considering the impending war and the expenses of the military.[147] Consequently, a 3% tax was imposed on all income exceeding $800 annually, but this was inadequate to offset the cost of the war. This led to Congress imposing more aggressive excise taxes as they struggled to find ways to make ends meet during this period.[148]

By 1862, the Federal Government's desperation had intensified and excise taxes had been extended to include almost every possible commodity. The income tax threshold was modified to reflect 3% taxation for taxpayers earning over $600 per year and 5% for those earning over $10,000 per year.[149] This period also saw the birth of the first U.S. system dedicated specifically to tax collection – the Office of the Commissioner of Internal Revenue, which is known today as the IRS, relieved individual states of tax collection responsibilities.[150] Employers

were thrown into the mix with a duty to withhold taxes from employees' salaries and turn them over to the Internal Revenue department.[151]

Dubbed an emergency measure to offset expenditure incurred by the Civil War, taxpayers saw another spike in income taxes by 1864, with those earning between $600 and $5,000 mandated to pay 5% in taxes and 10% for those exceeding earnings of $5,000 yearly.[152] These taxes remained enforced until 1872, when most of the taxes under the emergency measures were repealed. However, excise taxes remained in place and efforts to resuscitate income taxes were stifled by the Supreme Court, which viewed direct taxation as unconstitutional.[153] Ten years after the repeal of the income tax, the Federal government reverted to levying of taxes on tobacco and liquor as a mean to support itself but this policy was disbanded by 1894. [154] The Supreme Court thwarted various attempts by the Congress to reintroduce the income tax because it deemed the as unconstitutional because the population of each state in the U.S. was not taken into consideration as required by the Constitution.[155] The ratification of the Sixteenth Amendment in 1913, granted Congress the right to levy and collect income taxes irrespective of how funds were derived.[156] As a result, the Federal Government has a lawful right to impose a federal tax on income earned by its citizens.

A graduated tax system followed the Sixteenth Amendment in 1916, where the income tax rate increased from 1% to 2% as a result of the financial needs of the protracted Civil war.[157] This prompted the passing of the 1916 Revenue Act which increased income tax rates from 2% for the lower income level to 15% for those earning more than $2 million dollars per year.[158]

Changes to the tax system did not stop. The War Revenue Act was passed as government was still in need of more funds in 1917 when war was declared by the U.S. on Germany. The passage of the War Revenue Act significantly increased taxes and lowered exemptions and the 15% income tax rate increased to 67% for taxpayers earning over $2 million dollars income annually.[159] This was reflective of an increase of 3.6 billion dollars in tax revenue in 1918, up from $809 million the previous year. Notwithstanding the heavy taxing of earnings, an estate tax accompanied income taxation on wealthy estates with an exemption of only $50,000.00.[160] After deducting the exemption amount, estates were then tax at rates starting from 1%, and up to 10% for any estates whose value exceeded over $5 million dollars.[161] The government's need for revenue was greatly increasing as World War I was capital-intensive, and the government did not have the necessary funding at its disposal.

In 1924, the dust had settled on World War I, but the estate tax law had not been repealed. The government was in a far better economic position, so much so that there was a budget surplus. Instead, the government saw fit to increase tax rates and implement the "gift tax", which was levied against all assets transferred between owners.[162] The 1920s to 1940s represented a period of intense taxation, which the government tried to pass off as an attempt to redistribute wealth to not have the same concentration in the hands of a selected few. In so doing, the government levied tax rates of up to 77% against large estates [163] to prevent the rich from staying rich.

In 1939, the Internal Revenue Code (IRC) was established and served to codify all federal tax laws concerning estates, gifts, employment, income, alcohol, tobacco, and excise. The IRC is the definitive source of all tax laws in the United States and has the force of law in and of itself.[164] The code was revised in 1954, hinging on years of discrepancies being

experienced with the federal income tax system.[165] Reform was advocated by various influential bodies such as the House Office of Legislative Counsel, the US Treasury, and Congress' Joint Committee on Taxation. The timing was appropriate, as there were major changes to employer-provided benefits. The tax-base expanded, and corporations and other businesses were increasingly more intricate, demanding a system that could better meet the needs of an evolving society.

President Eisenhower was a major driving force behind the reform of the tax system and chose an inclusive approach to the revision of the system.[166] According to Witte, a survey of U.S. citizens across the country was conducted, and they provided data in respect of their ideal system of taxation. Moreover, with this information and those garnered from different technical personnel, the Joint Committee on Taxation actively participated in a period of trial and error to arrive at the best solution to framing the tax system. Eisenhower and his team of technical experts proposed thousands of changes to the tax laws and Congress subsequently approved the modernization of the code in a timely and efficient manner, with the input of the American public imprinted in the new system.[167] The 1954 tax reform marked a significant step that influenced changes to the reduction of deductions. Initially, deductions were taken by taxpayers based on how long they would remain useful, and this applied indiscriminately.

From the 1950s into the 1960s, corporate income taxes accounted for approximately one-third of the total revenue collected. In 1953, 28.4% of federal receipts were garnered from corporate income taxation, which was also reflective of 5.4% of Gross National Product (GNP).[168] From 1953 to 1964, the corporate tax was lowered and gradually trended downwards as the rate declined to from 52% to 48 percent.[169] The rate was raised temporarily to offset expenses associated with the

Vietnam War and was again reduced in 1978, where the Corporate Tax Act imposed a flat rate of 46% and this remained in place for some time.[170]

By 1981, there was a significant reduction in the corporate tax burden as the Economic Recovery Tax Act replaced that system of several classes of depreciation with capital recovery classes.[171] Here, light equipment in use for over three years the cost could be deducted (written off), five years for other equipment, and 15 years for business structures. This was soon countered by the Tax Equity and Fiscal Responsibility Act of 1982, which implemented a 50% basis adjustment for investment tax credit and disallowed the use of the acceleration method of deprecation that was previously used to recover the cost of assets placed in business.[172] Notwithstanding, the Federal government's corporate tax revenue collection was reduced by about 40% between 1980 and 1982, a new low rate was reached in 1982, due to the falling of the average corporate tax rate.[173]

In 1986, the United States saw the biggest tax overhaul in its history with the Tax Reform Act, which was based on modifications of the 1913 and 1954 Tax Acts, but due to the extensive amendments enacted by the regulations, the date of the Acts was changed to reflect 1986.[174] The Act instituted a less complex code, decreasing tax breaks and reduced rates. Interestingly, taxes against ordinary income at the upper level was reduced from 50% to 28% and at the same time, taxes at the lower end were increased from 11% to 15%; this was the first time taxes at the upper and lower end were adjusted concurrently in opposite directions.[175] The distinction between long-term capital gains and ordinary income was removed and the tax rates for both incomes were fixed, which saw a 28% tax imposition on long term capital gains in contrast to 20% rate[176] which is still the current rate today.

The 1986 tax reform was, and still is, dubbed one of the most controversial pieces of legislation in U.S. history, whereby Congress disregarded the advice and appeals of learned lobbyists to reject the proposal but proceed with its approval.[177] The success of the legislation was short-lived, as it served to appease the interest of the public rather than be guided by lobbyists who advised otherwise.[178] Consequently, the reform made little progress in mitigating exemptions that stifled overall economic growth, despite closing special tax shelters for specific individuals.[179] The Act required Social Security numbers for children being claimed as dependents on tax returns and expanded the Alternative Minimum Tax (AMT) which set the minimum tax standard payable by corporations or individuals after all deductions, credits, and eligible exclusions were applied.[180] Furthermore, it sought to incentivize homeownership by increasing the Home Mortgage Interest Deduction (MID).[181] Additionally, some of the previous provisions in the Act that imposed restrictions on special tax loopholes resurfaced into the tax system.[182]

This was viewed as a fundamental flaw of the Act's legislation because politicians were easily susceptible to acquiesce to demands of influential lobbyists to remove the restrictions on the special loopholes since they financed or otherwise supported their political interests.[183] Since 1986, Congress has passed an estimated 15,000 changes to the tax law because many of the restricted loopholes that existed over two decades re-emerged, thereby causing those politicians like President Bush, who staunchly support the Act to deem it as unfair and it should be further reformed.[184] Under the administration of President Clinton in 1993, there were major changes in the tax law for individuals and businesses alike. Once again, the U.S. was grappling with the federal deficit, and the most feasible way the government saw to reduce this deficit was by imposing additional taxes. The solution was known as the

Omnibus Budget Reconciliation Act of 1993[185]. Among the changes was an extra 10% of taxes imposed on married couples earning above $250,000.00, the 36% tax bracket, and increased gasoline prices and social security benefits were recognized. The tax cap on Medicare was removed and the corporate tax rate increased.[186]

The wealthy were made to feel the brunt of the tax initiative, but poor and middle-income families were not entirely spared from the effects. For example, the 1993 federal gas tax was increased by $4.03 which led to widespread chaos. Americans could not afford the price of gas and this was exacerbated by the fact that gas-dependent industries like construction and manufacturing were unable to afford the commodity. Funds were not being circulated to improve infrastructure, so road users also had to contend with this challenge.[187] The federal gas tax has not been adjusted since, though many have called for reviews. Although it did not become law until 1993, the Omnibus Budget Reconciliation Act was among the first bills to raise the tax rate retroactively, instituting the increased tax rates from the start of the year.

The Taxpayer Relief Act of 1997 was the first piece of legislation in sixteen years to impact the federal tax system so significantly, especially because taxpayers were the primary beneficiaries with the passing of the Act[188]. In the ensuing five years, Americans anticipated a tax break of $95.3 billion at an average tax return of $764.00 per annum. In the ten years to follow, Americans were projected to experience a reduction of $275.4 billion in taxes; an estimated $2,136.00 saved by everyone who filed taxes. Tax adjustments included, but were not limited to, savings and investment incentives, education tax incentives (HOPE Tax Credit) pension simplification, child and dependent care tax credits, estate, gift, and trust simplification provisions, expiring tax provisions, excise tax, and other

simplification provisions, with the per-child tax credit seeing the most significant reduction projected over the five- and ten-years periods. Second, only to dependent taxes, education taxation received a significant tax break with the implementation of the HOPE scholarship program, which sought to off-set some of the expenses associated with post-secondary education by offering up to $1,500.00 in tax credits, to defray the cost of college tuition.[189]

With the "independence fever" long removed from the minds of Americans, people were no longer as compelled to take on all the federal debts and responsibilities without putting up resistance. The populace had been shouldering the economic burdens of running the country, and with past experiences of exorbitant taxation, citizens had long been exploring ways to avoid paying taxes. These compliance issues forced the government to take decisive actions. Citizens would engage in countless tax evasion strategies and the government was steadfast in its quest to collect these much-needed taxes and implemented measures to curtail non-compliance. By 1998, Congress had decided that the IRS was overly assertive in its attempt to get compliance from citizens, which resulted in more resistance. Therefore, Congress sought a gentler approach, where citizens would willingly comply with tax regulations. This included an emphasis on the rights of taxpayers and improved customer service. So, Congress believed that if taxpayers were employed in information reporting type jobs, they were far more likely to be compliant with tax regulations, largely because information reporting would be counterproductive to evading taxes. Self-employed taxpayers and some employees that did not embrace information reporting were far less compliant, with an estimated 42% of this group owing taxes in contrast to about 95% compliance from those in information reporting jobs.[190]

It was particularly difficult for the Federal Government to collect taxes from US citizens residing overseas, as some provisions under the Internal Revenue Code (1986) held loopholes that facilitated tax avoidance but it also addressed measures to prevent tax avoidance for income earned from foreign sources.[191] Here, the foreign earned income exclusion and the foreign tax credit reduced or removed the tax liability for said citizens whether they held alien status or were U.S. citizens residing in other countries.[192] Taxpayers earning up to $72,000 could receive tax exemptions and exclude housing costs over a certain amount. Under section 901 and 911 of the IRS Code, once it could be proven that permanent residents and citizens abroad were paying taxes to their host government, they could apply for exemption and no penalties would be applied. [193]This seems to be a great benefit for those who earned income abroad to avoid being double taxed.

Expatriates who immigrated to other countries to avoid paying taxes were liable for prosecution and those taxpayers were pursued and penalized by the IRS under Section 877 of the Internal Revenue Code.[194] According to Section 877, a citizen of the United States who relinquishes his citizenship will still have to pay taxes on all income received within the United States for ten years.[195]

Di Portanova v. United States, 231 Ct. Cl. 623 (1982) is a perfect example where the petitioner, Di Portanova gave up his U.S. citizenship so he could avoid paying taxes on income earned as a beneficiary under a trust. However, the court ruled that he in fact renounced his citizenship to avoid paying taxes.[196] As a result, he was required to pay income taxes pursuant to provision set forth in Section 877. There were roadblocks with this strategy. Based on section 877 regulations, the IRS would have to audit the income/earnings of expatriates for a period not exceeding ten years[197] after migration, but more often than not,

the U.S. could not collect from these taxpayers, as their savings or investments were based outside of the U.S. and they did not have the international rights to effect penalties across borders.[198] The government sought to combat this by seeking to recover taxes from assets left in the U.S, though many would transfer their valuables once they had decided to migrate.[199] Additionally, the government sought to encourage overseas taxpayers to comply by improving the enforcement results generated by the IRS, minimizing the amount of burden on overseas taxpayers, allowing greater access to tax filing forms in various countries, and providing greater tax incentives for citizens who are foreign taxpayers to pay their taxes.[200]

With mounting allegations of poor customer relations and ill-treatment from the IRS, reform was deemed critical, heralding an overhaul of the tax system in 1998 towards a more customer-friendly modus operandi not explicitly geared towards monetary benefits.[201] Soon, the IRS discontinued its pursuit of cases long outstanding over long periods and focused its attention toward more recent cases that were of high value. This yielded some positive results, as the IRS was already constrained by resources to audit all outstanding cases.[202] Pursuing high value, recent cases saw the IRS utilizing resources more consciously which led to a substantial reduction of its enforcement activities.[203] Contrastingly, there was a substantial increase in uncollected delinquent taxes, as the smaller amounts collected added up and impacted the overall performance of the IRS.[204] The above overhaul proved to be a symbiotic approach which benefited both taxpayers and the IRS.

Under the leadership of President George W. Bush, the Economic Growth and Tax Reconciliation Act of 2001, followed by the Jobs and Growth Tax Relief Reconciliation Act of 2003 provided major benefits especially for those high-income taxpayers. Between 2004 and 2012, the after-tax income

of this group was raised to an estimated 5 percent. As such, the top 1% of households stood to benefit from a tax cut averaging $570,000.00.[205] The 2001 and 2003 tax Acts fostered a reduction of the top four marginal income tax rates in addition to taxes imposed on dividends and capital gains.[206] In turn, this reduction saw decreases in the average tax rate for taxpayers earning above the different thresholds. A new bottom income tax rate of 10% was implemented, a reduction of the previous 15% tax rate. [207] The Acts were the forerunners in the phasing out of estate taxes, which was repealed in 2010. The Child Tax credit was doubled from $500 to $1,000 per child and many low-income working families became eligible for this credit. Additionally, taxes for some married couples were also reduced by provisions for marriage penalty relief.[208] Conversely, both Acts had their disadvantages and advantages depending on which end of spectrum of the Acts, taxpayers fall.

While many citizens and supporters of the 2001 and 2003 tax breaks contend that the regulations were beneficial to the U.S, it soon became evident that they did not foster economic growth nor were they self-financed. On the contrary, there were deficits and debt that soon translated into income inequality. The Bush administration had proposed that a vast majority of the tax cuts would become obsolete by 2010, but a budget deal 2010 saw policymakers approving an extension of two years. In 2011, the estate tax was reinstated by Congress and estates valued over $5 million for individuals and $10 million for couples were taxed[209], but with more exemptions and lower tax rates, benefitting only the wealthiest Americans. The top income tax rate of 39.6%[210] was reinstated in 2012, with the American Taxpayer Relief Act and high-income earners once more felt the brunt of the tax measure. Most of the provisions previously implemented under the Bush administration that benefited low to middle-income earners remained in place after the incoming President (Obama), made the Bush tax cuts permanent.[211]

Interestingly, economic growth between 2001 and 2007 fell below average. Despite the high taxes imposed in the early 1990s, growth exceeded that of the early 2000s, due in large part to the tax acts of 2001 and 2003 that sought to return earnings to the pockets of Americans[212]. Contrary to projections of supporters of the 2003 tax act, the reduction of dividends did not result in any significant amount of business growth.[213] Furthermore, after 2003, there was limited impact on investment in a business or for employee compensation. This led to the conclusion that seeking to incentivize high-income taxpayers by reducing taxes had no real effect on economic growth.

In his report, Reynolds sought to dispel myths surrounding federal income tax in the United States. He asserted that tax expenditure calculations did not convey the consequences of changes in attitude anticipated because of tax repeal as opposed to the case of revenue estimates[214]. Instead, information surrounding tax expenditure calculations was provided to give the impression that stockholders would benefit just as much, irrespective of the prevailing tax rate. Additionally, Reynolds argued that tax schedules with low rates such as the one introduced in 2001, did not infer exclusive benefits for low-income taxpayers[215]. Contrarily, the benefit was more for higher-income earners, as low-income taxpayers no longer paid federal income tax. The 10% rate fostered a reduction in average taxes for higher-income earners, alleviating the 10% bracket and lowering the top rate to 30%, a positive reform in terms of revenue regardless of tax deduction.[216]

The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 has been dubbed a gender-sensitive "game-changer" in the history of US taxation.[217] The policy has a distinct focus on increasing gains for working families deemed to be job creators, stimulating

economic growth through consumption. Based on the policy's emphasis on reducing the amount of income necessary to file tax returns from an estimated $12,500 to about $3,000; the Earned Income Tax Credit (EITC) and the Child Tax Credit (CTC) would see major improvements in the amounts that could be returned to working families. Women stood to benefit most from these changes, representing an estimated 60% of parents to gain from the expansions in both policies. Moreover, research indicated that one in three families to benefit from the extensions were single-parent households headed by women.[218] The American Opportunity Tax Credit in the Recovery Act provided relief for working families and low-income students, by providing access to up to $2,500.00 per year partially refundable tax credit which could assist in offsetting college-related expenses. [219] This could be a great relief for low-income earners who attended college and provided an incentive for others to go further their education.

According to the Tax Policy Center, in 2012, under the American Taxpayer Relief Act, most of the income tax cuts enacted between 2001 and 2010 were made permanent and many other temporary provisions received extensions lasting from one to five years.[220] This prevented the expiration of the previously enacted tax cuts, with only those for the highest income earners excluded. The Tax Increase Prevention Act of 2014 and the Protecting Americans from Tax Hikes (PATH) Act of 2015 facilitated the extension and modification of several expiring tax provisions that had significant implications for income tax, child tax credit, tuition, retirement plans, and real estate investment trusts.[221] Additionally, the Act was enacted to protect taxpayers, businesses and families against fraudulent activities.[222] In reporting tax liability to the IRS in 2015, over 150 million income tax returns were filed with taxpayers summing up their total income, from whichever sources derived and subtracting different credits (which reduced the amount of

taxes owed), exemptions (which reduced the amount of income subject to taxation) and deductions (which saw a reduction of taxable income by a specific amount) to substantiate their tax liability.[223] Income was weighted against child tax credit, personal exemption, and standard deduction, which could lead to a reduction of much taxes (tax liability) they owe to the Federal Government or how much money (refunds) they will receive from the IRS.

L. Present Day Tax System

The federal income tax is a progressive tax levied at different rates depending on the tax bracket in which taxpayers fall.[224] Due to the progressive nature of the federal income taxes, the marginal tax rate increases for higher level incomes as the threshold of income goes up. Higher tax brackets would require taxpayers to pay higher rates on income within their specified bracket, as each bracket is aligned with a set rate everyone is obligated to pay.[225] Due to the complex nature of having to file tax returns and be compliant with tax regulations, the federal government sought alternatives that would yield greater efficiency and limit the stress that taxpayers faced that would, in turn, become a deterrent to compliance.[226] In 2016, it was reported that IRS tax filing requirements cost individuals 2.6 billion hours of filing documents to be compliant with the IRS tax code.[227] The opportunity cost was a sore point, as much of this time could have been spent engaging in productive activities that would have greater benefits for the economy.

In 2017, Congress enacted Public Law 115-97 also known as the TCJA, of the United States Code to reform the Tax Reform Act of 1986. This reform changed some key old tax provisions and laid the foundation on which the United States' current tax law: TCJA exists[228]. The TCJA is the most sweeping overhaul of the U.S. tax code since the Tax Reform Act of 1986.

Although policy makers insisted this tax reform would cause economic growth, many argued this progression would not be sustainable, and revenue would decline in the long. Additionally, the Act could exacerbate the disparity in income distribution between the rich and poor classes, and make low-income taxpayers worse off economically.[229] The legislators' intent was to simplify the federal individual income tax process by "pushing" the standard deductions as opposed to itemized deductions. Under TCJA, the standard deduction doubled from $6,350 to $12,000 for single taxpayers, from $9,350 to $18,000 for the head of household taxpayers, and $12,700 to $24,000 for those taxpayers filing jointly.[230] By almost doubling the standard deduction, itemized deductions became less attractive as a strategy for reducing taxpayers' taxable income on their tax returns. For example, a total of 88% of taxpayers were projected to utilize standard deduction to file their taxes in tax year 2018, according the Joint Commission on Taxation.[231] This means that approximately 30 million taxpayers will benefit from the standard deduction choice while the amount of taxpayers who itemize will be substantially reduced by 74% to 75% depending on their income level.[232]

Individual income taxation saw several modifications with the TCJA, with reforms to the alternative minimum tax (AMT) and itemized deductions as well as lower marginal tax rates, expanded standard deductions, and child tax credit. The issue of itemization versus standard deduction rose to prominence, as Americans sought to maximize their tax dollars. The standard deduction sets threshold amounts on how much taxpayers can deduct to help them lower their taxable income. Itemization is a tax tactic where taxpayers would list tax deductible expenses they incurred or paid for throughout the year that would allow them to reduce their taxable income by the total of those expenses which generally is higher than their standard deductions.[233] High-income earners would especially

take advantage of this, by using tax deductible items like charitable donations, real estate taxes, and other deductions to dodge high taxation. Documentation beats conversation because taxpayers would have to provide sufficient proof of the expenses that they utilized for itemizing in or for them to be receive a refund for the amounts they claimed under the itemization process.[234]

In an attempt to increase tax compliance and eliminate the hassle of storing receipts and other proof of expenditure that would come with itemization, the standard deduction was promoted as a better alternative.[235] The IRS would also eliminate many of the verification hurdles, positing that the time frame to file individual income taxes could be reduced by up to 7% of filers opting for the standard deduction. This would translate into average compliance savings between $3.1 billion to $5.4 billion.[236] The TCJA would also impose new limits on itemized deductions such as those for state and local taxes, property taxes, charitable contributions, and mortgage interest, thereby causing a reduction of complications in the tax code by a broadening of the tax base.[237]

III. CONCLUSION

Despite overwhelming support for standard deductions, some scholars are yet to be convinced because the claims of progressivity and simplification are occurring simultaneously. Both roles are conflicting and facilitate complexity, as all the standard deduction has done is establish a floor that restricts itemization, to phase out the latter alternative.[238] However, the standard deduction has its limitations, as there are filing restrictions and the taxpayer might not receive reduced deductions.[239] For example, for married couples, if the spouse of

a taxpayer itemizes his or her deductions, the other spouse would not be able to opt for the standard deduction. Non-resident and some dual-status aliens and those filing for periods under a year are also at a disadvantage, as they would not qualify for the standard deduction.[240] Depending on the type of deductible expenses, the standard deduction amount may be less if the taxpayer had chosen to itemize, as there may be expenses that are greater in amounts than that allowed under the standard deduction option. Currently, there is an ongoing debate on whether TCJA was specifically designed to benefit both the poor and rich taxpayers while simultaneously offering no assistance to the middle-class taxpayers, contrary to the claims made by President Trump.[241] Therefore, the Tax Cut and Jobs Act of 2017 is the biggest overhaul of the United States' current federal income taxation system and its provisions are now entrenched into U.S. taxation law.

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[228] Tax Cuts and Jobs Act (TCJA) of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

[229] William G. Gale et al., *A Preliminary Assessment of the Tax Cuts and Jobs Act of 2017* (Jun. 13, 2018), https://www.brookings.edu/wp-content/uploads/2018/06/ES_20180608_tcja_summary_paper_final.pdf, p. 1.

[230] Tax Cuts and Jobs Act (TCJA) of 2017, Pub. L. No. 115-97, §11021.

[231] York & Muresianu, *supra note* 223.

[232] *Id.*

[233] I.R.C. § 63(d).

[234] JOHN R. BROOKS, *Doing Too Much: The Standard Deduction and the Conflict Between Progressivity and Simplification*, 2 COLUM. J. TAX. L. 203 (2011).

[235] York & Muresianu, *supra note* 223.

[236] *Id.*

[237] *Id.*

[238] BROOKS, *supra* note 234.

[239] Maryalene LaPonsie, *The Pros and Cons of Standard vs. Itemized Tax Deductions* (Feb. 16, 2021), https://money.usnews.com/money/personal-finance/taxes/articles/the-pros-and-cons-of-standard-vs-itemized-tax-deductions.

[240] *Id.*

[241] Isabel v. Sawhill and Christopher Pulliam, *The middle class needs a tax cut: Trump didn't give it to them* (Oct. 16, 2018), https://www.brookings.edu/blog/up-front/2018/10/16/the-middle-class-needs-a-tax-cut-trump-didnt-give-it-to-them/.

DAMNING THE MINISTERIAL EXCEPTION FOR EXCULPATING RELIGIOUS ORGANIZATIONS IN HOSTILE ENVIRONMENT CASES

by

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INTRODUCTION

Consider two hypothetical cases. Magda is a Libyan-American who works as a Youth Coordinator for a temple in Los Angeles. Recently, a rabbi from Jerusalem joined the temple on a temporary assignment. From the time she arrived, the rabbi complained about the hostility many countries harbor against Israel. Several times, she criticized Libya as being among the worst transgressors and often questioned Magda about her views. When Magda demurred, the rabbi surmised that she, too, was hostile to Israel and often demeaned her heritage in front of children while consistently, and unfairly, criticizing her job performance. The wave of incessant vitriol caused Magda to look for another job.

John is a teacher at a Catholic elementary school in Chicago. He is married to a man and tries to explain to his students the importance of tolerance and respect for gays and lesbians is in all facets of life. The principal, a pious man who takes a dim view of same-sex relationships, has admonished John to cease and desist from discussing his views with students. When John persisted, the principal stopped speaking with him,

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moved his office to the basement and once called him a pervert in the heat of an argument. John is so upset that he began therapy to help him overcome his anxiety about coming to school.

Assuming that the facts in both cases were proven, Magda would be able to persuade a federal jury that she is the victim of a hostile environment that violates Title VII of the Civil Rights Act of 1964.[1] John would never have his day in court since his complaint would be dismissed by a pretrial motion. The inconsistent resolution of these cases sets the stage for this article's analysis of the ministerial exception and condemnation of its exculpation of religious employers in hostile environment cases filed by ministerial employees. As Part I explains, the ministerial exception was judicially created as a bulwark, mandated by the First Amendment, to protect religious organizations from secular interference in decisions concerning the hiring, control and firing of employees who advance the faith. In Part II, the tension between the broad release of liability that the ministerial exception affords and the illegality a hostile environment manifests is explicated. It has produced a circuit conflict in which some ministerial employees are protected by federal antidiscrimination law, such as those in Los Angeles (subject to Ninth Circuit precedent described in Part II), while others are increasingly being shunted aside no matter the outrageousness of their work environment, as with those who work in Chicago (subject to Seventh Circuit precedent described in Part II). Part III condemns the categorical application of the ministerial exception in hostile environment cases. Finally, Part IV discusses worrisome issues that the ministerial exception augurs but have yet been addressed such as whether a self-described religious organization that holds discriminatory precepts that would otherwise violate federal antidiscrimination laws is cloaked by the ministerial exception. The article concludes with a call for the United States Supreme Court to resolve the circuit split by rejecting a categorical

application of the ministerial exception in hostile environment cases or, failing that resolution, to seal the Pandora Box the high court has opened by clearly defining what religious organizations are entitled to its protection.

I. BIRTH AND BAPTISM OF THE MINISTERIAL EXCEPTION

In 1971, the Salvation Army terminated Billie McClure from her job as a minister. She alleged that she was the victim of sex discrimination in violation of Title VII. The district court granted a motion to dismiss that was upheld by the Fifth Circuit on the grounds that the application of Title VII to a religious organization's decision to fire a minister would encroach into the area of religious freedom protected by the Free Exercise Clause of the First Amendment.[2]

> An application of the provisions of Title VII to the employment relationship which exists between The Salvation Army and Mrs. McClure, a church and its minister, would involve an investigation and review of these practices and decisions and would, as a result, cause the State to intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern. Control of strictly ecclesiastical matters could easily pass from the church to the State. The church would then be without the power to decide for itself, free from state interference, matters of church administration and government.[3]

In the following decades, every federal circuit court followed the rationale and applied the doctrine born in *McClure*

to create what came to be known as the "ministerial exception."[4] Two pillars undergird it. First, the "constitutional imperative"[5] of the First Amendment means that religious organizations have autonomy over all aspects of their relationship with ministerial employees (e.g., hiring, control and firing).[6] Second, their autonomy is so complete that that the rationale for a decision to hire, evaluate, compensate or terminate is beyond the scope of judicial review.[7] When the ministerial exception has been raised as an affirmative defense, almost every lawsuit has ended by pretrial motion.[8] It has shielded religious organizations from liability for discrimination and retaliation alleged by ministerial employees under the Age Discrimination in Employment Act[9], the Americans with Disabilities Act[10], the Family and Medical Leave Act[11] as well as Title VII.

