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From the Editors…

Welcome to the 29th volume of the MIDWEST LAW JOURNAL, the official publication of the Midwest Academy of Legal Studies in Business. The mission of the MLJ is to publish articles of general interest to teachers of business law, the legal environment and related fields of law.

The MIDWEST LAW JOURNAL, with a less than 25% acceptance rate, requires that all prospective journal entries undergo a double-blind peer review vetting process. We would like to thank all of the Associate Editors and the Editorial Board for their hard work and dedication. Without your hard work the feat of publishing the Journal could not happen.

We have implemented some exciting new changes with this Journal. First, we have implemented changes to make sure that the review and communication processes are clear with authors. There is a new deadline of May 1st for all submissions. All submissions must be in compliance with the style guide (posted on our website) in order to be considered for review. All reviews of submissions will be completed by June 1st and authors will be communicated with by June 15th. Our goal is to have the Journal published in the fall of each year.

Second, we are expanding our editorial opportunities at the Journal. We have added two new Senior Editors. We have also added Associate Editors and an Editorial Board. I encourage you to go to our website to see additional information on these roles.

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THE COST OF DOING (CANNABIS) BUSINESS: AN ANALYSIS OF FOUR FEDERAL TAX CASES ON THE DISALLOWANCE OF DEDUCTIONS AND CREDITS UNDER SECTION 280E

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ABSTRACT

In recent years, as state legalization of growing and selling cannabis has become more common, the federal government has generally taken a hand's off approach. As of June 2019, 39 states and Washington DC have legalized growing and selling cannabis for either medical or recreational purposes. In 2017, legal cannabis sales grew to $8.5 billion in North America, and these sales are expected to continue to grow dramatically. Cannabis remains a Schedule I drug under the federal Comprehensive Drug Abuse Prevention and Control Act of 1970. However, federal prosecutors have not enforced criminal laws against those involved in cannabis businesses under state sanctioned programs. In contrast, though, the Treasury Department and the Internal Revenue Service have enforced Section 280E under Title 26 of the U.S. Internal Revenue Code against cannabis businesses. This section prohibits these businesses from taking any deductions or credits against their gross income from carrying on a trade or business that involves trafficking in controlled substances, including cannabis. This puts these otherwise law-abiding businesses in a difficult position. Four recent federal court decisions, two in the Tenth Circuit Court of Appeals and two in the U.S. Tax Court, demonstrate the application of Section 280E to cannabis businesses. These cases reveal that, unlike other businesses, they are taxed on their gross income and cannot deduct the costs of doing business, including some portions of the cost of goods sold and employee compensation. This limitation on deductions and credits can be imposed by the IRS even in the absence of proof that the business is trafficking cannabis or a criminal conviction. Because of this, cannabis businesses pay far more taxes on a percentage basis than other businesses. This likely will have a dramatic effect on whether new businesses will be able to break into the cannabis market and survive.

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I. INTRODUCTION

Beginning in 1996, when California first legalized the use of cannabis for medical purposes through Proposition 215,[1] the majority of state governments have, to varying extents, legalized cannabis. However, production, distribution, and use of cannabis remains criminal under federal law, though recently criminal prosecutions under the federal law of businesses operating under states' cannabis laws have been rare to non-existent. In contrast, however, the tax treatment of cannabis businesses has differed considerably from the tax treatment of other businesses because of Section 280E of the U.S. Internal Revenue Code (the "Code").[2] The Internal Revenue Service ("IRS") regularly imposes this section on businesses dealing in cannabis under state law. Section 280E forbids businesses "trafficking in controlled substances" from claiming deductions or credits that would otherwise be available.[3] Four recent cases, two in the Tenth Circuit Court of Appeals and two in the U.S. Tax Court, have addressed the application of Section 280E on businesses operating under state laws that legalize the sale of medical cannabis. The cases demonstrate the dramatic increase in taxes owed by these businesses, which will apply in equal force to businesses formed under recreational cannabis laws. The disallowance of all deductions for cannabis businesses dramatically increases these businesses' federal tax burdens and makes it more difficult for them to survive.

II. BACKGROUND

As of March 2019, 34 states, the District of Columbia, Guam, and Puerto Rico have enacted comprehensive medical cannabis programs and have legalized the production, sale, and use cannabis within those programs.[4] Eleven states[5] and the District of Columbia have legalized the production, sale, and use of recreational cannabis by adults, and state legislatures in 21

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[1] Nat'l. Conf. of State Legislators, *State Medical Marijuana Laws* (Jul. 2, 2019), http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.
[2] 26 U.S.C. § 280E (1998).
[3] *Id*.
[4] Nat'l. Conf. of State Legislators, supra note 1, at 1.
[5] Illinois is the most recent state to have legalized the sale of recreational marijuana to adults in June 2019. Sales will begin on January 1, 2020. Illinois Public Act 101-00027 (Jun. 25, 2019), http://www.ilga.gov/legislation/BillStatus.asp?DocNum=1438&GAID=15&DocTypeID=HB&SessionID=108&GA=101.

states considered (but did not necessarily enact) similar legislation in 2018.[6] It is a lucrative business. Total sales of legal cannabis in the United States reached $8.5 billion in 2017 and are projected to reach $23.4 billion by 2022.[7]

In contrast, under federal law, cannabis is still treated as one of the most dangerous illegal street drugs. It remains a Schedule I drug, along with heroin, lysergic acid diethylamide (LSD), 3,4-methylenedioxymethamphetamine (ecstasy), methaqualone (quaaludes), and peyote, under the federal Comprehensive Drug Abuse Prevention and Control Act of 1970, which was designed to curtail the unlawful manufacture, distribution, and abuse of dangerous drugs.[8] The federal government considers cannabis to be more dangerous than cocaine, methamphetamine, oxycodone (OxyContin), and fentanyl, all of which are Schedule II drugs.[9] The increasingly diametrically opposed views of cannabis by most states and the federal government has led to little serious conflict under criminal law, especially recently. This is due to a series of appropriations riders enacted by Congress for the past four years to prevent the Department of Justice from using any funds to prevent states from "implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana."[10]

The lack of federal criminal prosecution of cannabis businesses and its continued federal illegality has caused confusion, even leading one commentator at a major U.S. newspaper to state affirmatively that the federal government cannot tax income from cannabis sales.[11] That is incorrect. The

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[6] Nat'l. Conf. of State Legislators, *Marijuana Overview* (Jul. 26, 2019), http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx.

[7] Thomas Pellechia, *In 2017 and Beyond, U.S. Enjoys The Highest Legal Cannabis Market Share Worldwide*, FORBES (June 26, 2018), https://www.forbes.com/sites/thomaspellechia/2018/06/26/in-2017-beyond-u-s-enjoys-the-highest-legal-cannabis-market-share-worldwide/#3d70e3942d20.

[8] Pub. L. No. 91-513, § 202, 84 Stat. 1249 (codified as amended at 21 U.S.C. § 812); 21 U.S.C. § 812(c) (Schedule I (c)(10)).

[9] *Id.*, §812(c) (Schedule II).

[10] See Consol. Appropriations Act, 2018, Pub. L. No. 115-141, § 538 (2018); Consol. Appropriations Act, 2017, Pub. L. No. 115-31, § 537, 131 Stat. 228 (2017); Consol. Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2332-33 (2015); Consol. and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2217 (2014).

[11] The author suggests that the federal government should adopt a sales tax for cannabis businesses, not recognizing that the federal government already taxes these businesses' gross income. Katie Zezima, *Study: Legal marijuana could generate more than $132 billion in federal tax revenue and 1 million jobs*, WASH. POST, Jan. 10, 2018, https://www.washingtonpost.com/national/2018/01/10/study-legal-marijuana-could-generate-more-than-132-billion-in-federal-tax-revenue-and-1-million-jobs/?utm_term=.6a8dfb284efa ("The federal government would reap $51.7 billion in sales tax from a legal marijuana market

federal government taxes cannabis businesses' income at a much higher level than other businesses. The IRS, a branch of the Department of Treasury, it has used its statutory authority to dramatically limit business deductions taken by businesses created under the recreational and medical cannabis state laws under Section 280E of the Code.[12] Section 280E states:

No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.[13]

Section 280E prevents cannabis businesses from using any business deductions or credits normally provided to trades and businesses, including those for ordinary and necessary business expenses like employee wages and salaries, supplies, rent, depreciation, utilities, and state and local taxes, to offset their gross income.[14]

Taxpayers subjected to the limitations of Section 280E have brought cases in the U.S. Tax Court and other federal courts to challenge the IRS's application of Section 280E in different circumstances. This article discusses four recent court decisions that have interpreted Section 280E as applied to businesses conducting activities under their states' medical cannabis laws. An analysis of these four decisions may help taxpayers involved in medical and recreational cannabis businesses predict how Section 280E may be applied to their own circumstances.[15]

A. *Alpenglow Botanicals, LLC v. United States*

On July 3, 2018, the U.S. Court of Appeals for the Tenth Circuit issued a decision in *Alpenglow Botanicals, LLC v. United States*.[16] Alpenglow Botanicals, LLC ("Alpenglow") operated a medical cannabis business legally

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between 2017 and 2025, entirely new revenue for a business that remains illegal -- *and unable to be taxed* -- federally.") (emphasis added).

[12] See, e.g., Feinberg v. Comm'r. (Feinberg I), 808 F.3d 813, 814 (10th Cir. 2015) ("[P]rosecutors will almost always overlook federal marijuana distribution crimes in Colorado but the tax man never will.")

[13] 26 U.S.C. § 280E.

[14] See, e.g., 26 U.S.C. § 162 (2017) and regulations promulgated thereunder.

[15] The cases discussed herein all involved businesses organized under state medical cannabis laws. The rulings by the courts, however, should apply equally to medical cannabis businesses and recreational cannabis businesses because Section 280E does not distinguish between these different types of sales.

[16] 894 F.3d 1187 (10th Cir. 2018).

under Colorado's medical cannabis law.[17] The IRS conducted an audit of Alpenglow's 2010, 2011, and 2012 tax returns. It issued notices of deficiency, in which it asserted that Alpenglow had "'committed the crime of trafficking in a controlled substance in violation of the CSA' "[18] and denied Alpenglow's claimed business deductions, dramatically increasing Alpenglow's tax liability. Alpenglow was an LLC, a flow-through entity, so its increased tax liability was passed on to its two members. The members paid the tax under protest and filed for a refund, which the IRS denied. Alpenglow and its members then filed an action in federal district court, which was dismissed. On appeal, the Tenth Circuit considered three issues raised by the appellants:

1. whether the IRS had the authority to disallow deductions under Section 280E without a criminal conviction;
2. whether Section 280E violates the Sixteenth Amendment's definition of gross income; and
3. whether Section 280E is an excessive fine that violates the Eighth Amendment.

1. Does Section 280E require a criminal conviction?

Alpenglow argued that the IRS could not use Section 280E to deny its deductions without a criminal conviction under federal drug trafficking laws. As Alpenglow had not been convicted of trafficking, the IRS could not deny its deductions. In addition, Alpenglow asserted that because Congress did not expressly authorize the IRS to investigate violations of federal drug laws, the IRS could not make a finding of trafficking on its own.[19]

The court disagreed. It found that it is within the IRS's statutory authority under civil tax law to determine whether taxpayers have trafficked in controlled substances in applying Section 280E. Therefore, the IRS need not wait for a criminal conviction before denying deductions to a taxpayer under Section 280E.[20]

Alpenglow also asserted that the IRS had no proof that Alpenglow was trafficking in controlled substances and therefore could not support its application of Section 280E to Alpenglow's tax liability.[21] However, as the

[17] *Id.* at 1193.
[18] *Id*.
[19] *Id.* at 1195-97.
[20] *Id*.
[21] *Id.* at 1198.

court stated, in an action to recover taxes paid to the IRS, the taxpayer has the burden to show that the tax assessment was incorrect. Thus, Alpenglow had the burden to demonstrate that it was not trafficking in cannabis. It did not meet this burden because its amended complaint did not allege any credible evidence that it was not trafficking in cannabis.[22]

2. Does Section 280E violate the Sixteenth Amendment's definition of gross income?

The Sixteenth Amendment provides that: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."[23] The U.S. Supreme Court has held that, for a reseller or producer, income means gross income, not gross receipts.[24]

Alpenglow argued that, under the Sixteenth Amendment, the constitutional definition of income requires that ordinary and necessary business expenses be excluded from gross income. In addition, it asserted that the IRS improperly denied Alpenglow's costs of goods sold ("COGS") exclusions under Section 263A in violation of the Sixteenth Amendment.[25]

As the *Alpenglow* court explained, the Sixteenth Amendment requires taxation of income, rather than gross receipts. To ensure that this takes place, COGS is a required exclusion from gross receipts to calculate a taxpayer's gross income.[26] While taxpayers are constitutionally entitled to COGS exclusions, they are not always entitled to statutorily authorized deductions, including deductions for "ordinary and necessary expenses paid or incurred during the taxable year in carrying on the trade or business."[27]

Alpenglow argued that certain items like ordinary and necessary business expenses are not deductions, but instead are exclusions like COGS because businesses cannot avoid incurring these expenses.[28] The court explained that, while COGS and ordinary and necessary business expenses

[22] *Id.*
[23] U.S. CONST. amend. XVI.
[24] See, e.g., Doyle v. Mitchell Bros. Co., 247 U.S. 179, 185 (1918) ("'Income may be defined as the gain derived from capital, from labor, or from both combined.'") (quoting Stratton's Independence v. Howbert, 231 U.S. 399, 415, 34 Sup. Ct. 136, 58 L.Ed. 285 (1913)); New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934) ("The power to tax income like that of the new corporation is plain and extends to the gross income. Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed.").
[25] 26 U.S.C. § 263A (2017).
[26] Alpenglow, 894 F.3d at 1199.
[27] 26 U.S.C. § 162(a).
[28] Alpenglow, 894 F.3d at 1200.

are similar, COGS "relates to acquisition or creation" of products and "ordinary and necessary business expenses are those incurred in the operation of day-to-day business activities."[29] Only COGS must be excluded absent statutory authority for the exclusion under the Sixteenth Amendment. "In contrast, ordinary and necessary business expenses have been repeatedly recognized as statutorily-authorized deductions." [30] Congress has the authority to limit or remove altogether such deductions.