By the time the Supreme Court addressed the ministerial exception, there was little doubt that it would be upheld to some degree.[12] The high court had unambiguously held that disputes concerning a religious organization's decision as to who could act as its minister were beyond judicial review.[13] However, when *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*[14] was decided in 2012, the breadth and unanimity of the court's holding baptized the affirmative defense. Cheryl Perich, a teacher at a Lutheran school "called" with ministerial obligations, developed narcolepsy, was placed on disability leave and was replaced. In her lawsuit claiming disability discrimination, the high court formally endorsed the "ministerial exception" largely for the reasons articulated in *McClure* as well as the subsequent twelve circuit court opinions in accord.[15] Not only would judicial examination of a religious organization's decision to reject a minister violate the Free Exercise Clause of the First Amendment, the court reasoned, doing so would run afoul of the amendment's Establishment Clause by subjecting ecclesiastical decisions to government review.[16] A more perplexing issue was whether a teacher of secular subjects, as

well as religious topics, was embraced under the exception. Since Ms. Perich was held out as a minister, had received religious training, taught religion and lead students in prayer, Chief Justice Roberts concluded that she qualified as a minister even though she also performed secular duties.[17] Concurring opinions provide an even more expansive view of the exception. According to Justice Thomas, courts are required to defer to a religious organization's "good faith understanding" of an employee's ministerial role.[18] Justice Alito, joined by Justice Kagan, stressed that the exception was not limited to those who were formally designated as ministers. Any employee who leads a religious organization, conducts important religious rituals, or serves as a messenger or teacher of its faith so qualified.[19]

In the aftermath of *Hosanna-Tabor*, federal courts focused on whether an employee's duties qualified him or her as a minister.[20] Inconsistent rulings invited a subsequent ruling by the high court. In *Our Lady of Guadalupe School v. Morrissey-Berru*, teachers responsible for secular subjects as well as religious instruction, Agnes Morrisey-Berru and Kristen Biel, were barred from pursuing age and disability discrimination lawsuits, respectively, by the ministerial exception.[21] Writing for the majority, Justice Alito rejected a mechanical analysis focusing on an employee's job description in favor of a holistic examination of what they do and how their employer views their roles.[22] However, by now the real world impact of the ministerial exception had raised red flags. In dissent, Justice Sotomayor bemoaned the fact that teachers alleging discrimination for being too old and having breast cancer had their lawsuits summarily dismissed despite the fact that they primarily taught secular subjects, lacked religious titles and were not required to be a member of the church.[23] "So long as an employer determines that an employee's 'duties' are 'vital' to 'carrying out the mission of the church' [citation omitted], then today's laissez-faire analysis appears to allow that employer to make

employment decisions because of a person's skin color, age, disability, sex or any other protected trait for reasons having nothing to do with religion."[24] The unbounded expansion of the ministerial exception as well as judicial deference to employers' views of what their employees do, has been critically received among legal scholars.[25] And what constitutes a religious organization remains elusive because of a circular definition that defines such organizations as entities whose purpose is religious.[26]

II. APPLICABILITY OF THE MINISTERIAL EXCEPTION IN HOSTILE ENVIRONMENT CASES

A summary of federal harassment law focusing on sex will provide ground for the ministerial exception's figure. While the exception was gaining traction in the circuit courts, the Supreme Court began fashioning a theory of liability plaintiffs could pursue under Title VII that filled the gap left by classic cases where managers threatened or bribed subordinates for sex. In quid-pro-quo cases, employers are vicariously liable for actions their managers commit—tangible actions—based on black letter agency principles.[27] In *Meritor Savings Bank FSB v. Vinson*, the court held that sexual harassment could occur in the absence of tangible employment actions. An employee's Title VII rights are violated when he or she is subject to unwelcome harassment, the harassment is based on a trait or quality protected by discrimination statutes, the harassment was sufficiently severe or pervasive such that it altered the employee's working environment and there is a basis for holding employers liable.[28] This new theory is based on intangible actions and came with a novel defense. If an employer can prove that it exercised reasonable care to prevent or promptly correct harassing behavior of a manager, coworker or third party, and the employee unreasonably failed to take advantage of the

employer's preventive or corrective action, then it is not liable.[29] The affirmative defense is commonly referred to as the Ellerth/Faragher defense after the two cases articulating it.

The ministerial exception applies to a religious organization's decision concerning the hiring, assignment, compensation, promotion, and firing of ministerial employees.[30] Accordingly, it provides a complete affirmative defense to tangible employment actions.[31] In *Hosanna-Tabor*, the court endorsed the ministerial exception only in cases where ministerial employees sue religious organizations over tangible employment actions.[32] The high court expressed no views on the applicability of the exception in other types of employment disputes preferring, instead, to address those issues if and when they arise.[33] By the time the Supreme Court ruled, a pivotal issue had already arisen and exposed a circuit conflict. Does the ministerial exception apply in hostile environment cases?

Allegations of tangible employment actions do not fall within the scope of hostile environment cases.[34] But since employment lawsuits often allege a hostile work environment, exclusively or in conjunction with quid-pro-quo theory, it was inevitable that the federal courts would have to confront the question of whether the ministerial exception would apply in cases filed against religious organizations. The first to do so was the Ninth Circuit. In *Bollard v. California Province of the Society of Jesus*, the court held that it does not.[35] John Bollard was a novice who was in training to become a priest in the Jesuit order. He alleged that his superiors sent him pornographic materials, made unwelcome advances, and engaged in discussions of sex. When his complaints about this conduct were ignored, he quit and commenced litigation under Title VII.[36] The panel overruled the district court's dismissal based on the ministerial exception for two reasons. First, the Jesuits proffered no religious justification for the conduct alleged (indeed, the

order condemned harassment as repugnant to its values) and, therefore, by adjudicating plaintiff's allegation a court would not be intruding on ecclesiastical matters in violation of the Free Exercise Clause.[37] Second, accepting the plaintiff's allegations as true at the pleading stage, the conduct did not implicate the order's decision to accept him as a novitiate, evaluate his training or determine whether he satisfied the requirements for ordination—conduct that the Establishment Clause protects.[38] In a subsequent case, the Ninth Circuit affirmed *Bollard* but drew a line of demarcation between conduct protected by the ministerial exception and that justiciable under federal antidiscrimination laws.[39] Monica Elvig was an associate pastor in a Presbyterian church who alleged that she was the victim of sexual harassment, that she complained about the conduct to church officials and that she was terminated as a result. In reversing the lower court's order dismissing the case, the panel held that the ministerial exception would shield the church from liability concerning its decision to terminate plaintiff as a pastor but that the case could proceed on causes of action for hostile environment and retaliation.[40]

The Ninth Circuit's rejection of a categorical application of the ministerial exception in hostile environment cases was soon eclipsed. The Tenth Circuit broadly applied the exception in a hostile environment case because adjudicating the Ellerth/Faragher defense would entangle the court in a church's "core functions, its polity and its autonomy".[41] The Sixth Circuit held that the exception applies to any cause of action that implicates a tangible employment action.[42] The Eleventh and Fifth circuits have suggested in dicta that they would join the Tenth and Sixth Circuits if the issue was squarely presented.[43] Most recently, the Seventh Circuit has been the most strident in categorically applying the ministerial exception in hostile environment cases.

Sandor Demkovich was the music director for a Catholic church near Chicago. He was fired by the pastor and claimed that his termination was because he was gay and obese. The district court dismissed that part of his amended complaint alleging a hostile environment based on sexual orientation (based largely on the fact that the church offered a religious justification for the alleged remarks) but permitted his disability-based allegations to go to trial. Although a panel of the 7th Circuit reversed the order dismissing the Title VII claims while affirming the disability claims, plaintiff's hope for a trial on the merits was thwarted. The full court vacated the judgment, granted review and a majority ruled that the ministerial exception provided a categorial bar to employment disputes filed by ministerial employees against their religious organizations.[44] The majority reasoned that a broad application of the exception in hostile environment cases was dictated by both clauses of the First Amendment. The Free Exercise Clause would be violated because deciding harassment allegations necessarily entails probing into the religious work environment and, in the process, interfering with a religious organization's right to shape its faith and mission.[45] The Establishment Clause would be imperiled because delving into the merits of harassment would excessively entangle courts in a religious organization's relationship with its ministerial employees.[46] Thus, the eight judges in the majority concluded the ministerial exception applies without regard to the tangibility of the claims asserted by ministerial employees.

III. CRITICAL ANALYSIS OF THE MINISTERIAL EXCEPTION AS APPLIED IN HOSTILE ENVIRONMENT CASES

A critical analysis of the ministerial exception's categorical application in hostile environment cases is predicated on four grounds. First, the gravamen of allegations entailed in hostile environment complaints have nothing to do

with a religious organization's ability to select, supervise or terminate a ministerial employee and, therefore, applying neutral statutes, such as Title VII, to religious organizations passes constitutional muster. Second, hostile environment cases are like tort claims which the Supreme Court has explicitly excluded from the ministerial exception. Third, any argument that litigation concerning a religious organization's employment relations would enmesh federal courts in ecclesiastical matters is inapposite when such cases are decided by private arbitrators as is increasingly the norm in all workplace disputes. Fourth, dismissing a ministerial employee's hostile environment case without regard to its merits does not make sense. Invoking the First Amendment to shield a religious organization from liability to protect its internal affairs has nothing to do with a ministerial employee's allegations of conduct that, if proven, would be patently illegitimate, unauthorized, and reprehensible—legally and, presumably, morally.

Hostile Environment Cases Do Not Intrude On Ecclesiastical Matters Protected by the Ministerial Exception

The Supreme Court made clear that a religious organization's right to control its ministerial employees justifies applying the First Amendment to shield it from litigation. Given the fact that control is key to the exception, its relevance extends only to disputes where a religious organization's tangible employment actions—hiring, assignment, firing—are challenged since those claims by necessity involve the decision as to who will minister the faith and how they will do so. As Judge Hamilton's dissent in *Demkovich* explains, a hostile workplace environment is not a legally permissible means for an employer, religious or secular, to exercise control over any employee.[47] "An employer's need and right to control employees should not embrace harassing behavior that the

Supreme Court has defined in numerous cases as conduct that 'unreasonably interferes with an employee's work performance.' [citation omitted] The notion that such harassment is somehow necessary to control or supervise an employee is, under employment discrimination law, an oxymoron."[48]

To be sure, when a ministerial employee alleges that a supervisor's comments were sufficiently severe or pervasive enough to interfere with his or her working environment, litigation will unavoidably touch on the inner working of a religious organization. A categorical application of the ministerial exception would perforce foreclose that possibility. However, the Supreme Court has never construed the First Amendment to extend unfettered protection to religious organizations. Entanglement between the state and church becomes unconstitutional only when it is excessive.[49] In *Employment Division, Department of Human Resources of Oregon v. Smith*, the high court upheld the denial of unemployment benefits to employees who had been terminated for smoking peyote for sacramental purposes.[50] The Free Exercise Clause of the First Amendment, Justice Scalia explained, does not prohibit the state from enforcing a valid and neutral law even when the law criminalizes conduct a religious organization endorses.[51] In *Hosanna-Tabor,* the high court distinguished *Smith* by reasoning that a religious organization's decision to hire or fire a ministerial employee is dissimilar to an individual's smoking of peyote; the former entails an internal decision manifesting ecclesiastical considerations while the latter regulates "outward physical acts".[52]

Actions perpetrated by supervisors in religious organizations against ministerial employees may be committed within the confines of the organization, but they are surely outward physical gestures perpetrated by one member against another manifesting a physical reaction (e.g., anxiety, injury).[53]

In essence, intangible actions embody outward physical acts and thereby justify judicial review notwithstanding the religious nature of the employer.

Hostile Environment Cases Are Essentially Tort Claims Undisturbed by the Ministerial Exception

In *Hosanna-Tabor*, the high court made clear that its endorsement of the ministerial exception in tangible employment cases under Title VII cases neither expressly nor impliedly expressed its view on whether the exception applies to other types of suits (such as those alleging tortious conduct perpetrated by religious employers).[54] Hostile environment cases are tortious in nature.[55] An employer's vicarious liability is determined by common law tort principles.[56] Where the harasser is a coworker, courts determine liability by asking whether the employer was negligent.[57] In her concurring opinion in *Price Waterhouse v. Hopkins*, Justice O'Connor explained that Title VII draws its essence from tort law. "Like the common law of torts, the statutory employment 'tort' created by Title VII has two basic purposes. The first is to deter conduct which has been identified as contrary to public policy and harmful to society. … The second goal of Title VII is 'to make persons whole for injuries suffered on account of unlawful employment discrimination.'"[58]

Applying common law tort principles to lawsuits filed by ministerial employees against religious organizations does not categorically intrude on ecclesiastical matters.[59] Indeed, hostile environment theory seeks to protect an employee's dignity and physical well-being and, as such, it maps nicely with tort law.[60] A tort is simply a lawsuit seeking redress for another's violation of a non-contractual duty. The fact that the duty commonly emanates from state appellate opinions while Congress created

Title VII is a distinction without substance. The fact that they both seek redress of civil wrongs is the bond that unites them.

The Ministerial Exception is Inapplicable in Arbitration

Lawsuits alleging a hostile environment are becoming scarce. It is not that employers are doing a better job of obeying the law (though one would hope that is a causal factor). Rather, employers are increasingly requiring their employees to resolve their disputes in arbitration.[61] The Supreme Court has consistently subjected claims by employees against their employers generally, as well as those arising under federal antidiscrimination laws specifically, to arbitration under the Federal Arbitration Act.[62] Employers have taken note. Since 2000, the number of non-union employees bound by arbitration clauses has doubled and, as of 2017, represents approximately 56% of the private workforce (totaling approximately 60 million people).[63] Closing courthouse doors to employees by shunting them into arbitration has a tendency to suppress claims since attorneys are less likely to pursue cases in arbitration where claimants win less often and, among those who prevail, recover lower damages.[64]

Although no empirical study has examined the prevalence of employment arbitration clauses among religious organizations, the likelihood is that they are as common as they are among secular employers. If such organizations have access to the kind of sophisticated legal advice that would invoke the ministerial exception in court, they are savvy enough to avoid the mere prospect of litigation by creating employment contracts that include arbitration clauses. So, if a ministerial employee complains about a hostile environment, an arbitrator would be the one dispensing justice. Although they perform similar functions, arbitrators are not judges. They are private parties.

The First Amendment only restricts state action.[65] Since arbitrators are not bound by the First Amendment, the rationale for the ministerial exception dissipates. Permitting an arbitrator to delve into the most sensitive ecclesiastical issues does not enmesh federal judges in religious affairs. Indeed, religious organizations and their ministerial employees can agree to select arbitrators who are members of their faith or who are sensitive to theological considerations. In sum, the public ministerial exception is inapposite in hostile environment disputes decided in private arbitration.

Barring Hostile Environment Cases Without Consideration of Their Merits Based On the Ministerial Exception Is Nonsensical

A tenet of statutory construction is that the law should make sense.[66] When a key constitutional principle is at stake the need for common sense in its application is paramount. A categorical application of the ministerial exception in hostile environment cases is nonsensical on two levels. First, doing so presumes that a judge is incapable of distinguishing actions prompted by a religious organization's mission from activities one might encounter in a secular workplace. If a hostile environment theory is alleged by one who qualifies as a minister, ecclesiastical allegations could easily be excised from a lawsuit by a pre-trial motion or by an evidentiary ruling during trial. In other words, the allegations relating to tangible actions would be barred while those dealing with intangible actions would be adjudicated.

On a deeper level, however, categorically applying the exception in hostile environment cases is at best ironic and at worst absurd. Granting that affirmative defense serves to legally exonerate organizations that are expected to espouse the kind of

higher order principles people associate with religion from provable, perhaps admitted, conduct those implications would be condemned as profane. Moreover, no rational goal of the First Amendment would be served because a religious organization's internal governance is not implicated in hostile environment cases. Uttering racist, ethnic, misogynistic, ageist, or homophobic slurs to a ministerial employee is quite different from terminating that person based on a violation of the organization's doctrine. Quite simply, when a ministerial employee complains of conduct so severe or pervasive that it substantially interferes with his or her ability to work, no commonly accepted religious practice is at issue.

IV. THE PANDORA'S BOX OPENED BY A CATEGORICAL APPLICATION OF THE MINISTERIAL EXCEPTION IN HOSTILE ENVIRONMENT CASES

All cases invoking the ministerial exception were filed against entities that unmistakably qualified as religious organizations under a conventional view of religion—Catholic, Greek Orthodox, Presbyterian, Episcopalian, Lutheran and Seventh-Day Adventists to name a few. Indeed, no jurist has dwelled on what constituted a religious organization even though the term is replete in every opinion on the subject. For example, in *Hosanna-Tabor*, Chief Justice Roberts used the terms religious group, religious institution, religious organization and religious employer no less than fifteen times. At a minimum, any institution associated with religions practiced in the United States[67] should qualify.

The ministerial exception does not stop there. Indeed, the absence of a definition of religious organization in judicial opinions, the "elephant" in *Hosanna-Tabor*,[68] poses a dramatic risk that undermines the applicability of the exception in

hostile environment cases. Does the ministerial exception protect nontraditional religious organizations whose mission tolerates, perhaps demands, conduct that would easily qualify as harassing in any secular workplace?

The Supreme Court has never defined religion under the Constitution. The best guidance appears in precedent addressing the rights of individuals under federal statutes but, even then, the search for a definition has been elusive.[69] Title VII does little to help. Religious corporations, associations, educational institutions, and societies are exempted with respect to the employment of individuals who must belong to a particular religion to execute the entity's activities (e.g., requiring an Imam to be a Muslim).[70] The exemption does not, however, define religious.[71]

As a matter of constitutional law, the contours of religion have been amorphous. The Supreme Court initially adopted a theistic approach. Religion refers to one's view of his relation with his Creator.[72] By the mid-twentieth century, the high court discarded this approach in light of the presence of more diverse faiths such as Buddhism.[73] In a pair of cases in which conscientious objectors were charged with violating a federal statute imposing the draft, the Supreme Court held that a belief that is closely held and that takes the place of religion in a person's life qualifies for protection.[74] An individual need not be a member of formal organization much less attend church.[75] Administrative regulations that draw on those cases are equally vague. The EEOC defines religious practices to include an individual's moral or ethical beliefs as to what is right or wrong, without regard to whether any group accepts such beliefs, if they are sincerely held with the strength of traditional religion views.[76] The antithesis of what many would consider a religion, atheism, has also been protected.[77]

Neither novelty nor nonconformity exclude practices from protection.[78] They may even seem preposterous to others.[79] However, when an organization's mission embodies precepts that manifest discrimination based on race, color, sex (including sexual orientation), national origin, age, or disability, the question of whether an organization qualifies as religious becomes more disturbing. According to a 2021 study published by the Southern Poverty Law Center, there are currently 733 hate groups operating in the United States.[80] Many of these organizations superficially espouse a spiritual goal that mimics Judeo-Christianity but in essence advocate racism, misogyny, antisemitism and homophobia (e.g., Kingdom Identity Ministries, America's Promise Ministries, Radical Hebrew Israelites).[81] The possibility that such organizations could be granted judicial protection as a religion under antidiscrimination laws is far from an academic conundrum. In *Peterson v. Wilmur Communications, Inc.*, a district court held that an employee's role as a minister in the World Church of the Creator insulated him from demotion from a supervisory position based solely on his publicized affiliation with the church.[82] The tenets of Creativity include white supremacy and antisemitism.[83] In granting plaintiff's motion for summary judgment, the court held that the uncontroverted evidence showed plaintiff's sincere belief in Creativity and its central role in life as evidenced by his practice of its teaching.[84] The court cast aside the argument that Creativity's immorality disqualified it as a religion.[85] "Title VII protects against discrimination on the basis of religion, regardless of the court's or anyone else's opinion of the religion at issue. Plaintiff has shown that Creativity functions as religion in his life; thus, Creativity is for him a religion regardless of whether it espouses goodness or ill."[86]

Making the problem even more worrisome, the ministerial exception does not stop at the church door. Federal courts have applied it in cases filed against schools, hospitals

and corporations (for profit as well as non-profit) that are affiliated with traditional religions.[87] Described by one commentator as "parachurches," a growing number of such organizations are nominally motivated by religious ideals (though not necessarily formally controlled by religions) though their activities are primarily social because their daily interactions parallel those of secular organizations.[88]

The broad expanse of the ministerial exception opens a Pandora's box from which organizations with dubious religious claims could emerge to seek protection from hostile environment lawsuits by those in their employ. Moreover, the potential exists that purely secular entities controlled by religious managers could claim the exception.[89] Adding to the dilemma is the range of employees who could be qualified as having a ministerial role. Recall, that in the two cases decided by Supreme Court, the exception was applied to elementary school teachers who were assigned religious topics as part of their curriculum even though they were not required to be Catholics. The job description of any employee could easily be manipulated to include tasks that sound religious (e.g., proselyting) though the bulk of their work is secular. Given the deferential, holistic nature of defining a minister under *Our Lady of Guadalupe*, no individual could be assured when hired that he or she can sue for federal protection from workplace harassment—even if the employer expressly states that it is an "EEO Employer". For example, an outreach coordinator in a for-profit firm controlled by followers of Creativity who marries someone of color, a Semite or a same-sex partner would likely be subject to severe or pervasive abuse but may well be denied any federal remedy if a judge rules that the employer qualifies as a religious organization and that he or she is charged with duties that qualify as ministerial.

Those managers who espouse noxious views cloaked as religion would be tempted to create organizational structures and job descriptions that bring their firm under the aegis of the ministerial exception. Since the exception's legitimacy flows from the First Amendment, only the Supreme Court could stand in the way. But to do so the high court would have to tackle the daunting task of more precisely defining a religious organization. If the court limits the boundaries to conventional religions, it runs the risk of violating the Establishment Clause of the First Amendment because such a ruling would advance some religions while inhibiting the nontraditional. Such a ruling would also run afoul of the Free Exercise Clause because drawing a line would give the judiciary the prerogative to objectively determine the employment decisions made by those in control of a self-perceived religious organization. However, such decisions are inherently subjective since they are dictated by faith. But if an employee is victimized by an organization controlled by bigots, the high court would have little choice but to confront the issue. Given an unconstrained ministerial exception, dark clouds of uncertainty loom on the horizon for a potentially vast array of workers.

CONCLUSION

Nearly fifty years ago, the circuit courts gave birth to a defense that would prevent the judiciary from interfering with the personnel decisions of religious organizations. When the Supreme Court ultimately addressed the ministerial exception, it baptized its rationale and scope. In sum, where a religious organization's decision to hire, control or fire a ministerial employee is concerned—actions the court defines as tangible—no judge can meddle. But that simplicity belies complex issues that the federal appellate courts are grappling with as well as those that may well arise. The circuits have split on whether the ministerial exception can be invoked in hostile environment

cases with a growing majority holding that it does. However, the trend misconstrues the purpose of the ministerial exception, fails to recognize that hostile environment cases are much like torts impervious to the exception, neglects the fact that many, if not most, employment disputes are decided by private arbitrators and, last but far from least, that a categorical application of the exception is nonsensical. For these reasons, the Supreme Court should accept review of a hostile environment case and squarely reject a categorical application of the ministerial exception. If the high court declines to do so, the possibility that controversial organizations whose mission manifests principles repugnant to federal antidiscrimination laws will take shelter under the exception by giving them free reign to harass employees they deem to be ministerial. If a case involving such an organization was accepted for review, the high court would have little choice but to define what it means to be a religious organization under the First Amendment. Since bad cases usually make bad law, the high court would do well to step in sooner rather than later with a narrower ruling that cabins the ministerial exception. No religious practice shielded by the First Amendment can justify the kind of harassment Title VII and our other federal antidiscrimination laws were enacted to prevent.

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[1] 42 U.S.C. §§ 2000e *et seq* (2018).
[2] McClure v. Salvation Army, 460 F.2d 553, 560-61 (5th Cir. 1972).
[3] *Id*. at 560.
[4] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 and n. 2 (2012).
[5] Minker v. Baltimore Ann. Conf. of United Methodist Church, 894 F.2d 1354, 1357 (D.C. Cir. 1990).
[6] Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.3d 1164, 1169 (4th Cir. 1985).

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[7] Werft v. Desert Sw. Ann. Conf. of the United Methodist Church, 377 F.3d 1099, 1102 (9th Cir. 2004); EEOC v. Roman Cath. Diocese of Raleigh, 213 F.3d 795, 801 (4th Cir. 2000).
[8] *See, e.g.*, Alicea-Hernandez v. Cath. Bishop of Chi., 320 F.3d 698, 703 (7th Cir. 2003) (quoting EEOC V. Roman Cath. Diocese of Raleigh, 213 F.3d at 802)).
[9] Tomic v. Cath. Diocese of Peoria, 442 F.3d 1036 (7th Cir. 2006), *abrogated on other grounds, Hosanna-Tabor,* 565 U.S. 171.
[10] Hollins v. Methodist Healthcare, 474 F. 3d 223 (6th Cir. 2007), *abrogated on other grounds*, *Hosanna-Tabor*, 565 U.S. 171.
[11] Fassl v. Our Lady of Perpetual Help Roman Cath. Church, No. Civ. A. 05-CV-0404, 2005 WL 2455253 (E.D. Pa. Oct. 5, 2005).
[12] Ira C. Lupu & Robert W. Tuttle, *#MeToo Meets The Ministerial Exception: Sexual Harassment Claims By Clergy And The First Amendment's Religion Clauses*, 25 Wm. & Mary J. Race, Gender & Soc. Just., 249, 254-55 (2019).
[13] *See* Serbian Eastern Orthodox Diocese for U.S. & Can. v. Milivojevich, 426 U.S. 696, 708 (1976)*;* Kedroff v. St. Nicholas Cathedral of Russ. Orthodox Church, 344 U.S. 94, 116 (1952).
[14] *Hosanna-Tabor*, 565 U.S. 171.
[15] *Id.* at 188.
[16] *Id*. at 188-89.
[17] *Id*. at 190-192.
[18] *Id*. at 196-97 (Thomas, J. concurring).
[19] *Id*. at 198-99 (Alito, J., concurring).
[20] *See* Lupu & Tuttle, *supra* note 12, at 255. *See, e.g.*, Herx v. Diocese of Ft. Wayne-South Bend, 48 F. Supp. 3d 1168, 1177 (N.D. Ind.), *appeal dismissed*, 772 F.3d 1085 (7th Cir. 2014); Davis v. Baltimore Hebrew Congregation, 985 F. Supp. 2d 701, 711 (D. Md. 2013).
[21] 140 S. Ct. 2049 (2020).
[22] *Id.* at 2063-66.
[23] *Id*. at 2071-72 (Sotomayor, J., dissenting).
[24] *Id*. at 2082 (Sotomayor, J, dissenting).
[25] *See, e.g.*, Patrick Hornbeck, *A Nun, A Synagogue Janitor, And A Social Work Professor Walk Up To The Bar: The Expanding Ministerial Exception.* 70 Buff. L. Rev. 695, 699-703 (2022); Caroline Mala Corbin, *Above The Law? The Constitutionality Of The Ministerial Exemption From Antidiscrimination Law,* 75 Fordham L. Rev. 1965, 1981-85 (2007).
[26] *Cf.* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, COMPLIANCE MANUAL ON RELIGIOUS DISCRIMINATION § 12-I (C)(1) (2021) (Title VII's exemption for religious institutions is limited to those organizations whose purpose and character are primarily religious).

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[27] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762 (1998).
[28] 477 U.S. 57, 64-67 (1986). *See also* Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-23 (1993). *See generally* U.S. EQUAL EMP'T. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: VICARIOUS LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors (last visited July 28, 2022). Hostile environment liability has also been recognized in cases arising under the Age Discrimination In Employment Act, McKennon v. Nashville Banner Pub'l Co., 513 U.S. 352, 357 (1995), and the Americans With Disabilities Act. Lanman v. Johnson Cnty, Kan., 393 F. 3d 1151, 1155 (10th Cir. 2004).
[29] *Ellerth*, 524 U.S. at 765; Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998).
[30] *Hosanna-Tabor*, 565 U.S. at 194-195. *See also Ellerth*, 524 U.S. at 763 (tangible employment actions reflect a significant change in employment status—hiring, assignment, promotion, compensation or firing).
[31] Middleton v. United Church of Christ Bd., 483 F. Supp. 3d 489, 495 (N.D. Ohio 2020), *aff'd*, 2021 WL 5447040 (6th Cir. Nov. 22, 2021).
[32] *Hosanna-Tabor*, 565 U.S. at 196.
[33] *Id*.
[34] Rachel Casper, *When Harassment At Work Is Harassment At Church: Hostile Work Environment And The Ministerial Exception,* 25 U. Pa. J. L. & Soc. Change, 11, 18-19 (2021).
[35] 196 F.3d 940 (9th Cir. 1999).
[36] When an employee terminates employment because he or she believes that the workplace environment is unendurable, no tangible employment action is implicated. Instead, the constructive discharge is adjudicated on a hostile environment theory where the Ellerth/Faragher affirmative defense applies. *See* Pa. St. Police v. Suders, 542 U.S. 129, 151-52 (2004).
[37] *Bollard*, at 947.
[38] *Id*.
[39] Elvig v. Calvin Presyrbertian Church, 375 F.3d 951 (9th Cir. 2004).
[40] *Id*. at 961-62. The dissent disputed the line of demarcation drawn by the majority because litigation over whether the church was reasonable in its investigation of defendant's Ellerth/Faragher defense would entail impermissible judicial review of the church's governance, procedures, and decisions. *Id*. at 973-76 (Trott, J., dissenting).
[41] Skrzypczak v. Roman Cath. Diocese of Tulsa, 611 F.3d 1238, 1245 (10th Cir. 2010).
[42] *Middleton*, 2021 WL 5447040 at *5-6.

[43] *Cf.* Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1303-04 (11th Cir. 2000) (case alleging intangible employment action (retaliation) and tangible employment action (constructive discharge) was precluded by the ministerial exception); Combs v. Cent. Texas Ann. Conf. of the United Methodist Church, 173 F.3d 343, 350-51 (5th Cir. 1999) (case alleging sex and pregnancy discrimination leading to termination subject to ministerial exception).
[44] Demkovich v. St. Andrew The Apostle Parish, 3 F.4th 968, 985 (7th Cir. 2021) (en banc). The full court's opinion was unsurprising since a panel of the Circuit held nearly two decades earlier that the ministerial exception applied regardless of the type of claims asserted against a religious organization. *See* Alicia-Hernandez v. Cath. Bishop of Chi., 320 F.3d 698, 703 (7th Cir. 2003).
[45] *Id*. at 980 (quoting *Hosanna-Tabo*r, 565 U.S. at 188).
[46] *Id*.
[47] *Id* at 990-91 (Hamilton, J., dissenting) (citing *Harris*, 510 U.S. at 17).
[48] *Id*. at 991 *See also*, Casper, *supra* note 34, at 32-37.
[49] *See* Agostini v. Felton*,* 521 U.S. 203, 233, (1997).
[50] 494 U.S. 872, 879 (1990).
[51] *Id.* at 879.
[52] *Hosanna-Tabor*, 565 U.S. at 189-90.
[53] *Cf*. Doe #2 v. Norwich Roman Cath. Diocesan Corp., No. HHDX07CV125036425S, 2013 WL 3871430, at *3 (Conn. Super. Ct. July 8, 2013) (causes of action against a church alleging a failure to warn and negligent supervision arising out a sexual assault perpetrated by a priest were not barred by the ministerial exception).
[54] *Hosanna-Tabor*, 565 U.S. at 196.
[55] *Ellerth*, 524 U.S. at 756.
[56] *Id.* at 744 (quoting Restatement (Second) of Agency § 219 (2)(d)).
[57] Vance v. Ball St. Univ., 570 U.S. 421, 424 (2013).
[58] 490 U.S. 228, 264 (1989) (O'Connor, J., concurring).
[59] *See* Smith v. O'Connell, 976 F. Supp. 73, 80-82 (D.R.I. 1997) (in case against church arising out of a priest's alleged sexual assault, First Amendment did not bar suit since the negligent supervision claim could be adjudicated under tort law principles without interpretation of religious doctrine).
[60] Casper, *supra* note 34, at 45-47. *See also* Lupu & Tuttle, *supra* note 12, at 266-67 (the Ellerth/Faragher defense reflects foundational principles of tort law as well as the antidiscrimination goals of Title VII).
[61] *See* Debra Berman & Douglas M. McCabe, *Compulsory Arbitration In Nonunion Employee Relations: A Strategic Ethical Analysis,* 66 J. Bus. Ethics 197, 197 (2006).

[62] *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 122-24 (2001); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27-29 (1991).
[63] Alexander J. S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST., 1, 2 (April 6, 2018), https://www.epi.org/publication.
[64] *Id*. at 10-11.
[65] Manhattan Comty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019).
[66] Studiengesellschaft Kohle, v. Dart Indus., Inc., 862 F. 2d 1564, 1568 (Fed. Cir. 1988); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, at 252 (West 2012).
[67] *See* PEW RES. CTR., *Religious Landscape Study*, https://www.pewresearch.org/religion/religious-landscape-study (last visited Aug. 1, 2022).
[68] Brian M. Murray, Article, *The Elephant in Hosanna-Tabor*, 10 Geo. J. L. & Pub. Pol'y 493, 515 (2012).
[69] *See* Africa v. Commw. of Pa., 662 F. 2d 1025, 1031-33 (3rd Cir. 1981) (a religion addresses fundamental questions dealing with deep and imponderable matters, consists of a comprehensive belief system and is cognizable by formal, external signs). The factors identified in *Africa* are analyzed holistically and flexibly. Love v. Reed, 216 F.3d 682, 687 (8th Cir. 2000).
[70] 42 U.S.C. § 2000e-1(a). *See also* Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 496 F. Supp. 3d 1195, 1201-05 (S. D. Ind. 2020) (Title VII's exemption for religious institutions is limited to hiring decisions based on religion and does not preclude liability for discrimination based on race, color, gender, or national origin), *appeal dismissed*, 2021 WL 9181051 (7th Cir. July 22, 2021).
[71] *See* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 617-18 (9th Cir. 1988). *See also* COMPLIANCE MANUAL ON RELIGIOUS DISCRIMINATION, *supra* note 26.
[72] Davis v. Beason, 133 U.S. 333, 342 (1890).
[73] Torcaso v. Watkins, 367 U.S. 488, 498 (1961).
[74] *See* Welsh v. U.S., 398 U.S. 333, 339-40 (1970); U.S. v. Seeger, 380 U.S. 163, 183-84 (1965).
[75] Frazee v. Ill. Dep't of Emp't Sec'y, 489 U.S. 829, 834-35 (1989).
[76] 29 C.F.R. § 1605.1 (2022).
[77] Young v. Sw. Sav. & Loan Asso., 509 F. 2d 140, 144 (5th Cir. 1975).
[78] *Cf.* EEOC v. United Health Programs Of Am., Inc., 213 F. Supp.3d 377, 398-402 (E.D.N.Y. 2016) (Onionhead qualifies as a religion).
[79] *See* Stevens v. Berger, 428 F. Supp. 896, 899 (E.D.N.Y. 1977).

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[80] S. POVERTY L. CTR., *The Year In Hate & Extremism Report 2021* (March 9, 2022), https://www.splcenter.org/20220309/year-hate-extremism-report-2021

[81] *Id*. *See also* Meghan Hamilton, *Five Dangerous 'Christian Hate' Groups,* THEHUMANIST.COM (March 5, 2014), https://thehumanist.com/news/religion/5-dangerous-christian-hate-groups.

[82] 205 F. Supp. 2d 1014 (E.D. Wis. 2002).

[83] *Id*. at 1015.

[84] *Id*. at 1021-22.

[85] *Id*. at 1023.

[86] *Id*. at 1024. The holding in *Wilmur* is controversial because federal courts have struggled with defining Creativity as a religion. *Compare* Hale v. Fed. Bureau of Prisons, No. 14-cv-00245-MSK-MJW, 2015 WL 719646, at *5-7 (D. Colo. Sept. 30, 2015) (Creativity is a religion because it addresses the purpose of life, imposes duties on its members, and celebrates holidays and ceremonies), *with* Birkes v. Mills, No. 03:10-cv-00032-HU, 2011 WL 517859, at *2-4 (D. Or. Sept. 28, 2011) (Creativity's goal of white supremacy is not predicated on the type of deep and imponderable matters that concern traditional religions).

[87] Jeremy Weese, Comment, *The (Un)Holy Shield: Rethinking The Ministerial Exception,* 67 UCLA L. Rev. 1320**,** 1352-53 (2020).

[88] Murray, *supra* note 68, at 508-10.

[89] *Cf*. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 705-19 (2014) (closely held for-profit corporations, controlled by those with a belief that life begins at conception, were exempted under the Religious Freedom Restoration Act from providing contraceptive coverage to employees mandated by the Affordable Care Act).

BACK TO BASICS: THE CONSTITUTIONALITY OF NAKED ECONOMIC PROTECTIONISM

JUDY GEDGE, J.D.[1]

INTRODUCTION

Today more than twenty-five percent of U.S. workers require a state license to do their jobs. This compares with approximately five percent of the workforce requiring a license in the 1950s.[2] A Report on occupational licensing issued by the Obama White House concluded, with regard to the impact of occupational licensing laws:

> [B]y one estimate, licensing restrictions cost millions of jobs nationwide and raise consumer expenses by over one hundred billion dollars. The stakes involved are high, and to help our economy grow to its full potential we need to create a 21st century regulatory system – one that protects public health and welfare while promoting economic growth, innovation, competition, and job creation.[3]

While there can certainly be benefits to licensing requirements in helping to ensure high-quality services and safeguards against serious harms, there can also be drawbacks to such requirements.[4] The negative impacts of licensing requirements include reducing employment opportunities, lowering wages for excluded workers and increasing costs for consumers.[5] Furthermore, it has been shown that the cost of licensing falls disproportionately on certain populations

including military spouses, immigrants and those with criminal convictions.[6]

Clearly, occupational licensing can be a legitimate constitutional exercise of the government's power to regulate. For example, licensing of doctors or plumbers is justified as protecting public health and safety. Such licensing laws protect the general public from unqualified practitioners. But what about an occupational licensing law whose sole purpose is not to protect the general public but to protect the current practitioners of a trade from competition by newcomers? Is that type of occupational licensing law a legitimate exercise of the government's power to regulate? This anti-competitive approach is referred to as 'economic protectionism' and when it is the *only* purpose of legislation, it is referred to as "naked economic protectionism." Naked economic protectionism is the consequence of "laws and regulations whose sole purpose is to shield a particular group from intrastate economic competition."[7] This article addresses the constitutionality of occupational licensing laws that are justified solely by naked economic protectionism. The fundamental issue is whether such a licensing law is a valid exercise of government power or a violation of constitutionally protected principles of economic liberty.

A state clearly has very broad powers to protect the health, safety and welfare of its citizens under its "police power." But a state's regulatory powers, including the power to enact occupational licensing laws, are subject to constitutional limits. The constitutional test applied to economic legislation (including occupational licensing laws) is the rational basis test under which a challenged law must bear some rational relation to a legitimate state interest. This article addresses the specific constitutional issue of whether naked economic protectionism is a legitimate state interest under the rational basis test. There is

currently a circuit split with five circuit courts explicitly addressing this important constitutional issue. While there is no Supreme Court case directly on point, relevant Supreme Court cases can provide helpful guidance on this issue.

To that end, this article undertakes an analysis of Supreme Court cases relevant to the constitutional issue of whether naked economic protectionism is a legitimate state interest. Section I of this article explains the constitutional scrutiny applied to occupational licensing laws. Section II describes the circuit split on this constitutional issue. Section III analyzes relevant Supreme Court cases addressing the constitutionality of occupational licensing laws and tax discrimination challenges. Section IV analyzes recent Supreme Court cases dealing generally with economic liberty as guideposts to the constitutionality of naked economic protectionism. This article highlights the importance of going "back to basics" in applying the fundamental principle running through the relevant Supreme Court case law: the purpose of an occupational licensing law must be the protection of public health, safety and welfare.

This article addresses the singular constitutional issue of whether economic protectionism is a legitimate state interest justifying a state occupational licensing law. Clearly there are other important legal issues within the broad field of economic liberty including, for example, whether the rational basis test should be replaced with a stricter level of scrutiny,[8] whether the privileges and immunities clause of the Fourteenth Amendment should be interpreted to provide protection for economic liberties,[9] whether there is a constitutionally protected right to earn an honest living,[10] whether Certificate of Need laws should be stricken as unconstitutional,[11] and whether state constitutions provide broader protection for economic liberty than the federal constitution.[12] Further, arguments are regularly made that overturning a challenged occupational licensing law would (or

would not) constitute a return to the *Lochner* era.[13] While these are important legal issues within the field of economic liberty, they are outside the scope of this article.

I. Constitutional Scrutiny of Occupational Licensing Laws

A. The Rational Basis Test Applied to Occupational Licensing Laws is Anchored to the State's Interest in Protecting Public Health, Safety and Welfare

Constitutional challenges to occupational licensing laws are generally brought under the due process and/or equal protection clause of the Fourteenth Amendment.[14] The constitutional review applied to such challenges was shaped in the New Deal era by a series of Supreme Court cases.[15] The level of scrutiny applied to a challenged law under this constitutional analysis depends on whether the affected right is deemed a "personal" right or an "economic" right.[16] *Carolene Products* adopted the so-called rational basis test for evaluating economic regulations.[17] Under this test, the law need only bear some rational relation to a legitimate state interest with extreme deference afforded to the legislature under this scrutiny.[18] A much higher level of strict scrutiny is used for evaluating a law affecting a Carolena personal right (such as the right to marry) under which scrutiny the law must be closely tailored to achieve a compelling state purpose.[19] However, if a law neither burdens a fundamental right nor targets a suspect class (i.e. if the law impacts an economic right) it is subject to the highly deferential rational basis scrutiny.[20]

Thus, in determining whether an occupational licensing law violates the due process or equal protection clause of the Fourteenth Amendment,[21] the court must determine: (1) whether the law promotes a *legitimate state interest*; and (2) whether the

law bears a rational relation to such *legitimate state interest*. Before we explore the issue of whether economic protectionism constitutes a legitimate state interest, let's take a brief look at those New Deal-era Supreme Court cases that shaped the rational basis review of economic regulation to help identify fundamental principles that underlie this constitutional analysis.

B. The Early Cases Applying the Rational Basis Test are Anchored to the State's Interest in Protecting Public Health, Safety and Welfare

The judicial scrutiny currently applied to occupational licensing laws derives from *Nebbia*[22] and its line of cases establishing the rational basis test for economic regulation. In applying the rational basis test to occupational licensing laws, courts generally uphold such legislation based on the extreme degree of deference afforded to legislatures under this test. But it is important to note that these early Supreme Court cases applying the rational basis test to economic regulation are anchored to the state's interest in protecting public health, safety and welfare.

The Supreme Court in *Nebbia* upheld a state law setting the retail price of milk, explicitly anchoring the application of the rational basis test to the exercise of state power that promotes public welfare. "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose."[23] Specifically, the Court identified the purpose of this law was "to prevent ruthless competition from destroying the wholesale price structure on which the farmer depends for his livelihood, and the community for an assured supply of milk."[24]

Similarly, in *West Coast Hotel*, the Supreme Court upheld a state law setting the minimum wage for women employees explicitly anchoring its holding to the due process requirement that the law "protect the health, safety, morals and welfare of the people."[25] The Court identified the specific state interest underlying this minimum wage law as the health of women and their protection from unscrupulous employers.[26]

In *Carolene Products*, the Supreme Court upheld the constitutionality of a federal statute which prohibited the interstate shipment of "filled" milk. The Court relied on the power of Congress to exclude from interstate commerce articles "it may reasonably conceive to be injurious to the public health, morals, or welfare."[27] More specifically, the Court pointed to "the danger to the public health from the general consumption of foods which have been stripped of elements essential to the maintenance of health"[28] as well as the conclusion of Congress that "the use of filled milk as a substitute for pure milk is generally injurious to health and facilitates fraud on the public."[29]

Clearly, these early Supreme Court cases establishing the rational basis test reflect extreme judicial deference to legislative action in evaluating the means chosen by a legislature to achieve its objective. But a careful reading of the cases also shows that each one of these cases requires that the purpose of such legislation must be the protection of the public health, safety and welfare (e.g., protecting dairy farmers from economic ruin and assuring a supply of milk for the community, protecting women from unscrupulous employers, and protecting consumers from the health dangers of "filled" milk). The important and basic lesson of these key cases establishing the rational basis test is that, notwithstanding the extreme deference afforded to legislatures, the purpose of challenged legislation

must be legitimate; it must be to protect public health, safety and welfare.

II. THE CIRCUIT SPLIT CREATED BY THE CASKET CASES

It is clear that consumer protection of public health and safety are legitimate state interests which would satisfy the rational basis test under the Fourteenth Amendment.[30] However, is economic protectionism a legitimate state interest sufficient to satisfy the rational basis test? A series of circuit court cases addresses this very issue. The first two cases, *Craigmiles v. Giles*[31] and *Powers v. Harris,*[32] deal with similar laws enacted in Tennessee and Oklahoma which prohibit the intrastate sale of caskets by all but licensed funeral directors in those states. In both cases, having found that economic protection of funeral directors was the actual underlying rationale for the law, the courts address whether such economic protectionism constitutes a legitimate state interest. In the 2002 *Craigmiles* case, the court held that economic protectionism is not a legitimate state interest and struck down the state statute. The 2004 *Powers* case came to the opposite conclusion on this important constitutional issue, laying the groundwork for the current circuit split.

A. Craigmiles v. Giles: Naked Economic Protectionism Is Not a Legitimate State Interest

The plaintiffs in *Craigmiles* operated casket stores in Tennessee from which they sold caskets and other funeral-related merchandise. The stores did not provide funeral services, cremations, embalming or burial services.[33] Tennessee law required that caskets be sold only by licensed funeral directors.[34] Since the plaintiffs were not licensed funeral directors, the State Funeral Board issued a cease-and-desist order barring them from

continuing to sell caskets and other funeral merchandise.[35] The plaintiffs brought suit alleging a violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment.[36]

Applying the rational basis test,[37] the Court analyzed whether requiring casket sellers to be licensed funeral directors bears a rational relationship to any legitimate purpose.[38] In describing the constitutional review to be applied, the Court explained that "rational basis review while deferential, is not toothless."[39] The Court rejected the defendants' assertions that the requirement that casket retailers be licensed as funeral directors promoted public health and safety or consumer protection.[40] Instead, the Court identified that the obvious purpose of this licensing law was to protect licensed funeral directors from competition in selling caskets (noting that this actually harms consumers in their pocketbook).[41]

The Court unanimously struck down this licensing requirement noting that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose."[42] The Court stated: "[W]e invalidate ... the General Assembly's naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers. This measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review."[43]

In *Craigmiles*, the Sixth Circuit became the first federal appellate court since the New Deal to invalidate an economic regulation for infringing on economic liberties protected by the Fourteenth Amendment.[44]

B. Powers v. Harris: Economic Protectionism Is a Legitimate State Interest

The Tenth Circuit Court of Appeals in *Powers v. Harris*, came to the exact opposite conclusion from the Sixth Circuit *Craigmiles* case in a challenge to an Oklahoma law requiring that casket retailers be licensed funeral directors.[45] Under a law very similar to the one challenged in *Craigmiles*, Oklahoma required that anyone engaged in the sale of caskets and other funeral-service merchandise must be a licensed funeral director and operate out of a licensed funeral establishment which required substantial training and expertise.[46] The statute specifically applied to intrastate sales of caskets only.[47]

The plaintiffs owned and operated an online business selling caskets and other funeral merchandise over the Internet. They did not provide any other death or funeral-related services nor did they deal with human remains. The plaintiffs were not licensed funeral directors in Oklahoma nor did they operate their business from an Oklahoma-licensed funeral establishment. Because the statute prevented them from engaging in the business of selling caskets, the plaintiffs brought suit alleging that the statute violated the Due Process and Equal Protection clauses of the Fourteenth Amendment.[48]

The Court applied the rational basis test to determine whether the statute violated the Fourteenth Amendment.[49] It described the exceedingly lenient rational basis standard of review as one which is satisfied if "any state of facts either known or which could reasonably be assumed affords support for it."[50] The standard is satisfied even where there is no empirical evidence to support it.[51] Although the state relied on consumer protection as the governmental interest, the Court identified intrastate economic protectionism as the governmental interest underlying this licensing law[52] and then addressed whether this constitutes a legitimate state interest.[53]

Deciding in favor of the State, the Court held "given the overwhelming supporting authority, and the dearth of credible arguments to the contrary, we hold that, absent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest."[54] The Court further stated: "We also note, in passing, that while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments."[55]

Note that the concurring opinion in *Powers* rejects the Court's holding that economic protectionism constitutes a legitimate state interest pointing out that "[t]he Supreme Court has consistently grounded the "legitimacy" of state interests in terms of a public interest."[56] Reviewing the precedent relied on by the majority, Judge Tymkovich concludes in his concurring opinion "[n]o case holds that the bare preference of one economic actor while furthering no greater public interest advances a "legitimate state interest."[57]

Thus, in *Powers*, the Tenth Circuit parted company with the Sixth Circuit creating what has become a split in the circuits on this key constitutional issue.

C. The Broadening of the Circuit Split

Subsequent to the *Craigmiles* and *Powers* cases, three additional federal courts of appeal have weighed in on this important constitutional issue. Both the Ninth and the Fifth Circuits are aligned with *Craigmiles'* rejection of economic protectionism as a legitimate state interest. The Second Circuit is aligned with *Powers*' acceptance of economic protectionism as a legitimate state interest.

1. *Craigmiles* Line of Cases

The plaintiff in *Merrifield v. Lockyer* raised a constitutional challenge to California's pest control licensing laws.[58] Under California licensing laws, a pest-control operator did not need a license to engage in the non-pesticide control of certain vertebrate pests (e.g., bats) but did need a license for the non-pesticide control of certain other vertebrate pests (e.g., pigeons).[59] Obtaining a pest-control license required a minimum of two years of experience and passing an exam.[60] The plaintiff, who operated a non-pesticide pest-control business, was prevented from pursuing his trade because he did not have a pest control license.[61] The plaintiff brought suit alleging that the licensing requirements violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[62] While the plaintiff lost on his Due Process challenge,[63] the Court did strike down the classification system for vertebrate pests on Equal Protection grounds.[64]

The Court held that this classification system violated the Equal Protection Clause of the Fourteenth Amendment concluding that singling out these particular pests as requiring this license failed to satisfy the relatively easy standard of rational basis review. This statutory classification, the Court concluded "was designed to favor economically certain constituents at the expense of others similarly situated … economic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest."[65] The Court specifically rejected the Tenth Circuit's reasoning in *Powers* and adopted the Sixth Circuit's rationale in *Craigmiles*.

The Fifth Circuit aligned with the Sixth Circuit *Craigmiles* case in rejecting economic protectionism as a legitimate state interest in the 2013 *St. Joseph Abbey* case.[66]

Similar to the casket-selling laws in Tennessee and Oklahoma, Louisiana law required that anyone engaged in the intrastate sale of caskets be a licensed funeral director and operate out of a licensed funeral home both of which required substantial training and expense.[67] The plaintiffs were monks in a Louisiana Benedictine monastery who made and sold wooden caskets which were priced significantly lower than those offered by funeral homes. The plaintiffs did not provide funeral services, nor did they prepare bodies for burial. They simply made and sold wooden caskets.[68]

The plaintiffs filed suit alleging that the challenged law violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[69] The defendant urged the Court to adopt the Tenth Circuit's *Powers* approach that "pure economic protection of a discrete industry is an exercise of a valid state interest."[70] The plaintiffs, on the other hand, urged the Court to adopt the Sixth Circuit's *Craigmiles* holding rejecting economic protectionism as a legitimate basis for this type of casket regulation.[71] Applying the rational basis test, the Court held in favor of the plaintiffs concluding that the challenged law was not rationally related to consumer protection or protection of public health and safety.[72] Specifically on the issue of economic protectionism, the Court explained that "[a]s we see it, neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose…."[73] Further supporting its rejection of economic protectionism as a legitimate state interest, the Court emphasized its role as a protector against "the taking of wealth and handing it to others when it comes not as economic protectionism in service of the public good but as 'economic' protection of the rulemakers' pockets."[74]

Both the Fifth and the Ninth Circuits are aligned with the *Craigmiles* holding in rejecting naked economic protectionism as a legitimate state interest.

2. *Powers* Line of Cases

The plaintiff in *Sensational Smiles, LLC v. Mullen*[75] operated a teeth-whitening business in the State of Connecticut using a light emitting diode to enhance teeth whitening. Because the plaintiff was not a licensed dentist, the Connecticut State Dental Commission issued it a cease-and-desist order.[76] The plaintiff brought suit alleging a violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[77]

Applying the rational basis test, the Court upheld the Commission's ruling that only licensed dentists were permitted to provide these teeth-whitening procedures citing protection of the public's oral health as a legitimate governmental interest.[78] The Court then addressed the plaintiff's argument that the true purpose of this rule was naked economic protectionism, i.e. to protect the monopoly of licensed dentists on dental services.[79] Recognizing the circuit split on this issue, the Court held that economic protectionism is a legitimate state interest adopting the rationale of the *Powers* case.[80] In reaching this conclusion, the Court was "compelled by an unbroken line of precedent" in which "the Supreme Court has long permitted state economic favoritism of all sorts, so long as that favoritism does not violate specific constitutional provisions or federal statutes."[81] Further justifying its conclusion, the Court stated: "Much of what states do is to favor certain groups over others on economic grounds. We call this politics."[82]

While Judge Droney concurred in the majority opinion that limiting teeth whitening services to licensed dentists is rationally related to the state's legitimate interest in protecting

the public health, he parted ways with the majority on the issue of economic protectionism. He explicitly agreed with the Fifth Circuit's reasoning in *St. Joseph Abbey* and cited the *Powers* concurrence with approval.[83] Judge Droney concluded that "no matter how broadly we are to define the class of legitimate state interests, I cannot conclude that protectionism for its own sake is among them."[84]

To date, these five circuit courts have weighed in on this important constitutional issue. But none of these cases were heard by the U.S. Supreme Court.[85] Therefore, there is no Supreme Court precedent addressing the specific issue of whether naked economic protectionism is a legitimate state interest to justify occupational licensing laws. An analysis of this important constitutional issue therefore requires a careful examination of relevant Supreme Court case law.

III. Supreme Court Cases Providing Helpful Guidance

A. Supreme Court Precedent on Occupational Licensing is Grounded in Protection of Public Health and Safety

We first turn our attention to the key Supreme Court cases generally addressing the constitutionality of occupational licensing laws which are grounded in a state legislature's inherent police power to protect public health and safety.

In its first occupational licensing case,[86] the Court rejected a due process challenge to West Virginia's statutory requirement that doctors be licensed.[87] In *Dent v. West Virginia,* the Court analyzed the licensing requirement under the standard of review applicable at that time which was to "secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property."[88] The Court upheld this

physician licensing statute concluding that the law "was intended to secure such skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under authority of the state"[89] and that there was "nothing of an arbitrary character" in this statute.[90] Note that the constitutional analysis in *Dent* is based on the underlying purpose of the challenged statute which is to promote the general welfare of the community for the protection of society as a whole.[91]

In *Smith v. Texas*[92] a railroad worker challenged his conviction for acting as a freight train conductor without the specific previous experience required by state law. The statute required two years' experience as a freight conductor or brakeman as a condition to employment as a freight train conductor even though, according to the Court, this was clearly not the only adequate means of demonstrating the skill and competency required to serve as a freight train conductor. Explaining that the public interest is the basis for this type of regulation, the Court stated that the law must be enacted with reference to such public interest.[93] Since this statute "is not confined to securing the public safety" the Court reversed the conviction as violating the constitutional protections of the Fourteenth Amendment.[94]

Because *Smith* pre-dated the adoption of the current rational basis test, the Court's opinion is framed in terms of protecting an individual's liberty of contract.[95] Whether the application of the Court's current deferential rational basis test would yield the same result is, of course, uncertain. Nonetheless, *Smith* is significant for several reasons. *Smith* explicitly bases its constitutional analysis in the state's interest in securing the public safety. Further, the Court soundly rejects economic protectionism as a valid basis for occupational licensing stating that "...under the power to secure the public safety, a privileged

class can [not] be created and be then given a monopoly of the right to work in a special or favored position. Such a statute would shut the door, without a hearing, upon many persons and classes of persons who were competent to serve, and would deprive them of the liberty to work in a calling they were qualified to fill with safety to the public and benefit to themselves."[96]

In *Williamson v. Lee Optical of Oklahoma*,[97] the Court upheld an Oklahoma occupational licensing law which prohibited opticians from fitting or duplicating eyeglass lenses without a prescription from an ophthalmologist or an optometrist. The plaintiff (an optician) challenged this statute on due process grounds for preventing him from taking old lenses and placing them in new frames fitted to the customer. Applying the highly deferential rational basis test,[98] the Court upheld this licensing law explaining that "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[99] The Court held that the occupational licensing statute in *Williamson* was rationally related to the legitimate state interest of protecting public health.

It is important to note that the *Williamson* case does not in any way address the issue of whether economic protectionism is a legitimate state interest. The Court concluded that the law was rationally related to protecting public health[100] (which clearly constitutes a legitimate state interest).

Schware v. Board of Examiners[101] is the only case in which the Supreme Court has struck down a licensing restriction under rational basis review.[102] The State Board of Bar Examiners had rejected Schware's application to take the bar exam concluding that he lacked the requisite "good moral character" for admission to the Bar. This was based, in part, on

Schware's past membership in the Communist Party. Based on an extensive review of the evidence addressing Schware's moral character, the Court concluded there was no evidence which rationally justified a finding that Schware was morally unfit to practice law and the Board's action was a violation of due process of law.[103] Underlying *Schware* is the valid state interest of requiring that attorneys have high standards of qualification such as good moral character or proficiency in its law.[104] Note that *Schware* does not in any way address the issue of whether economic protectionism is a legitimate state interest.

In *City of New Orleans v. Dukes*,[105] the Court upheld a grandfather clause in a New Orleans ordinance which prohibited those pushcart vendors from operating in the city who had not been continuously engaged in such business for the prior eight years. The Court applied the extremely deferential rational basis standard of review to this law.[106] In rejecting the equal protection challenge, the Court held that the ordinance rationally furthered the legitimate state interest "to preserve the appearance and custom valued by the Quarter's residents and attractive to tourists" stating that "[t]he legitimacy of that objective is obvious."[107] The ordinance was intended "to ensure the economic vitality" of the French Quarter.[108] It is important to note that *Dukes* does not specifically address whether economic protectionism is a legitimate state interest.[109]

Other Supreme Court cases post-New Deal addressing the constitutionality of occupational licensing laws are based on the extreme deference afforded the legislative branch under the rational basis test.[110] These cases, in general, do not address the issue of what constitutes a legitimate state interest justifying an occupational licensing law.

B. Supreme Court Cases Addressing Tax Discrimination Challenges

In analyzing the constitutionality of occupational licensing laws based on economic protectionism the appellate courts on both sides of this issue rely on a line of Supreme Court cases applying the Equal Protection Clause to discriminatory tax statutes. Let's examine these cases to see whether they support the conclusion that economic protectionism constitutes a legitimate state interest.

Metropolitan Life Insurance Company[111] addresses the degree to which the Equal Protection Clause places limits on discriminatory taxation imposed on out-of-state businesses solely because of their residence. The tax statute challenged in *Metropolitan Life* imposed a higher tax rate on out-of-state insurance companies than on domestic insurance companies. Using rational basis scrutiny, the Supreme Court analyzed whether the statutory discrimination between foreign and domestic corporations passed the rational basis test focusing specifically on whether the state purpose justifying the statute was legitimate.[112] The statute served two identified purposes in addition to raising revenue: encouraging the formation of new insurance companies in the state and encouraging capital investment by foreign insurance companies in state securities.[113]

While the state did not explicitly identify the promotion of domestic business as a purpose of the statute, the Court nonetheless identified such economic protectionism as the logical primary reason for a statute such as this.[114] In addressing economic protectionism, the Court soundly rejected the State's position that promotion of domestic industry is a legitimate state purpose under equal protection analysis[115] identifying that such a position "would eviscerate the Equal Protection Clause."[116] The Court held that this discriminatory tax treatment violated the

Equal Protection Clause because promotion of domestic business within a State by discriminating against out-of-state businesses is not a legitimate state purpose.[117]

Addressing an equal protection challenge to a state tax statute, the Supreme Court in *Nordlinger*[118] upheld the constitutionality of a real property assessment method based on the "acquisition value" rather than the more commonplace "current value of the property." [119] This taxing method essentially created two classes of taxpayers - longer term property owners who pay lower taxes based on historic property values and newer owners who pay higher taxes based on more recent current property values. The Court applied the rational basis test which is satisfied when "there is a plausible policy reason for the classification"[120] noting, in particular, the high degree of deference afforded to classifications made in tax laws.[121] The legitimate state interests justifying this tax method were identified as local neighborhood preservation, continuity and stability, as well as the protection of reliance interests of existing property owners.[122] Holding that this taxing method "is not palpably arbitrary," the Court rejected the petitioner's Equal Protection claim.[123]

The state interests relied upon in *Nordlinger* are neighborhood preservation and protection of the reliance interests of earlier real estate purchasers. Under longstanding Supreme Court Noerdlinger precedent, both of these interests constitute legitimate state interests.[124] The focus in *Nordlinger* is not on the legitimacy of the underlying state interest. Rather, it is whether the challenged taxing method rationally furthers such state interest.

The statute at issue in *Fitzgerald*[125] opened up slot machine gambling to racetracks (such gambling was already permitted on riverboats) and adopted two different tax rates for

revenues generated from slot machines. Under this taxing method, the maximum tax rate for slot machine revenue on riverboats was 20% and on racetracks was 36%.[126] The Court applied the rational basis test to determine whether the distinction for tax purposes among revenues generated by two in-state enterprises violated the Equal Protection Clause.[127] The Court identified "advancing the racetracks' economic interests"[128] as the state interest supporting this tax method. Taken as a whole, the Court concluded that allowing slot machine gambling at racetracks, even with the imposition of a tax on such revenue, can be seen as advancing the racetracks' economic interests.[129] The Court pointed to the highly deferential nature of the rational basis test particularly when it comes to legislators deciding "whom they wish to help with their tax laws and how much help those laws ought to provide."[130] The fact that the tax rate differential is harmful to racetracks and beneficial to riverboats does not, in itself, invalidate the statute. A statute may seek to achieve multiple objectives which in this case could include not only advancing the economic interests of racetracks by allowing slot machine gambling, but also aiding riverboats with their reduced tax rate on slot machine gambling.[131] The Court held that the State's differential tax rate did not violate the Equal Protection Clause.[132]

It has been argued that this tax discrimination line of cases supports a conclusion that economic protectionism constitutes a legitimate state interest.[133] In this regard, it is important to note that the Supreme Court in *Metropolitan Life* held that the discriminatory tax method violated the Equal Protection Clause and rejected interstate economic protectionism as a legitimate state interest.[134] And, while the Court in *Nordlinger* and *Fitzgerald* rejected Equal Protection challenges to discriminatory tax laws, neither case addresses the issue of whether economic protectionism is a legitimate state interest. Furthermore, this line of cases makes clear that the

highly deferential rational basis test is even more deferential when applied to tax discrimination statutes.

The impact of existing Supreme Court case law on this important constitutional issue has been the subject of disagreement amongst the judges deciding the cases underlying this circuit split.[135] And, not surprisingly, there is legal scholarship on both sides of this issue, with some scholars arguing that economic protectionism is a legitimate state interest[136] and others arguing that economic protectionism is not a legitimate state interest.[137] This makes it particularly helpful to closely examine the relevant Supreme Court case law for guidance on this important constitutional issue.

IV. RECENT SUPREME COURT CASES GENERALLY ADDRESSING ECONOMIC LIBERTY

As there is no Supreme Court precedent directly on point on the issue of whether economic protectionism constitutes a legitimate state interest under the Fourteenth Amendment, recent Supreme Court cases dealing more generally with issues of economic liberty can provide helpful guidance on this constitutional issue.