Alpenglow also argued that, by enacting Section 280E, Congress has allowed the IRS to tax gross receipts. However, Congress, through its enactment of statutory provisions in the Code, and the Tax Court have determined that ordinary and necessary business expenses are discretionary deductions, rather than mandatory exclusions like COGS. The court found Congress' decision to limit or deny these deductions is not a violation of the Sixteenth Amendment, even if the resulting tax liability exceeds the taxpayer's net income.[31]

Finally, Alpenglow argued that the IRS denied it an exclusion for COGS. The court did not address this argument, finding that the trial court properly determined that the amended complaint did not make this allegation.

3. Does Section 280E constitute a penalty in violation of the Eighth Amendment?

Alpenglow asserted that the IRS's enforcement of Section 280E constituted a penalty that violates the Eighth Amendment. [32] The court disagreed, citing to its opinion in *Green Solution v. United States*[33] in which it held that Section 280E is not a penalty because disallowing a tax deduction is not a punishment – tax deductions "'are a matter of legislative grace.'"[34]

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[29] *Id*.
[30] *Id*.
[31] *Id.* at 1201-02. For the IRS's interpretation of the calculation of COGS under Section 280E, see IRS Chief Counsel Advice, No. 201504011 (Dec. 10, 2014).
[32] U.S. CONST. amend. IIX (""Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").
[33] Green Solution v. U.S., 855 F.3d 1111 (10th Cir. 2017).
[34] *Id.* at 1121.

B. *Patients Mutual Assistance Collective Corp. D.B.A. Harborside Health Center v. Commissioner*

Patients Mutual Assistance Collective Corp. d.b.a. Harborside Health Center v. Commissioner ("*Harborside*")[35] was decided by the U.S. Tax Court on November 29, 2018. It involved a California medical cannabis dispensary called Harborside Health Center ("Harborside"). Harborside was established in 2005 as a nonprofit corporation under California law and was considered a C corporation for federal tax purposes. Its founder intended it to be the "gold standard" in cannabis dispensaries, and it grew to be "what may be the largest marijuana dispensary in America."[36] Besides selling various types of cannabis, "clones,"[37] and cannabis-containing products in a "closed-loop" structure,[38] it also sold non-cannabis containing products like branded merchandise, books, and tools for handling and smoking cannabis. In addition, it provided its patients with a variety of free services and community outreach supplied by contractors paid by Harborside. It hired employees whose work consisted of selling its various products, preparing cannabis and cannabis-containing products for sale, providing security, and conducting administrative tasks like finance, human resources, and maintaining the facility.

In 2012, a civil forfeiture action was filed against Harborside by the federal government, alleging that Harborside used its property to distribute, cultivate, and possess cannabis in violation of 12 USC 841(a) and 856. This action was dismissed with prejudice in 2016.

The IRS issued notices of deficiency against Harborside for tax years from 2007 to 2012 denying Harborside's deductions and COGS under Section 280E. Harborside contested these notices of deficiency in the Tax Court. It raised five main issues:

1. whether the doctrine of *res judicata* prevented the Commissioner from arguing that Harborside was trafficking in a controlled substance;

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[35] 151 T.C. 11 (2018).
[36] *Id.* at 2.
[37] "Clones are cuttings from a female cannabis plant that can be transported and used to cultivate marijuana." *Id.* at 6.
[38] The "closed-loop" structure, a requirement of the California medical cannabis law, provided that the cannabis Harborside purchased and sold was provided by its own patient-members who grew it using clones or seeds given or sold to the patient-members by Harborside. For a detailed description of Harborside's closed-loop system, see *id.*

2. whether Harborside's business actually "consisted of" trafficking in a controlled substance under Section 280E;
3. whether Harborside's different activities constituted more than one trade or business;
4. what expenditures Harborside could include in its COGS; and
5. whether Harborside was responsible for accuracy-related penalties.[39]

Each of these issues was addressed separately by the court.

1. Did *res judicata* prevent the Commissioner's argument that Harborside was trafficking in a controlled substance?

Harborside argued that the 2012 civil forfeiture case that was dismissed with prejudice in 2016 was based on the same claim that the Commissioner raised in the notices of deficiency – "that Harborside was trafficking in a controlled substance."[40] Thus, Harborside asserted, the IRS's claim that Section 280E applied to it, which was based on the same allegation that Harborside was trafficking in a controlled substance, was barred by the doctrine of *res judicata*.

The court disagreed, holding that this action was not barred by *res judicata*. It determined that there was no identity of claims between the civil forfeiture action and this action because the two cases did not " 'arise out of the same transactional nucleus of facts' "[41] and the tax deficiencies raised here could not have been brought in the civil forfeiture action.

2. Did Harborside's business "consist of" trafficking in a controlled substance under Section 280E?

Harborside argued that the language in Section 280E, which requires that a "trade or business *consist of* trafficking in controlled substances,"[42] did not apply to it because it engaged in different activities and did not only traffic in cannabis. It asserted that the term "consist of" always precedes a complete and exhaustive list of possibilities. Based on that meaning, Section 280E could only apply to businesses that "*exclusively* or *solely* traffic in

[39] This issue was addressed by the Tax Court in a separate opinion. Patients Mutual Assistance Collective Corporation d.b.a. Harborside Health Center v. Comm'r. ("Harborside II"), T.C.M. 2018-208 (2018).
[40] Harborside, 151 T.C. 11, at 21.
[41] *Id.* at 22, quoting Cent. Delta Water Agency v. U.S., 306 F.3d 938, 952 (9th Cir. 2002).
[42] 26 U.S.C. § 280E (emphasis added).

controlled substances and not to those that also engage in other activities."[43] The Commissioner countered that "section 280E applies to an entire trade or business if any one of its activities is trafficking in a controlled substance."[44] The court engaged in a lengthy statutory construction exercise on the language "consist of," considering common usage, dictionaries, the Code, and case law, before determining that Harborside's interpretation of "consist of" would render Section 280E "ineffective and absurd."[45] It determined that Section 280E applied equally to businesses that trafficked in controlled substances exclusively and those who trafficked in controlled substances and sold other items as well, including Harborside.

The court also considered whether the literal meaning of Section 280E and its statutory purpose were at odds, considering that medical cannabis dispensaries were not legal under any state law in 1982 when Congress enacted Section 280E. It determined that the fact that legal dispensaries did not exist in 1982 did not limit Section 280E's coverage of cannabis. " 'Enforcing these laws might make it more costly to run a dispensary, but it does not change whether these activities are *authorized* in the state.' "[46] On that basis, the court held that Section 280E prevented Harborside from deducting its business expenses.

3. Did Harborside's different activities constitute different businesses?

Harborside argued that, notwithstanding Section 280E's application to its sale of cannabis and cannabis-containing products, it could deduct business expenses from its other non-trafficking businesses. It asserted that it conducted four activities, each of which was a separate trade or business: (1) sales of cannabis and cannabis containing products; (2) sales of non-cannabis products; (3) therapeutic services; and (4) brand development.

The court agreed that a taxpayer with two trades or businesses, one consisting of trafficking and the other not, can deduct its expenses for the second non-trafficking trade or business. Whether a taxpayer is conducting more than one trade or business is a question of fact based on the " 'degree of organizational and economic interrelationship of various undertakings, the business purpose of which is (or might be) served by carrying on the various undertakings separately or together ***, and the similarity of the various

[43] Harborside, 151 T.C. 11, at 25 (emphasis in original).
[44] *Id*.
[45] *Id.* at 26-35.
[46] *Id.* at 36, quoting Olive v. Comm'r., 792 F.3d 1146, 1150 (9th Cir. 2015)

undertakings.' "[47] The court reviewed its previous decisions on this issue[48] in discussing the facts that it had found relevant in making this determination. These included: (1) whether the taxpayer had separate employees for each activity; (2) what percentage of activity of the taxpayer was engaged in trafficking in cannabis; (3) the taxpayer's primary purpose; (4) how pricing for cannabis and other products and services was done; (5) whether additional wages, rent, or other significant costs were connected with the non-trafficking activities; (6) whether the taxpayer used the same or different bookkeepers and accountants; (7) how much income came from non-cannabis sales or services compared to cannabis sales; and (8) whether the non-trafficking activities were "incident to" the trafficking activities.[49]

The court found that selling cannabis and cannabis-containing products was Harborside's "primary purpose."[50] Sixty percent of the people who entered the premises were there to buy cannabis, 75% of the sales floor was taken up by cannabis and cannabis containing products, 80 to 90% of the employees' time was spent purchasing, processing, and selling cannabis and cannabis-containing products, and sales from these products generated 97% of Harborside's revenue.[51] Thus, these activities, which constituted trafficking in a controlled substance, were clearly a trade or business.

In contrast, however, the court found that Harborside's sale of non-cannabis-containing products, branded merchandise, books, and equipment to use the cannabis, only generated 0.5% of its revenue and took up about 5 to 10% of its employees' time. The space used to display these items was only 25% of the sales floor, which was accessible only to people who were authorized to buy cannabis from Harborside, its patient-members. The court ruled that the sale of these items was not a separate trade or business and was "incident to" Harborside's cannabis business.[52]

Harborside also argued that the therapeutic services offered to its patient-members constituted a separate trade or business. Because these services were offered free of charge, it argued that a portion of each cannabis sale was actually a sale of its therapeutic services. The court determined otherwise. It found that the provision of the therapeutic services were incident to the cannabis business. Harborside's security personnel spent 60%

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[47] Harborside, 151 T.C. 11, at 38, quoting Olive v. Comm'r., 139 T.C. 19, 41 (2012), *aff'd*. 792 F.3d 1146 (9th Cir. 2015).
[48] Californians Helping to Alleviate Med. Problems, Inc. v. Comm'r. ("CHAMPS"), 128 T.C. 173 (2007); Olive, 139 T.C. 19; Canna Care, Inc. v. Comm'r., T.C.M. 2015-206, *aff'd*. 694 F. App'x. 570 (9th Cir. 2017).
[49] Harborside, 151 T.C. 11, at 37-40.
[50] *Id.* at 41.
[51] *Id*.
[52] *Id.* at 42.

of their time checking in people to buy cannabis and only 5% of their time checking in people for the therapeutic services. In addition, less than 1% of Harborside's revenue from the sale of cannabis went to paying the independent contractors who provided the therapeutic services. Finally, the court found that there was a business purpose to the provision of these services with the cannabis sales – it supported the premium pricing Harborside imposed on its cannabis and helped it comply with California's community-benefit standards.

Harborside asserted that its "brand-development activity" was a separate trade or business because it conducted brand-development with a separate profit motive. The Commissioner argued that, because these activities did not generate any revenue until after the years to which the notices of deficiency applied, they were preoperational expenditures that needed to be capitalized rather than deducted. To counter this argument, Harborside asserted that these activities were a part of a "unified business enterprise" with its profit-making activities during those years.[53]

The court found that this argument of a "unified business enterprise" suggested that the brand-development activity was part of a single trade or business. The evidence showed that Harborside conducted its brand-development activities "using the same entity, management, capital structure, employees, and facilities as its marijuana sales."[54] This demonstrated that it was the same business as Harborside's cannabis sales.