A. Tennessee Wine and Spirits: Dormant Commerce Clause

Tennessee Wine and Spirits examines the constitutionality of a Tennessee state residency requirement for retail liquor store operators.[138] This is the most recent in a line of Supreme Court cases addressing the constitutionality of state liquor laws under the dormant Commerce Clause.[139] The dormant Commerce Clause prohibits state laws that unduly restrict interstate commerce.[140] These liquor store cases hinge on the special treatment[141] afforded alcoholic beverages by

virtue of Section 2 of the Twenty-first Amendment[142] which prohibits the transportation, importation or possession of intoxicating liquor into a state in violation of such state's laws. In particular, this line of cases addresses whether economic protectionism constitutes a legitimate state interest under Commerce Clause scrutiny.

Based on a review of the history surrounding the adoption of the Constitution and the Court's established case law, the Court emphatically concluded "that the Commerce Clause by its own force restricts state protectionism."[143] The standard of review applied to a dormant Commerce Clause challenge is whether the law is narrowly tailored to advance a legitimate local purpose.[144] In applying the dormant Commerce Clause to this state residency requirement, the Court analyzed the interplay between the dormant Commerce Clause and a state's right under the Twenty-first Amendment to address alcohol-related public health and safety issues within its own state.[145]

While acknowledging the broad scope of a state's police power to protect the health, morals, and safety of their people, the Court reaffirmed its prior holding that the Twenty-first Amendment does not give States "a free hand to restrict the importation of alcohol for purely protectionist purposes."[146] The Court explicitly held that the Twenty-first Amendment "allows each State leeway to enact the measures that its citizens believe are appropriate to address the public health and safety effects of alcohol use and to serve other legitimate interests, but it does not license the States to adopt protectionist measures with no demonstrable connection to those interests."[147]

The Court concluded that the overall purpose of the statutory residency requirement was simply to protect the Association's members from out-of-state competition which

does not satisfy the applicable constitutional test.[148] The Court invalidated the law holding that under the Commerce Clause, a law whose purpose is protectionism, not the protection of public health or safety, is unconstitutional because it lacks a legitimate state purpose.[149]

Tennessee Wine followed on from *Granholm v. Heald* in which the Court struck down certain state laws banning or severely limiting the direct shipment of wine by out-of-state wineries.[150] The *Granholm* Court identified the purpose of these laws as granting in-state wineries a competitive advantage over out-of-state wineries[151] and held that states may not enact laws that burden out-of-state businesses simply to give a competitive advantage to in-state businesses (except in the narrowest circumstances).[152]

In the earlier *Bacchus* case, the Court had struck down a state law which imposed a 20% excise tax on wholesale sales of liquor but exempted certain locally produced alcoholic beverages from the tax.[153] The Court concluded that the purpose of the law was to aid in-state businesses and explained that stricter constitutional scrutiny applies when the purpose of a statute is economic protectionism.[154]

The Court has been clear in rejecting economic protectionism as a legitimate state interest for alcoholic beverage laws that favor in-state businesses over out-of-state businesses. The recent case of *Tennessee Spirits* reinforces the principle that that under the Commerce Clause, a law whose purpose is economic protectionism, not the protection of public health or safety, is unconstitutional because it lacks a legitimate state purpose.[155] While this line of cases arises under the dormant Commerce Clause addressing issues specific to state regulation of alcohol, these cases highlight the Court's view of the dangers of economic protectionism. These cases can therefore provide

helpful guidance on the issue of whether economic protectionism constitutes a legitimate state interest under the Due Process and Equal Protection clauses of the Fourteenth Amendment.[156]

B. North Carolina State Board of Dental Examiners: Anti-Trust Law

The Supreme Court highlighted the importance of safeguarding the Nation's free market structures in the 2015 anti-trust case of *North Carolina Board of Dental Examiners.*[157] This case addresses action taken by the State Board of Dental Examiners to prevent nondentists from providing teeth whitening services (the same type of restriction at issue in *Sensational Smiles*). The case focuses on the application of so-called *Parker*[158] immunity for anticompetitive conduct taken by a state board dominated by active market participants.[159] The Court held that the Board violated anti-trust laws by unreasonably restraining trade because the Board was dominated by active market participants in the occupation regulated and such Board's actions were not actively supervised by the State.[160]

North Carolina State Board of Dental Examiners addresses antitrust law. It does not address the issue of whether economic protectionism is a legitimate state interest under the Fourteenth Amendment. However, the case is significant for the importance that the Court places on the protection of economic freedom and our free-enterprise system. The Court highlights the role of federal antitrust law as a "central safeguard for the Nation's free market structures."[161] It also highlights the importance of drawing a line "prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest."[162] In this way, *North Carolina Board of Dental Examiners* shows the Court's view of

the importance of protecting the nation's free market system and, in particular, in preventing private interests from restraining trade.[163]

CONCLUSION

This article addresses an important constitutional issue in the field of economic liberty - whether the due process clause of the United States Constitution provides protection against state-imposed occupational licensing requirements where the law's sole purpose is to protect current practitioners of a trade from outside competition. A constitutional challenge of occupational licensing laws is analyzed under the highly deferential rational-basis test. Under this test, a challenged law is upheld provided the law bears some rational relation to a legitimate state interest. The specific issue of whether naked economic protectionism constitutes a legitimate state interest is currently the basis of a circuit split which the Supreme Court has yet to resolve. To explore this issue, this article goes "back to basics" to analyze relevant Supreme Court case law. These cases include key Supreme Court cases addressing occupational licensing and establishing rational basis constitutional scrutiny. This analysis reveals that the state interest underlying an economic regulation such as an occupational licensing law must be the protection of public health, safety and welfare. Under the well-established jurisprudence of economic due process, the appropriate framing of this constitutional issue is therefore whether protecting public health, safety and welfare is the basis of an occupational licensing law whose sole purpose is naked economic protectionism. This is the constitutional inquiry a court must address when faced with a challenge to an occupational licensing law based on naked economic protectionism.

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[2] MORRIS M. KLEINER, THE HAMILTON PROJECT, REFORMING OCCUPATIONAL LICENSING POLICIES, 5 (2015).
[3] U.S. DEP'T OF THE TREASURY, COUNCIL OF ECONOMIC ADVISERS & U.S. DEP'T OF LABOR, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 5 (2015).
[4] *Id.* at 3.
[5] *Id.* at 4.
[6] *Id.* at 4-5.
[7] Sensational Smiles LLC v. Mullen, 793 F.3d 281, 286 (2nd Cir. 2015).
[8] *See, e.g.,* Alexandra L. Klein, Note, *The Freedom to Pursue a Common Calling: Applying Intermediate Scrutiny to Occupational Licensing Statutes*, 73 Wash. & Lee L. Rev. 411 (2016).
[9] *See, e.g.,* Adam Griffin, *Protecting Economic Liberty in the Federal Courts: Theory, Precedent, Practice,* 22 Federalist Soc'y Rev. 232 (August 20, 2021) (arguing that the Supreme Court should overrule the *Slaughter-House Cases*).
[10] *See, e.g.,* TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW, (Cato Institute 2010).
[11] *See, e.g.,* Timothy Sandefur*, Insiders, Outsiders, and the American Dream: How Certificate of Necessity Laws Harm Our Society's Values*, 26 Notre Dame J.L. Ethics & Pub. Pol'y 381 (2012).
[12] *See, e.g.,* Patel v. Texas Dep't of Licensing and Reg'n, 469 S.W.3d 69 (Texas 2015) (striking down an occupational licensing law under the Texas Constitution due course of law provision because such law "is not just unreasonable or harsh, but it is so oppressive that it violates [the Texas Constitution]").
[13] For example, in *Sensational Smiles* both the court's opinion and Judge Droney's concurring opinion address *Lochner*. Citing with approval Justice Holmes' dissenting opinion in *Lochner,* the court explains: "[c]hoosing between competing economic theories is the work of state legislatures, not of federal courts." Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 287 (2d Cir. 2015). And addressing the specter of *Lochner*, Judge Droney explains "[n]or do I believe that rejecting pure economic protectionism as a legitimate state interest requires us to resurrect *Lochner*." *Sensational Smiles* at 289 (Droney, J. concurring).
[14] In addition, constitutional challenges to occupational licensing laws have been brought under the privileges and immunities clause of the Fourteenth amendment (*see*, *e.g.,* Note 36 *infra*) and the dormant commerce clause (*see*

Part IV.A. *infra*). Such constitutional challenges have also been brought under state constitutions. *See, e.g.,* Patel v. Texas Dep't of Licensing and Reg'n, 469 S.W. 3d 69 (Texas 2015).

[15] U.S. v. Carolene Products Co., 304 U.S. 144 (1938) (upholding as constitutional a federal statute prohibiting the interstate shipment of filled milk); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding as constitutional a Washington state law setting a minimum wage for women employees and overruling Adkins v. Children's Hospital); Nebbia v. New York, 291 U.S. 502 (1934) (upholding as constitutional a New York statute setting a minimum retail price for milk).

[16] Note that the distinction between personal and economic rights was introduced to the constitutional legal framework in *Carolene Products*, 304 U.S. at 152 n.4 (applying to economic regulations a highly deferential presumption of constitutionality while identifying that a "more searching judicial inquiry" may well be appropriate in reviewing statutes that impinge on protections afforded by the Bill of Rights or that target "discrete and insular minorities").

[17] *Id.* at 152 (holding that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis...").

[18] *See, e.g.,* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993) (explaining that "if there is any reasonably conceivable state of facts that could provide a rational basis" for a challenged law, the rational basis test is satisfied).

[19] *See, e.g.,* Zablocki v. Redhail, 434 U.S. 374, 388 (1978) ("When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.") (internal citations omitted).

[20] *See, e.g.,* Romer v. Evans, 517 U.S. 620, 632 (1996).

[21] The constitutional analysis in an Equal Protection claim is similar to a claim under the Due Process clause. *See, e.g.,* Nordlinger v. Hahn, 505 U.S. 1, 10 (1992) (identifying that "this Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.") (internal citations omitted).

[22] Nebbia v. People of New York, 291 U.S. 502 (1934).

[23] *Id.* at 537.

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[24] *Id.* at 530.
[25] W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) ("But the liberty safeguarded [by the due process clause of the Constitution] is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people ... and is adopted in the interests of the community…").
[26] *Id.* at 398 ("What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers?").
[27] U.S. v. Carolene Products Co., 304 U.S. 144, 147 (1938) ("Hence Congress is free to exclude from interstate commerce articles whose use in the states for which they are destined it may reasonably conceive to be injurious to the public health, morals, or welfare …") (internal citations omitted).
[28] *Id.* at 148.
[29] *Id.* at 149.
[30] *See, e.g.,* Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483 (1955) (applying the rational basis test to uphold, as a protection of public health, the constitutionality of an Oklahoma statute prohibiting opticians from providing replacement lenses in glass frames without a prescription).
[31] Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002).
[32] Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004).
[33] *Craigmiles*, 312 F.3d at 222-23.
[34] Note that the requirements to obtain a funeral directors license under the statute are extensive and require an applicant to complete either (a) one year of course work at mortuary school followed by a year's apprenticeship; or (b) a two-year apprenticeship. The applicant must then pass the Tennessee Funeral Arts Examination. *Id.* at 222.
[35] *Id.*at 223.
[36] *Id.* The plaintiffs also argued that the statute was a violation of the Privileges and Immunities clause of the Fourteenth Amendment but, given the Court's conclusion that the statute violated other clauses of the Fourteenth Amendment, the Court chose not to address this issue. *Id.* at 229.
[37] *Id.* at 224.
[38] *Id.* at 225.
[39] *Id.* at 229 (internal citations omitted). *See also id.* at 225 ("Tennessee's justifications for the 1972 amendment come close to striking us with "the force of a five-week-old, unrefrigerated dead fish, a level of pungence almost required to invalidate a statute under rational basis review. Only a handful of provisions have been invalidated for failing rational basis review.

We hold that this case should be among this handful.") (internal citations omitted).
[40] *Id.* at 229.
[41] *Id.*
[42] *Id.* at 224 (internal citations omitted).
[43] *Id.* at 229.
[44] Patel v. Texas Dep't of Licensing and Reg'n, 469 S.W. 3d 69, 105 (Texas 2015) (Willett, J., concurring).
[45] Powers v. Harris, 379 F. 3d 1208 (10th Cir. 2004).
[46] *Id.* 1211-13.
[47] *Id.* at 1212.
[48]*Id.* at 1213-14. (The plaintiffs also argued that the statute violated their right to earn an honest living as protected by the Privileges and Immunities Clause, which argument the Court summarily rejected stating that it is the Supreme Court's prerogative alone to overrule the *Slaughter-House Cases*.)
[49] *Id.* at 1215.
[50] *Id.* at 1217 (quoting U.S. v. Carolene Products Co., 304 U.S. 144, 154 (1938)).
[51] *Id.*
[52] *Id.* ("Thus, we are obliged to consider every plausible legitimate state interest that might support the FSLA – not just the consumer-protection interest forwarded by the parties. Hence, we consider whether protecting the intrastate funeral home industry, absent a violation of a specific constitutional provision or a valid federal statute, constitutes a legitimate state interest.").
[53] *Id.* at 1218.
[54] *Id.* at 1221.
[55] *Id.*
[56] *Id.* at 1225 (Tymkovich, J., concurring) (While rejecting economic protectionism as a legitimate state interest, Justice Tymkovich concurs in the majority's conclusion that the legislation satisfies the rational basis test relying on consumer protection as the state interest served by the legislation. *Id.* at 1226-27.).
[57] *Id.* at 1226.
[58] Merrifield v. Lockyer, 547 F.3d 978 (9th Cir. 2008).
[59] Under this licensing law, pest control operators using non-pesticide methods of controlling bats, raccoons, skunks and squirrels did not need to obtain a license. But non-pesticide control of mice, rats or pigeons did require a pest control license. *Id.* at 982.
[60] *Id.* at 986.
[61] *Id.* at 980-81. (Plaintiff's pest control services included installing spikes, screens, and other mechanical devices on structures to remove (or keep

away) certain vertebrate pests from structures. Plaintiff's work involved non-pesticide control of skunks, raccoons, squirrels and bats (all of which do not require a pest-control license) as well as non-pesticide control of rats and pigeons (which do require a pest-control license.)).
[62] *Id.* at 982-83. Plaintiff also alleged a violation of the Privileges and Immunities Clause of the Fourteenth Amendment. However, the Court refused to entertain this claim "[g]iven the *Slaughter-House Cases* limitation on the Privileges or Immunities Clause of the Fourteenth Amendment." *Id.* at 984.
[63] *Id.* at 988. The Court applied the rational basis test to this due process claim, concluding that the training and testing requirements of the licensing law were constitutionally valid as they promoted the legitimate state interest in health, safety and consumer protection.
[64] *Id.* at 992.
[65] *Id.* at 991 n. 15 ("We conclude that mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review. In doing so, we agree with the Sixth Circuit in *Craigmiles* and reject the Tenth Circuit's reasoning in *Powers v. Harris*. *Powers* rejected the Sixth Circuit's conclusion that economic protectionism for its own sake is irrational. We do not disagree that there might be instances when economic protectionism might be related to a legitimate governmental interest and survive rational basis review. However, economic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest.") (internal citations omitted).
[66] St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013).
[67] *Id.* at 218. There were no specific requirements or restrictions under Louisiana law regarding the quality or even the use of caskets. The sole regulation of caskets was to prevent their intrastate sales by anyone other than a licensed funeral director through a licensed funeral home. *Id.* at 217-18.
[68] *Id.* at 217.
[69] *Id.* at 220.
[70] *Id.* at 221-22.
[71] *Id.* at 222.
[72] *Id.* at 223-26. (The "grant of an exclusive right of sale [to funeral homes] adds nothing to protect consumers and puts them at a greater risk of abuse including exploitative prices." The Court further concluded "that no rational relationship exists between public health and safety and limiting intrastate sales of caskets to funeral establishments." *Id.* at 226.)
[73] *Id.* at 222 (describing that in a recent case this Court approved of the *Craigmiles* court's reasoning quoting from that recent case that "naked

economic preferences are impermissible to the extent that they harm consumers...") (internal citation omitted).

[74] *Id.* at 226-27.

[75] Sensational Smiles, LLC v. Mullen, 793 F.3d 281 (2d Cir. 2015).

[76] *Id.* at 283.

[77] *Id.* at 283-84.

[78] *Id.* at 284.

[79] *Id.* at 285. There was in fact no need for the Court to address the plaintiff's economic protectionism challenge given its conclusions regarding the rule's justification as protecting the public's oral health. ("[E]ven if, as appellants contend, the Commission was in fact motivated purely by rent-seeking, the rational reasons we have already discussed in support of the regulation would be enough to uphold it." *Id.* at 286.)

[80] *Id.* at 286.

[81] *Id.*

[82] *Id.* at 287.

[83] *Id.* at 288 (Droney, J., concurring).

[84] *Id.* at 291 (Droney, J., concurring).

[85] The three cases in which *cert. petitions* were denied are: Sensational Smiles v. Mullen, 793 F. 3d 281 (2d Cir. 2015), *cert. denied*, 577 U.S. 1137 (2016); St. Joseph Abbey v. Castille, 712 F. 3d 215 (2013), *cert. denied*, 571 U.S. 952 (2013) and Powers v. Harris, 379 F. 3d 1208 (10th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005). *Cert. petitions were not filed in* Craigmiles v. Giles, 312 F. 3d 220 (6th Cir. 2002); and Merrifield v. Locker 547 F. 3d 978, 991 (9th Cir. 2008).

[86] Patel v. Texas Dep't of Licensing and Reg'n, 469 W.W.3d 69, 110 (Willett, J., concurring) (identifying *Dent* as the Court's first occupational licensing case).

[87] Dent v. West Virginia, 129 U.S. 114 (1889).

[88] *Id.* at 124.

[89] *Id.* at 128.

[90] *Id.* at 124.

[91] *Id.* at 122.

[92] Smith v. Texas, 233 U.S. 630 (1914).

[93] *Id.* at 636.

[94] *Id.* at 640.

[95] *Id.* at 638.

[96] *Id.* at 638.

[97] Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483 (1955).

[98] *Id.* at 487-88.

[99] *Id.* at 488.

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[100] A lengthy list of possible health-related justifications for this licensing law is provided by the Court. *Id.* at 487.
[101] Schware v. Board of Examiners of New Mexico, 353 U.S. 232 (1957).
[102] Patel v. Texas Dep't of Licensing and Reg'n, 469 S.W.3d 69, 111 (2015), (Willett, J., concurring) (internal citation omitted) ("[T]he High Court's 1957 ruling in *Schware v. Board of Bar Examiners* [is] the only time the Court has struck down a licensing restriction under rational-basis review.").
[103] Schware 353 U.S. at 246-47.
[104] *Id.* at 239.
[105] New Orleans v. Dukes, 427 U.S. 297 (1976).
[106] *Id.* at 303-04 ("States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. … In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, … in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.") (internal citations omitted).
[107] *Id.* at 304.
[108] *Id.* at 305.
[109] The ordinance's creation of a protected monopoly was raised in the lower court's decision striking down the ordinance. The Court of Appeals stated that, in reliance on the Supreme Court precedent of Morey v. Doud, 354 U.S. 457 (1957), the court focused on the "exclusionary character" of the ordinance and its concomitant "creation of a protected monopoly for the favored class member." *Dukes*, 470 U.S. at 300 (internal citation omitted). Note that *Dukes* explicitly overruled Morey v. Doud. "Morey was the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds, and we are now satisfied that the decision was erroneous. … the decision so far departs from proper equal protection analysis in cases of exclusively economic regulation that it should be, and it is, overruled." Dukes, 427 U.S. at 306.
[110] *See e.g.,* Fergusson v. Skrupa, 372 U.S. 726 (1963) (holding that Kansas statute prohibiting all but lawyers from engaging in the business of debt adjustment is not a violation of due process or equal protection. "We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' … Whether the legislature

takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas.") (internal citations omitted). *Id.* at 731-32.
[111] Metro. Life Ins. Co. v. Ward, 470 U.S. 869 (1985).
[112] *Id.* at 875 ("Because appellants waived their right to an evidentiary hearing on the issue whether the classification in the Alabama domestic preference tax statute bears a rational relation to the two purposes upheld by the Circuit Court, the only question before us is whether those purposes are legitimate.").
[113] *Id.* at 873.
[114] *Id.* at 879 n.7 ("Although the promotion of domestic business was not a purpose advanced by the States in support of their taxes in these cases, such promotion is logically the primary reason for enacting discriminatory taxes such as those at issue here.").
[115] *Id.* at 876-77.
[116] *Id.* at 882.
[117] *Id.*
[118] Nordlinger v. Hahn, 505 U.S. 1 (1992).
[119] *Id.* at 5.
[120] *Id.* at 11 (further explaining that under this constitutional scrutiny, a classification is valid if "the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.") (internal citations omitted).
[121] *Id.* at 11 ("This standard is especially deferential in the context of classifications made by complex tax laws.") (internal citations omitted).
[122]*Id.* at 12-13.
[123] *Id.* at 18.
[124] *Id.* at 12-13 ("First, the State has a legitimate interest in local neighborhood preservation, continuity, and stability. … This Court previously has acknowledged that classifications serving to protect legitimate expectation and reliance interests do not deny equal protection of the laws.") (internal citations omitted)).
[125] Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103 (2003).
[126] *Id.* at 105.
[127] *Id.* at 107.
[128] *Id.* at 108.
[129] *Id.*
[130] *Id.*

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[131] *Id.* at 109 (identifying as possible legislative objectives aiding the financial position of riverboats, encouraging the economic development of river communities, and protecting the reliance interests of riverboat operators).
[132] *Id.* at 110.
[133] *See, e.g.,* Powers v. Harris, 379 F.3d 1208, 1220 (relying in part on *Metropolitan Life Insurance*, *Nordlinger*, and *Fitzgerald* to support holding that economic protectionism is a legitimate state interest); and Sensational Smiles, LLC v. Mullen, 793 F3d 281, 286 (relying in part on *Fitzgerald* and *Nordlinger* to support holding that economic protectionism is a legitimate state interest).
[134] Restrictions on interstate competition implicate not only the Equal Protection Clause. They also raise issues under the dormant commerce clause. *See infra* Part IV.A.
[135] *See supra* Part II.B and *infra* Part IV.C.2.
[136] *See, e.g.,* Melanie DeFiore, Note, *Where Techs Rush In, Courts Should Fear to Tread: How Courts Should Respond to The Changing Economics of Today*, 38 Cardozo L. Rev. 761,793 (2016) (supporting the *Powers* and *Sensational Smiles* decisions that economic protectionism is a legitimate state interest and recommending an even more deferential level of scrutiny than the current rational basis test.); and Katharine M. Rudish, Note, *Unearthing the Public Interest: Recognizing Intrastate Economic Protectionism as a Legitimate State Interest*, 81 Fordham L. Rev. 1485, 1528 (2012) (arguing that under post-New Deal jurisprudence economic protectionism should be explicitly recognized as a legitimate state interest).
[137] *See, e.g.,* W. Sherman Rogers, *Occupational Licensing: Quality Control or Enterprise Killer? Problems That Arise When People Must Get the Government's Permission to Work*, 10 J. Bus. Entrepreneurship & L. 145 (2017) (arguing that economic protectionism is not a legitimate state interest) and Evan Bernick, *Towards a Consistent Economic Liberty Jurisprudence*, 23 Geo. Mason L. Rev. 479 (2016) (arguing that occupational licensing justified by economic protectionism is unconstitutional).
[138] Tenn. Wine and Spirits Retailers Ass'n v. Thomas, ___U.S. ____, 139 S. Ct. 2449 (2019).
[139] *See* Granholm v. Heald, 544 U.S. 460 (2005) (invalidating under the dormant Commerce Clause state laws banning (or severely limiting) the direct shipment of wine by out-of-state wineries); Healy v. Beer Institute, 491 U.S. 324 (1989) (invalidating under the dormant Commerce Clause a state law requiring out-of-state beer shippers to set their wholesale prices at or below that charged to wholesalers in bordering states); and Bacchus

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Imports v. Dias, 468 U.S. 263 (1984) (invalidating a state tax law favoring in-state alcohol producers under the dormant Commerce Clause).
[140] Tenn. Wine at 2459 ("Although the Clause is framed as a positive grant of power to Congress, we have long held that this Clause also prohibits state laws that unduly restrict interstate commerce. "This 'negative' aspect of the Commerce Clause" prevents the States from adopting protectionist measures and thus preserves a national market for goods and services. This interpretation [is] generally known as "the dormant Commerce Clause …") (internal citations omitted).
[141] Granholm, 544 U.S. at 494 (the direct wine-shipping restrictions on out-of-state wineries "would be patently invalid under well-settled dormant Commerce Clause principles if they regulated sales of an ordinary article of commerce rather than wine. But ever since the adoption of the Eighteenth Amendment and the Twenty-first Amendment, our Constitution has placed commerce in alcoholic beverages in a special category.")
[142] U.S. CONST. amend. XXI, § 2. ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.")
[143] *Id.* at 2460. The Court did note "vigorous and thoughtful critiques" of this interpretation of the Commerce Clause by some Members of the Court, but the Court also noted that "… the proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in our case law." (internal citations omitted).
[144] *Id.* at 2461 ("Under our dormant Commerce Clause cases, if a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to advance a legitimate local purpose.") (internal citations and quotation punctuation omitted).
[145] *Id.* at 2474.
[146] *Id.* at 2469 (internal citations omitted).
[147] *Id.* at 2474.
[148] *Id.* at 2476 ("[T]he predominant effect of the 2-year residency requirement is simply to protect the Association's members from out-of-state competition. We therefore hold that this provision violates the Commerce Clause and is not saved by the Twenty-first Amendment.")
[149] *Id.* at 2474.
[150] Granholm v. Heald, 544 U.S. 460 (2005).
[151] *Id.* at 465.
[152] *Id.* at 472.
[153] Bacchus Imports. v. Dias, 468 U.S. 263 (1984).

[154] *Id.* at 270-71. ("[W]here simple economic protectionism is effected by state legislation, a stricter rule of invalidity has been erected.").
[155] Tenn. Wine and Spirits Retailers Ass'n v. Thomas, __ U.S. ___, 139 S. Ct. 2449, 2474 (2019).
[156] *See* Braden H. Boucek, *That's Why I Hang My Hat in Tennessee: Alcohol and the Commerce Clause,* Cato Sup. Ct. Rev. 119 (2019) (identifying the significance of *Tennessee Wine* as providing Supreme Court guidance on whether economic protectionism is a legitimate justification for a state's exercise of its police powers.) "[*Tennessee Wine*] reaffirms that a state's police powers are limited to those which actually protect the public …[T]he Court's logic would obtain when a law is challenged under the rational basis test; any law with no real tendency to promote public health or safety would be a law that is constitutionally irrational. The related question would be how to evaluate any kind of protectionism, even those that exist not to protect in-state residents, but a discrete industry? As it stands, a circuit split exists over this very question. *Tennessee Wine* bodes ill for the pro-protectionism circuits." *Id.* at 151 (internal citations omitted).
[157] N.C. State Bd. of Dental Examiners v. FTC, 574 U.S. 494 (2015).
[158] Parker v. Brown, 317 U.S. 341 (1943) (The *Parker* line of cases address immunity from anti-trust laws of non-sovereign actors such as state boards. The intricacies of such state immunity are not relevant for these purposes.)
[159] *N.C. State Bd. of Dental Examiners,* at 503.
[160] *Id.* at 510-12, 514.
[161] *Id.* at 502. ("Federal antitrust law is a central safeguard for the Nation's free market structures. In this regard it is "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.") (internal citations omitted).
[162] *Id.* at 509. ("*Omni,* like the cases before it, recognized the importance of drawing a line "relevant to the purposes of the Sherman Act and of *Parker*: prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest.") (internal citation omitted).
[163] *See* Will Clark, Comment, *Intermediate Scrutiny as a Solution to Economic Protectionism in Occupational Licensing,* 60 St. Louis U. L. J. 345 (2015). "Though [the *North Carolina Board of Dental Examiners*] decision may not directly affect civil rights suits challenging occupational licensing on due process and equal protection grounds, it signals a willingness to challenge occupational licensing…" *Id.* at 355. "Describing the dangers of regulatory capture as obvious suggests that the Supreme Court is sensitive to the problems of economic protectionism in occupational licensing, just as the *St. Joseph Abbey* and *Craigmiles* courts were." *Id.* at 356.

IN TERROREM CLAUSES: UNDER WHAT CIRCUMSTANCES ARE THEY TRIGGERED?

by

Elizabeth A. Marcuccio*

I. INTRODUCTION

When an in terrorem or "no contest" clause is included in a last will and testament or trust, its purpose is to protect the wishes of the testator or grantor from being challenged. Regrettably, appointed fiduciaries have used these clauses as a means to threaten beneficiaries with disinheritance if the beneficiaries question the fiduciary's administrative actions or lack thereof. This article analyzes the various circumstances under which an in terrorem clause will be triggered under New York state law.

II. DUTIES OF A FIDUCIARY

A “fiduciary duty” is the duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person.[1] Both executors appointed by testators to carry

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out the terms of their wills and trustees named by grantors to administer their trusts are fiduciaries.[2] While it is clear that executors and trustees owe a fiduciary duty to the testator or grantor, they also have the duty to act in the best interest of the beneficiaries named in the instrument.[3] Fiduciaries can face legal liability if they fail to meet this duty, such as when they act in their own interests or allow the assets in the estate or trust to languish.

In *Boles v. Lanham*[4] the petitioner, a beneficiary, sought to enforce the terms of a trust agreement and alleged a breach of fiduciary duty by the trustee. In this case the grantor established an irrevocable living trust and named her daughter as trustee.[5] When the grantor died, the only asset of the trust was one parcel of real property. In accordance with her powers under the trust, the trustee sold the property, and the petitioner requested payment of his share of the net proceeds from the sale.[6] Although two trust beneficiaries received their share of the proceeds from the sale, the trustee did not distribute petitioner's share despite repeated demands to do so.[7] The petitioner commenced an action to compel the trustee to perform her duties as a fiduciary and distribute his share of the net proceeds.

The court found that the trustee failed to make distributions of trust income and principal in accordance with the terms and conditions of the trust.[8] It is well established that a trustee must act in good faith in the administration of a trust, with honesty and loyalty to the beneficiaries, and avoid any circumstances whereby the trustee's personal interest will come in conflict with the interest of the beneficiaries.[9] The purpose of this rule is to ensure that the trustee's acts are above suspicion and that the

trust receives the trustee's best services and unbiased and uninfluenced judgment.[10] In summary the court stated:

> As a fiduciary, a trustee bears the unwavering duty of complete loyalty to the beneficiaries of the trust no matter how broad the settlor's directions allow the trustee free reign to deal with the trust. The trustee is liable if he or she commits a breach of trust in bad faith, intentionally, or with reckless indifference to the interest of the beneficiaries.[11]

Likewise, New York's Estates Powers and Trust Law § 11-1.7 (EPTL) provides that it is against public policy for an instrument to grant immunity to an executor or trustee who breaches his or her fiduciary duty as set forth below:

> (a) The attempted grant to an executor, testamentary trustee or inter vivos trustee, or his or her successor, of any of the following enumerated powers or immunities is contrary to public policy:
>
> (1) The exoneration of such fiduciary from liability for failure to exercise reasonable care, diligence, and prudence.
>
> (2) The power to make a binding and conclusive fixation of the value of any asset for purposes of

distribution, allocation or otherwise.

(b) The attempted grant in any will or trust of any power of immunity in contravention of the terms of this section shall be void but shall not be deemed to render such will or trust invalid as a whole, and the remaining terms of the instrument shall, so far as possible, remain effective.