The court held that Harborside had a single trade or business – the sale of cannabis – and its other activities were "neither economically separate nor substantially different."[55] As the sale of cannabis constituted trafficking in a controlled substance under Section 280E, Harborside could not deduct any of its business expenses related to the sale of non-cannabis-containing items, the provision of services to its patient-members, or its brand-development activity.

4. What expenditures could Harborside include in its COGS?

As discussed above, under the Sixteenth Amendment, taxpayers can only be required to pay tax on gross income, which is equal to gross receipts

[53] A separate entity that operates at a loss is considered a trade or business eligible for deductions as long as it and entities related to it form a "unified business enterprise" that has a profit motive. *Id.* at 46, citing Campbell v. Comm'r., 868 F.2d 833, 836-37 (6th Cir. 1989); Kuhn v. Comm'r., T.C.M. 1992-460.
[54] *Harborside*, 151 T.C. 11, at 47.
[55] *Id.* at 48.

minus COGS.[56] A taxpayer is allowed to offset its gross receipts by COGS in carrying on the trade or business, which in this case was Harborside's costs of obtaining inventory.[57] Section 162(a) of the Code generally allows a deduction from gross income for ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.[58] Section 280E denies only deductions and credits to taxpayers trafficking in controlled substances and does not prevent taxpayers trafficking in controlled substances from subtracting COGS when calculating gross income.[59]

The court considered whether Harborside should determine the amount of its COGS under Section 471[60] or Section 263A.[61] Section 471 authorizes the IRS to issue regulations regarding accounting for inventories[62] and was in existence when Section 260E was enacted by Congress. The regulations distinguish "resellers" and "producers" of inventory in determining what amounts are included in COGS. The regulations require resellers to include the price paid for inventories and the costs of transportation and other charges incurred in obtaining possession of the inventory in COGS.[63] Producers of inventory include more costs in COGS, including costs of raw materials, direct labor, and "indirect production costs," such as a portion of management costs.[64] Section 471 also references Section 263A.[65]

Section 263A was enacted in 1986, after Section 280E, and contains uniform capitalization, commonly known as UNICAP, rules. It provides, in pertinent part, that both producers and resellers must include in costs of inventory (or capitalize) both direct and indirect costs, and it expands the

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[56] U.S. CONST. amend. XVI; *Harborside*, 151 T.C. No. 11, at 48.

[57] "In a manufacturing, merchandising, or mining business, 'gross income' means the total sales, less the cost of goods sold, plus any income from investments and from incidental or outside operations or sources. … The cost of goods sold should be determined in accordance with the method of accounting consistently used by the taxpayer." 26 C.F.R § 1.61-3(a) (1992).

[58] 26 U.S.C. §162; 26 C.F.R. § 1.62-1(a) (2003).

[59] The Explanation of Provision in the Senate Report issued with the bill that was enacted into Section 280E states:

All deductions and credits for amounts paid or incurred in the illegal trafficking in drugs listed in the Controlled Substances Act are disallowed. To preclude possible challenges on constitutional grounds, the adjustment to gross receipts with respect to effective costs of goods sold is not affected by this provision of the bill.

S. Rep. No. 97-494 (Vol. I), at 309 (1982).

[60] 26 U.S.C. § 471 (2017).

[61] 26 U.S.C. § 263A (2017).

[62] See 26 C.F.R. §§ 1.471-3(b), 1.471-11 (1960).

[63] 26 C.F.R. § 1.471-3(b).

[64] 26 C.F.R. § 1.471-11.

[65] 26 U.S.C. § 471 ("For rules relating to capitalization of direct and indirect costs of property, see section 263A.")

definition of indirect costs. It requires taxpayers to include more expenses in COGS that otherwise would be considered ordinary and necessary business deductions and delays the effect of these expenses on reducing tax in the year incurred by requiring capitalization.[66]

Under Section 471, Harborside would only be able to include in COGS the limited expenses allowed under that section and in its regulations. Under Section 263A, Harborside also would be able to include in COGS many of its costs of doing business that would otherwise be considered the ordinary and necessary business expenses that are denied under Section 280E. However, as the court recognized, Section 263A was amended to prevent any cost that could not be included in calculating taxable income (that is, otherwise disallowed deductions) from being included in the indirect costs otherwise included in COGS under this section.[67]

The court found, contrary to Harborside's argument, that it was not a violation of the Sixteenth Amendment for Congress to limit COGS to direct inventory costs. Requiring the payment of tax on the total amount realized on sales does not violate the Constitution.[68] Because Section 263A specifically prevents its application to any disallowed deductions, like those disallowed under Section 280E, Harborside's only exclusion for COGS was that available under Section 471.

Harborside also argued that it was a producer, rather than a reseller, of cannabis. Producers include more costs in COGS under Section 471 than resellers.[69] It purchased edible cannabis items and non-cannabis containing items from third parties and was, therefore, clearly a reseller of these products. In contrast, Harborside obtained its cannabis inventory through a "closed-loop" system, as required by California law. In its "closed-loop" system, Harborside purchased and sold only cannabis grown by its patient-members from the "clones" and seeds that it gave or sold to its patient-members. Because of this structure, Harborside argued that it was a producer of the cannabis it sold.

The court disagreed. It determined that Harborside had no ownership interest in the "clones" once given or sold to its patient-members, and its patient-members had complete autonomy with regard to whether they sold the cannabis they grew back to Harborside or not.[70] Therefore, the court

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[66] 26 U.S.C. § 263A; 26 C.F.R. § 1.263A-1(a)(3), (c)(1), (e) (1993).
[67] Harborside, 151 T.C. 11, at 53, citing 26 U.S.C. § 263A(a)(2) ["Any cost which (but for this subsection) could not be taken into account in computing taxable income for any taxable year shall not be treated as a cost described in this paragraph."]. See also IRS Chief Counsel Advice, No. 201504011, at 6.
[68] Harborside, 151 T.C. 11, at 55.
[69] See 26 C.F.R. §§ 1.471-3(b), 1.471-11.
[70] Harborside, 151 T.C. 11, at 60.

determined that it was a reseller, not a producer, of the cannabis grown and sold to it by its patient-members. As a reseller, the only amount it could include in COGS was the cost of purchasing that cannabis from its patient-members.[71]

5. Was Harborside responsible for accuracy-related penalties?

In a separate opinion issued on December 20, 2018,[72] the court considered whether Harborside was responsible for the penalties imposed by the IRS under Section 6662(a).[73] Under this section, the IRS imposed penalties of 20% of Harborside's underpayments of tax. The court considered whether Harborside acted "with reasonable cause" and "in good faith" in making the underpayment.[74]

The court found that Harborside did act with reasonable cause because at the time of the tax returns at issue, 2007 to 2012, there was no clear authority on the issues raised in *Harborside*. At that time, the Tax Court had only issued one decision relating to whether medical cannabis dispensaries could be considered to be trafficking in a controlled substance under Section 280E, in which the court allowed the dispensary to deduct its expenses not related to its trafficking.[75] In addition, there was little to no guidance at that time from the IRS on the application of Section 280E on medical cannabis businesses. Finally, the court held that Harborside acted in good faith because it kept good books and records.[76] Therefore, Harborside was not responsible for payment of the accuracy-related penalties imposed on it by the IRS.

C. *Alternative Health Care Advocates v. Commissioner*

Alternative Health Care Advocates v. Commissioner[77] is a consolidated U.S. Tax Court case issued on the same date as *Harborside II*, December 20, 2018. It addresses some of the same issues raised in the *Harborside* opinions.

Like Harborside, Alternative Health Care Advocates ("Alternative") was a California nonprofit corporation treated as a C corporation for federal

[71] *Id.* at 62.
[72] Harborside II, T.C.M. 2018-208.
[73] 26 U.S.C. § 6662(a) (2018).
[74] 26 U.S.C. § 6664(c)(1).
[75] Harborside II, T.C.M. 2018-208, at 4, citing CHAMP, 128 T.C. at 185-86.
[76] Harborside II, T.C.M. 2018-208, at 4-7.
[77] 151 T.C. 13 (2018).

tax purposes and doing business as a medical cannabis dispensary.[78] The other taxpayers in this suit were individuals who were shareholders in Wellness Management Group ("Wellness"), an S corporation, who also served as officers of Alternative.[79] Wellness was organized to handle daily operations for Alternative, such as hiring employees and paying expenses. Wellness did not perform services for any other dispensaries. It had offices separate from Alternative, but used Alternative's mailing address.

Like Harborside, Alternative operated a closed-loop system for obtaining cannabis; it purchased cannabis in various forms from its patient-members.[80] Alternative employed processors though Wellness who prepared the cannabis products for sale and maintained the "clone" cannabis plants. Its employees, security personnel, receptionists, customer service representatives, and managers spent 85 to 90% of their time processing and selling cannabis.[81] Alternative also sold non-cannabis products like books, clothing, and tools for handling and smoking cannabis, which took up little floor space and 10 to 15% of employee time.[82]

Alternative paid cash to its patient-members for cannabis purchased and made all sales tax payments. Wellness dealt with Alternative's other financial needs, including making payments for advertising, rent, and employee wages, for which it was reimbursed by Alternative.[83] Alternative and Wellness had separate bank accounts, but managed finances from the same computer using the same software. While its product sales were supposed to be categorized into cannabis/non-cannabis and taxable/non-taxable categories, the court found that these categories may have had errors, and sales entries for cannabis and non-cannabis products were not distinguished in Alternative's financial records.[84]

Both entities and two of the individual owners of Wellness filed income tax returns.[85] The IRS issued notices of deficiency to Alternative for tax years 2009 and 2010. It also issued notices of deficiency to the individual taxpayers, one for tax years 2009 to 2012, and the other two from tax years 2011 and 2012. The IRS imposed accuracy related penalties on Alternative and two of the individual taxpayers under Section 6662(a).[86]

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[78] *Id.* at 7.
[79] *Id.* at 6-8.
[80] *Id.* at 10.
[81] *Id.* at 12.
[82] *Id.* at 12-13.
[83] *Id.* at 13-18.
[84] *Id.* at 14.
[85] *Id.* at 15-18.
[86] *Id*. at 3-5; 26 U.S.C. § 6662(a).

The issues raised by the petitioners were similar to those raised in Harborside. The court considered the following issues:

1. whether Alternative's activities "consisted of" of trafficking in cannabis;
2. whether Alternative's sale of cannabis and sale of non-cannabis products were separate trades or businesses;
3. whether Section 280E applied to Wellness;
4. whether Alternative was entitled to a higher COGS amount than allowed by the IRS; and
5. whether Alternative was liable for the accuracy-related penalty imposed by the IRS.

1. Did Alternative's activities "consist of" trafficking in cannabis?

Alternative argued that its "varied commercial activities" placed it outside of the reach of Section 280E; because it did not exclusively sell cannabis, its activities did not "consist of" trafficking. This is the same argument that the court rejected in *Harborside* a month earlier.[87] As Alternative and the other petitioners did not dispute that Alternative was selling cannabis, the court applied the same reasoning as that in *Harborside* to find that, though Alternative's trafficking activities were legal under California law and Alternative also sold non-cannabis containing products, Section 280E still applied to it.[88]

2. Was Alternative's sale of non-cannabis containing products a separate trade or business than its sale of cannabis?

Also like Harborside, Alternative argued that its sales of non-cannabis containing products was a separate trade or business from its cannabis selling activities. Again, the court disagreed. The court cited *Harborside* in finding that the sale of the non-cannabis containing products "had 'a close and inseparable organizational and economic relationship' with – and was 'incident to' – Alternative's primary business of selling marijuana."[89] Therefore, the court held that Alternative was not entitled to separate deductions for its sales of non-cannabis containing products.

[87] See supra Harborside, 151 T.C. 11, at 21.
[88] Alternative, 151 T.C. 13, at 24.
[89] *Id.* at 26, quoting Harborside, 151 T.C. 11, at 41-42.