(c) Any person interested in an estate or trust may contest the validity of any purported grant of any power or immunity within the purview of this section without diminishing or affecting adversely his or her interest in the estate or trust, any provision in any will or trust to the contrary notwithstanding.[12]

The Surrogate's Court in *Matter of Kornric*[13] examined whether the terms of an inter vivos trust could exempt the trustee from her fiduciary duty to account. In this case a trust was established for the benefit of Philip Shore and funded with the net proceeds from a personal injury action.[14] Shore's attorney retained Georgina Vassiliou, Esq. to both prepare the trust instrument and administer the trust. Under the trust Vassiliou gave herself, as fiduciary, "sole and absolute discretion" to make or withhold, distributions of net income and principal to Shore, with the remainder at his death to be distributed to his distributees.[15]

From the inception of her tenure as trustee, Vassiliou gave Shore only a few hundred dollars per month.[16] After she failed

to give him a satisfactory answer to his repeated questions as to why he was receiving so little compared with his needs, Shore commenced a proceeding to compel her to account, and the court directed her to provide Shore with an accounting.[17] When she failed to do so, Shore's guardian ad litem petitioned the court for Vassiliou's removal as trustee for her failure to account.[18] Vassiliou contended, however, that the terms of the trust instrument exempted her from the duty to account to anyone during the beneficiary's lifetime.[19] Such contention raises a question as to whether language in an inter vivos trust relieving the trustee of the obligation to account during the lifetime of the trust is unenforceable as "contrary to public policy" as expressed in both the statutory[20] and common law of New York state.

The trust instrument in question provided that, "In order to minimize costs and expenses, neither . . . the Trustee nor any successor . . . shall be required to render a formal judicial account of her transactions in this Trust . . . The [T]rustee shall prepare, as an expense of the Trust, a final accounting upon termination of the trust and shall submit a copy of same to the Primary Beneficiary . . . who may accept the same and release the Trustee from liability and claim."[21] Even assuming that the trust instrument can be read to mean that Vassiliou is excused from accounting during Shore's lifetime, there is a basic reason that such a provision cannot be enforced: Accountability is an essential element of all fiduciary relationships which cannot be waived.[22] Furthermore, EPTL 11-1.7 (a) (1) clearly recognizes that an attempt to render a fiduciary entirely unaccountable is inconsistent with the nature of a trust and void as against public policy.

The public policy against exonerating testamentary fiduciaries from any and all accountability is equally applicable to testamentary and inter vivos trusts where there is no one in a position to protect the beneficiaries' interests during the

existence of the trust.[23] Although some decisions might appear to hold that the references to testamentary fiduciaries in EPTL 11-1.7 signify that exoneration clauses in inter vivos trusts are not similarly forbidden,[24] such a conclusion is not supportable. According to such decisions, the statute's prohibition was intended to apply to a decedent's estate and testamentary trust because the beneficiaries of such an entity were in special need of protection given the fact that a decedent was not able to hold the fiduciary accountable. Such reasoning, however, is equally applicable to inter vivos trusts when the language of the trust attempts to relieve the trustee from any and all accountability during the trust's existence.[25]

Based upon a reading of the EPTL and relevant case law, accountability is an essential element of all fiduciary relationships which cannot be waived. However, should beneficiaries be fearful of challenging a fiduciary's actions and holding them accountable when a will or trust contains an in terrorem clause?

III. IN TERROREM CLAUSES

In recent years, testators and grantors have included in terrorem or “no contest” clauses in wills and trusts with increasing frequency in an effort to discourage challenges to the validity of their estate plan.[26] An in terrorem clause is a provision included in a will or trust that operates to disinherit beneficiaries who challenge the decedent’s wishes. Challenging beneficiaries risk losing their entire inheritance if their actions violate the in terrorem clause. This risk can create a powerful deterrent to beneficiaries who might otherwise dispute a testator’s or grantor’s wishes. The extent to which in terrorem clauses are enforced varies by state.[27]

In New York, EPTL § 3-3.5 gives guidance stating, in part, that in terrorem clauses create, "[a] condition designed to prevent a disposition from taking effect in case a will is contested by a beneficiary[.] [The clause] is operative despite the presence or absence of probable cause for such contest[.]",[28] thereby enforcing in terrorem clauses regardless of whether there was probable cause for the contest. While this section of the EPTL clearly applies to in terrorem clauses in wills, it has been argued that it does not pertain to such clauses in trusts. The practice commentary indicates that this argument is incorrect, stating, "Although this section governs wills, lifetime trusts can also contain in terrorem clauses."[29] In addition, regardless of whether the in terrorem clause in question was contained in the decedent's will or trust, courts have regularly treated issues surrounding these clauses the same.[30]

To be clear, New York law disfavors in terrorem clauses and strictly construes their application, but courts will enforce the specific language to honor the testator's or grantor's intent. This differs from some states where no-contest clauses are void as against public policy in both wills and trusts.[31] There are, however, certain statutory limitations to implementation of in terrorem clauses. Specifically, New York's Estates, Powers, and Trusts Law § 3-3.5(b) (EPTL) sets forth the following "safe harbor" provisions:

> (b) A condition, designed to prevent a disposition from taking effect in case the will is contested by the beneficiary, is operative despite the presence or absence of probable cause for such contest, subject to the following:
>
> (1) Such a condition is not breached by a contest to establish that the will is a forgery or that it was revoked by a

later will, provided that such contest is based on probable cause.

(2) An infant or incompetent may affirmatively oppose the probate of a will without forfeiting any benefit thereunder.

(3) The following conduct, singly or in the aggregate, shall not result in the forfeiture of any benefit under the will:

(A) The assertion of an objection to the jurisdiction of the court in which the will was offered for probate.

(B) The disclosure to any of the parties or to the court of any information relating to any document offered for probate as a last will, or relevant to the probate proceeding.

(C) A refusal or failure to join in a petition for the probate of a document as a last will, or to execute a consent to, or waiver of notice of a probate proceeding.

(D) The preliminary examination, under SCPA 1404, of a proponent's witnesses, the person who prepared the will, the nominated executors and the proponents in a probate proceeding and, upon application to the court based upon special circumstances, any person whose examination the court determines may provide information with respect to the validity of the will that is of substantial importance or relevance to a decision to file objections to the will.

> (E) The institution of, or the joining or acquiescence in a proceeding for the construction of a will or any provision thereof.

While these actions by a beneficiary are protected, what types of conduct will trigger an in terrorem clause?

IV. TRIGGERING THE IN TERROREM CLAUSE

While blatant challenges to the dispositive scheme of a testator or grantor will clearly trigger an in terrorem clause, what if it is the nominated or appointed fiduciary that is being challenged? Do these challenges trigger the enforcement of an in terrorem clause? This issue was examined by the Appellate Division in *In re Ellis*.[32]

In *Ellis*[33] Mrs. Ellis's will left her personal effects and real property to her daughter, who was also her nominated executor. In addition, her will left one-half of the residue to her daughter and one-quarter of the residue to each of her two sons. Mrs. Ellis told the attorney-draftsman that she was concerned that one or both of her sons would cause "trouble" for her daughter, and she was advised to include an in terrorem clause in her will.[34] The clause that was ultimately included provided for disinheritance if any beneficiary "in any manner, directly or indirectly, contested [the] will or any of its provisions."[35] After Mrs. Ellis's death her sons engaged in the following activities: They sent a letter to their sister and her husband demanding production of certain documents, after the will was admitted to probate they objected to their sister being appointed as executor, they alleged fraud and undue influence against their sister, and that their mother was not competent when she executed her will, they

compelled their sister to post a bond even though the will contained a waiver of bond provision, they served objections to the will and subpoenas on numerous non-party witnesses, and they deposed their sister, the attorney-draftsman and the witnesses to the will.[36] Discovery, including related motions, lasted over two years. Just before the case was going to be placed on the trial calendar, the brothers notified the court that they were not going to proceed with their objections.[37]

Once the will was admitted to probate, the sister, as executor, commenced a construction proceeding to enforce the in terrorem clause. The brothers argued that since they had not gone to trial with respect to their objections, they had not "contested" the will.[38] The brothers were relying on the Second Department's 1932 decision in *In re Cronin.*[39] That case had construed the word "contest" to be synonymous with "going to trial" and refused to enforce an in terrorem clause because the objectant withdrew his objections before trial.[40] They also claimed that their challenge to the fitness of the executor was a protected act immune from the reach of the in terrorem clause.[41] Both sides moved for summary judgment, and the Surrogate's Court determined that the holding in *Cronin* was controlling.[42] The Appellate Division reversed, holding that the in terrorem clause had been violated.[43]

The Appellate Division distinguished but did not reject *Cronin,* noting that the in terrorem clause in *Cronin* was not as broad as the clause in the *Ellis* case; it did not call for disinheritance if any beneficiary "in any manner" contested the will or "any of its provisions."[44] While the doctrine of strict construction prohibits disinheritance for actions that are beyond those specified under the will, the primary function of a court in a will construction proceeding is to ascertain and carry out the intent of the testator.[45] In *Ellis* the surrounding circumstances revealed that the testator anticipated trouble and intended that

the in terrorem clause cover any kind of opposition to probate that the beneficiaries mounted to hinder or delay probate.[46] The doctrine of strict construction is subordinate to the intent of the testator, and the Court held that the sons' behavior was exactly what the testator foresaw and wished to prevent. The Court enforced the in terrorem clause against the sons even though the will did not expressly refer to the specific offending acts engaged in by the sons.[47]

The Court also considered the sons' argument that they were merely challenging the fitness of the executor, which is a protected act that is immune from the reach of the in terrorem clause as a matter of public policy.[48] The Court rejected this argument stating that the bill of particulars served in support of their answer was being utilized to attack the validity of the will itself.[49] Furthermore the aggregate of the various tactical moves made by the sons challenged the testator's testamentary plan and harassed the nominated executor.[50]

The Surrogate's Court's decision in *Matter of Merenstein*[51] provides further guidance in assessing the type of conduct that will trigger an in terrorem clause. It illustrates that the courts, in construing broad in terrorem provisions, will draw a distinction between conduct aimed at challenging the behavior of an executor and conduct aimed at nullifying a testator's choice of executor. In *Merenstein*, the decedent bequeathed his estate to his two daughters. His daughter Ilene was favored under the will, receiving 73% of the decedent's residuary estate. She also was named as the sole executor. His daughter Emma received 27% of the decedent's residuary estate.[52] The in terrorem clause in *Merenstein* provided as follows:

> If any person in any manner, directly or indirectly, challenges the validity or adequacy of any bequest or devise to

> him or her in this Will, makes any other demand or claim against my estate, becomes a party to any proceeding to set aside, interfere with or modify any provision of this Will or of any trust established by me, or offers any objections to the probate hereof, such person and all of his or her descendants shall be deemed to have predeceased me, and accordingly they shall have no interest in this Will.[53]

Decedent's will was admitted to probate and Ilene was appointed executor without objection. Emma brought a proceeding asking the court whether certain contemplated conduct on her part would trigger a forfeiture of her beneficial interest under the in terrorem clause.[54]

Emma alleged that Ilene had fraudulently used the decedent's credit card during the decedent's life. Emma asked the court whether a petition to remove Ilene as executor in the event that Ilene was found to have engaged in improper conduct with respect to the credit card charges would trigger the in terrorem clause.[55] While the court declined to rule on that question, it pointed out that the alleged credit card charges occurred while the decedent was still alive and referred to *Matter of Cohn*.[56]

In the *Cohn* estate, the court confirmed that public policy will bar the application of an in terrorem clause if a beneficiary seeks removal of an executor based on allegations of the executor's misconduct while acting as executor.[57] Conversely, an in terrorem clause will be triggered where a beneficiary seeks to remove an executor based on some other alleged basis, such as hostility of the executor towards the beneficiary or alleged wrongdoing by the executor while the testator was still alive.[58]

This will be seen as an attack on the testator's choice of fiduciary since the executor has not failed to act, has no conflict, and has not engaged in misconduct as executor.[59] When faced with an in terrorem provision a beneficiary must consider whether it is challenging the conduct of the fiduciary or attacking the decedent's choice of fiduciary. There is a difference, and it could result in disinheritance.

IV. CONCLUSION

While it is undisputed that executors and trustees owe a fiduciary duty to the testator or grantor who nominated them, the court in *Boles v. Lanham*[60] made it clear that a fiduciary bears the unwavering duty of loyalty to the beneficiaries named in the instrument. This is true no matter how much discretion was granted to the fiduciary. Furthermore, New York's Estates Powers and Trust Law[61] provides that it is against public policy for a will or trust to grant immunity to an executor or trustee who breaches his or her fiduciary duty.[61]

In *Matter of Kornric*[62] the court stated that accountability is an essential element of all fiduciary relationships, and fiduciaries must exercise reasonable care in performing their duties. However, beneficiaries are reluctant to challenge a fiduciary's conduct now that testators and grantors are more frequently including in terrorem clauses in their instruments. This is true even though New York law disfavors in terrorem clauses and strictly construes their application. New York's Estates, Powers, and Trusts Law[63] provides further guidance to beneficiaries, setting forth certain conduct by the beneficiary that will not trigger an in terrorem clause.

The Appellate Division in *In re Ellis*,[64] referring to *Matter of Cohn*,[65] made an important distinction. If a beneficiary is merely making a good faith attempt to hold a fiduciary accountable, the in terrorem clause will not be triggered. If instead, the challenge of the fiduciary is actually a cloaked attempt to challenge the will or trust itself, or challenge the decedent's choice of fiduciary, the in terrorem clause is triggered, and the challenging beneficiary will be disinherited.

In construing an in terrorem clause, or any part of a will or trust, the paramount consideration is identifying and carrying out the testator's or grantor's intent. Beneficiaries who wish to question the actions or inaction of a fiduciary should be advised to proceed with extreme caution when the instrument contains an in terrorem clause.

ENDNOTES

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[2] N.Y. EST. POW & TRUSTS L § 11-1.1 (2012).
[3] *Boles v. Lanham*, 55 A.D.3d 647 (2d Dept 2008).
[4] *Id.*
[5] *Boles v. Lanham*, 17 Misc 3d 1106 (2007), *aff'd* 55 A.D.3d 647 (2d Dept 2008).
[6] *Id.*
[7] *Id.*
[8] *Boles v. Lanham*, 55 A.D.3d 647 (2d Dept 2008), citing *O'Hayer v. de St. Aubin*, 30 A.D.2d 419 (2d Dept 1968) and *Matter of Heller*, 6 NY3d 649 (2006).
[9] *Id.* (citing Pyle v. Pyle, 137 AD 568 (1910), aff'd, 199 NY.538 (1910).

[10] *Id.*

[11] *Boles v. Lanham*, 55 A.D.3d 647 (2d Dept 2008), citing *O'Hayer v. de St. Aubin*, 30 A.D.2d 419 (2d Dept 1968) and *Matter of Heller*, 6 NY3d 649 (2006).

[12] N.Y. EST. POW & TRUSTS L § 11-1.7 (2012).

[13] *Matter of Kornrich*, 19 Misc 3d 663 (Sur Ct, New York County 2008)

[14] *Id.*

[15] *Id.* at 664.

[16] *Matter of Vassiliou* [sub nom. Vassilou], NYLJ, June 28, 2005, at 24, col 2.

[17] *Id.*

[18] *Id.*

[19] *Matter of Kornrich,* supra, at 664.

[20] N.Y. EST. POW & TRUSTS L § 11-1.7 [a] (2012).

[21] *Matter of Kornrich,* supra, at 665.

[22] *Id.* citing *Matter of Malasky*, 290 A.D.2d 631 (3d Dept 2002), *Bauer v. Bauernschmidt*, 187 A.D.2d 477 (2d Dept 1992); *Matter of Central Hanover Bank & Trust Co*., 176 Misc 183 (1941), affd 288 NY 608 (1942).

[23] *Matter of Kornrich,* supra.

[24] *Matter of Kassover*, 124 Misc 2d 630 (1984); *Matter of Brush*, 46 Misc 2d 277 (1965).

[25] *Matter of Kornrich*, supra, 666.

[26] Mann, *Divergence Among States in Enforcement of In Terrorem Clauses in Wills and Trusts,* NAT'L. L. REV., Vol. XI, No 86 (2020).

[27] *Id.*

[28] N.Y. EST. POW & TRUSTS L § 3-3.5(b)(1) (2012).

[29] Turano, McKinney's Practice Commentary, EPTL § 3-3.5 (2011).23[2] See *Tumminello v. Bolton,* 59 A.D.3d 727 (2d Dept 2009).

[30] *Id.*

[31] Mann, *Divergence Among States in Enforcement of In Terrorem Clauses in Wills and Trusts,* NAT'L. L. REV., Vol.

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[32] *In re Ellis*, 252 A.D.2d. 118 (2d Dept 1998).
[33] *Id.*
[34] *Id.*
[35] *Id.* at 119.
[36] *Id.*
[37] *Id.*
[38] *Id.* at 120.
[39] *In re Cronin,* 143 Misc 559 (Sur Ct, West. Co. 1932), *aff'd* 237 A.D. 856 (2d Dept 1932).
[40] *Id.*
[41] *Id.*
[42] *In re Ellis*, 252 A.D.2d. 118 (2d Dept 1998).
[43] *Id.* at 130.
[44] *Id.* at 118.
[45] *Id.* at 127.
[46] *Id.* at 130.
[47] *Id*.
[48] *Id.* at 133.
[49] *Id*.
[50] *Id*.
[51] *Matter of Merenstein*, 2018 NY Slip Op 32498(U), (Sur Ct, NY Co.).
[52] *Id.* at 2.
[53] *Id*.
[54] *Id.* at 1.
[55] *Id.* at 2.
[56] *Matter of Cohn*, 72 AD3d 616 (1st Dept 2010).
[57] *Id.*
[58] *Matter of Merenstein*, 2018 NY Slip Op at 3, 32498(U), (Sur Ct, NY Co.).
[59] *Id.*
[60] *Boles v. Lanham*, 17 Misc 3d 1106 (2007), *aff'd* 55 A.D.3d 647 (2d Dept 2008).
[61] §11-1.7 (EPTL)

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HOW TREASURE ISLANDS AND SECRECY JURISDICTIONS HARM POOR NATIONS

by John Paul*

I. INTRODUCTION

Before the definitions of a "treasure island" and "secrecy jurisdiction" are presented, a definition of a tax haven is in order. There is no universal definition of a tax haven; however, in general, a tax haven is a nation or jurisdiction that allows multinational corporations and individuals to escape the laws in the nations where they operate and/or reside in order to pay less tax than they normally would in their home nations.[1] Many find the general definition of a tax haven to be troublesome, since tax havens also allow corporations and individuals to circumvent criminal laws, transparency requirements, financial regulation and more in addition to the tax laws.[2]

The term "treasure island" refers to a nation or jurisdiction that sells a wide variety of offshore services; however, these offshore services are not secret and many entities and individuals know about them. The United Kingdom is an example of a treasure island, since the nations does not offer secret banking but does offer a wide variety of offshore services, including lax

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financial regulation.[3] The term "secrecy jurisdiction" is used instead of tax haven to nations or jurisdictions that enable multinational corporations and individuals to hide their wealth and financial affairs from the rule of law. Switzerland and Luxembourg are secrecy jurisdictions as they offer a wide variety of secret offshore services, including secret banking and corporate tax abuse.[4]

While several global bodies produce their own lists of tax havens, treasure islands and secrecy jurisdictions, these lists are often skewed by political expediency. The lists are usually based on politics and not evidence. These lists exclude the large powerful tax havens, such as the United States, and highlight the small weaker ones.[5]

Due to the growing gap between wealth and poverty, more global attention is paid to the global inequality mechanisms. The polarization of wealth across the world is not a recipe for peace or stability.[6] The rise of rampant economic insecurity is leading to the end of the fragile peace agreements between nations as every nation demands a larger share of the shrinking financial pie. Due to unease and greater data sophistication, the tax havens, treasure islands and secrecy jurisdictions are garnering greater attention.[7]

Tax avoidance does not respect the needs of those it deprives. A reduction in a multinational corporation's tax payments could mean millions and even billions of revenues from which a group of poor nations may never benefit.[8] While the looting of developing nations by corrupt elites has long captured the headlines, the generally legal tax avoidance methods used by some of the biggest corporate players in the world are usually overlooked.[9]

II. THE MODERN OFFSHORE SYSTEM

By the early 1980s, the main elements of the modern offshore system were in place and growing exponentially. An older group of European havens that were enabled by old European aristocracies and led by Switzerland, were now being outpaced by a new global network of more aggressive havens in the former outposts of the British empire.[10] The City of London transformed from an old gentleman's club into a brasher, deregulated global financial center dominated by American banks.[11]

While the old European havens were primarily about tax evasion and secret wealth management, the new British and American jurisdictions were about escaping financial regulation, with a lot of tax evasion and criminal activities as well.[12] The participants in each jurisdiction were welcomed into the others. The modern offshore system became stronger as it became more interconnected, as nations competed with each other in a race to the bottom on lax financial regulation, tax and secrecy in order to lure more financial capital. The strong competition also forced many offshore practices onshore, making it more difficult to tell the two apart.[13]

In the 1970s, the "golden age of capitalism" that followed World War II ended after the collapse of the Bretton Woods system of global cooperation and tight financial flow control. The world entered a phase of slower growth and regular financial crises, particularly in the developing world.[14]

The modern offshore system grew and spread all around the global economy, nurtured by the powerful army of accountants, lawyers and bankers, who drove the processes of deregulation and financial globalization.[15] The London-based

Euromarkets provided the platform for United States banks to escape tight local constraints and grow large again, which led to the political capture of the Washington by the financial services industry. The implicit subsidies of taxpayer guarantees led to the growth of the giant banks, who not only grew the modern offshore system, but continue to hold many western economies in their stranglehold. The United States emerged as a powerful offshore jurisdiction in its own right by attracting vast financial flows to within its borders, bolstering the bankers' powers. The old alliance between London and Wall Street, which collapsed after the Great Depression, was now resurrected.[16]

Many people assumed that by eliminating double taxation and creating smooth conduits for financial capital, the modern offshore system was promoting international economic efficiency. In reality, the modern offshore system wasn't adding that much value; rather, the system was distributing wealth upward and risk downward and creating a new global network for crime.[17]

From time to time, the public becomes aware of the treasure islands and the secrecy jurisdictions; however, those who benefit from the modern offshore system always manage to artfully conceal the true nature of the new financial revolution and this has played out numerous times in the last half century.[18]

III. THE OFFSHORE ROLE IN POVERTY

Poverty around the globe can be better understood by examining the role of the modern offshore system. If you look at any significant economic event with the last 20 years, the offshore system is usually behind the headline.[19]

A. The Offshore Role in Angola

In the early 1990s, an offshore story was developing in the oil-rich African state of Angola. Jonas Malheiro Savimbi, was the Angolan revolutionary politician and military rebel leader who founded and led the National Union for the Total Independence of Angola (UNITA).[20] UNITA had surrounded the major Angolan towns and was trying to starve them into submission. In the City of Kuito, people were eating cats, dogs and rats to survive. The United Nations at the time was calling it the world's worst war and the Angolan government was under an arms embargo; therefore, the government turned to the secret French Elf networks to help secure military arms.[21]

In order to purchase the weapons for Angola, Arkady Gaydamak, a Russian-born, French-Israeli businessman, put together about $800 million in financing.[22] The weapons were purchased from a Slovak company and then repaid via Geneva in Angolan oil money in order to get around the embargo. These transactions involved a number of treasure islands, secrecy jurisdictions and tax havens. In September 2005, when Gaydamak was under an international arrest warrant for the "Anglogate" deals, he claimed that he just wanted to bring peace to Africa and the Middle East.[23]

When interviewed, Gaydamak claimed that in the so-called "market economies," there is no way to make money with all of the regulations, taxation and legislation about working conditions. To quote Gaydamak,

> *"It is only in countries like Russia, during the period of redistribution of wealth – and it is not*

> *yet finished – when you can get a result. So that is Russian money. Russian money is clean money, explainable money. How can you make $50 million in France today? How? Explain it to me!"*[24]

In other words, since there are so many holes in Russian and international law, the redistributed money to a small oligarchy must be clean.[25]

Some have claimed that the upward wealth distribution of Russia after the collapse of the Soviet Union is similar to the robber baron era of the United States; however, there is an important difference. The U.S. robber barons did not employ the use of treasury islands and secrecy jurisdictions to hide their money; rather, they focused on domestic investment. While the U.S. robber barons did fleece unsuspecting investors and subvert the political system, they also built the nation's industrial prosperity. Moreover, the state did rein in the worst excesses of the robber barons eventually.[26]

In the case of nations like Angola and Russia, the money disappeared forever among the treasury islands and secrecy jurisdictions. African governments have become weaker and more dependent on aid from the very nations that support the offshore system. Unfortunately, many African nations gained independence around the same time that the offshore system started to emerge.[27]

B. The Offshore Role in Ghana

Another example of the offshore role involves the African nation of Ghana, and the vehicle of the offshore system was a beer company.

SABMiller International BV is a Dutch company that brews and sells alcoholic beverages.[28] The suffix of BV – *besloten venootschap* – indicated that local rights to brands including Ghana's popular Stone Lager, Castle Milk Malt, South African Castle Lager and a southern African sorghum-based brew called Chibuku were all owned by a Dutch limited company. All of these beers were brewed in Africa using mostly African ingredients and sold in Africa to Africans by local vendors. So why were they now owned by a Netherlands company?[29]

Tax is the answer. Between 2007 and 2010, Accra Breweries Ltd. Paid £1.33 million, or 2.1% of its turnover, in tax-deductible royalties to SABMiller International BV for using the names and trademarks of the drinks. These royalty fees constituted a small part of the £50 million annual turnover that the Dutch company obtains from licensing names not just to Ghana but many nations around the world; however, over half of it comes from Africa.[30]

When the royalties reach the Netherlands, they are supposed to be taxed by the Dutch government; however, SABMiller International BV found a way around that through the offshore system. In 2005, SABMiller International BV bought a batch of trademarks from another Dutch company for over $200 million, which can be offset against the income it receives for licensing the trademarks to the African companies that really use them. Moreover, the tax break is quite flexible, allowing SABMiller

International BV to take it whenever it pleases the company. The tax break enabled SABMiller International BV to eliminate any Dutch corporate tax bill. Back in Ghana, Accra Breweries Ltd.'s taxable profits are reduced by the royalty payments paid to SABMiller International BV. Accra Breweries Ltd. pays a withholding tax of 8% to the Ghanian government on the revenue leaving Ghana, as well as a local corporate tax at 25%, which means SABMiller International BV saves 17% in Ghanian taxes.[31]

A Swiss SABMiller company also extracts even more cash from the Ghanian Accra Breweries Ltd. Company. Bevman Services AG, based in Zug, Switzerland, takes 4.6% or almost £1 million of Accra's revenue every year in "management fees." Similar to the royalties, which go to the Netherlands, the management fees reduce Ghanaian profits and aren't taxed any further when they reach Switzerland.[32]

SABMiller also has set up a company in Mauritius called Mubex, through which it runs most of its African purchasing. So, when Accra Breweries Ltd. Buys maize from South African farms, the produce gets shipped up Africa's Atlantic coast but the paperwork heads over to Mubex in the Indian Ocean offshore tax haven. Since Mubex is only taxed at 3% by acting as the middleperson, Mubex makes considerable profit at the expense of Ghana, just as the Netherlands and Switzerland do. When an Accra manager was asked about Mubex, he stated it was just "tax planning."[33]

These "tax planning" techniques leave the Ghanian Accra Breweries Ltd. Company with barely any profit. In a four-year period, Accra made £63 million in revenue, but only £500,000

in profit after payments to offshore treasure islands and secrecy jurisdictions. After Accra paid its finance costs, the company was left with a £3 million loss. This means that in three out of four years, Accra paid no corporate income tax and in the other year a tax payment of £200,000 was made to the Ghanian government.[34]

C. The Offshore Role in Peru

In a contract between Serenco and General Electric (GE), Serenco was designated as GE's sales representative in Peru. The contract, among other items, specifically forbid violations of antibribery laws such as the FCPA, and it required strict compliance with GE's stated policy against bribing foreign officials to procure sales.[35]

The problems between GE and Serenco arose out of a maintenance agreement that Serenco entered into with Electricidad del Peru (ElectroPeru). Serenco was ordered to pay bribe to Luis Ampuero Salas, the ElectroPeru general manager. Serenco was told that if it refused to comply again, the company would face serious problems with the new ElectroPeru administration, including an aggressive investigation of Serenco's transactions. Serenco refused to comply again, and Ampuero retaliated by falsely accusing Serenco of overbilling ElectroPeru for more than $1 million. After an extensive Serenco audit, ElectroPeru agreed to reduce the monetary accusation from $1 million to $25,000, but Ampuero still blocked the resolution of the settlement agreement.[36]

Ampuero then increased the pressure on Sercenco by complaint go GE about the quality of the service Sercenco was providing to ElectroPeru. GE supposedly told Sercenco to

quickly resolve the issue. Sercenco believed that GE wanted Sercenco to give in to Ampuero's threats in order to maintain ElectroPeru as a GE customer.[37]

Eventually, GE advised Ampuero that it had suspended its contract with Serenco. Serenco begged for reconsideration to no avail and was replaced with the Japanese corporation of Sumitomo. Serenco suspected that it was replaced by Sumitomo because it was not subject to the FCPA and had a history of paying bribes to government-controlled companies in exchange for contracts.[38]

Sercenco sued GE alleging violations of the RICO and the FCPA, as well as claims for breach of contract, tortious interference, unfair competition and common law fraud. In the end, the court concluded that the types of harm claimed by Sercenco was too remote to support claims under RICO and the FCPA; therefore, the claims against GE were dismissed with prejudice.[39]

D. The Offshore Role in Free Trade Zones

Free Trade Zones (FTZs) are sometimes called export processing zones, free ports, enterprise zones and special economic zones. Broadly defined, FMZs are distinct economic areas that benefit from tax exemptions. Geographically located with a nation or jurisdiction, they are outside normal customs parameters and basically exist outside of national border for tax purposes. Generally, companies operating within FTZs may benefit from deferring tax payments until their products are moved somewhere else, or avoid them altogether if they bring in goods to a store, or produce them onsite before exporting them again.[40]

FTZs are located in large developed nations, such as the United States, or included in economic growth plans for the developing nations. In the world today, there are over 5,400 FTZs, which are basically manufacturing, trading and transportation hubs.[41]

The United States leads OECD nations in the use of FTZs. In 2016, the U.S. FTZs were responsible for an estimated $610 billion in imports – approximately 22.5 percent of total United States imports that year. The number could be much higher today but not much is known about the FTZs in the United States or elsewhere as there are few investigations.[42]

FTZs attract criminal activity. Criminals and criminal organizations see them as the perfect places to produce and transport illegal goods as the audits, controls and checks by government authorities are often infrequent and even absent. The World Customs Organization found that FTZs play a large role in smuggling tobacco products. The NGO Traffic reported on seizures of illegal timber and other wildlife products in FTZs. FTZs are usually governed by private companies or private-public partnerships that are granted a license to operate in that zone. Since these administrators run the FTZs according to their own internal policies and regulations, there is little oversight and enforcement by the host government.[43]

E. The Result of the Offshore Pattern

The offshore pattern appears to be repeated for operations in many parts of the developing world. Profits in a developing nation are wiped out by management fees after they disappear to

a more developed nation in royalties. The result is a serious drain in developing nations' revenues and their efforts to move out of global aid dependency. Ghana takes only 22% of its gross domestic product in taxation, which is far more than its neighbors, but way behind the 40% typically raised in the developed world.[44]

The Financial Action Task Force stated, "Due to the illegal nature of the transactions, precise statistics aren't available and it is therefore impossible to produce a definitive estimate of the amount of money that is globally laundered every year."[45] Yet, there have been a number of studies over the decades that provide general estimates of the offshore pattern.