3. Did Section 280E apply to Wellness's activities?

The petitioners argued that Wellness was not subject to Section 280E because it was a legally separate entity from Alternative that did not engage in the sale or purchase of cannabis. The court agreed that Wellness was a separate trade or business from Alternative that did not purchase or sell cannabis. However, the court found that "the only difference between what Alternative did and what Wellness did (since Alternative acted only through Wellness) is that Alternative had title to the marijuana and Wellness did not."[90] The court also found it significant that Wellness employees were directly involved in Alternative's purchase and sale of medical cannabis. Based on these findings, the court ruled that Wellness trafficked in controlled substances. Further, because the record before the court was not sufficient to allocate Wellness's expenses between cannabis-related and non-cannabis-related activities, the court ruled that Wellness could not deduct any of its business expenses.[91]

The court also found that, though its ruling resulted in income earned by Wellness's shareholders to be taxed without deductions twice, once when earned by Alternative and the second time when Alternative paid Wellness for its services, "[t]hese tax consequences are a direct result of the organizational structure petitioners employed, and petitioners have identified no legal basis for remedy."[92]

4. Was Alternative entitled to a higher amount of COGS than allowed by the IRS?

Like in *Harborside*, the *Alternative* court considered whether Alternative was entitled to include in COGS both its direct and indirect costs of its inventory. As in *Harborside*, the court found that the amounts includible in COGS were only those allowed under Section 471, and not those available under Section 263A.[93] In addition, the court found that Alternative was a reseller, not a producer, of its cannabis inventory as it purchased its products from its patient-members through its closed-loop system. While the court agreed that some of the products Alternative offered "required some additional preparation and maintenance," including inspection, packaging, trimming, drying, and maintenance of the cannabis,

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[90] Alternative, 151 T.C. 13, at 28.
[91] *Id.* at 29.
[92] *Id*.
[93] *Id.* at 31.

this was not enough to show that Alternative "grew, created, or improved its marijuana products to the extent required by section 263A or 471."[94]

5. Was the accuracy-related penalty imposed on Alternative warranted?

Finally, like in *Harborside*, the court considered whether the Section 6662(a) penalty on Alternative was warranted. Unlike Harborside, the court found that Alternative did not argue that it had substantial authority for its position or that it disclosed the Section 280E issue and had a reasonable basis for its calculation of tax; thus, it found that Alternative had waived that argument. Alternative had not disclosed that it was engaged in a cannabis business on its tax returns, instead listing its business activity as "Medicine Sales."[95] While Alternative provided evidence that it believed its accountant had experience with cannabis dispensaries, Alternative did not show that it relied on that accountant for advice as to whether and to what extent Section 280E applied to its business. Based on these facts, the court held that Alternative was liable for the accuracy-related penalty under Section 6662(a).

D. *Feinberg v. Commissioner*

The U.S. Court of Appeals for the Tenth Circuit issued its opinion in *Feinberg v. Commissioner* on February 26, 2019.[96] *Feinberg* involved much narrower issues than the other cases discussed in this paper. However, its consideration of the application of the Fifth Amendment right against self-incrimination to the requirement that a taxpayer's burden of proving it is not trafficking under Section 280E is important as an issue of first impression in that circuit.[97] In *Feinberg*, the three taxpayers were shareholders in Total Health Concepts, LLC, a Colorado company allegedly engaged in selling medical marijuana. After the company's shareholders (collectively "THC") claimed its business deductions on their 2009, 2010, and 2011 income tax returns, the IRS conducted an audit, determined that THC was not entitled to take these deductions under Section 280E, and issued a notice of deficiency. THC challenged the notice in the tax court. The court raised a new issue outside of the notice of deficiency that THC had failed to provide sufficient evidence to substantiate its business expenses and, on that basis rather than on Section 280E, affirmed the notice. THC filed a motion to reconsider, to

[94] *Id.* at 32.
[95] *Id.* at 37-38.
[96] Feinberg v. Commissioner ("Feinberg II"), 916 F.3d 1330 (10th Cir. 2019).
[97] *Id.* at 1335.

which the IRS agreed, arguing that the court should consider the Section 280E arguments. The court denied that motion.

On appeal to the Tenth Circuit, the court affirmed the decision of the tax court, but on different grounds. The court found that the tax court erred in deciding the case on the basis that THC failed to substantiate its business expenses because the tax court improperly allocated the burden of proof on this new matter to THC instead of to the IRS.[98] Instead, the Tenth Circuit affirmed the tax court's decision based on the issues raised by the parties under Section 280E.

The relevant issues on appeal were:

1. whether requiring THC to bear the burden of proving the IRS erred in applying Section 280E violates the Fifth Amendment privilege against self-incrimination; and
2. whether THC met the burden of proof that Section 280E did not apply to it.

1. Does it violate the Fifth Amendment privilege against self-incrimination to require THC to bear the burden of proving that the IRS erred in applying Section 280E in denying the deductions?

THC argued that requiring them to bear the burden of demonstrating that Section 280E did not apply to them would violate their Fifth Amendment right against self-incrimination. The court disagreed. Because of the IRS's decision to withdraw a motion to compel seeking discovery from THC on the nature of the company's business (apparently in response to the court's dicta in its decision an earlier interlocutory appeal in the same case),[99] THC not required to produce discovery in the tax court regarding its business activities.

The court disagreed that placing the burden of proof on THC in this instance violated the Fifth Amendment. The court noted that cases cited by THC demonstrated that the right against self-incrimination is best applied where an individual is forced to choose between subjecting themselves to

[98] As the issue of which party bears the burden of proof before the tax court on a new matter not included in a notice of deficiency does not bear on the subject matter of this article, it is not discussed in detail here. For additional information on this subject, see *id.* at 1334.

[99] Feinberg I, 808 F.3d at 815 (opining that the proceedings in the tax court "took an especially curious turn" when the Commissioner attempted to compel discovery because "[i]n tax court, after all, it's the petitioners who carry the burden of showing the IRS erred in denying their deductions—and by invoking the privilege and refusing to produce materials that might support their deductions the petitioners no doubt made their task just that much harder.").

criminal sanctions for not providing incriminating information or subjecting themselves to criminal sanctions when they do provide incriminating information. In other words, the Fifth Amendment applies if a criminal sanction would be imposed on an individual for refusing to incriminate themselves in a criminal matter. In contrast, "[h]ere, the Taxpayers must choose between providing evidence that they are not engaged in the trafficking of a controlled substance or forgoing the tax deductions available by the grace of Congress."[100] Because THC would not be subject to criminal penalties if they did not produce the evidence, but instead would simply lose a tax deduction, the privilege against self-incrimination does not apply.

While the court admitted that THC's burden to prove that Section 280E did not apply to them because they were not engaging in trafficking would be made difficult by their decision not to provide evidence, " 'a party who asserts the privilege against self-incrimination must bear the consequences of [the] lack of evidence.' "[101]

2. Did the taxpayers meet their burden of showing that Section 280E did not apply to them?

In arguing that they met their burden of demonstrating that Section 280E was not applicable to their tax situation, THC argued that, as found by the tax court, there was "a complete absence of proof" that the company was trafficking in controlled substances.[102] They argued that this lack of evidence was fatal to the IRS's assertion that Section 280E applied.

The court rejected this argument. First, it found that THC took out of context the tax court's statements about a lack of evidence, which actually criticized THC for failing to meet their evidentiary burden regarding industry standards for COGS in the medical cannabis industry.

Second, the court found that THC was responsible for demonstrating that the IRS erred in applying Section 280E to the company's business. Therefore, the lack of evidence as to the company's business activities worked against THC's argument and instead supported the IRS's position.

III. LESSONS LEARNED

The rulings in these four cases, *Alpenglow*, *Harborside*, *Alternative*, and *Feinberg*, demonstrate that, absent a change in federal law, businesses

[100] Feinberg II at 1336.
[101] *Id*. at 1337, quoting U.S. v. Goodman, 527 F. App'x 697, 700 (10th Cir. 2013).
[102] Feinberg II at 1337.

operating under the various state cannabis laws will not escape the application of Section 280E. These cases appear to have definitively settled at least three of the main issues raised by these medical cannabis businesses. First, based on these cases and those preceding them, it is unlikely that any business dealing in cannabis could show that it is not "trafficking in a controlled substance."[103] The cases uniformly demonstrate that if a business buys, produces, or sells cannabis, or even simply provides assistance to another entity that buys, produces, or sells cannabis, the courts will find that it is trafficking.[104]

Second, it appears well settled at this point that Section 280E's denial of deductions to businesses trafficking in controlled substances is not a violation of the Sixteenth Amendment. Section 280E specifically provides that "no deduction or credit shall be allowed" and does not mention COGS.[105] The opinions addressing this issue in this article have determined without exception that this applies to ordinary and necessary expenses taken as business deductions, not to costs of inventory or production.[106]

Third, placing the burden of proving that they are not trafficking in controlled substances on taxpayers does not violate their Fifth Amendment right against self-incrimination. As long as no criminal penalties apply to their refusal to produce evidence, the right against self-incrimination is inapplicable.[107]

Other guidance for cannabis businesses can be found in these cases. For instance, it is unlikely that a cannabis business in which the majority of revenue, employee activities, and floor space consist of cannabis sales will be able to show that non-cannabis sales and activities it provides using the same location, employees, and management are separate trades or businesses. In only one case, *Californians Helping To Alleviate Medical Problems, Inc. v. Commissioner* ("*CHAMP*"),[108] which was also its first case on this issue, has

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[103] 26 U.S.C. § 280E.
[104] Alpenglow, 894 F.3d at 1197-98; Harborside, 151 T.C. 11, at 25-35; Alternative, 151 T.C. 13, at 21-24; Feinberg II at 1333-34.
[105] 26 U.S.C. § 280E.
[106] Alpenglow, 894 F.3d at 1198-1202; Harborside, 151 T.C. 11, at 54-56; Alternative, 151 T.C. 13, at 31.
[107] Feinberg II at 1336. Other recent cases have challenged the IRS's attempts to seek evidence during audits related to trafficking by cannabis businesses, including, in some cases, by raising the Fifth Amendment privilege against self-incrimination. See High Desert Relief, Inc. v. U.S., 917 F.3d 1170 (10th Cir., 2019); Medicinal Wellness Ctr., LLC v. U.S. I and II, No. 17-mc-00170-PAB (D. Colo., Apr. 24, 2019); Green Solution, LLC v. U.S. I and II, No. 16-mc-00167-PAB (D. Colo. Apr. 24, 2019). Because these cases address the propriety of IRS investigation and audit methods used with cannabis businesses, but not the interpretation of Section 280E by the courts, they are not discussed here.
[108] CHAMP, 128 T.C. 14.

the Tax Court found that a taxpayer had two separate businesses, one a counseling and caregiving business and the other a cannabis dispensary. In *CHAMP*, the cannabis dispensing activities of the non-profit were secondary and limited compared to its primary activities of caregiving and counseling.[109] In contrast, the Tax Court has distinguished every case following *CHAMP* that raised this issue, including those discussed herein, because the cannabis dispensing activities of the taxpayer in every subsequent case have been the primary activities of the business.[110]

To have any likelihood of separating cannabis and non-cannabis sales into separate trades or businesses in order to deduct expenses for the non-cannabis sales, the taxpayer should, at a minimum, set up completely separate business entities that operate at different locations using different equipment with different employees, management, and contractors. Even in that instance, if the two separate entities are a "unified business enterprise" with a single profit motive, they will be considered one trade or business for the purposes of Section 280E.[111]

In addition, given the court's ruling in *Alternative* that Wellness was trafficking in a controlled substance, creating two separate legal entities may not be enough. Unless the second entity can demonstrate that it is not related in any way to the first's cannabis business, it is possible, if not likely, that the court would find both businesses to be trafficking.[112]

These cases also give hints on how to increase the amount of COGS a taxpayer can use to offset gross receipts. As discussed above, under Section 471, producers of inventory are able to include more costs in COGS than resellers.[113] Thus, a cannabis business that can demonstrate that it produces its own cannabis and cannabis-containing products is likely to be able to include more of its expenses in COGS. In a "closed-loop" structure like those in *Harborside* and *Alternative*, the cannabis business may be able to characterize itself as a producer by retaining title of the clones that it gives or sells to its patient-members and requiring those patient-members, once the clone or seed produces cannabis, to "turn in" a percentage of that grown cannabis to the dispensary for a fee. The business could also produce edibles and other cannabis-containing products itself. Based on those facts, the taxpayer could argue that the costs of the clones and seeds, providing training

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[109] *Id*. at 18-23.
[110] See, e.g., Olive, 139 T.C. 2, at 35-39; Beck v. Comm'r., T.C.M. 2015-149, at 15-17 (2015); Canna Care, T.C.M. 2015-206, at 11-13; Alterman, et al., v. Comm'r., T.C.M. 2018-83, at 26-29 (2018).
[111] Harborside, 151 T.C. 11, at 37; citing Morton v. U.S., 98 Fed. Cl. 596, 600 (2011).
[112] Alternative, 151 T.C. 13, at 28.
[113] 26 U.S.C. § 471.

on the care and harvesting of cannabis plants to its patient-members, and associated with producing the edibles and other cannabis-containing products should be included in the costs of production. Such a structure may result in an increase in COGS to offset gross revenues.

Finally, the Tax Court cases discussed above give insight into avoiding accuracy-related penalties imposed under Section 6662(a) in testing the legal limits of Section 260E.[114] Alternative's mischaracterization of the nature of its business on its tax return and its failure to argue that it had substantial authority for its legal position resulted in having the penalty affirmed the court.[115] In contrast, Harborside reported the nature of its business, allocated a portion of its operating expenses to a "nondeductible" category immediately after the decision in *Olive*,[116] raised a unique argument and argued it "almost persuasively," and kept good books and records.[117] Obviously, following Harborside's example and maintaining honest and careful accounting and business practices will help taxpayers avoid penalties. In addition, hiring an accountant experienced in tax issues facing cannabis businesses and expressly relying on her advice may also help avoid missteps that lead to penalties.

IV. CONCLUSION

Businesses established under state laws allowing the sale of medical and recreational cannabis are taxed on far more of their income than other trades and businesses. Section 280E of the Code prevents businesses "trafficking in controlled substances," which includes state-sanctioned medical and recreational cannabis businesses, from claiming deductions or credits that would otherwise be available.[118] Four recent cases on Section 280E's applicability to cannabis businesses contain useful guidance to help these businesses navigate difficult federal tax issues. The IRS regularly disallows all deductions under Section 280E for businesses operating under state medical and recreational cannabis laws. This results in significantly higher federal taxes for cannabis businesses than other businesses. While the majority of states have legalized the production, sale, and distribution of cannabis for medical or recreational purposes, the federal government has continued to list cannabis in Schedule I of the Comprehensive Drug Abuse Prevention and Control Act of 1970 along with the most dangerous street

[114] 26 U.S.C. § 6662(a).
[115] See Alternative, 151 T.C. 13, at 37-38.
[116] Olive, 139 T.C. 2.
[117] Harborside II, T.C.M. 2018-208, at 4-7.
[118] 26 U.S.C. § 280E.

drugs. This divide has major implications for the federal tax treatment of medical and recreational cannabis businesses.

DELPHI DECISION-MAKING IN LEGAL ENVIRONMENT COURSES

Evan A. Peterson, J.D., Ph.D.[*]

All organizations face crises. Organizational crises . . . "may be sparked by all manner of developments—from a New York Times article about bribery allegations that were improperly investigated, to a massive recall of a best-selling product linked to consumer deaths, to reporting by nonprofit researchers to a federal agency regarding deceptive conduct."[1] An organization, in responding to an organizational crisis, must consider the legal, ethical, and business strategy consequences of a wide range of proposed courses of action simultaneously, from both short-term and long-term perspectives.[2] Any crisis management team gathered in response to the crisis must, therefore, by necessity include a diverse range of individuals, including managers and executives, directors, outside counsel, consultants, public relations personnel, and in-house counsel.[3] Four principal challenges inherent to group decision-making process in the crisis management context include: (1) the need for meticulous consideration of possible consequences associated with specific courses of action, (2) the difficulties inherent to building consensus among diverse members of a crisis management team, (3) diversity among team members may lead to organizational conflict within the team,[4] and (4) cognitive, social, and personal barriers among team members may hinder creativity in the overall team problem solving process.[5]

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[1] Robert Waterman & Bruce E. Yannett, *Crisis Management*, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (2018).

[2] Peterson, E. (2019). "Promoting Future-Oriented Legal Thinking in Long-Term Strategic Planning." *Southern Law Journal,* 29(1).

[3] *Id.*

[4] Adam D. Galinsky et al., *Maximizing the Gains and Minimizing the Pains of Diversity: A Policy Perspective*, 10(6) PERSPECTIVES ON PSYCHOLOGICAL SCIENCE, 742 (2015) (conflict arises as a result of the team's need to draw together individuals with different backgrounds, skills, and perspectives).

[5] PAUL BREST & LINDA H. KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT (2010) (Cognitive barriers – people have a tendency to embrace the first solution that comes to mind. Social barriers – people often converge on a 'safe' solution quickly to avoid proposing untested ideas that will leave them looking foolish in front of others. Personal barriers – people have different creative aptitudes.

To prepare today's business students to face these challenges, there is a growing need for assignments designed to foster a holistic examination of the legal, ethical, and business outcomes connected to courses of action proposed in response to an organizational crisis. The Delphi Law-in-Practice Exercise, a project for graduate legal environment courses based on the Delphi Method,[6] sets up one possible means for instructors to promote a holistic examination of the varied issues connected to legal crisis management by students in their courses. The Delphi Law-in-Practice Exercise, in addition to promoting a more holistic examination of legal crisis management by students, also: (1) stimulates experiential learning,[7] (2) reduces the potential negative effects of social pressures in the learning environment, (3) encourages reflection on biases inherent to the decision-making process, and (4) illustrates one possible means through which a diverse group of people can develop a consensus on how to respond to a complex problem.

The discussion in this paper proceeds in three parts. Part I includes a brief overview of the Delphi Method. Part II encompasses an exploration of how legal environment instructors may incorporate the Delphi Law-in-Practice Exercise into their courses, including suggestions for introducing the Exercise to students, choosing a topic, and assigning groups. Part III outlines the pedagogical benefits of the Exercise, followed by a sample Exercise based on a class actions lawsuit involving Homed Depot in Part IV. Part V concludes with a summary of the implications addressed by this paper.

I. OVERVIEW OF THE DELPHI METHOD

The Delphi Method was pioneered by the RAND Corporation in the 1950s as a means to generate forecasts in connection with military technological innovation.[8] The Delphi approach is particularly suited to building consensus in scenarios where prior research on an issue is absent or incomplete.[9] The Delphi process occurs through a series of iterations (rounds), starting off normally with the distribution of broad, open-ended

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[6] References to Delphi as a method, approach, technique, or design will appear interchangeably in this paper. References to Delphi as an exercise, by contrast, will appear only to describe the assignment referenced in this paper.

[7] ASSOCIATION FOR EXPERIENTIAL EDUCATION, *What is Experiential Education?* http://www.aee.org/what-is-ee (last visited Dec. 18, 2018) (experiential learning encourages students to engage in the classroom by asking questions, experimenting, solving problems, and constructing meaning).

[8] HAROLD A. LINSTONE & MURRAY TUROFF, THE DELPHI METHOD: TECHNIQUES AND APPLICATIONS (1975).

[9] Ali R. Afshari, *Selection of Construction Project Manager by Using Delphi and Fuzzy Linguistic Decision Making*, 28 J. INTELLIGENT & FUZZY SYS. 2827, 2827 (2015).

questions in the first round and ending with the formation of consensus in the ending round. The Delphi design encompasses four principal characteristics: (a) participant selection is grounded on predefined qualifications; (b) participants communicate exclusively with a facilitator; (c) information is gathered and redistributed to all participants by the facilitator after each round, and (d) responses of individual participants are combined by facilitator into a collective group response. Delphi facilitates a rigorous examination of any solutions proposed in response to an examined problem by having participants evaluate the solutions along four key dimensions: desirability, feasibility, importance, and confidence.[10] Through subjecting every proposed solution to scrutiny using these four separate dimensions, participants are able to collectively consider the potential effects of proposed solutions in a holistic manner.

In addition to rigor, another central benefit of the Delphi Method is the easing of the social pressures common in face-to-face meetings. Face-to-face communication may lead participants to modify their answers in response to social pressures pushing conformance toward a particular position.[11] The desire for consensus among group members, commonly referred to as groupthink, may lead to the erosion of critical thinking and the disregard of dissenting opinions.[12] Other benefits of the Delphi Method include the reduction of wasted time in group decision-making as well as the ability to incorporate the opinions of participants from diverse geographic locations.[13]

II. INCORPORATING DELPHI INTO LEGAL ENVIRONMENT COURSES

This section encompasses an overview of how to incorporate the Delphi Law-in-Practice Exercise into graduate legal environment courses. Although the discussion in the present article centers on a variety of approaches for incorporating the Delphi Law-in-Practice Exercise into legal environment courses, the approaches discussed here are equally applicable to other business disciplines. Instructors have a fair amount of flexibility to modify

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[10] Murray Turoff, *The Design of a Policy Delphi*, 2 TECH. FORECASTING & SOC. CHANGE 80 (1970) (The scales of desirability, feasibility, importance, and confidence signify the bare minimum of information necessary for adequate assessment of an issue in a Delphi study).
[11] Richard Skinner et al., *The Delphi Method Research Strategy in Studies of Information Systems*, 37 COMMUNICATIONS OF THE ASSOC. INFO. SYS. 31, 34 (2015).
[12] IRVING L. JANIS, VICTIMS OF GROUPTHINK (1972).
[13] Arash Habibi et al., *Delphi Technique Theoretical Framework in Qualitative Research*, 3 INT'L J. ENG'G & SCI. 8, 8 (2014); HAROLD A. LINSTONE & MURRAY TUROFF, THE DELPHI METHOD: TECHNIQUES AND APPLICATIONS (1975).

Delphi to their course needs. To provide better explanation and guidance to readers, this section will include periodic references to a sample Delphi Law-in-Practice Exercise contained in Appendix A. As this section will also include suggestions for how faculty may adapt the Exercise to suit their individual preferences and course needs, the sample is for illustrative purposes only. It is important to note that the goals of the exercise are not to make students experts on the Delphi technique or to necessarily produce Delphi results that are appropriate for publication in peer-reviewed journals not focused pedagogy.[14]

A. *Introducing the Delphi Exercise to Students*

A proper introduction is an important first step to the Delphi Law-in-Practice Exercise, as the Delphi process will likely be unfamiliar to many students. Although a detailed explanation of the origins and inner workings of the Delphi design is not necessary, instructors should discuss how the Delphi Method represents a technique for structuring group communication processes for the purpose of building consensus on a topic or issue. Instructors should also describe the general process, wherein students will complete a series of questionnaires over the course of several rounds, with the results of each questionnaire determining/driving the questionnaire in the next round. As part of this process, students will be asked to evaluate/rate their classmates' answers, as well as re-evaluate their own answers in light of the answers provided by their classmates. Instructors must remind students that they are not to share their answers with other students or disclose their identities anywhere in the content of their questionnaire responses. Students will communicate exclusively with the instructor or individuals selected by the instructor to help facilitate the processes of data collection and data analysis. Instructors may conclude the introduction by describing the overall goal of the assignment: to have student groups reach a consensus on the best future-oriented courses of action in response to the examined legal issue.

B. *Assigning Students to Groups*

Instructors have a variety of possible options in terms of arranging groups and structuring the overall focus of the Delphi Law-in-Practice Exercise. Although instructors may divide their classes into groups of

[14] Due to time limitations and other course constraints, normal elements used to strengthen validity, such as questionnaire field testing or pilot testing, are not included in the Delphi Law-in-Practice Exercise.

virtually any size, possible group compositions may include small groups of 3 to 5 students each, medium groups of 6 to 9 students each, large groups of 10 or more students each, or an entire class size group of 25 students or more.[15] Instructors who do not wish to track the progress of multiple groups may decide to administer the exercise using the entire class as a single group. Instructors can take comfort in that the Delphi Method can accommodate larger classes, as it is designed for building consensus among large groups of participants. Researchers have conducted successful Delphi studies involving groups of 80 participants or more.[16]

C. *Choosing a Focus or Issue for the Exercise*

As the Delphi Method is designed to develop a future-oriented consensus on a problem or issue,[17] instructors are encouraged to focus the exercise on responding to emerging topics rather than on critiquing prior practices in the marketplace. Instructors may allow student groups to select their own issues for Delphi examination or may decide to assign issues/topics to each group. Allowing groups to choose their own issues for Delphi examination, alongside possible enhancements to topic engagement, could also provide an opportunity for instructors to assess students' investigative skills by requiring them to research their own topics. Permitting student groups to choose different issues would provide a greater diversity of topics for post-Delphi debriefing, but may provide less opportunity for robust discussion on the differences in approaches taken by each group toward a central identified problem. If all student groups examine the same issue, instructors will have a greater opportunity to examine and discuss the nuances in consensus building results among the different groups.

D. *Establishing the Measure of Consensus*

The instructor must decide how to evaluate consensus in the Delphi Law-in-Practice Exercise. Although numerous measures exist for evaluating consensus, percentage agreement is an easily understood (and applied) method for determining consensus. Although instructors can set percentage

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[15] Online tools, such as SurveyMonkey, provide an efficient means to administer questionnaires electronically and collate the resulting data even from groups involving larger numbers of students.

[16] Che K. Che Ibrahim et al., *Development of a Conceptual Team Integration Performance Index for Alliance Projects*, 31 CONSTRUCTION MGMT. & ECON. 1128 (2013).

[17] Nibedita Mukherjee et al., *The Delphi Technique in Ecology and Biological Conservation: Applications and Guidelines*, 6 METHODS IN ECOLOGY AND EVOLUTION 1097, 1098 (2015).

agreement at any level they wish (the levels of percentage agreement in Delphi analyses have ranged from 51% to over 80%), it is advisable to adopt a percentage agreement of 70% or higher to maintain rigor. For a rated item (items are rated in the round 2 questionnaire and beyond) to advance to the next round questionnaire, the frequency of students' top 2 responses (rating of 4 or 5 on a 5-point Likert scale) on that item would need to meet or exceed the 70% threshold. Setting the level of consensus at 70% will set a relatively high bar indicating that a substantial majority of the students lean toward consensus on any given course of action. If an instructor chooses a level of percentage agreement that is too low, such as 51%, this may render it more difficult for students to reach a consensus on the best future-oriented courses of action in response to the examined legal issue.