In March 2008, the Global Financial Integrity (GFI) authored a study on the illicit financial flows out of African nations. The GFI concluded that between 1970 and 2008, the illicit financial flows out of Africa were conservatively estimated to be approximately $854 billion and may be as high as $1.8 trillion.[46]

In April 2008, the University of Massachusetts – Amherst released a study examining the capital outflows from forty African nations from 1970 to 2004. This study concluded that real capital outflows over the 35-year period amounted to approximately $420 billion for 40 nations as a whole. If imputed interest earnings are included, the accumulated capital flight was approximately $607 billion as of the end of 2004. Yet, the external debt of these nations was $227 billion. Without this capital outflow, these nations could have been debt-free with substantially more money to address the poverty issues many of them face.[47]

In 2018, the United Nations estimated that the proceeds laundered annually amount to between 2 and 5 percent of global

GDP.[48] The World Bank estimated that in 2018, the world gross domestic product was approximately $85 trillion.[49] This means that global money laundering is approximately $4 trillion per year.

There is also the issue of hidden cash. The Tax Justice Network estimated that in 2010, $21 to $31 trillion was hiding in more than 80 global tax havens. This study also found that the elites in 139 lower-and-middle-income nations had $7.3 to $9.3 trillion in unrecorded offshore wealth – at a time when most of the governments of the nations involved were borrowing into bankruptcy and other economic problems.[50]

In general, the poor are more likely to be the most heavily penalized by the offshore role due to their inferior bargaining position relative to the powerful, organized elites. As government revenues become scarcer, the least powerful interest groups in non-democratic and even democratic nations are more likely to lose. Dictators and democratically-elected officials alike have greater incentives to restrict pro-poverty spending in favor of the socially inefficient programs that benefit the rich and powerful.[51]

IV. RECOMMENDATIONS AND CONCLUSION

In light of how the offshore role is exacerbating global poverty, it is clear that a new anti-offshore strategy is needed. A key challenge for offshore reform lies in facilitating and encouraging collective global action around financial and tax issues.

Given the unlimited supply of offshore opportunities, the priority must be to destroy the demand for it. Potential offshore opportunists need to be given strong reasons not to indulge in offshore activities, to counter the strong motivations to do so. Capital and taxes are public obligations and institutions as well as individuals enjoying privileges such as limited liability, tax subsidies and managing capital derived from pensions as well as FTZ activities should be expected to show how they are fulfilling their obligations.

Multinational corporations and high-wealth individuals must publish what tax they pay in each nation in which they have any presence and make publicly available accounts for the branches and subsidiaries they have there.

The usage of Legal Entity Identifiers (LEI) should be promoted and required. The LEI is a global, non-proprietary identification system that is freely accessible.[52] Over 435,000 legal entities from more than 195 nations have been issued LEIs. The LEI will serve as a linchpin for financial and tax data – this will enable risk managers and regulators to identify parties to financial and tax transactions accurately and immediately. Subsequent iterations of the LEI program will link beneficial ownership data around ownership structures that will provide the accountability and transparency needed for investigators in following the money trail.[53]

In the interests of public confidence and objective interpretations of the law, the offshore activities need to be exposed in court more, not negotiated behind closed doors. The transparent ability to raise revenue is central to advancing the

economies of the developing and developed nations in order to end global poverty.

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HOW YOU TEACH, WHO YOU TEACH, AND HOW YOU ASSESS HAVE ALL CHANGED: USING NEARPOD AS A TOOL FOR ENGAGEMENT AND ASSESSMENT IN THE POST-PANDEMIC LEGAL STUDIES CLASSROOM

By Prof. Glen M. Vogel[*]

INTRODUCTION

Educators, particularly postsecondary professors, must work hard and learn to adapt their teaching methodologies to stay effective, competitive, and relevant in today's rapidly changing educational and social environment.[1]

At no time was this more obvious than during the recent COVID-19 pandemic when professors across the country had to quickly migrate to on-line or hybrid learning. Students realized very quickly which professors were not only able to make the switch but could do so while keeping students engaged.[2] The constantly changing health and safety rules, the sudden shift in the method of instruction, and students bouncing between live and remote learning, depending on their exposure to the virus, meant that educators and students had to "operate in a triage mode" where there was little time to focus on best practices for both online and hybrid learning.[3] This confluence of events left large numbers of students dissatisfied with their on-line experience.[4] One recent survey of approximately 12,000 college students revealed that almost one-third would likely

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transfer to another school if their university continued with virtual learning only, while 56% of students on that same survey characterized on-line only learning as “unappealing”.[5] This response can be surprising since the majority of students that are now in college are digital natives who spend approximately 10 hours a day on-line and their use of technology is not so much an addiction, but rather a way of life.[6]

Even before the shift to online learning a large percentage of students reported dissatisfaction with their educational experience[7] and one of the things many students reported struggling with on a regular basis was staying engaged.[8] This is troubling because as one expert has opined, “postsecondary institutions must be diligent in fostering and monitoring engagement as ‘learning begins with student engagement.’”[9] Even as some aspects of life slowly return to their pre-pandemic condition, there are two things that educators still need to be concerned with: (1) the frequency of online and hybrid learning is likely to increase rather than recede and (2) students have come to expect their professors to be able to use a diverse array of technology to facilitate whatever form of instruction is employed and to use it in a way that helps them stay engaged and think critically.

With these challenges in mind, this article will review two legal studies projects that I have embedded into an undergraduate healthcare law and compliance course. These projects required students to engage with a simple web-based tool and can be used in classes that are structured to run face-to-face, synchronously or asynchronously online, or in a hybrid format. While the specific web-based tool and projects discussed herein focused on legal and ethical issues in healthcare, the tool can be used for a wide array of other projects in any legal studies course.

The projects were titled: Genetically Modified Embryos and Who Gets the Heart.[10]

Part I of this article briefly discusses the engagement challenges associated with traditional teaching methods in legal studies courses and how the technology used with these projects changes that paradigm and supports the Association to Advance Collegiate Schools of Business's (AACSB) Philosophy and Learning Standards for business school accreditation, specifically with respect to ethics, diversity and inclusion, and innovation in curriculum and delivery that foster critical thinking, and student outcomes. Part II reviews the components of the Genetically Modified Embryo project and how the use of the web-based tool Nearpod enhanced student engagement, specifically on the topics of the ethical and legal issues surrounding the genetic modification of embryos. Part III discusses the Who Gets the Heart group project and how the same technology tool supported student engagement as teams negotiated the difficult task of determining which of the eight candidates presented should receive priority for a heart transplant. Part IV discusses how Nearpod, and similar technology tools can be used in other legal studies courses, its applicability to both live and online instruction, and a discussion on how critical it has become for professors to continuously create new, interesting, diverse, and timely assessments that are relevant to and supportive of the course goals. Finally, Part V will conclude with some thoughts on how legal studies professors can adapt their approach to classroom management and assessments as they go deeper into their career and as higher education becomes more dependent on technology.

PART I: USE OF TECHNOLOGY IN THE LEGAL STUDIES CLASSROOM CAN ENHANCE STUDENT ENGAGEMENT AND CRITICAL THINKING

One of the areas of study that has traditionally struggled with using technology in the classroom is the study of the law.[11] Dating back to 1870 and the influence of C.C. Langdell, the study of law has been dominated by lectures and the use of the Socratic method.[12] For undergraduate or graduate legal studies in business courses, the primary teaching tools have been the lecture and case study.[13] The problem with these methods, particularly in large classes, is that most of the students are passive listeners and it is doubtful that they make any "significant cognitive gains."[14] In the early 2000's, academics predicted that technology would "bring about fundamental reform in how teachers teach and how students learn …."[15] Those predictions have become reality. Now more than ever, educators, including those who teach legal studies, need to seek out and infuse their courses with appropriate and engaging technology that can support active learning and student engagement and provide opportunities to demonstrate critical thinking skills.

It is not just good practice to consider incorporating technology in the legal studies classroom, but it can also help satisfy the 2020 AACSB Business Accreditation Standards. Under Standard 4.3, business schools are expected to have an innovative approach to curriculum and delivery method in a way that demonstrates currency, creativity, and forward-thinking.[16] In addition, Teaching Effectiveness Standard 7.3 states that the AACSB expects that faculty are not only current in their discipline, but that they are also using the most recent pedagogical methods that engage diverse

student perspectives in an inclusive environment.[17] Traditionally, business school professors have used lectures infused with case discussions as the preferred pedagogical delivery method with the hope of involving the class in a discussion about a real-life circumstance.[18] Even though these are the dominant pedagogical approaches for teaching legal studies, the lecture format and case-study approach have been criticized as not being sufficiently engaging or innovative.[19]

One scholar from Harvard describes the lecture format as, a transfer of information which casts the student as a dry sponge who passively absorbs facts and ideas from a teacher. This model has ruled higher education for 600 years, since the days of the medieval Schoolmen who, in their *lectio* mode, stood before a room reading a book aloud to the assembly—no questions permitted. The modern version is the lecture.[20]

While case discussions are an attempt to avoid the shortcomings of passive learning through lectures they do not go far enough in today's classroom to engage the diverse student population who "carry an arsenal of electronic devices"[21] and embrace technology as their primary pathway to gain information such that they "no longer accept that their studies are severable from the conduct of their daily lives."[22] Educators who have traditionally relied on the lecture format or case discussions will need to transition from a delivery system that simply conveys information or limits the discussion to one student at a time to one that integrates technology into the experience to turn all students into active learners instead of passive information vessels.[23]

Active learning recognizes that, during classroom time, students should be engaged in behavior and activities other than listening and forces

them to undertake higher order thinking as described in Bloom's Taxonomy[24] and to engage in analysis, synthesis, and evaluation.[25] The use of handheld electronic devices during class (i.e., clickers, or like here, Nearpod on their tablet or phone), encourages active learning in a way that lectures and case studies cannot because these tools engage the whole class simultaneously instead of one student at a time.[26] Use of these tools also incentivize the students to attend class and to participate because the professor can track their attendance and performance through their responses.[27] Instructors can now see how all of their students have answered questions and can determine in real time if there are knowledge gaps or misunderstandings.[28] Scholars have noted that by using this kind of technology,

[the classroom] is an active one. Its students are pressing keys on their handheld devices in response to the instructor's cues and questions. They're listening carefully to the instructor for directions and information, asking the instructor questions, … and talking and debating …. This active engagement becomes especially relevant in classes of 30 or more. In larger classes, where active learning is often very difficult to implement, its benefits become even more important.[29]

These technology tools do more than just foster engagement, but rather they also help the professor to support the various learning styles of their students. It is generally understood that students, including those who study business, have their own individual learning style and that it is the responsibility of educators to not only be aware of those styles, but to teach in such a way as to satisfy each student's preference for taking in new information.[30] Experts in business education have identified the three main sensory modalities of learning as Visual, Auditory, and Kinesthetic.[31]

"Matching learning styles with learning environment contributes significant benefits to learning outcomes."[32]

One recent study found that there are some students whose learning styles are not addressed at all by the standard lecture format employed by many professors and that students in general prefer a classroom approach that is multimodal and more active.[33] Another study found that approximately one-third of students achieved better learning outcomes when taught in a blended environment using a variety of instructional materials and methods other than traditional live classroom lectures.[34]

Last, it is important to acknowledge that most students entering college over the next decade will be from Generation Z (Gen Z).[35] One recent study of more than ninety Gen Z business students found that in-class problem solving has become a "critical component" for these learners as opposed to "just listening to lectures."[36] Another study in 2016 of 1300 middle school students, students who are now either in or entering college, found that 60% said they learned best by working through examples and only 12% said they learned best by listening to a lecture.[37] Two major challenges for keeping these students engaged are that (1) their attention span can be as short as 8 seconds[38] and (2) keeping them focused requires varying methods of stimulation because they are drawn technology.[39] The Gen Z business student study found that the two preferred learning styles were visual and kinesthetic.[40] Visual learners benefit from the use of videos, pictures, and other imagery while kinesthetic learners learn best with hands-on activities and physically moving around the room working in groups.[41] Thus, the kind of technology-infused cooperative projects discussed in this article are targeted towards those preferences

and can lead to higher levels of knowledge retention and increased ability to manipulate and analyze information.[42]

PART II: GENETICALLY MODIFIED EMBRYO PROJECT

One of the topics that is likely to be covered in a healthcare law and compliance course is the legal and ethical issues associated with genetically modifying embryos. One of the ways to create a more dynamic and engaging approach to covering this topic could be the following method that was employed in my healthcare law & compliance course on two separate occasions: once with a live class in the fall of 2019 and once with a fully on-line class in the spring of 2021.

Pre-Class Activities: Genetically Modified Embryo Project

Prior to the class session the students were required to read the following two articles, view the two referenced videos, and research the two international laws listed below:

- Article: The CRISPR baby scandal: what's next for human gene-editing[43]
- Article: Perspectives on Gene Editing, The Harvard Gazette[44]
- Video: Gene Editing: Last Week Tonight with John Oliver[45]
- Video: The Realities of Gene Editing with CRISPR/Nova/PBS[46]
- Independent research: the 1997 European Convention on Human Rights and Biomedicine (Oviedo Convention)[47]
- Independent Research: EU Charter of Fundamental Rights (EU Charter)[48]

The pre-class assignments and in-class activity are designed to connect to all three learning modalities discussed above.[49] The referenced articles are approximately 2-3 pages in length and provided the students with current examples in the news on the topic that are in easily digestible lengths, interesting, informative, and were provided as a supplement to their textbook which did not include this dynamic and engaging topic.[50] The articles have built in questions that can be used as a springboard for discussion in class.[51] Both the John Oliver and NOVA videos were approximately 19 minutes in length, which is very close to the acceptable 18-minute target time for lectures set by experts and used by organizers of TED[52], and they appealed to visual and auditory learners as well as most students' comfort with, and in many cases preference for, web-based content. In addition, from a student accessibility perspective, the two videos were equipped with closed captioning for any student with a hearing impairment.

The John Oliver video, while serious in parts, also injected humor in a way that kept students engaged.[53] The two treaties on Human Rights and Biomedicine provided a simple legal framework for how the topic is regulated from an international perspective and supported the class discussion covering the legal landscape regulating the modification of human embryos. Finally, the in-class project itself, because it employs an interactive role-play approach, appealed to the kinesthetic learner who prefers a combination of sensory functions and is drawn to more "hands-on" experiences to understand the basic principles of the topic at issue.[54]

Prior to the start of class, I created an account with the free, web based, interactive learning tool Nearpod.[55] This simple and easy-to-use tool enables professors to create engaging presentations,

activities, and real time assessments that can either be standalone or imbedded into Google slides. The site has free tutorials[56], as well as a library of existing presentations on a variety of subjects. For the topic of genetically modified embryos, the presentation option selected was to create a survey wherein the students were asked whether they would want to have their fertilized embryo genetically modified in a few simple ways. The students, whether live or online, were required to have access to some form of electronic device such as their laptop, tablet, or smartphone.

In-Class Activity: Genetically Modified Embryo Project

When the students arrived in class, they were given an access code generated and provided to the professor by Nearpod. The students logged into the site using the access code and gave themselves an alias. The alias option (providing anonymity) can be important if the students' identities would restrict their comfort with providing honest answers to the survey questions. The survey had simple instructions about how the students should proceed through the questions and then the students were asked: If the technology existed so that they were able to genetically modify their fertilized embryo for the following characteristics, what would be their preferences with respect to the following:

1. What birth sex would you prefer? (Choices: male, female, or no preference)
2. What eye color would you prefer? (Choices: brown, hazel, blue, green, gray, amber, or no preference)[57]
3. What hair color would you prefer? (Choices: black, brown, blond, white/gray, red, or no preference)[58]

4. If you could have a procedure done to your embryo, and that procedure would ensure with 100% certainty that your child would not have a hereditary disability of any kind, would you do it? (Choices: yes, no, or no preference)

On both occasions, live and on-line, the survey was set to "professor paced"[59] and once every student answered the first question, I was able to release the second question and so on, so that the class moved along at the same pace. The entire survey took approximately ten minutes to complete and Nearpod provided a compilation chart of the results that was projected onto the screen and reviewed with the class.

This project was conducted on two separate occasions with two separate groups of students. The first was in-person during the fall 2019 semester and the second was on-line using Zoom during the spring 2021 semester. A total of 27 students participated. While this is a small sample, the students' overall demographics were:

- All students were between the ages of 18 and 28
- 12 students identified as female and 15 identified as male
- 3 students had disabilities (for privacy reasons the nature of the disabilities of the students were not disclosed to the professor)
- All 27 students were business majors with a focus on legal studies in business

Post-Exercise Discussion: Genetically Modified Embryo Project

The complete results of the student responses can be found on Table A; however, if an embryo were to be modified according to what the majority of the 27 students selected it would be born a male,

have blue eyes and brown hair, and would have any genetic material that would lead to a disability removed. While it was interesting to examine and discuss what traits most of the students selected and why, there was an equally interesting conversation regarding the traits that were either in the minority or not selected at all.

Some of the students felt the characteristics selected by many of their peers were "more desirable" based on personal experience, advertising and marketing images, and anecdotal references from family and friends and they believed it would provide their child with societal advantages that they wouldn't otherwise experience if they had different, allegedly less-popular traits. For the question regarding the removal of genetic material that would ensure with 100% certainty that your child would not have a hereditary disability of any kind, 25% of the students responded they would not opt for this procedure.

This sparked an interesting discussion about the ethics of such a procedure. Two of the three students who self-identified as having a disability stated that they would not have wanted this procedure done to them as an embryo because it would have altered "who they were." This statement was surprising to many of the students in both classes and created a natural shift to a discussion about why someone would want to live with a disability if they didn't have to. This created an opportunity for the class to engage in a conversation about tolerance, empathy, equality, diversity, and inclusion and how these are not only important aspects of a legal studies education, but they are desired in the modern workplace.

This discussion also supported the ideals set forth in the Preamble to the AACSB Accreditation

Standards, as well as its Guiding Principles. [60] The Preamble emphasizes and models the values of equality, diversity, and inclusion, … ethics, social responsibility, and community[61] and its Guiding Principles require that an accredited business school foster awareness, understanding, acceptance, and respect for diverse viewpoints related to current and emerging issues.[62]

It is undeniable that today's students are very different in significant ways and classrooms today have more diversity in every sense of the word. Not only is there greater diversity with respect to ethnic, racial, religious, and economic backgrounds[63], but there are more students with disabilities, both physical and cognitive, that have very different needs and expectations which can be challenging to satisfy through traditional educational methods.[64] One of the benefits of using a web-based tool such as Nearpod is that it offers many features to support accessibility so that the professor can customize the learning experience enabling students with disabilities to use the tool.[65] There are text-to-speech and translation options, closed-captioning for videos, and a variety of assessment approaches to fit different student strengths; including drawing options, quizzes, open-ended questions, and image only activities.[66]

Assessment of Learning: Genetically Modified Embryo Project

The students were assessed in three different ways that all aligned with the course and topic goals. The overall project grade was 50 points with the first part of the assessment being a 5-point (or 10%) participation grade. The students were told they would be graded on their participation in the survey and whether they engaged in some meaningful way during the post-survey discussion.[67] The second part of their grade was based on a post-class reflection.

The students were required to post their reflection on the class Discussion Board (here, Blackboard was the Learning Management System) and to respond respectfully and professionally to one of their classmate's reflections. This assignment was worth 30 points and they were required to:

1. Discuss what they felt was the most important thing that they learned from participating in the survey & class discussion.
2. Did they feel laws/treaties need to be created or modified to address the ethical and legal issues of genetic modification of human embryos on a national and global level, and if so, how?
3. Appropriately cite to whatever laws and articles they used as a source for questions (1) and (2), and
4. Reply to a classmate's posting from question 2 with whom they disagreed and discuss why their approach is preferred, or they could discuss how their classmate's posting changed their opinion on how this issue should be addressed from an ethical and legal perspective.[68]

Finally, the students were required to take a 15-point, four-question, on-line quiz consisting of 3 multiple choice questions (3 point each) covering the information in the pre-class readings and 1 short answer question (6 points) where they were required to either defend or object to the genetic modification of embryos from a purely ethical perspective and to provide a detailed explanation for their position. Since the multiple-choice questions were not based on textbook material or publisher resources it provided a simple way to check knowledge retention from the pre-class readings and could be updated from semester-to-semester. In addition, as policies, laws, and science on the genetic modification of embryos changes over time the articles can easily be swapped out with newer publications or statutes to

keep the coverage of the issue current and relevant. These assessment activities were diverse in their format and aligned with the course goals of: (1) demonstrating awareness of the ethical, legal, and social responsibility issues in specific areas of the health care field (i.e., genetic modification of embryos), (2) the use of critical thinking skills, and (3) the production of well-written communication on the subject matter. Finally, while one aspect of the grade was clearly based on retention of specific information contained in the readings, the students also had the opportunity to express themselves and their interpretation of the topic in the written sections of the assessments. "Requiring students to express themselves in writing … opens up additional teaching opportunities for the professor and gives students yet more practice with a mode of communication that will be central to their professional careers."[69]

PART III: WHO GETS THE HEART PROJECT

The legal and ethical issues of organ donation is another topic covered in a healthcare law and compliance course. Organ donation and transplantation have become more and more common, and receipt of a donated organ is sometimes the only way to prolong the recipient's life. While the United States has a national organ transplant waiting list, each state has its own set of laws governing organ donation.[70]

Pre-Class Activity: Who Gets the Heart Project

Prior to the class session on organ donation, the students were required to read the following article, view the referenced video, and research the New York State Regulation for Organ Donation listed below:

- Article: The Drive for More Living Heart Donors[71]
- Video: Organ Transplants and Ethics.[72]
- New York State Organ Donation Regulations.[73]

In this project, the students used Nearpod; however, unlike the genetically modified embryo project, the students here worked in groups. Prior to the class session, the students were randomly divided into teams of between 3 to 5 students. Again, the in-person and online students were required to have access to an electronic device such as their laptop, tablet, or smartphone.

In Class Activity: Who Gets the Heart

In lieu of lecturing on the ethics and intricacies of organ donation and transplantation, the students were engaged, not just with the professor and topic, but more importantly, with their peers in the class. The students were told that they were members of the "Medical Science and Ethics Committee" and had eight patients who desperately needed a heart transplant if they were to have any chance of living. All eight patients lived near the hospital and were classified as "critically ill" and without a transplant could die at any time. The profiles of the eight patients had been previously loaded onto Nearpod as part of a survey. The eight patients were as follows:

1. Patient 1: female, age 57, and a renowned poet and novelist who immigrated from Nigeria. Received the 1987 Nobel Prize for literature. Has been an inspiration throughout the developing world because of her anti-colonialist writings. Patient 1 has been confined to bed for the past five months because of steadily deteriorating health. (Married: four children between the ages of 30 and 37).

2. Patient 2: male, age 14, and a junior high school student who immigrated from South Korea. Patient 2 was born with a heart defect. Doctors wanted to wait until he was a teenager to replace his heart, but his condition has worsened dramatically. He is being kept alive on a machine.
3. Patient 3: female, age 27, has had heart problems from a genetic defect and her twin sister (patient 4) is similarly affected. Although Patient 3 is a promising Ph.D. student in biochemistry at Georgetown University, her failing heart and kidneys have caused her to drop out of school temporarily. (Patient 3 and her partner Emily have 3-year-old twin daughters).
4. Patient 4: female, age 27, and Patient 3's twin sister. Patient 4 holds a master's degree from Harvard University in Computer Science and currently operates a computer business with her husband. Patient 4's condition differs from that of her sister in that her kidneys have not been affected by her failing heart. (Married: one daughter, age 4).
5. Patient 5: male, age 34, and works for the Central Intelligence Agency (C.I.A.) and is considered the leading authority on Middle East military strategy. Patient 3 is being kept alive on a heart machine. (He is a widower, his wife died in an automobile accident a year ago and he has three children, ages 6, 3 and 2).
6. Patient 6: female, age 23, and has heart problems because of having had scarlet fever during her childhood. Patient 6 grew up in an economically challenged neighborhood in New York and she is currently unemployed and on welfare. She raised money for her operation through the contributions of people in her neighborhood. (Never married, she has four children, ages 8, 6, 5 and 1).

7. Patient 7: male, age 42, with a family history of heart disease. His father died from heart failure at age 39. Considered the leading scientist in the world in bacteriological diseases, Patient 7 has already had one heart transplant operation six years ago. Since his body rejected that heart three weeks ago, Patient 7 has been kept alive by machines. (Never married, no children).
8. Patient 8: transgender male, age 28, and needs the transplant due to a heart-related birth defect. Patient 8 is currently a social worker specializing in LGBTQ issues and lives with his partner who is a lawyer. They have a 3-year-old son whom they adopted from Vietnam a year ago.

The students were told that the hospital had just received news that the heart of a 16-year-old boy who was killed in an auto accident had become available for transplantation. Time is of the essence because not only are the eight patients critically ill, but the donor heart will soon begin to deteriorate. When making the determination as to which of the eight patients was to receive the heart, the students were told that the age and sex of the donor had no relationship to the age and sex of the recipient. They were then instructed to read the information about each patient carefully and discuss among their teammates why each person should receive the heart and to come to a consensus and rank the patients in order of preference: 1 being their first choice to receive the heart, to 8 being their last choice to receive the heart. For the live class, the students were directed to move about the classroom into their groups to begin their discussion. I was able to migrate around the room to monitor the group discussions, answer questions, and keep the students on task. For the on-line section, the class was on Zoom and the breakout room feature was used to enable the students to engage privately with their team while also allowing me the opportunity to drop

into each breakout room to monitor the group discussions, answer questions, and keep the students on task. The students were told that they had 20-minutes to complete this task.

Once each team completed its discussion, the students were directed to select one member of their team to access the Nearpod survey and to: (1) rank the heart recipients in order of priority as decided by their team and (2) to provide brief, written rationales for why they chose the patient they did as the top priority and why they chose the patient they selected to be last in priority. In the interest of time, the students were not asked to provide rationales for the patients that were ranked numbers 2 through 7 on their organ recipient priority list; however, this certainly is an option if time permits.

Post-Exercise Discussion: Who Gets the Heart Project

The same 27 students also participated in this project, so the student demographic and class structure did not change. However, for this project, the students were broken into 9 teams of 3 students per team. While a convincing case can be made for any one of the eight transplant candidates to be selected first, the person who the student-teams most often selected to be the person to receive the transplant was Patient 2, a 14-year-old boy.[74] The dominant reason given by the teams was his youth and the fact that he had waited several years for a transplant. The second most frequent selection to receive the heart was Patient 6, a 23-year-old unmarried mother of 4 children.[75] Here, the students focused on the fact that Patient 6 had young children who would be orphaned if she were to die, and they were impressed by her having raised the funds to pay for the transplant through charitable donations.

More interesting were the choices and justifications given for the people who were selected last on the list of candidates. Patient 7 was selected last by 56% of the student teams.[76] The primary reasons given were the fact that he was unmarried with no children and several of the students remarked that he was middle-aged, already had one heart transplant that failed, and that he was a riskier choice. The second most frequent candidate to be selected last by 33% of the teams was Patient 1, a 57-year-old woman[77]. Here, the students focused on her age, that her children were grown, and that according to them she had already lived a fairly long life and she was identified as a less compelling choice than some of the other transplant candidates.

One of the more interesting discussions to come out of this project was that the students were surprised by the fact that a person's lifestyle is not considered when they are placed on the organ recipient registry. Meaning, the students felt that someone who drank alcohol to excess, smoked, was obese, or who engaged in risky hobbies like riding motorcycles or skydiving should be less deserving of a heart transplant than someone who did none of those things. This suggestion allowed the discussion to migrate to the question: If lifestyle issues were to be considered when placing someone on the organ recipient registry, who would get to decide what factors were acceptable or not?[78] The teams also discussed the fact that they seemed to value parenthood over other attributes and what this would mean for people who either cannot have, or decide they do not want, children.

One of the post survey questions posed to the teams during the discussion was whether it impacted their thoughts on a candidates' ranking for an organ transplant if that candidate were transgender or disabled in some significant way. There was a mixed

response to this question, and it sparked a passionate discussion on diversity, equality, discrimination, and other ethical issues that could impact organ recipient decision making and made some of the students rethink their position on lifestyle factors being considered as part of the recipient ranking. Again, this presented an opportunity to discuss that not only should a classroom be a place of empathy, tolerance, and mutual respect for gender identity and expression, but the same should be true in all aspects of life so that persons who are disabled or "identify as non-binary, gender non-conforming, and/or transgender, are part of a culture of inclusion and diversity that has indirect benefits to all."[79] This may not always be obvious in a class dominated by lecture or case analysis structure since many students in those traditional formats don't volunteer to participate because they often feel afraid to express their true opinions on the subjects of gender identity and sexual orientation for fear of being ostracized or canceled by their peers or even worse, by their professor.[80]

Assessment: Who Gets the Heart Project

In the Who Gets the Heart project, the students were assessed in two different ways that aligned with the course and topic goals. The first part of the assessment was a peer grade from their teammates on the project. Because peer grading is often a source of frustration for students and they believe it comes with some degree of unfairness[81], the students were told in advance they would be graded by their peers solely on the degree to which they participated in the group discussion part and that the peer grade would be the smallest part of their overall grade on the project; it was worth 5 points out of a total of 25 points.[82] The second part of the assessment was a 3-5-page, properly annotated essay worth 20-points to be submitted by each student

individually. Here, they were required to research how organ donation is regulated in another country and compare it to how the United States regulates the subject. For example, in 2008, Israel's Ministry of Health adopted a law "rewarding individuals with prioritized access to organs on the condition they participate in cadaveric organ donation.[83] Additionally, many other countries like Singapore, Austria, Belgium, France, Sweden, and others have "presumed consent" laws where a person has to affirmatively elect not to be an organ donor.[84] Both of these approaches differ from the US where there is no reward system and a person has to take some specific action (i.e., check a box on their driver's license) to consent to be an organ donor. By requiring this global comparative analysis, this assignment aligned with the AACSB's requirement that business school curriculum provide a global perspective.[85]

The students were also required to suggest one important change they would like to see happen to how organ recipients are prioritized in the United States and how they think such a change can be implemented without resulting in bias, prejudice, or discrimination. Since the students "experienced" the process of selecting a recipient rather than just hearing or reading about how it works the suggestions in the students' final papers suggested they had more of a vested interest in the policies they proposed. Some included personal anecdotes about organ recipients they knew and how their policy suggestion would have impacted that person's place on the recipient list, while others discussed their own lifestyle choices or physical circumstances and how those may impact their engagement in the organ transplant system if they needed to be either a donor or recipient.

These two assessment activities aligned with the course goals of demonstrating the ability to work effectively with peers, think critically, and produce a well-written communication on the subject matter. The brief research paper also allowed the students to explore alternative approaches to organ donation that is employed by other countries and to brainstorm for ways to improve the system here in the United States.

PART V: CHALLENGES & OTHER APPLICATIONS

There are a few questions that may arise with both projects; including, whether the projects can be implemented in larger classes, whether the webtool used (Nearpod) has cross-over application to other legal studies courses and other applications, and how these projects connect to both on-line and more traditional ways of teaching the subject matter.