E. *Setting an Exercise Timeline*

The Delphi Law-in-Practice Exercise is ideally suited as part of an end-of-term project. Instructors are encouraged to give students at least one week to complete each questionnaire. If each questionnaire is lengthy, requires students to conduct outside research, or asks students to justify their reasoning in response to each questionnaire item (as discussed below), additional completion time per round (two weeks) is strongly recommended. Giving students too much time to complete each questionnaire, however, may encourage students to put off completing the questionnaire until the last minute and hinder preparations for the next round. Instructors, or students in the class chosen to help facilitate the Exercise, will also need a suitable amount of time to analyze the questionnaire data and prepare the questionnaire for the next round.[18]

F. *Creating the Questionnaires*

The overall structure will depend on how many rounds an instructor wishes to allocate to the consensus building process. A 3-Round Exercise is recommended, with students completing one questionnaire per round. Allowing for three rounds will enable students to evaluate proposed courses of action along the four dimensions of desirability, feasibility, importance, and confidence, facilitating a rigorous evaluation of any solutions proposed in response to the examined issue.

[18] As noted above, SurveyMonkey provides an efficient means to administer questionnaires electronically and collate the resulting data.

1. First Round Questionnaire

It is recommended that the first round questionnaire contain no more than 2-3 broad, open-ended questions geared toward generating possible future-oriented courses of action in response to the examined legal issue. For example, possible questions for the first round questionnaire might include: (a) What are the most important elements of an overall response to the issue? (b) What are the least important elements of an overall response to the issue? and (c) What factors must be considered alongside the implementation of any proposed response to the issue? The instructor may also consider including supporting instructions that ask students to provide a minimum number of recommendations in response to each question and to respond in bullet point format. The goal of the first round questionnaire is to generate as complete a list of recommendations from students as possible in response to the examined issue.

In a traditional research practice, Delphi facilitators often use thematic content analysis to generate the second round questionnaire based on participants' responses to the first round questionnaire.[19] This process takes time, however, and may lead to a second round questionnaire of inordinate length. For the purposes of the Delphi Law-in-Practice Exercise in legal environment courses, instructors are instead encouraged to either select specific statements from students' first round responses, or generate new statements based on to illustrate key concepts as desired by the instructor, that provide a range of possible courses of action for students to evaluate in the next round. As instructors may need to exclude certain responses to produce a second round questionnaire of feasible length, they may wish to inform students that statements for the second round questionnaire will be chosen at random (to help avoid possible negative feelings).

2. Second Round Questionnaire

For the second round questionnaire, instructors are encouraged to have students apply ratings to each statement each statement represents a possible course of action in response to the legal issue along two separate dimensions: desirability and feasibility. Instructors are cautioned against asking students to evaluate statements along more than two dimensions. Asking students to evaluate the second round statements along more than two dimensions may overwhelm students, especially if the instructor wishes for students to explain

[19] Shane R. Brady, *Utilizing and Adapting the Delphi Method for Use in Qualitative Research*, 14 INT'L J. QUALITATIVE METHODS 1, 3-4 (2015) (Thematic content analysis refers to the process of detecting and analyzing patterns across responses to open-ended questions).

their reasoning in connection with each rating (to avoid the possibility of arbitrary decisions). Requiring students to justify their ratings for each item can reduce potential biases derived from an unwillingness to consider contrary viewpoints.[20]

The goal of the second round questionnaire is to begin reducing the list of proposed courses of action using the pre-determined measure of consensus (set at a 70% agreement threshold for the purposes of the present article as discussed above). Appendix B contains a formatted second round sample questionnaire. Using the sample questionnaires contained in Appendix B for guidance, the instructor would apply the 70% measure of consensus in the following fashion: Any statement (proposed course of action) where the frequency of students' top 2 responses (rating of 4 or 5 on a 5-point Likert scale) is 70% or higher on both the desirability and feasibility scales will carry over to the third round questionnaire. Any statement that fails to meet the 70% threshold on both scales will not carry over to the third round questionnaire and drops out of further consideration.

The instructor may also wish to provide students with additional clarity as to the meaning of each item on the desirability and feasibility scales respectively by including the following references and definitions in the instructions to the second round questionnaire:

- (1) – Highly Undesirable: Will have major negative effect
- (2) – Undesirable: Will have a negative effect with little or no positive effect
- (3) – Neither Desirable nor Undesirable: Will have equal positive and negative effects
- (4) – Desirable: Will have a positive effect with minimum negative effects
- (5) – Highly Desirable: Will have a positive effect and little or no negative effect

- (1) – Definitely Infeasible: Cannot be implemented (unworkable)
- (2) – Probably Infeasible: Some indication this cannot be implemented
- (3) – May or May Not be Feasible: Contradictory evidence this can be implemented
- (4) – Probably Feasible: Some indication this can be implemented
- (5) – Definitely Feasible: Can be implemented

[20] Skinner et al., *supra* note 11.

3. Third Round Questionnaire

The third round questionnaire encompasses all items carried over from the second round questionnaire. In the third round students apply ratings to each remaining statement along two new dimensions: importance and confidence. Appendix B contains a formatted third round sample questionnaire. The goal of the third round questionnaire is to have students come to a consensus on the best future-oriented courses of action in response to the examined legal issue. Applying the same 70% measure of consensus from the second round, the items where the frequency of students' top 2 responses (rating of 4 or 5 on a 5-point Likert scale) is 70% or higher on both the importance and confidence scales will represent a final consensus by the class as to the best future-oriented courses of action in response to the examined legal issue.

Similar to desirability and feasibility in the second round, instructors are encouraged to provide students with additional clarity on the meaning of items on the importance and confidence scales by including the following references and definitions in the instructions to the third round questionnaire:

- (1) – Most Unimportant: No relevance to the issue
- (2) – Unimportant: Insignificantly relevant to the issue
- (3) – Moderately Important: May be relevant to the issue
- (4) – Important: Relevant to the issue
- (5) – Very Important: Most relevant to the issue

- (1) – Unreliable: Great risk of being wrong
- (2) – Risky: Substantial risk of being wrong
- (3) – Not Determinable: Information needed to evaluate risk is unavailable
- (4) – Reliable: Some risk of being wrong
- (5) – Certain: Low risk of being wrong

G. *Other Considerations*

1. Student Presentations

Alongside post-Delphi debriefing discussions, instructors may also wish to incorporate a presentation component into the Delphi Law-in-Practice Exercise. For courses in the traditional format, or hybrid classes that that meet face-to-face periodically throughout the term, instructors can ask students to give short presentations reflecting on what they learned about

legal crisis management and consensus building from the exercise. For courses that meet using a strictly online format, instructors can ask students to present their reflections to their classmates using Blackboard Collaborate.

2. Interdisciplinary Collaboration Considerations

The Delphi Law-in-Practice Exercise also presents an opportunity for instructors to collaborate across business courses. Instructors can distribute the same factual scenario involving a business issue to students in different classes, asking students in each respective class to provide recommendations on the best future-oriented courses of action in response to the issue. When the results from each class are combined, students may gain a better appreciation for considering any business issue from a holistic perspective. As 'legal' issues are not separate from other business issues in the crisis management context, the Exercise presents an opportunity for legal environment instructors to demonstrate to students the financial, marketing, PR, management, and other considerations that may affect organizational responses to 'legal' issues. By the same token, it presents an opportunity for marketing, management, and other instructors to demonstrate the importance of similar considerations to their own students. Due to the electronic format of the Exercise, there is less chance of scheduling or logistical conflicts.

III. PEDAGOGICAL BENEFITS OF THE DELPHI EXERCISE

Incorporating the Delphi Law-in-Practice Exercise into graduate legal environment courses provides several pedagogical benefits. First, it provides legal environment students with a means to examine the challenges of responding to legal issues in a more holistic, real-world business context. As legal issues do not occur within a 'vacuum' in business practice, the Exercise provides a tool for instructors to illustrate the connection between legal strategy and business strategy, and to help students connect legal concepts from the legal environment course to concepts they encounter in other business courses. In the crisis management context, for example, crisis management teams are often comprised of in-house counsel, managers, executives, directors, outside counsel, consultants, public relations and other personnel.[21] Crisis management teams face numerous questions and concerns in responding to legal issues, including:[22]

[21] Robert Waterman & Bruce E. Yannett, *Crisis Management*, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (2018).
[22] *Id.*

- What level of factual investigation is proper when possible disruptions to daily business operations are taken into account?
- What information should employees receive given potential drops in morale that may derive from worries regarding the investigation process?
- What approach is best suited for communicating with government regulators or investigators?
- How to assess which information to distribute internally and which information to preserve as confidential?
- How to assess when (and how) to self-report misconduct to regulators and investigators?
- What tactics to pursue in settlement negotiations?
- What measures are necessary to prevent comparable crises from occurring in the future?

A second benefit of incorporating the Delphi Law-in-Practice Exercise into a legal environment course stems from the Delphi Method's capacity to reduce the possibility of certain biases and social pressures that may affect group decision-making in the classroom. Biases are a natural, unavoidable component of the decision-making process. Social influences, emotional motivations, and unconscious reactions can undermine rational decision-making and mislead decision-makers into believing that they have made rational decisions.[23] Biases that hinder one's ability to engage in rational decision-making include:[24]

- Bandwagon effect bias – tendency to adopt beliefs held by others
- Anchoring bias – overreliance on first piece of information acquired
- Confirmation bias – exclusion of information that fails to confirm preconceptions
- Availability heuristic bias – overestimation of importance of available information

[23] *See, e.g.,* George F. Loewenstein et al., *Risk as Feelings*, 127 PSYCHOLOGICAL BULLETIN. 267 (2001); Hans-Rüdiger Pfister & Gisela Böhm, *The Multiplicity of Emotions: A Framework of Emotional Functions in Decision Making*, 3 JUDGMENT AND DECISION MAKING. 5 (2008); X. T. Wang et al., *Social Cues and Verbal Framing in Risky Choice*, 14 J. BEHAVIORAL DECISION MAKING. 1 (2001); Eldad Yechiam et al., Observing Others' Behavior and Risk Taking in Decisions from Experience. 3 JUDGMENT AND DECISION MAKING. 493 (2008); Laura A. Kaster, *Improving Lawyer Judgment by Reducing the Impact of "Client-Think."* 67 DISP. RES. J. 56 (2012).

[24] *See, e.g.,* Samantha Lee & Shana Lebowitz, *20 Cognitive Biases that Screw Up Your Decisions*, http://www.businessinsider.com/cognitive-biases-that-affect-decisions-2015-8 (last visited Apr. 15, 2018).

- Choice-supportive bias – positive feelings toward decision despite awareness of inherent flaws
- Conservatism bias – favoritism towards prior information over newly discovered information

The Delphi method presents a means to reduce the potential for conformance based on social pressures.[25] Although complete anonymity is impossible in a traditional face-to-face classroom setting, the method would allow students to give their opinions confidentially. The instructor may assign students random participant numbers to help preserve confidentiality. An instructor may also, by requiring students to justify their ratings for each item, further reduce potential biases derived from the bandwagon effect or from an unwillingness to consider contrary viewpoints.[26]

The focus of the Delphi Method on developing consensus among a diverse group of participants represents a third benefit of incorporating the Delphi Exercise into a legal environment course. Groups consisted of diverse individuals characteristically produce more innovative, improved decisions as compared to non-diverse groups, based on the diverse group's heightened capacity to observe problems using a range of perspectives.[27] By the same token, however, asking a group comprised of individuals with different backgrounds, skills, and perspectives to agree on a course of action invites conflict among members of the group.[28] Identifying a means through which groups can harness the benefits of diversity and come to a consensus, while minimizing the potential conflict among group due to diverse perspectives, represents a critical consideration.