Application based on Class Size

As for the first issue, class size, the two sections that completed the project had a total of 27 students and neither section had more than 15 students. Even though the classes in these cases were small, both projects and the web tool Nearpod can be implemented in classes that have higher enrollments. The free version of Nearpod can accommodate up to 50 participants and there are options to purchase additional features to allow for up to 250 respondents depending on the selected access plan.[86] The Genetically Modified Embryo project asked for individual responses and Nearpod kept track of all responses and provided a distribution chart once the survey was completed so there would not be an administrative issue for a professor teaching a larger class. For the Who Gets the Heart project, since the

students were broken into teams, again Nearpod could be utilized in a class with larger enrollments depending on how many teams the professor prefers and how many students will be on each team. In larger settings Nearpod provides an excellent opportunity for all voices and opinions in the room to be heard and for all students to be actively engaged in the material.

Broader Application and Use in Other Legal Studies Courses

Nearpod is just one of dozens of webtools that allow a professor to inject creativity and engagement in their legal studies classroom.[87] If the goal of a business school is to prepare today's students to enter the modern workforce then it needs to require students to engage in a seamless integration of technology and higher order thinking skills to solve complex problems.[88] Essentially, that is one of the primary functions of those working in the field of law: complex problem solving. While specific articles, videos, and laws were assigned for both projects before the students came to class, those resources were supplemental to the coverage of ethical decision making that can be found in a traditional Legal Environment of Business textbook.

These specific resources, the articles, videos, and statutes, were selected because they would accommodate all learning styles, discussed a subject that was not covered in the assigned textbook, and provided several points or issues that triggered engagement and critical thinking opportunities that were part of the post-project discussion. These are all valid reasons for using this technology in any other legal studies course as well.

Nearpod is ripe for use in discussing ethics, constitutional issues, employment law challenges, negligence fact patterns, intellectual property issues, and many other topics covered in a legal studies course.[89] More specifically here, the Genetically Modified Embryo project included: insight into issues such as the disparity in access to gene editing based on economic status, the commercial potential of this science, the ethics of the scientific research into gene editing, a discussion about what should happen to the Chinese scientists who experimented with gene editing on two young girls that was discussed in one of the pre-class readings[90], and the different approaches to regulating the science from a global perspective. For the Who Gets the Heart project, the pre-class readings and videos provided some anecdotal stories about real people facing organ transplant shortages as well as some current statistics on organ availability, recipient mortality rates, and scientific information that is not always presented in a legal studies or healthcare law and compliance textbook.[91]

Finally, two of the hottest areas in the job market and in legal studies education are healthcare law and legal/corporate compliance.[92] As a result, many business schools are creating courses or even entire undergraduate and graduate programs in healthcare law and compliance. One business law scholar has noted that the subject of compliance has a natural affinity with the topics of legal and ethical analysis and suggested that it be part of a program on the global legal environment of business.[93]

One additional benefit to using Nearpod that has not been discussed is its potential use as a tool for data collection for a professor's scholarly projects. While I did not include this element in my projects, a professor could use the Nearpod survey question format and include demographic or other

data-driven questions as a way of collecting statistics on particular issues as well as for generating data on how students feel about issues related to a professor's specific research subject.

Connection to Live, On-Line, and Hybrid Modes of Instruction

Using web tools like Nearpod engages students and pushes them to actively participate in the classroom activity, it supports the goal of integrating technology with problem-solving, and it creates a springboard for post-activity discussions that are catalysts for additional active learning opportunities.[94] Active learning fosters higher-level thinking, including analysis, synthesis, and evaluation and makes students more powerful thinkers.[95] One of the advantages of using the Nearpod survey tool for any legal studies course is that the tool can easily be used during a live class, a hybrid class, and one that is fully on-line. Even in situations where the course is asynchronous, the student-paced feature enables students to access the tool at different times and the data can be collected and shared with the class either during a subsequent live session (in person or on-line), it can be posted for students to review on their own, or it can be used for questions on a variety of assessments. Nearpod can also be integrated with other platforms including but not limited to: Moodle, Canvas, Zoom, Google Meet, and Microsoft Teams.[96] For synchronous on-line classes it provides a different way to interact with students while on Zoom or similar platforms and it can break up the monotony and fatigue that can arise from excessive use of the same tool for on-line class sessions.[97]

Educators are guides and facilitators for their students' journey through the subject matter. Good guides and facilitators know their charges and adjust

their approach accordingly. "Policy makers, scholars, advocacy groups, and others who seek to improve higher education want to see more evidence that students are truly learning in college. As "cognitive psychology produces new insights into how students learn, these observers say professors can no longer simply pump out information and take it on faith that students understand it."[98] Effective professors know how to use technology as a tool for both learning and assessment, not to merely test student recall, but rather to engage critical thinking skills and to support the goals of the material the assessment was connected to.

Effective teaching and learning require a system and structure in which the course content and assessment components are integrated and are designed to support higher-level thinking skills.[99] There are so many ways this can be accomplished because there are plenty of resources and technology tools available. Finally, by using a tool like Nearpod assessment does not have to be viewed merely as a method for grading students rather, it [can] be treated as a 'tool for learning' to help determine if the students have reached the intended goals and objectives of the topic.[100]

PART VI: CONCLUSION

The role of a university instructors is to provide their students with an excellent experience that not only results in an increase in knowledge of the subject area, but also improve critical thinking and analytical skills that will make them competitive in the marketplace. As hard as students must work, professors, if they want to remain committed to delivering the kind of education that students deserve, need to work even harder, especially in the rapidly changing environment of education. If the pandemic of 2020 showed educators anything, it was

that the old way of delivering content is now a thing of the past and students demand and are used to a variety of content delivery modes and, in many cases, having the structure of their education almost personalized. Knowing this, professors should not rely on just one delivery method, such as, the lecture or case discussion; rather, they should incorporate a variety of tools including providing interactive opportunities and technological resources that can enhance the student's experience with the course material.[101] "For example, clickers or webtools such as Nearpod, can be used to elicit immediate feedback and/or answers to questions in all areas of legal studies, which can in turn, be used as a springboard for discussion. Class time can be reserved for activities, discussion, problem-solving, group work, or other interactive tasks to create investment in the material, critical thinking opportunities, and collaborative learning. In addition, interspersing TED Talks, YouTube videos, movie clips, podcasts, and other multi-media resources can provide the students with a different "voice" on the topics being discussed.

While the two projects discussed in this article used the webtool Nearpod, there are many other technology-based tools that can be adopted by professors to help make their classes more engaging and ensure that multiple learning preferences are covered. One of the first places a faculty member can look for assistance with these tools is their university's Educational Technology staff. Having a conversation with someone familiar with the latest technology tools, having them review an existing course's delivery modes, or separately make recommendations for the implementation of tools that can be accessed internally to diversify the delivery of content can infuse an existing course with active learning and critical thinking opportunities. Faculty can engage with colleagues, formally or

informally, who use these tools to exchange ideas and approaches to teaching, even sharing resources or having another professor review course materials and provide ideas for improvement. Additionally, there are a myriad of free web-based tools that come with straightforward tutorials and examples of best practices; this includes a library of thousands of Ted Talks, YouTube videos, podcasts, and documentaries on streaming services or available through a university's library that can be used to generate interesting discussions that require the students to think critically and apply the subject matter content they learned from the more static resources such as textbooks and articles. This can be particularly important to students who have disabilities. There are dozens of additional approaches that can be implemented including flipping the classroom and having students teach one another, assigning in-class projects, presentations, and group problem-solving. All of these create discussions and interactions with the professor and peers and offer opportunities for the exchange of ideas and solutions.

In the end, the goal is to be up-to-date on how students learn; how to help students see the big picture yet still be able to think critically when facing specific problems; how to make the content engaging; how to inspire students to learn; how to create an active experience for students, including those with disabilities; how to prepare for a class that is more diverse than ever before; how to develop engaging and varied assessments that don't just test knowledge retention, but align with the goals of the course; how to develop improved classroom management skills to create an environment that is free from discrimination and judgment; and finally, how to incorporate the use of technology in such as way as to advance the students' desire and ability to stay engaged in the course and to enable them to walk

away with not just a basic understanding of the topic, but rather the ability to apply what they've learned to new situations that arise as they enter the workforce. Structuring class sessions to facilitate student engagement by using a seamless integration of technology and higher order thinking skills to solve complex problems will help prepare students to thrive in a 21st century economy.

TABLE A: Genetically Modified Embryos (total of 27 respondents)

Birth Sex	**Male**	**Female**	**NP**				
Responses	13	10	1				
Eye Color	**Brown**	**Hazel**	**Blue**	**Green**	**Grey**	**Amber**	**No Pref.**
Responses	3	6	9	5	0	2	2
Hair Color	**Black**	**Brown**	**Blonde**	**White/Grey**	**Red**	**No Pref.**	
Responses	7	13	7	0	0	0	
Remove Disabilities	**Yes**	**No**					
Responses	20	7					

TABLE B: Who Gets the Heart (total of 27 respondents)

Candidate	**Age**	**Selected First**	**Selected Last**
Patient 1	57	0	3
Patient 2	12	5	0
Patient 3	27	0	0
Patient 4	27	0	0
Patient 5	34	1	0
Patient 6	23	3	1
Patient 7	42	1	5
Patient 8	28	0	0

TABLE C: Grading Rubric for Genetically Modified Embryo Class Exercise

Participation	Points
Answered at least 11 out of the 13 survey questions and provided at least one meaningful/significant comment about the experience/topic during the class discussion.	5
Didn't complete the survey* but did provide at least one meaningful/significant comment about the experience/topic during the class discussion.	3
Didn't take the survey but contributed to the class discussion on the experience/topic; however, not in a meaningful/significant way.	1
Didn't take the survey and did not participate in the class discussion.	0
*Was late to class or had technology issues that prevented participation in the survey	

TABLE D: Genetically Modified Embryo Post-Exercise Essay Assignment

Please discuss the following:

1. What was the most important thing that you learned from participating in the genetically modified embryo survey & discussion? You must answer in full and grammatically correct sentences (or you can use bullet points) and your answer should be a minimum of 50 words. Your answer is worth 10 points.
2. Do you feel that new laws & treaties need to be created or existing ones modified to address the ethical and legal issues of genetic modification of human embryos, and if so, describe them in detail? You must answer in full and grammatically correct sentences and your answer should be a minimum of 75 words. Your answer is worth 10 points.
3. When answering the two questions above, you are required to appropriately cite to whatever

laws and articles you used as a source. You must use at least TWO sources for each answer. You must use different sources for each answer. Your correct citations are worth 5 points.

4. You are to respectfully and professionally reply to a classmate's posting from question 2 with whom you disagree. Discuss why your approach is preferred OR you can discuss how that student's posting changed your opinion on how this issue should be addressed from an ethical and legal perspective. You must answer in full and grammatically correct sentences and your answer should be a minimum of 50 words. Your reply to a classmate is worth 5 points.

TABLE E: Who Gets the Heart Peer Grading Rubric

Points	Criteria
5	Student was present, participated in the rankings of the organ donation recipients and articulated a rationale for each of the rankings.
4	Student was present, participated in the rankings of more than half of the organ donation recipients and articulated a rationale for more than half of the recipients.
3	Student was present, participated in ranking some, but less than half, of the organ donation recipients and articulated a rationale for some but less than half of the organ donation recipients.
2	Student was present, participated in ranking only 1 of the organ donation recipients and/or provided a rationale for only the 1 recipient they ranked.
1	Student was present, participated in ranking only 1 organ donation recipient

	but did not contribute a reason or rationale for the rankings.
0	Student wasn't present or was present but didn't contribute to the determination of organ recipient rankings.

[1] *Top Qualities of an Effective Teacher*, GEORGETOWN CENTER FOR NEW DESIGNS IN LEARNING & SCHOLARSHIP (Feb. 17, 2022, 2:26 PM), https://cndls.georgetown.edu/atprogram/twl/effective-teacher/ (positing that effective teachers recognize that the proper use of technology creates active learning and can increase engagement), *see also* Madeline St. Amour, *As Times and Students Change, Can Faculty Change Too?*, INSIDE HIGHER ED (Apr. 3, 2020), https://www.insidehighered.com/news/2020/04/03/faculty-face-uphill-battle-adapting-needs-todays-students (noting that some faculty struggle to adapt to the changing demographics of the student population with an increase in enrollment from lower income, older, and diverse students).

[2] CBS News, *91-year-old professor's virtual teaching goes viral during pandemic*, YOUTUBE (Sept. 29, 2020), https://www.youtube.com/watch?v=3JNobChHfkI (showing Charles Krohn, professor emeritus at the University of St. Thomas in Houston embracing a new way of teaching via Zoom at the age of 91).

[3] Digital Promise, *Suddenly Online: A National Survey of Undergraduates During the COVID-19 Pandemic*, at 3, https://digitalpromise.org/wp-content/uploads/2020/07/ELE_CoBrand_DP_FINAL_3.pdf.

[4] *See id.* at 18 (collecting data from May and June of 2020 from over 1000 undergraduate students in the US and finding that college students' satisfaction dropped sharply after schools shifted to all on-line instruction during the COVID-19 pandemic and that the students surveyed reported that they struggled with staying motivated, receiving feedback from their professors, and engaging with their classmates).

[5] Derek Newton, *College Students May Be Unhappy, But They're Probably Coming Back*, FORBES (May 28, 2020), https://www.forbes.com/sites/dereknewton/2020/05/28/college-students-may-be-unhappy-but-theyre-probably-coming-back/?sh=69b00390266c.

[6] GLOBAL NEWS, *Is generation 'Z' glued to technology? 'It's not an addiction; it's an extension of themselves'*, June 19, 2018, https://globalnews.ca/news/4253835/generation-z-technology-addiction/, *see also* Richard Matasar, *The State and Future of Legal Education: The Canary in the Coal Mine: What the University Can Learn from Legal Education*, 45 MCGEORGE L. REV. 161, 194 (2013) (noting that today's students embrace technology not simply as tools, but that they use them in all aspects of their lives to gain information, stay in touch with friends and family, shop, and find entertainment).

[7] *See* Digital Promise, *supra* note 3, at 6 (finding that only 51% of students surveyed were satisfied with their course before the pandemic forced it to go fully online).

[8] Michael D. Toth, *Why Student Engagement is Important in a Post-COVID World – and 5 Strategies to Improve It*, LEARNING SCIENCES INTERNATIONAL (March 17, 2021), https://www.learningsciences.com/blog/why-is-student-engagement-important/. (noting that many students had become more passive, felt disengaged, and had a lessor sense of social belonging after months of engaging solely in on-line learning).

[9] B. Jean Mandernach, *Assessment of Student Engagement in Higher Education: A Synthesis of Literature and Assessment Tools*, 12 INT'L J. OF LEARNING, TEACHING AND EDUCATIONAL RESEARCH 1, June 2015 at 2, (*citing* Lee S. Shulman, *Making differences: A table of learning*. 34(6) CHANGE, THE MAGAZINE OF HIGHER LEARNING 36-44 (2002)).

[10] GEORGE ROOKS, THE NON-STOP DISCUSSION WORKBOOK (2d ed., Heinle Cengage Learning 1998). These two activities were taken and modified from this workbook. The modifications to the projects consisted of changing the names and some of the demographic information of the candidates for the heart transplant project to make them more diverse and adding in some additional options for genetic traits for the designer embryo project.

[11] Kristen E. Murray, *Let Them Use Laptops: Debunking the Assumptions Underlying the Debate over Laptops in the Classroom*, 36 OKLA. CITY U.L. REV. 185 (Spring 2011) (discussing the mixed reactions and skepticism many law professors expressed over the use of technology in the classroom).

[12] *See generally,* Todd E. Pettys, *The Analytic Classroom*, 60 BUFFALO L. REV. 1255, 1263-1272 (Dec. 2012).

[13] *See* Richard A. Kaplan, *A Business School Model for Presenting Your Case*, 24 UTAH BAR J. 14, 15 (May/June 2007) (stating that both business school and law school professors use cases as their primary method of class discussion).

[14] *See* Pettys, *supra* note 12 at 1270 (noting that after a while students become bored with these methods of instruction and end up relying on their professors to "carry the intellectual load" and that some students end up too intimidated to participate).

[15] *Id.* at 1292, *citing* Lawrence S. Bacow, *et. al.*, *Barriers to Adoption of Online Learning Systems in U.S. Higher Education*, ITHAKA S+R 6 (May 1, 2012), https://sr.ithaka.org/publications/barriers-to-adoption-of-online-learning-systems-in-u-s-higher-education/.

[16] *See* AACSB 2020 Standards For Business Accreditation, Standard Learner Success, Innovation, Experiential Learning, Lifelong Learning, and Societal Impact, Standard 4.3, at 39, https://www.aacsb.edu/educators/accreditation/business-accreditation/aacsb-business-accreditation-standards?gclid=CjwKCAiAo4OQBhBBEiwA5KWu_x6ZfkiThIEt6NiS64rjUqRLifhdTggfjER4xtvC4NW5GTbLzSHXNxoCInkQAvD_BwE.

[17] *See id.* at 48.

[18] *See* Kaplan, *supra* note 13 at 15, *see also* Beverly Petersen Jennison, *Beyond Langdell: Innovating Legal Education*, 62 CATH. U.L. REV. 643, 646, 651-52 (Spring 2013).

[19] *See* Craig Lambert, *Twilight of the Lecture*, HARV. MAG., Mar.-Apr. 2012; located at: https://www.harvardmagazine.com/2012/03/twilight-of-the-lecture, *see also* Daphne Koller, *Death Knell for the Lecture: Technology as a Passport to Personalized Education*, N.Y. TIMES, Dec. 6, 2011, at D8, *see also* Todd E. Pettys, *supra* note 12 at 1269 (positing that the case-dialogue method is useful to prepare student for academia or to be a judge but is inadequate to prepare them for more traditional careers).

[20] Lambert*, supra* note 19.

[21] *See* Murray, *supra* note 11 at 195.

[22] Matasar, *supra* note 6 at 194, *see also* Pettys, *supra* note 12 at 1270 (noting that most students in large classes are passive listeners during Socratic exchanges and it is unlikely they are making any significant cognitive gains).

[23] *See* Matasar, *supra* note 6 at 195.

[24] Susan P. Liemer, Embodied Legal Education: Incorporating Another Part of Bloom's Taxonomy, 95 U. Det. Mercy L.R. 69, 76-77 (2017) *citing* TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS, HANDBOOK I, COGNITIVE DOMAIN (Benjamin S. Bloom, ed., David McKay Co. 1956).

[25] *See* Rafael Gely and Paul L. Caron, *Taking Back the Law School Classroom: Using Technology to Foster Active Learning*, 54 J. LEGAL EDUC. 551, 552 (2004).

[26] *See id.* at 561.

[27] *See id.* at 562.

[28] *See id.* at 564.

[29] *See id, citing* Joan Wines & Julia Bianchi, *Extending the Personal Response System (PRS) to Further Enhance Student Learning*, Paper Presented at the SSGRR (Scuola Superiore G. Reiss Romoli) International Conference 2, (July 2002). This presentation discussed the effectiveness of these tools in an undergraduate setting to support the *Seven Principles of Good Practice* in education.

[30] *See* Nikki Shoemaker and Marie Kelly, *How College Business Students Learn With Emphasis on Differences Between Majors*, 12(4) J. OF COLLEGE TEACHING & LEARNING 223 (2015) (stating that one of the factors contributing to student success is if a professor matches their teaching style to the student's learning style), *see also* Murray, *supra* note 12 at 192 (pointing out that not only do students have different learning styles but forcing them to change their preference can cause a learning handicap), *citing* David I.C. Thomson, LAW SCHOOL 2.0: LEGAL EDUCATION FOR A DIGITAL AGE 78 (2009), *see also* Kanchi Shah, Junaid Ahmed, Nandita Shenoy & Srikant N, *How different are students and their learning styles?*, 1(3) INT. J. RES. MED. SCI. 212, 213 (Sept. 2013). The preference in learning style is defined "in terms of the sensory modality in which the student prefers to take in new information." *Id.* at 213.

[31] *See* Shoemaker, *supra* note 30 at 225 (referring to the Learning Styles Inventory developed by the Center for Innovative Teaching Experiences), *see also* Gerald Biberman & James Buchanan, *Learning Style and Study Skills Differences across Business and Other Academic Majors*, 61(7) J. OF EDUC. FOR BUSINESS, 303-307 (1986) (relying on Kolb's Learning Style Inventory), *see also* Doreen J. Gooden, Robert C. Preziosi, and F. Barry Barnes, *An Examination of Kolb's Learning Style Inventory*, 2(3) AM. J. OF LEGAL EDUC. 57, 59 (May/June 2009) (stating that there is a

need to accommodate different learning styles and modes and that educators' teaching styles should be adjusted to increase course effectiveness and student engagement).

[32] Shoemaker, *supra* note 30 at 225, *citing* N.D. Fleming, *I'm different; not dumb. Modes of presentation (VARK) in the tertiary classroom*, PROCEEDINGS OF THE 1995 ANNUAL CONFERENCE OF THE HIGHER EDUCATION AND RESEARCH DEVELOPMENT SOCIETY OF AUSTRALIA, 18, 308-313 (1995).

[33] *See* Shah, *supra* note 30 at 215.

[34] *See* Pettys, *supra* note 12 at 1304-1305.

[35] Generation Z has been identified as those born between 1996-2010. *See* Dr. Arlene J. Nicholson, *Preferred Learning Methods of Generation Z*, DIGITAL COMMONS @ SALVE REGINA UNIVERSITY (Jan. 1, 2020), https://digitalcommons.salve.edu/cgi/viewcontent.cgi?article=1075&context=fac_staff_pub, *see also* Melissa Jancourt, *Gen Z and the workplace: Can we all get along?*, 10(1) CORP. REAL ESTATE J. 41 (2020) (stating that by 2030 Gen Z will make up 30% of the global workforce).

[36] Nicholson *supra* note 35 at 1 (noting that in this same study, 95% of respondents stated that having to solve problems in class helped them learn the course material).

[37] *See id.* at 5 (referring to the 2016 Barnes & Noble College Survey Getting to Know Gen Z: Exploring Middle and High Schoolers' Expectations for Higher Education, https://www.bncollege.com/wp-content/uploads/2018/09/Gen-Z-Report.pdf).

[38] *See* Sparks & Honey, *Gen Z 2025: The final generation*, (Sparks & Honey Management Consulting, NY, Aug. 2017), https://www.sparksandhoney.com/gen-z.

[39] *See* Nicholson, *supra* note 35 at 2.

[40] *See* Shoemaker, *supra* note 30 at 223.

[41] *See id.* at 223.

[42] *See* Jennison, *supra* note 18 at 653.

[43] *See* David Cyranoski, *The CRISPR baby scandal: what's next for human gene-editing*, NATURE, MAR. 11, 2019, https://www.nature.com/articles/d41586-019-00673-1.

[44] *See* Mary Todd Berman, *Perspectives on Gene Editing: Harvard researchers, others share their views on key issues in the field*, THE HARVARD GAZETTE, Jan. 9, 2019, https://news.harvard.edu/gazette/story/2019/01/perspectives-on-gene-editing/.

[45] *See Last Week Tonight with John Oliver: Gene Editing* (HBO broadcast July 2, 2018), https://www.youtube.com/watch?v=AJm8PeWkiEU.

[46] *See NOVA: Realities of Gene Editing with CRISPR* (PBS broadcast Sept. 9, 2020), https://www.youtube.com/watch?v=E8vi_PdGrKg.

[47] COUNCIL OF EUROPE, *Oviedo Convention and its Protocols,* https://www.coe.int/en/web/bioethics/oviedo-convention.

[48] EU CHARTER OF FUNDAMENTAL RIGHTS, https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights_en.

[49] *See* Part I at 6.

[50] The textbook used in this course was JOSHUA E. PERRY AND DALE B. THOMPSON, LAW AND ETHICS IN THE BUSINESS OF HEALTH CARE, (1st ed., West 2017). This text did not cover the subjects of genetically modifying embryos and organ donation specifically since it focused more on the business issues of the healthcare field (i.e., contracts, tort liability, anti-fraud & abuse, intellectual property, privacy & information management, medical malpractice, basic ethics issues, and the unique aspects of payment and market dynamics).

[51] *See* Cyranoski, *supra* note 43. The CRISPR article raises the ethical issues of what will become of the two sisters that were born in China after having their embryos genetically modified as well as what will happen to the other scientists who worked on the project. *See also*, Berman, *supra* note 43. The Harvard Gazette article discusses the concerns created in the areas of bioethics, commercial applications, medical applications, legal consequences, and scientific and societal impacts of genetically modifying embryos.

[52] Carmine Gallo, *TED Talks are Wildly Addictive for Three Powerful Scientific Reasons* (2014), https://www.forbes.com/sites/carminegallo/2014/02/25/ted-talks-are-wildly-addictive-for-three-powerful-scientific-reasons/?sh=5a63e6d56b6a. When discussing the power of the 18-minute rule one can be reminded that John F. Kennedy inspired a nation to look to the stars in 15 minutes; in a 15-minute TED talk, Facebook COO Sheryl Sandberg inspired millions of women to "lean in"; and it took Dr. Martin Luther King only 17-minutes to share his dream of racial equality.

[53] Avner Ziv, *Teaching and Learning with Humor: Experiment and Replication*, 57 J. OF EXPERIMENTAL EDUC. 5, 11 (Fall 1988) (noting that students retain more of the material presented when humor is used, as long as the humor was connected to material taught).

[54] *See* Shah, *supra* note 30 at 213.

[55] Nearpod, https://nearpod.com/. Nearpod is described as an engaging media and formative assessments tool to make every lesson interactive.

[56] There are also plenty of YouTube videos on how to use Nearpod. *See The EdTech Show with Dan Spada: How to Use Nearpod tutorial 2021* (Jan. 26, 2021), https://www.youtube.com/watch?v=XVmkS4nGq5E.

[57] MICHIGAN EYE INSTITUTE, *How Many Eye Colors Are There?*, https://mieye.com/how-many-eye-colors/#:~:text=While%20there%20is%20a%20limitless,green%2C%20gray%2C%20and%20amber (stating that while there is a limitless number of hues, shades, richness, and combinations of colors, there are basically six eye colors in general).

[58] Dr. Liji Thomas, *News Medical Life Sciences: Genetics of Hair Color* (Feb. 26, 2019), https://www.news-medical.net/health/Genetics-of-Hair-Color.aspx#:~:text=Predominantly%2C%20human%20hair%20can%20be,%2Fgray%2C%20and%20rarely%20red (Noting that while different shades exist, predominantly there are five human hair colors).

[59] Another option is to have the survey set up as student paced. That way, as the student answers each question they automatically advance to the next question. This is a better option for when Nearpod is being used as an out-of-class assessment tool. Here, in class, the preference was to keep all the students on the same pace so no one student finishes early and sits idly while other students catch up.

[60] *See* AACSB 2020 Standards For Business Accreditation, Guiding Principles and Expectations for Accredited Business Schools, Preamble, Introduction to AACSB Accreditation, at 7.

[61] *See id.,* Diversity and Inclusion, at 16 (stating that AACSB remains deeply committed to diversity and inclusion in collegiate business education).

[62] *See id.* at 16.

[63] *See* U.S. DEPT. OF EDUCATION, OFFICE OF PLANNING, EVALUATION, AND POLICY DEVELOPMENT, *Advancing Diversity and Inclusion in Higher Education* (Nov. 2016), at 22, https://www2.ed.gov/rschstat/research/pubs/advancing-diversity-inclusion.pdf

[64] Grace L. Francis, Jodi M. Duke, Megan Fujita & Jason C. Sutton, *"It's a Constant Fight:" Experiences of College Students with Disabilities*, 32(3) JOURNAL OF POSTSECONDARY EDUCATION AND DISABILITY, 247 (Fall 2019) at 247 (noting that some researchers believe the number of students with disabilities attending college has tripled or quadrupled in the past twenty years); *citing* Lucy Barnard-Brak, DeAnn Lechtenberger & William Y. Lan, *Accommodation strategies of college students with disabilities* 15 THE QUALITATIVE REPORT, 411 (Mar. 2010).

[65] Accessibility with Nearpod: How to, https://nearpod.zendesk.com/hc/en-us/articles/360061945231-Accessibility-with-Nearpod-How-To-. For example, if the survey were set to "student-paced" it would allow each student to progress through the survey at their own pace which would be helpful to students with a disability who require more time to complete tasks.

[66] With Nearpod, you can duplicate a presentation to create alternative versions to be sent to students with different learning requirements. Here are some ways that lessons could be customized:

1. Add in reference media supports for formative assessments
2. Alter question types for formative assessments
3. Alter content types, for example, replace a PDF text with a video

[67] *See* Table C: Grading Rubric for Genetically Modified Embryo class exercise.

[68] *See* Table D: Post Genetically Modified Embryo Assignment.

[69] *See* Pettys, *supra* note 12 at 1314.

[70] Organ Donor Registry: Health Resources & Services Administration, https://www.organdonor.gov/sign-up?gclid=Cj0KCQjwiqWHBhD2ARIsAPCDzakyX572_nbKXcfCzZRQYJW999dUCn0uvKXQ0ddzYNP5UEe_S4Tg_kcaAhvpEALw_wcB.

[71] Sumathi Reddy, *The Drive for More Living Heart Donors*, WALL ST. JOURNAL, Aug. 26, 2019, https://www.wsj.com/articles/the-drive-for-more-living-heart-donors-11566832825.

[72] YOUTUBE, *Organ Transplants and Ethics* (Sept. 9, 2020), https://www.youtube.com/watch?v=WgDzrnZGB80.

[73] N.Y. COMP. CODES R. & REGS. tit. 10 § 405.25 (2021).

[74] *See* Table B. Patient 2 was selected first by 56% of the student teams.

[75] *See* Table B: Patient 6 was selected first by 33% of the student teams.

[76] *See* Table B: Patient 7 was selected by 5 out of 9 student teams to be last on the list.

[77] *See* Table B: Patient 1 was selected by 3 out of 9 student teams to be last on the list.

[78] One very recent development that can be inserted here is the denial of a heart transplant to a man who was not vaccinated against COVID-19. *See Unvaccinated man denied heart transplant by Boston hospital*, BBC NEWS, (Jan. 25, 2022), https://www.bbc.com/news/world-us-canada-60132765.

[79] *See* Brielle Harbin, Leah Marion Roberts, Roberta Nelson & Chris Purcell, *Teaching Beyond the Gender Binary in the University Classroom*, VANDERBILT UNIV. CENTER FOR TEACHING (June 9, 2021, 11:00 AM), https://cft.vanderbilt.edu/guides-sub-pages/teaching-beyond-the-gender-binary-in-the-university-classroom/ (pointing out that in a recent article in the *Journal of Higher Education*, several university students expressed fear of professors misgendering them or committing other microaggressions and they described having anxiety about being "outed" by professors in their classes or even being forced to "come out" every semester when they must talk with faculty about their names or pronouns), *citing* Sheen S. Levine, and David Stark, *Diversity Makes You Brighter*, N.Y. TIMES, Apr. 11, 2016; http://www.nytimes.com/2015/12/09/opinion/diversity-makes-you-brighter.html (ensuring that all of the benefits and enjoyments of life are accessible to non-majority persons will result in enhanced creativity and improved problem solving and decision-making in the workplace), *see also* Katherine W. Phillips, *How Diversity Makes Us Smarter*, SCIENTIFIC AMERICAN, Apr. 11, 2016, http://www.scientificamerican.com/article/how-diversity-makes-us-smarter/, *see also* AACSB 2020 Standards For Business Accreditation, Guiding Principles and Expectations for Accredited Business Schools, *supra* notes 68 and 69 (discussing the AACSB's focus on issues of diversity and inclusion).

[80] John Rose, *How I Liberated My College Classroom*, WALL ST. JOURNAL, June 25, 2021, at A21 (noting that in an anonymous survey of 110 students in his spring 2021 class, "68% responded that they self-censor on certain political topics" both in class and even around good friends).

[81] Bill Provaznik and Theresa Wilson, *Teaching Nice People to Hate Managing: The Impact of Non-Anonymous Peer Review on Student Confidence at Reviewing*, 16 J. ACADEMY OF BUSINESS ED. 243 (Winter 2015) (noting that non-anonymous peer review is a critical skill needed for effective management and teamwork).

[82] See Table E: Who Gets the Heart Peer Grading Rubric.

[83] Corrine Berzon, *Israel's 2008 Organ Transplant Law: continued ethical challenges to the priority points model*, 7 ISR J. HEALTH POLICY RES 11 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5855996/#:~:text=In%202008%2C%20responding%20to%20a,they%20participate%20in%20procurement%20efforts.

[84] REUTERS, FACTBOX: Organ donation regulations in some major countries (June 1, 2007, 9:08 AM), https://www.reuters.com/article/us-eu-donors/factbox-organ-donation-regulations-in-some-major-countries-idUSL3133184720070601.

[85] *See* AACSB 2020 Standards For Business Accreditation, Guiding Principles and Expectations for Accredited Business Schools, *supra* note 17, Global Mindset, at 16 (requiring that the curriculum "imbues the understanding of other cultures and values, and learners are educated on the global nature of business and the importance of understanding global trends"), *see also* Kabrina Krebel Chang, *Introducing Global*

Content in a Business Law Course Using the Amanda Knox Murder Trial, 36(1) J. OF LEGAL STUD. EDUC. 31 (Winter 2019).

[86] Nearpod provides different license types for instructors; located at: https://nearpod.zendesk.com/hc/en-us/articles/360047122671.

[87] EDUCATORS TECHNOLOGY, *Educational Technology and Mobile Learning, The 31 Educational Webtools Every Teacher Should Know About*, Dec. 17, 2013, https://www.educatorstechnology.com/2013/12/the-31-educational-web-tools-every.html.

[88] *See* Christine M. Collaco, *Increasing Student Engagement in Higher Education*, 17(4) JOURNAL OF HIGHER EDUCATION THEORY AND PRACTICE 40, 43 (2017) (noting that learning is not a quiet, passive activity and that the teachers who used engaging technology as part of their instruction saw real and positive results from the hands-on active participation of their students).

[89] *See generally* Beatty & Samuelson, LEGAL ENVIRONMENT (6th ed., Cengage Learning, 2018) (covering the topics of tort law, contracts, ethics, civil procedure and litigation, constitutional law, corporate structure, and employment law), *see also* Cross & Miller, THE LEGAL ENVIRONMENT OF BUSINESS, TEXT & CASES (11th ed., Cengage Learning, 2019) (covering ethics, contracts, torts, constitutional law, litigation and the court system, intellectual property, cyber law, and numerous other legal studies topics), *see also* George J. Seidel, *Six Forces and the Legal Environment of Business: The Relative Value of Business Law Among Business School Core Courses*, 37 AM. BUS. L.J. 717, 720 (2000).

[90] *See* Cyranoski, *supra* note 43 (noting that gene editing experiments have already occurred outside of China and that momentum has grown for an international moratorium).

[91] *See* Reddy, *supra* note 71, *see also* YOUTUBE, *supra* note 79.

[92] See *Hottest Practice Areas Post Pandemic II: Privacy, Data Security, Information Law, and Healthcare*, THE NATIONAL JURIST, Aug. 20, 2020; located at: https://www.nationaljurist.com/national-jurist-magazine/hottest-practice-areas-post-pandemic-ii-privacy-data-security-information (noting that "Legal professionals with health care law expertise are being sought by companies to help them understand, implement, and comply with workplace health and safety policies and regulations. Health care organizations, such as hospitals and medical service providers, are seeking legal counsel and analysis of governmental regulatory and reporting mandates to minimize legal risks and liabilities to both patient care and employees.").

[93] *See* Siedel*, supra* note 89 at 740.

[94] Cognitively, today's college students don't possess the capacity to expend the mental effort required to sit by and passively absorb material to any meaningful degree over the length of a standard college class lecture. *See* Dan Berrett, *How 'Flipping' the Classroom Can Improve the Traditional Lecture*, THE CHRONICLE OF HIGHER ED. (Feb. 19, 2012), https://www.chronicle.com/article/how-flipping-the-classroom-can-improve-the-traditional-lecture/.

[95] *See* Larry P. Nelson and Mary L. Crow, *Do Active-Learning Strategies Improve Students' Critical Thinking?,* 4(2) HIGHER EDUC. STUDIES 77, 79 (2014), *see also* Daniel R. Cahoy & Tonia Hap Murphy, *The Name Game: Merging the Business and*

Law of Trademarks, 38 J. OF LEGAL STUD. EDUC. 37 (Winter 2021) (*citing* Mystica M. Alexander, *The Flipped Classroom: Engaging the Student in Active Learning,* 35 J. LEGAL STUD. EDUC. 277, 279 (2018)).

[96] Nearpod Integrating with Other Platforms, https://nearpod.zendesk.com/hc/en-us/sections/360010013931-Integrating-with-other-platforms.

[97] Some of the challenges facing educators today are how to contend with zoom fatigue as well as the emotional and physical strains that can develop when one stares at a screen all day. *See* Vignesh Ramachandran, *Stanford researchers identify four causes for 'Zoom Fatigue' and their simple fixes,* STANFORD NEWS (Feb. 23, 2021), https://news.stanford.edu/2021/02/23/four-causes-zoom-fatigue-solutions/.

[98] *See* Berrett, *supra* note 94.

[99] John Biggs, Aligning Teaching and Assessing to Course Objectives, TEACHING AND LEARNING IN HIGHER EDUCATION: NEW TRENDS AND INNOVATIONS 13-17, (Univ. of Aveiro, Apr. 2003).

[100] Gerard van de Watering, David Gijbels, Filip Dochy & Janine van der Rijt, *Students' assessment preferences, perceptions of assessment and their relationships to study results*, 56 HIGH EDUC. 645, 646 (Feb. 2008).

[101] *See* Collaco, *supra* note 88 at 44.

Teaching Diversity Correctly: 'Either Everyone Counts or Nobody Counts'

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ABSTRACT

The ability to work in teams is crucial in the Information Age. Respect for inclusion and diversity is essential because the workforce consists of ethnically and culturally diverse individuals. However, there are far too many kinds of biases, and all are vile and immoral. Those who avoid maligning one ethnic group but mock the elderly, obese, disabled, intellectually disabled, stutterers, unattractive, or people with cerebral palsy (CP) do more harm than good. There is a famous saying, "either everyone counts, or nobody counts," which also applies to bigotry and prejudice. Inclusion and diversity training can make a difference. Indubitably, people must be taught the value of inclusion and diversity. The correct way to teach diversity, equity, and inclusion is to highlight all the different types of biases and hatred and show why they are all wrong from an ethical and religious perspective. A macro approach must be taken, not a micro one.

Keywords: Diversity, DEI, Diversity of Opinion, Bigotry, Prejudice, Moral Certainty, Implicit Bias.

Teaching Diversity Correctly: 'Either Everyone Counts or Nobody Counts'

Introduction

Teamwork and collaboration are crucial in globalization and in the Information Age. Furthermore, respect for inclusion and diversity is vital because the workforce consists of diverse individuals. Diversity can refer to a range of identities, such as race, gender, religion, sexual orientation, ethnicity, nationality, socioeconomic status, language, (dis)abilities, age, religion, body size, parental status, veteran status, education, values, beliefs, and/or other social identities.

Diversity ensures that varied voices, experiences, knowledge, and opinions contribute to building an organization, institution, or community. Being included assures diverse individuals that they are essential parts of the team and have fair opportunities to grow, contribute, participate, and develop, regardless of their identity (Rohwerder, 2017).

Diversity, equity, and inclusion (DET) have moral and financial dimensions, such as increased creativity and satisfaction "as a result of cultural diversity was found by a meta-analysis of 108 empirical studies" (Urwin et al., 2013, p. 22). Research has also emphasized that diversity, inclusion, and valuing and respecting differences are vital for recruiting and maintaining the best employees possible. People who feel more "included" would be likelier to stay with the organization/community (Wright et al., 2014).

According to research conducted by McKinsey & Company, diversity is correlated with profitability, and a variety of opinions and perspectives leads to more creative problem-solving and innovation. Companies committed to DEI can attract top talent, increase customer and employee satisfaction, and improve decision-making. Moreover, DEI in the workplace is essential for long-term progress. Research has found that having diverse viewpoints at all levels of an organization improves financial results, organizational and team performance, innovation, and other business areas (Hunt, Layton, & Prince, 2015).

However, whether conscious or unconscious, discrimination and bias are "likely to impact negatively on the working lives of those who experience it and ultimately lead to negative impacts on performance and commitment at work" (Urwin et al., 2013, p. 4).

Inclusion and diversity training can also make a difference. Indubitably, people must be taught the value of inclusion and diversity; however, the question of how to teach this effectively remains.

Problems in Teaching Diversity

One of the most difficult values to teach is the importance of diversity. Singal (2023) posits that diversity, equity, and inclusion (DEI) training has been ineffective. The amount spent on diversity training was about $3.4 billion in 2020. Numerous studies have attempted to evaluate the effectiveness of this kind of training and have found little or no positive effects in the long term. Such training programs are just a fad and might even have adverse long-term effects resulting in a backlash. For instance, Paluck (2006) suggests that diversity training courses might

reinforce stereotypes and "backfire" by increasing, renewing, or even fostering new sensitivities. Plaut et al. (2011) posit that majority participants may feel excluded in some cases, for example, if there is an overemphasis on celebrating minority cultures. Many people of all races resent hearing about a "white supremacy culture" or that there is something insidious in stating that "America is a melting pot." Some bias researchers advocate that the focus should be on changing behavior rather than people's attitudes. Introducing white fragility workshops into an organization probably accomplishes considerably less than finding ways to widen the net when hiring managers.

Many feel that racial categorization is problematic and may result in intense battles among various ethnic groups. Classification by race is often misleading, given that ethnic groups do intermarry. Indeed, 35% of Americans have close relatives that married someone from another race, and approximately 30% of Asians are married to someone from a different ethnic group (Brooks, 2022, A23). There is a lawsuit against Brooklyn College because professors in the graduate mental health counseling program have allegedly "maligned Jews on the basis of race and ethnic identity by advancing the narrative that all Jews are white and privileged and therefore contribute to the systemic oppression of people of color" (Redden, 2022, para. 2).

It should be pointed out that race is a biological myth, and it is socially constructed. This paradigm shift is the first step in moving away from racism and bigotry. There are six arguments supporting the view that race is not biology:

> 1. People cannot be reliably divided into racial groups. 2. There are no relationships between traits that are

> used to categorize people into races (like skin color) and associated stereotypes. 3. Over time, geography and environment influence the genetic structures of human populations through natural selection. 4. There is more diversity within racial groups than between racial groups. 5. All people living today are descended from populations that originated in Africa. 6. All people living today are one biological species (McChesney, 2015, p. 2).

Value of Diversity Including Diversity of Opinion

It is possible that diversity training often forgets to focus on the value of diversity of opinion. One reason for encouraging diversity is that it enables an organization to flourish. Yes, bigotry and intolerance are evil and should be eradicated, but diversity's positive aspects should also be stressed. Duarte *et al*. (2015, p. 1) maintained: "Psychologists have demonstrated the value of diversity – particularly diversity of viewpoints – for enhancing creativity, discovery, and problem solving." Encouraging ethnic, gender, and other kinds of diversity is one way to ensure a variety of viewpoints. A board consisting of only white males will not have the diversified mindsets, approaches, and backgrounds to make sound decisions. In fact, according to research by McKinsey, organizations with more diverse executive boards outperformed industry medians. In addition, diverse teams beat other teams 87% of the time (Zalis, 2017). Firms that encourage diversity outperform those that are less diverse, as indicated by the below statement:

> Our latest analysis reaffirms the strong business case for both gender diversity and ethnic and cultural diversity in corporate leadership—and shows that this business case continues to strengthen. The most diverse companies are now more likely than ever to outperform less varied peers on profitability. Our 2019 analysis finds that companies in the top quartile for gender diversity on executive teams were 25 percent more likely to have above-average profitability than companies in the fourth quartile—up from 21 percent in 2017 and 15 percent in 2014 (Dixon-Fyle et al., 2020, paras. 4-5).

A growing body of evidence confirms that diversity is the secret ingredient that leads to creativity (Friedman, Friedman, and Leverton, 2016). This may explain why DEI has become the mantra of many organizations. However, diversity is not being taught correctly in many institutions.

Critical thinking encourages students to see the world from new perspectives that include the voices of women, blacks, Asians, LGBTQ, the disabled, and all other minorities. Therefore, diversity training should improve critical thinking and cognitive abilities to make everyone smarter (Phillips, 2014). Hearing all sides and learning how to evaluate different viewpoints enhances wisdom. However, focusing solely on ethnic diversity does not guarantee diversity of thought. Imagine a Supreme Court consisting of nine Clarence Thomases, a Senate composed of 100 Herschel Walkers, or 435 George Santoses in the

House of Representatives. There is more to authentic diversity than examining skin color.

The push toward diversity in education rarely includes the diversity of ideas and, thus, runs counter to critical thinking. Freedom of speech is being suppressed or limited on many campuses because the cancel culture has become widespread. Even professors are afraid of expressing opinions that are not seen as "woke" because they might be fired. Thanks to social media, it has become relatively easy to know if someone articulates a viewpoint that might be inconsistent with the woke establishment.

Critical thinking is not about what to think but how to think. A recent study found that 63.5% of students believe "the climate on [their] campus prevents some people from saying things they believe because others might find them offensive" (Burt, 2022, para. 3). A national poll found that "Fifty-five percent of respondents said that they had held their tongue over the past year because they were concerned about retaliation or harsh criticism" (The Editorial Board, 2022, para 17). The authors posited:

> A society that values freedom of speech can benefit from the full diversity of its people and their ideas. At the individual level, human beings cannot flourish without the confidence to take risks, pursue ideas and express thoughts that others might reject (para. 6).

Jonathan Haidt co-founded Heterodox Academy to push for "viewpoint diversity" on campus. He believes universities should pursue truth, but diversity courses often

prioritize victimization and emotional safety, interfere with genuine scholarship, and silence disagreement (Goldstein, 2017). In addition, some institutions offer classes encouraging tribalism and hindering society. There are certain fields in the humanities usually characterized as "grievance studies" where "Scholarship based less upon finding truth and more upon attending to social grievances has become firmly established, if not fully dominant" (Eggington, 2018, A21). The opposite of critical thinking, these courses may produce angry people who can never fit into the community or the workplace. Kaylan (2010) noted that ethnic cheerleading is not a substitute for practical knowledge.

Different Types of Bias

Another serious problem with how diversity is approached is that the focus is mainly on skin color. There are many kinds of intolerance, and all should be addressed. Bias against other groups is appalling, but so is prejudice within groups. The following are just a few examples of different kinds of prejudice and bigotry: Young and old (ageism), male and female (sexism), white supremacists and people of color, light-skinned Blacks and dark-skinned Blacks, Caribbean Blacks and American Blacks, Hutus and Tutsis, Cubans and Mexicans, Sephardic Jews and Ashkenazi Jews, Shia Muslims and Shiite Muslims, Pakistanis and Indians, Buddhists and Muslims, Jews and Christians, Jews and Muslims, Vietnamese and Chinese, Japanese and Korean, Chinese and Japanese, legal immigrants and undocumented immigrants, and educated and uneducated, to name a few.

The amount of hatred is mind-boggling, and there is even a "redneck stereotype." Many of them are unconscious.

Implicit bias (also known as unconscious bias) refers to all kinds of unconscious ways of stereotyping and intolerance based on gender, race, age, religion, ethnicity, and appearance, among others. People tend to make false assumptions about people (e.g., poor people are lazy) based on these biases that reside in their unconscious minds.

The "greatest hatred in human history" is probably antisemitism, which has been around for more than 23 centuries (Flannery, 1974). The hatred of the poor is another type of prejudice being examined. Research by neuroscientists Lasana Harris and Susan Fiske indicates that Americans have an intense hatred for the poor based on false stereotypes. The immediate reaction of Americans looking at pictures of homeless people is disgust. When looking at images of wealthy people, the part of the brain that was activated revealed that rich people are seen as human. We may envy wealthy people but still see them as part of the same species. This, however, is not the case with homeless people. Brain scans show that they are not seen as fellow human beings. The attitude toward the poor is as bad or worse than how racists look at minorities (Hammond, 2016; Lubrano, 2013).

Another type of prejudice is based on clothing. The kind of clothing people wear affects how they are judged. This is a significant issue for Black students. They are rated differently regarding intelligence, warmth, and trustworthiness when they wear formal clothing compared to swagger clothing. Travon Martin might not have been killed in Florida had he been wearing a suit rather than a "hoodie" (Gurung, 2020). Other kinds of prejudices related to clothing include the stereotype that women wearing hijabs are likely to be seen as terrorists or supporters of terrorism and that females wearing revealing tops are sluts (Martensen, 2018).

There have been cases of discrimination based on religious attire as well. For instance, Orthodox Jews wearing head coverings (*kippahs,* also known as *yarmulkas*) have had problems getting jobs. Other articles of clothing that have affected employment include crucifixes, crosses, hijabs, turbans, and tzitzit (Friedman, Friedman, and Leverton, 2016).

Linguistic discrimination is the tendency to draw inferences about intelligence, character, education level, class, and abilities based on speech style. It can be a problem in employment. If employers put more weight on style or method of delivery rather than actual substance, discrimination based on language style may occur, especially when the job does not require fluency in a particular language or a specific style of speech. For example, speaking with a distinctive Black accent ("*blaccent*") could have an adverse effect on earnings. This can be particularly hard on immigrants in the workforce, who often struggle to learn the host country's language and fit in (Karlson, 2011; McWhorter, 2020).

A speech impediment, such as a stutter, may also lead to unconscious discrimination (implicit bias) against an individual, especially in employment settings (Allard and Williams, 2008; Butler, 2014). According to a survey by the National Stuttering Association, approximately 40% of adults who stutter have been refused jobs or promotions (Karlson, 2011). Nowadays, with many ways to use technology to make presentations, there is no reason to deny someone a job because of a speech impediment.

Whereas diversity in work groups, across an organization, and society at large fosters many of the benefits discussed earlier in this paper, much discrimination

creates or takes advantage of an us-versus-them mindset. Nowhere is this more evident, perhaps, than in the nativist elitism that rears its head in every generation.

The Civil Rights Act specifically barred discrimination based on national origin. Immigration certainly can enhance the diversity of a country. Indeed, the United States is a nation of immigrants (except for Native Americans). Evidence shows that immigration is beneficial for a country and an organization. Contrary to what bigots believe, the benefits of immigration outweigh its costs. Immigrants tend to be more entrepreneurial than native-born citizens and, thus, greatly help the economy (Friedman, Friedman, and Leverton, 2016). It would not be an exaggeration to say that immigration made America successful; immigrants have significantly contributed to economic growth, jobs, and improving everyone's standard of living.

> As a long-standing immigration destination, the United States has depended on the entrepreneurial contributions of immigrants as an economic driver. While much of the current immigrant entrepreneurship discussion centers on high-tech start-ups and Fortune 500 companies, immigrants create businesses of all sizes that help fuel American economic growth. The U.S. Census' 2007 and 2012 Survey of Business Owners (SBO) found that immigrants had formed about 25% of new businesses in the United States, with rates surpassing 40% in some states.

> Immigrants are also 10% more likely to own their own business than U.S. natives. Simply put, the United States' economic success story would not exist without immigrant entrepreneurs with a range of backgrounds and skill levels who were willing to launch (Nepal and Ramon, 2022, p. 4).

One of the largest groups that experience prejudice is the disabled. Approximately 26% of adults in the United States are disabled (CDC, 2022). Discrimination against those with disabilities is against the law. The Americans with Disabilities Act (ADA) of 1990 made this type of bias similar to that involving race, color, religion, sex, or national origin, which was included in the Civil Rights Act of 1964. Despite this law, there is discrimination against individuals with disabilities that have been well-documented in the literature (e.g., Gold, Oire, Fabian, and Wewiorksi, 2012; Hernandez et al., 2008; Kaye, Jans, & Jones, 2011; Lengnick-Hall, Gaunt, and Kulkarni, 2008, and others).

> Workplace discrimination is often subtle, however people with disabilities have expressed that negative attitudes towards disability influence their success in employment. One study, which involved sending mock job applications, found that those who disclosed disability (either spinal cord injury or Autism) received 26% fewer expressions of employer interest than applicants that did not include a

> disability disclosure.[7] Stigmatizing attitudes have been perceived by people with disabilities to negatively impact progress in their careers through not getting hired, being denied promotions, having extended probationary periods, or being treated differently than coworkers without disabilities. In a study conducted by the Center for Talent Innovation as described in an article published by the *Harvard Business Review*, a third of survey respondents with disabilities indicate that they had experienced negative bias in the workplace such as feeling underestimated, insulted, excluded, or had coworkers appear uncomfortable because of their disability. Almost half of these respondents (47%) also report that they would never achieve a leadership role in their company, regardless of their performance or qualifications (Harris, Gould, and Mullin, 2019, para. 8).

Another kind of prejudice that academics rarely discuss is disciplinary elitism, also known as *déformation professionelle*—the tendency to see things narrowly (i.e., from the point of view of one's discipline or profession; Friedman, 2017). Because of this hatred, professors often mock the research conducted in other disciplines. No one has been killed because of this type of intolerance, but it may have the same roots as other kinds of racism—arrogance and

a sense of superiority. Several papers have been written about the feelings of superiority of economists; many denigrate the research conducted by professors from the other social sciences, especially sociology (Cole, 1983; Fourcade, Ollion, and Algan, 2015; Lazear, 2000). If academic departments encourage the belief that one discipline is superior to others and can provide all the answers, one wonders whether they can be trusted to teach the value of diversity and respect for others.

There is a large body of research that demonstrates that there is an attractiveness bias, also known as lookism (Chamorro-Premuzic, 2019). People seen as more attractive will earn higher salaries and receive better treatment in schools and the workplace. Moreover, those who are not seen as attractive (e.g., those who are short or obese) will be discriminated against. There is a problem in our society with body shaming and appearance mocking. Donald Trump was known for doing this, especially when dealing with women. Bodenheimer (2020) admonished those who body-shamed Donald Trump by calling him obese. She believed that the people these barbs hurt were innocents who were overweight.

> The irony of progressives perpetuating fat-phobia is that the people who it hurts the most are those we purport to support and advocate for: people who are already marginalized, either by their race, their class, or both (Bodenheimer, 2020, para. 13).

According to 2017–2018 National Health and Nutrition Examination Survey data, more than 70% of American adults are overweight or obese. It is immoral to

ridicule fat people; it is well known that diets do not work, and they are not responsible for their conditions.

In summary, there are many kinds of bias that should be addressed. Naively focusing only on white supremacy may be a good start but will accomplish very little when it comes to the other kinds of harmful prejudices. There are so many kinds of bigotry and intolerance in the world. If we do manage to eradicate bias against the elderly but the hatred against the destitute and the obese increases, have we gained anything? The focus should be on all kinds of bigotry. What is the root cause of all types of discrimination, whether against gay people, Asians, or intellectuals?

What should be done to eliminate all of them? Dr. Martin Luther King, Jr., stated in his legendary "I Have a Dream" speech, "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character." However, this viewpoint has also been embraced by conservatives who interpret these words to suit their own political views (e.g., to attack affirmative action). Moreover, there are many other kinds of judgments that are harmful to society. The good news is that many laws are attempting to eliminate all types of discrimination. One day, there may be laws against workplace bullying, which is also a type of discrimination.

One might posit that creating various ethnic departments in colleges and universities only exacerbates the problem. Most institutions must decide which groups are "department worthy," which only become interdisciplinary programs, and which should be entirely ignored. Many are concerned with political pressure or student demographics rather than what makes the most sense. One doubts that any

college has an Unsightly Persons Studies Department. If the elderly, disabled, overweight and obese, unattractive, bald, and short people are included as areas of study, that would be dealing with almost all of humankind.

Proper Way of Teaching Diversity

The authors posit that the correct way to teach diversity is to focus on the root of the problem and take a macro approach. Much of the research dealing with prejudice demonstrates that being different is the most significant factor in causing others to be antagonistic (Hammond, 2016). People are most likely to loathe and mistrust those different from them. In addition, the importance of diversity of opinion should be emphasized. Disrespecting those with different views may be just as wrong as deriding those who are different from us in other ways.

Moreover, there is a tendency to dehumanize the most helpless members of society (Harris and Fiske, 2006). For example, the Nazis asserted that German Aryans constituted a superior "master race" and that all non-Aryans were inferior. They murdered millions of men, women, and children they claimed were of a substandard race, whom these accursed murderers called "*untermenschen*," or sub-humans.

It should also be noted that well before the Nazis killed Jews, Gypsies, homosexuals, and other unfortunates, they started with the most helpless of all—the disabled. This could not have been done without the assistance of the medical establishment. The first step involved the mandatory sterilization of people classified as "hereditarily sick." Doctors sterilized as many as 350,000 people. The

justification for this was that this was "life unworthy of life" (*lebensunwertes leben*). Soon after, the German medical establishment killed "impaired" children, starting with newborns, moving on to young children, and then to older ones. Eventually, "impaired" adults became victims of the "euthanasia" project (Lifton, 2000). The theoretical work used by the Nazis to justify these killings was *Die Freigabe der Vernichtung Lebensunwerten Lebens* (*The Permission to Destroy Life Unworthy of Life*). In case it is thought that this book was "low media," it was written by two distinguished professors, Karl Binding and Alfred Hoche. Belittling those who are different and weak is immoral, even if it does not result in the murder of innocents.

In the film *Borat,* there is a scene with a humor coach https://www.youtube.com/watch?v=_olqoCwvUUo). Borat asks the coach about making fun of the "mentally retarded." The coach responds and states something quite profound: "In America, we try not to make fun of or be funny with things people don't choose." This is one approach to teaching diversity. We must respect people who are different; it does not matter what causes the disparity. What they all have in common is that these people did not choose these distinctions. What must be stressed is the dignity of difference.

Those who wish to take a religious approach to the evils of bias and prejudice can cite the doctrine that every human being was created *b'Tzelem Elohim* (in God's image). This is based on the verse in Genesis (9:6): "Whoever sheds the blood of man, by man shall his blood be shed; for in the image of God He made man." This philosophy "invests all human life with intrinsic sanctity and immeasurable value" (Korn, 2021, p. 22). Malachi said (2:10): "Have we not all one father? Has not one God created us? Why do we deal

treacherously every man against his brother?" Human dignity is based on the belief that we were all created in the image of God. All men were not created equal; we are all different in many ways, including appearance, health, speech, ability, and talent. The message of the Bible is that all were created in the image of God, and all should be respected.

The importance of human dignity is linked to the belief that God created all humankind. Thus, the Midrash (Genesis Rabbah 34:14) asserts: "He who sheds blood is regarded as though he had diminished the likeness of God." The Mishna provides another reason that human life is sacred. It (Sanhedrin 4:5; 37a) opines: "Therefore the human was created alone in the world; to teach that one who destroys a single life is considered by Scripture as if he had destroyed an entire world; and one who preserves a single life, is considered by Scripture as if he had preserved an entire world." This suggests that the value of the life of any human being is infinite. Incidentally, this famous maxim from the Talmud is also in the Koran (Sura 5, verse 32).

The Bible goes beyond treating everyone fairly; it demands that people love the stranger. The biblical verse (Leviticus 19:18), "You shall love your fellow as yourself," is well known and the basis of the Golden Rule. The Torah requires more and declares (Leviticus 19:33–34), "When a stranger dwells among you in your land, you are not to maltreat him. The stranger who dwells with you shall be like a native among you; you shall love him like yourself, for you were strangers in the land of Egypt: I am the Lord your God." The love of God is repeated several times in the scriptures (Deuteronomy 6:5; 11:1; 19:9; 30:6; 30:20; Joshua 22:5), often in conjunction with "to walk in all His ways." Surprisingly, the love of God is not stated as repeatedly as

showing kindness and concern for the stranger. The stranger in the Bible is anyone who is different. This includes immigrants, foreigners, the impoverished, those of a different skin color, the disabled, someone wearing strange clothing, or the homeless. If a society wants to thrive, it must open its doors and welcome "the stranger."

If one is commanded to love the stranger, then there is a concomitant obligation to treat strangers as equals under the law. The principle of having "one law and one ordinance" for the indigenous and the stranger is stated several times in the scriptures (Exodus 12: 49; Leviticus 24:22; Numbers 9:14; Numbers 15:15; 15:16).

Sacks (2002, pp. 50–51) highlighted that the solution to the problem of intolerance is not universalism. The idea that there is one truth and that you must accept it (or we will kill you!) has caused as much harm to society as tribalism. Lloyd (2017, paras. 4–5) also opined that moral certainty is dangerous. He posited, "History overflows with misery inflicted by well-intentioned people who were convinced that they had seen the only true moral values, and who sought to convert or destroy those who would not agree." His examples include the Inquisition, which was based on the moral certainty of the Roman Catholic Church. The Church did not doubt that only its interpretation of Christian scriptures was correct. Similarly, Stalin's Russia, Mao's China, and Hitler's Germany were totalitarian societies built on the belief that they knew the truth and anyone who disagreed had to be exterminated. There is a strong correlation between absolute belief certainty and totalitarianism and the ability to justify the most terrible acts in the name of helping humankind (Costello and Bowes, 2022).

White (2012, p. 453) underscored that "when death and destruction have followed every single Communist regime ever established, there would seem to be a flaw in the system." It should be impossible for anyone to believe that this economic system works.

White (2012, pp. 309-315) also described the effects of Adam Smith's dogmatic view that "Famine has never arisen from any other cause but the violence of government attempting, by improper means, to remedy the inconvenience of death." This notion that governments should not interfere with famine resulted in the deaths of 26.6 million people in British-ruled India. Amartya Sen challenged this view and noted that famines do not occur in democracies; the government's action can prevent deaths from famines in poor and rich countries (White, 2012, p. 309).

Just as there is great value in appreciating the diversity of opinion, the same can be said of respecting the dignity of difference. Sacks (2002, p. 209) concluded that "difference does not diminish; it enlarges the sphere of human possibilities." He pointed out that "only when we realize the danger of wishing that everyone should be the same … will we prevent the clash of civilizations, born of the sense of threat and fear."

Conclusion

There are far too many kinds of biases, and all are vile and immoral. Comics that avoid maligning one ethnic group but mock the elderly, the obese, the disabled, the intellectually disabled, stutterers, people with CP, or unattractive individuals do more harm than good. Discussions should also include why respect for diversity of opinion is essential and why any kind of bullying is wrong.

The correct way to teach DEI is to highlight all the different types of biases and hatred and show why they are all immoral and unethical from both a secular and religious perspective. There is a popular saying, "either everyone counts, or nobody counts," which also applies to bigotry and prejudice. A macro approach must be taken, not a micro one. Society—educators, comics, celebrities, writers, and the media—should ridicule and scorn haters, those who engage in discriminatory behaviors or express prejudiced values and attitudes.

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