A fourth benefit of incorporating the Delphi Law-in-Practice Exercise in the legal environment classroom centers on the exercise's capacity to promote experiential learning. Experiential learning provides students with an opportunity to investigate an issue, consider relevant questions, propose creative solutions, defend those solutions, and construct meaning in the context of solving a complex problem."[29] Exercises that promote experiential learning at the graduate level have important implications for assessment connected to re-accreditation. Business schools accredited by the Association

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[25] Mukherjee et al., *supra* note 17.
[26] Skinner et al., *supra* note 11.
[27] Galinsky et al., *supra* note 4.
[28] *Id.*
[29] ASSOCIATION FOR EXPERIENTIAL EDUCATION, *What is Experiential Education?* http://www.aee.org/what-is-ee (last visited Dec. 30, 2016); *Experiential Learning,* NORTHERN ILLINOIS UNIVERSITY, FACULTY DEVELOPMENT AND INSTRUCTIONAL DESIGN CENTER, http://www.niu.edu/facdev/resources/guide/strategies/experiential_learning.pdf (last visited Dec. 30, 2016).

to Advance Collegiate Schools of Business (AACSB) must work to maintain rigorous standards related to curricular innovation and teaching effectiveness.[30] For business schools that assess group decision-making, the Delphi Exercise provide a means for incorporating group decision making into legal environment courses. Alongside course assessment, AACSB accreditation/re-accreditation standards now assign additional importance to faculty teaching innovations that are geared toward producing graduates who are ready to tackle the challenges posed by the business environment.[31]

IV. SAMPLE DELPHI EXERCISE – THE CHEN VS. HOME DEPOT CASE

The discussion in this section encompasses a more detailed examination of a Delphi Law-in-Practice Exercise administered in a summer section of a graduate level legal environment course at the University of Detroit Mercy. For this assignment, students were presented with a factual scenario based on a real-life legal crisis faced by Home Depot. A description of the scenario is located in Appendix A. Students were tasked with using the Delphi Method to develop, refine, and reach a collective consensus as to the best future-oriented courses of action Home Depot should take in response to the legal crisis. The assignment consisted of 3 rounds, with students completing one questionnaire during each week-long round.

A. *Round 1*

Prior to beginning the first round, students reviewed textbook materials on ethics, criminal law, and tort law, as well as an article on legal strategy. The Round 1 questionnaire asked students to provide at least three future-oriented recommendations in response to each of the following questions:

1. From a litigation standpoint, how should Home Depot respond to the class action lawsuit?
2. From an ethical standpoint, how should Home Depot respond to the class action lawsuit?

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[30] ASS'N TO ADVANCE COLLEGIATE SCHS. OF BUS., *Accreditation Standards*, http://www.aacsb.edu/accreditation/standards/ (last visited August 4, 2016).
[31] ASS'N TO ADVANCE COLLEGIATE SCHS. OF BUS., *Eligibility Procedures and Accreditation Standards for Accounting Accreditation* (2012), http://www.aacsb.edu/~/media/AACSB/Docs/Accreditation/Standards/2003%20Standards/2012-accounting-accreditation-standards-tracked-changes.ashx (last visited August 4, 2016).

3. From a business strategy standpoint, how should Home Depot respond to the class action lawsuit?
4. From a business strategy standpoint, what modifications should Home Depot make to the practice of sending demand letters to consumers accused of shoplifting at its stores?

The first three questions were designed to encourage students to consider issues and factors surrounding resolution of the class action lawsuit in a more holistic fashion. By asking students to generate recommendations based on ethical and business strategy perspectives alongside litigation perspectives, this opened the door to a more in-depth examination of the connections between potential legal, ethical, and business strategy issues faced by Home Depot in the crisis management context. The phrases 'litigation standpoint,' 'ethical standpoint,' and 'business strategy standpoint' were intentionally undefined to solicit as wide array of student recommendations as possible.

The fourth question was designed to encourage students to think about the effects of the lawsuit on Home Depot's practices in a more long-term context. As organizations face both short-term and long-term concerns when responding to an organizational crisis, there is pedagogical value to having students consider the combined effects of short-run and long-run decision-making. For instance, while responding to a legal crisis in the short-term may involve decisions related to settlement negotiations, responses to governmental inquiries, product recalls, and public relations campaigns, such considerations alone do not address conditions or factors that led to crisis in the first place. Students, by considering the conditions or factors that led to the crisis, will then be in a position to consider both appropriate short-term responses and long-term policies/action plans for mitigating the likelihood of a similar crisis in the future.

Students provided a variety of recommendations in response to the first round questionnaire. From a litigation perspective, student recommendations for responding to the class action lawsuit included: (a) settle the class-action lawsuit; (b) revise approach toward dealing with shoplifting cases; (c) countersue for damages; and (d) drop claims against Chen. Students recommended, from an ethical perspective, that Home Depot should respond to the suit by (a) sending an apology letter to Chen; (b) publicly denouncing the loss prevention personnel; (c) enacting loss prevention policy changes; and (d) distancing itself from the law firm issuing the demand letters. Business strategy recommendations included suggestions that Home Depot: (a) alter the current shoplifting protocol; (b) settle the dispute; (c) conduct an internal investigation of loss prevention; (d) issue a formal statement; and (e)

hire a public relations team. In terms of modifications to the practice of sending demand letters, student recommendations included: (a) eliminate the practice entirely; (b) use less aggressive wording in demand letters; (c) send demand letters only when necessary; (d) remove threats of litigation and court fees from demand letters; and (e) hire different firm to continue sending demand letters. Although some recommendations demonstrated students' misunderstanding of the Home Depot scenario facts and/or relevant legal principles, such recommendations helped to highlight key areas appropriate for further examination in the subsequent rounds. The combined recommendations, however, confirmed that students interpreted the facts of the scenario, and perceived best courses of action, from a wide array of perspectives.

B. *Round 2*

For the second round, students evaluated whether they believed each statement would represent a desirable and feasible response by Home Depot in reaction to the legal crisis stemming from the Jimin Chen incident. Students rated each statement against 5-point Likert scales for desirability and feasibility. Instructions provided with the questionnaire asked student to consider each statement on its own, rather than in relation to, or in combination with, other statements. The instructions also asked students to provide a brief explanation of their reasoning (no more than two sentences) associated with their ratings for each statement. Finally, the instructions emphasized that students were to consider the potential pros or cons connected with each statement, and the impact each recommendation would have if implemented by Home Depot. The second round questionnaire contained 20 statements derived from the collective recommendations submitted by students in the first round. Appendix B contains a list of the 20 statements as well as a partial sample of the formatted second round questionnaire.

C. *Round 3*

Fourteen out of the 20 statements in the second round questionnaire met the 70% threshold for desirability and feasibility needed to carry over to the third round. Appendix C contains a list of the six statements that failed to carry over to the third round. For the third round, students evaluated the remaining 14 statements against 5-point Likert scales for importance and confidence. As with the second round, the instructions in the third round questionnaire asked students to evaluate each statement on its own, provide a

brief explanation of their reasoning for each rating, and to consider the impact each recommendation would have if implemented. To further encourage students to consider different viewpoints toward the remaining 14 statements, each statement included a series of justifications for the statement provided by your classmates in the second round. Of the 14 statements students evaluated in the third round, 7 statements satisfied the 70% threshold for both importance and confidence. These 7 statements represented a collective consensus by the class as to the best future-oriented courses of action Home Depot should take in response to the legal crisis.

D. *Post Exercise Student Reflections*

After completing the third round questionnaire, all students submitted a short reflection paper discussing what they learned from the Delphi Law-in-Practice Exercise. As this was the first application of the Exercise in a graduate legal environment course, students' views and comments were critical to assessing pedagogical effect. Although some students felt the assignment was time consuming, overall the results were positive. Student comments that spoke directly to the pedagogical impact of the assignment included:

- The approach was very useful for structuring and facilitating deeper consideration of our own ideas as well as those of other students.
- To be honest, there was the initial assumption I would hold fast to my established views with each round of questions. However, I was surprised to find the wide array of viewpoints and approaches to in-house counsel and the Home Depot Case influencing me throughout the assignment. In the end, I found that while I maintained some views, there were many that altered from round to round.
- If anything, this assignment reinforced my view that legal needs to be prepared to work with other departments, such as PR, to determine the best course of action for the company overall.
- By the end of the Round 3 Questionnaire, I found that I was thinking in a broader scope when addressing statements and integrating the thoughts of my classmates into this expanded perspective.
- I also learned that getting feedback from the rest of the team helped me in understanding how others think and if I want to change my ratings when they provided enough support that makes me switch sides.

V. CONCLUSION

The crisis management process poses a wide array of challenges for organizations. From the standpoint of group decision-making alone, the crisis management process presents the following problems: (1) the need for meticulous consideration of possible consequences associated with specific courses of action, (2) the difficulties inherent to building consensus among diverse members of a crisis management team, (3) diversity among team members may lead to organizational conflict within the team, and (4) cognitive, social, and personal barriers among team members may hinder creativity in the overall team problem solving process. There is a need for assignments designed to prepare today's business students to face these challenges. The Delphi Law-in-Practice Exercise provides legal environment instructors with a means to prepare their students to face these dynamic challenges while promoting a holistic examination of the legal, ethical, and business issues associated with responding to an organizational crisis. The Delphi Law-in-Practice Exercise, in addition to promoting a more holistic examination of legal crisis management by students, also: (1) stimulates experiential learning, (2) reduces the potential negative effects of social pressures in the learning environment, (3) encourages reflection on biases inherent to the decision-making process, and (4) illustrates one possible means through which a diverse group of people can develop a consensus on how to respond to a complex problem.

APPENDIX A

HOME DEPOT EXERCISE – THE FACTS

Home Depot recently found itself the focus of a class-action lawsuit filed in California Superior Court. The suit, filed by Jimin Chen, accuses the retail chain of using shoplifting charges and threats of criminal prosecution to shake down customers for arbitrary and unjust monetary (damages) awards. The lawsuit stems from a June incident involving a shopping trip by Chen at a Home Depot in San Leandro, California. According to court documents, Chen used store merchandise, a pair of work gloves, to assist in loading lumber into a cart for purchase. At the time of checkout, all merchandise was scanned, except for the gloves. Chen asserts that he had placed the gloves on top of the lumber, mistakenly forgetting they were there during the checkout process. It is alleged in Chen's lawsuit that he did not intend to steal the gloves at any time, nor did he attempt to conceal the gloves, which remained in plain view of Home Depot employees at all times. The total purchase amounted to $1,445.90, which Chen paid using his Home Depot credit card. Prior to exiting the store, Chen was stopped by a security guard, who accused Chen of stealing the gloves. Court documents further allege that Chen was taken to a room for aggressive questioning, where he later suffered an asthma attack and was placed in handcuffs. Chen was confined to the room for approximately 30 minutes, and allowed to leave only after agreeing to sign a document promising to stay out of the store for a 90 period. The police were never called and no arrest was ever made.

As a result of the incident, Chen received a collection letter from Orlando based law firm Palmer, Reifler & Associates. To Chen's great surprise, the letter demanded payment of $350 to settle claims that Chen shoplifted from the California Home Depot. When Chen failed to make the $350 payment as demanded, he received a second letter, this one demanding payment of $625. It is worthy to note that the gloves that sparked this controversy retail for less than $5.

Language included in the demand letters, reproduced in Chen's class-action lawsuit, read as follows: "Should full or partial payment not be made on time, we may review the matter for the possibility of recommending that our client take further civil action and depending on the state law, may choose to make a higher settlement request on behalf of our client. Home Depot may in the future consider filing a lawsuit, ***in which case it will likely seek any available attorney's fees, court costs and other legal expenses***

throughout such litigation. Any defending party to such a lawsuit would likely be served by a process server with a summons requiring the party or the party's attorney to respond and/or appear in court to defend the action. ***If successful in any such litigation, we estimate that Home Depot would be seeking a final judgment of damages, court costs and/or attorney's fees up to the maximum amounts allowed by law which might exceed the amount demanded above."*** [Emphasis added].

In support of its claims and demand letters to Chen, Home Depot relied on Penal Code Section 490.5 of California's Civil Shoplifting Law. Under Section 490.5, merchants may bring a civil action to recover (1) the value of any merchandise unlawfully removed from the premises, if not recovered in merchantable condition, and (2) damages of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00) plus costs. However, according to legal arguments and case law submitted by Chen's attorneys, in order to maintain an action under this statute, the merchant must establish at a minimum (1) the unlawful taking (2) of merchandise (3) from the premises (4) by an adult or emancipated minor. In addition, Chen's attorneys assert Section 490.5 does not authorize the merchant or its agents to recover late payment fees, installment fees, convenience fees, or attorneys' fees.

As a result, Chen accuses Home Depot of using the law to intimidate consumers into paying arbitrary settlements, and likens Palmer Reifler to a "demand letter mill." Chen alleges that the firm sends more than a million letters a year to consumers accused of shoplifting by Home Depot, using threats and a "smoke screen of legalese." When alleged shoplifters are detained at a Home Depot store, they are given a written Notice, stating they may "face both criminal charges and a civil claim" and be obligated to pay a "fine … and/or a civil penalty." Court documents further state, "The demand letters are crafted to frighten consumers into believing that failure to pay the amount demanded may result in criminal prosecution, subject them to a civil suit, and put them at risk of liability for significant additional damages that the merchant has no legal right to recover. Consumers, fearful and ignorant of the falsity of these threats, pay millions of dollars each year in satisfaction of these misleading and unlawful demands."

APPENDIX B

ROUND 2 STATEMENTS

1. Do everything possible to settle the lawsuit without going to court.
2. Terminate the employment of the loss prevention personnel who detained Jimin Chen.
3. Modify the policy at issue so the demand letters include language-requesting individuals to pay only for the retail cost of the stolen goods.
4. Consider other ways of making money using superior customer service tactics rather than demand letter tactics.
5. Develop staff training sessions and standardize treatment of accused shoplifters to avoid similar situations in the future.
6. Enforce a policy that customers cannot use merchandise without paying for it first.
7. Discontinue the demand letter policy entirely.
8. Maintain the demand letter policy/practice as is (i.e. make no changes) and utilize insurance to cover the cost of any lawsuits.
9. Post notices around each store notifying customers of potential legal action in the event merchandise is opened or used prior to purchase.
10. Review each potential shoplifting incident on a case-by-case basis to determine if a demand letter is appropriate.
11. Only send demand letters to individuals who are convicted of shoplifting.
12. Attempt to collect the money for shoplifted items during the in-store detention process and ask individual(s) to sign agreement not to return to the store for one year.
13. Home Depot should not back down in the lawsuit, and instead use it as an example to showcase a zero tolerance policy on shoplifting.
14. Publicly apologize to Mr. Chen
15. Drop all charges against Mr. Chen.
16. Restructure the shoplifting policy and issue an apology.

17. Ask Mr. Chen to drop the lawsuit.
18. Pay compensation to Mr. Chen and others who received demand letters without settling the case.
19. Publish a statistical report to the public outlining the impact of shoplifting on Home Depot.
20. Hire a public relations team to help manage fallout from the lawsuit.

Second Round Questionnaire

The second round questionnaire contains 20 theme statements derived from the recommendations submitted by the class in the first round. In this round, you will ***evaluate whether you believe each statement represents a desirable and feasible response by Home Depot in connection with the class-action lawsuit filed by Jimin Chen in California Superior Court***.

Please rate each statement as to both desirability and feasibility by entering a number in the colored box below each scale. Consider the desirability and feasibility of each statement on its own rather than in relation to, or in combination with, other statements. You must provide a brief explanation of your reasoning (no more than two sentences) for **each statement**. Although it is important that you supply ratings for each statement, I will allocate most of the points for this portion of the assignment to your explanations. The key is to strongly consider the potential pros or cons connected with each statement and the impact it might have if Home Depot were to implement the recommendation.

The following example demonstrates how to fill out the second round questionnaire:

Statement	Desirability Scale	Feasibility Scale
Example theme statement (derived from participants' responses to the first round questionnaire).	1 Highly Undesirable	1 Definitely Infeasible
	2 Undesirable	2 Probably Infeasible
	3 Neither Desirable nor Undesirable	3 May or May Not be Feasible
	4 Desirable	4 Probably Feasible
	5 Highly Desirable	5 Definitely Feasible
	Your rating: 4	Your rating: 5
Explain your Reasoning:		
Comments? (optional):		

No more than two sentences

Use this box if you wish to comment on an item (optional)

Rate each statement on both scales by typing in a number here. Please enter whole numbers only (i.e. no ratings of 3.5, 4.2, 4.7, etc.)

Third Round Questionnaire

The third round questionnaire contains 7 statements carried over from the second round. In this final round, you will ***evaluate the importance and confidence of each statement as a response by Home Depot in connection with the class-action lawsuit filed by Jimin Chen in California Superior Court***.

Please rate each statement as to importance, desirability, and feasibility by entering a number in the colored box below each scale. Consider the importance and confidence of each statement on its own rather than in relation to, or in combination with, other statements. You must provide a brief explanation of your reasoning (no more than two sentences) for **each statement**. The key is to strongly consider the potential pros or cons connected with each statement and the impact they it might have if Home Depot were to implement the recommendation. To encourage you to consider different viewpoints when completing this questionnaire, each statement includes a series of justifications for the statement provided by your classmates in the second round.

The following example demonstrates how to fill out the third round questionnaire:

Statement	Importance Scale	Confidence Scale
Example theme statement (carried over from second round questionnaire).	1 Most Unimportant	1 Unreliable
	2 Unimportant	2 Risky
	3 Moderately Important	3 Not Determinable
	4 Important	4 Reliable
	5 Very Important	5 Certain
	Your rating: 4	Your rating: 5
Explain your Reasoning:		
Comments? (optional):		
Reasoning/comments provided by some of your classmates in Round 2:		

No more than two sentences

Use this box if you wish to comment on an item (optional)

Rate each statement on both scales by typing in a number here. Please enter whole numbers only (i.e. no ratings of 3.5, 4.2, 4.7, etc.)

RECENT CHANGES TO THE H-1B VISA PROGRAM AND THE FUTURE OF AGENCY DEFERENCE

Sejal Singh, J.D.*

I. INTRODUCTION

The H-1B visa program as it exists today was created by the Immigration Act of 1990.[1] The program allows American employers to obtain the temporary services of foreign nationals in professions that require highly specialized knowledge and attainment of a bachelor's degree or higher degree in a specialty occupation.[2] Leading businesses rely heavily on H-1B visas to import talented and educated foreign nationals. In fact, the program has been so popular that in each of the past five years, the H-1B visa cap has been reached within a week of the application period opening.[3]

However, on April 18, 2017, President Trump signed an executive order, Buy American and Hire American.[4] The order was expressly issued to create higher wages and employment rates for U.S. workers and to protect their economic interests by rigorously enforcing and administering the immigration laws.[5] But in an effort to implement the order, U.S. Citizenship and Immigration Services (USCIS), the agency in charge of administering the country's naturalization and immigration system, issued decisions leading to a dramatic increase in both the number of denials for H-1B petitions and requests for evidence (RFEs).[6] These decisions are profoundly impacting businesses trying to secure employment-based visas for their foreign workers while threatening to disrupt significant sections of the U.S. economy that depend on these workers.

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[1] Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 1990.

[2] 8 U.S.C. § 1184(h)(3) (2015).

[3] Neil G. Ruiz, *Key facts about the U.S. H-1B visa program,* Pew Research Center (Apr. 27, 2017), https://www.pewresearch.org/fact-tank/2017/04/27/key-facts-about-the-u-s-h-1b-visa-program/.

[4] Buy American and Hire American, 82 Fed. Reg. 18837 (Apr. 21, 2017).

[5] *Id.* § 2(b).

[6] *H-1B Denials and Requests for Evidence Increase Under the Trump Administration*, National Foundation for American Policy 1 (July 2018), https://nfap.com/wp-content/uploads/2018/07/H-1B-Denial-and-RFE-Increase.NFAP-Policy-Brief.July-2018.pdf.

Therefore, there is a strong argument that courts should reduce deference to agency decision-making especially under the separation of powers doctrine where courts traditionally asserted the power to construe and interpret statutes when the need arose in cases before them. In fact, over the past few years, courts have increasingly criticized the practice of allowing agencies rather than courts to interpret ambiguous statutes and rules. These criticisms are particularly relevant in the immigration context given the high economic, political, and human rights issues at stake and the recent influx of immigration cases in federal courts.

From these developments, this article provides an overview of the H-1B visa category and its importance to the American economy. This is followed by a discussion of the Buy American and Hire American executive order and actions by the USCIS that have altered the immigration rules and policies. Finally, the article concludes with an analysis of the deference doctrines created by case law and argues for the reduction in the strength and scope of those doctrines, due in part to the separation of powers doctrine.

II. ORIGINS OF THE H-1B CATEGORY

Congress established the H-1B program so that American employers could hire highly-skilled working professionals to fill critical gaps in the U.S. labor markets. The current H-1B program is the product of the McCarren-Walter Act of 1952.[7] That Act created the H-1 program for workers of "distinguished merit and ability."[8] Case law established two ways foreign workers could meet the "distinguished merit and ability" standard: first, by demonstrating they were a "member of the professions"[9] or second, by showing they were a person of "prominence"[10] in his or her field.

However, the H-1 visa was revamped in the Immigration Act of 1990 to create the H-1B visa. This Act was enacted to meet the technological explosion of the 1990's and was met with positive feedback from the public and business sectors.[11] However, the Act significantly modified the H-1 category in several ways. First, the 1990 Act created the legal concept of

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[7] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 101(a)(15)(H)(i), 66 Stat. 163 (amended 1990).
[8] *Id.* at 168.
[9] In re Essex Cryogenics Indus. Inc., 14 I. & N. Dec. 196, 197 (Dep. Assoc. Comm'r 1972) (holding that "a person who is qualified as a member of the professions qualifies as a person 'of distinguished merit and ability'").
[10] In re Shaw, 11 I. & N. Dec. 277, 280 (Dist. Dir. 1965) (requiring H-1 beneficiaries to possess a "degree of skill and recognition substantially above that ordinarily encountered").
[11] Leah Phelps Carpenter, *The Status of the H-1b Visa in These Conflicting Times*, 10 Tulsa J. Comp. & Int'l L. 553, 559–60 (2003).

specialty occupation to replace the legal standard of being a *member of the professions*. *Specialty occupation* is defined as an occupation requiring: A. theoretical and practical application of a body of highly specialized knowledge, and B. attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.[12] Furthermore, if a state license is required to practice in the occupation, the applicant must obtain that license.[13] Some examples of a *specialty occupation* mentioned in subsequent federal regulations include architecture, engineering, mathematics, physical sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts.[14]

Another major change in the Immigration Act of 1990 is that unlike the prior H-1 counterparts, where workers were required to prove that their duties were temporary in nature and that they intended to eventually return to their home country, the 1990 Act created the concept of dual intent. This means that H-1B workers may lawfully pursue permanent residency while maintaining their H-1B status.[15] The purpose of this change was to bring in permanent workers rather than temporary workers.[16] Therefore, although H1-B visas holders are required to remain in the United States temporarily, they are also allowed to file green card applications and attempt to reside permanently in the United States.

In addition, the Immigration Act of 1990, placed numerical limitations on the number of H1-B petitions that can be approved each fiscal year. Congress has both increased and decreased these limitations over the past twenty years. Currently, the number of noncitizens who may be provided H1-B status is 65,000.[17] Furthermore, 20,000 additional H1-B visas are available for individuals who obtain a master's degree or higher from a U.S. University, and workers at universities and government research laboratories are exempt from all quotas.[18] Despite the caps, d**emand for H-1B workers has boomed in recent years.** The number of applications rose from 124,000 for fiscal 2014 to 236,000 in 2017, before dropping to 199,000 for fiscal year 2018. By contrast, from 2000 to 2013 the visa cap was reached only twice, in 2008 and 2009.[19]

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[12] 8 U.S.C. § 1184(i)(1) (2015).
[13] *Id.* § (i)(2)(A).
[14] 8 C.F.R. § 214.2(h)(4)(ii) (2019).
[15] *Id*. § 214.2(h)(16)(i).
[16] 136 Cong. Rec. H8637 (daily ed. Oct. 2, 1990) (statement of Rep. Bruce Morrison (D.-Conn.), the chief sponsor of the legislation in the House of Representatives).
[17] 8 U.S.C. § 1184(g)(1)(A)(vii) (2015).
[18] *Id*. §1184(g)(5).
[19] Ruiz, *supra* note 3.

III. THE H-1B PROCEDURE

To sponsor a foreign worker under the H-1B program, employers first submit a Labor Condition Application (LCA) with the Department of Labor attesting that no U.S. citizen worker would be displaced by the prospective foreign worker.[20] The employer must also state they will pay the nonimmigrant workers at least the local prevailing wage or the employer's actual wage paid by the employer to others with similar qualifications, whichever is higher.[21] The employer must also: offer benefits on the same basis as for U.S. workers; provide working conditions that will not adversely affect the working conditions of workers similarly employed; not employ an H-1B worker at a location where a strike or lockout in the occupational classification is occurring; and provide notice of the employer's intent to hire H-1B worker.[22] The Department of Labor will determine whether the potential H-1B employee "qualifies to perform services in the specialty occupation."[23]

Once the Department of Labor approves and certifies the LCA, the employer then files the I-129 petition with USCIS to sponsor the foreign national as an H-1B nonimmigrant.[24] The application is reviewed by USCIS before the State Department interviews the foreign worker and issues the visa. The program allows employers to hire foreigners to work for up to six years in jobs, and workers' employment may be extended if they have green card applications pending.[25] However, employers who want an H-1B worker for the entire six-year period have to file at least one application for an extension of stay.

IV. H-1B VISA AND THE U.S. ECONOMY

The H-1B program and the subsequent regulations, policies, and procedures reflect a delicate balance of two approaches. The first approach is an attempt by business leaders, government leaders, and various immigrant rights advocates to advance the American economy by encouraging foreign professionals from around the world to come to the U.S. The second approach attempts to protect American workers and wages from foreign labor competition through procedures such as the Department of Labor

[20] 8 C.F.R. § 214.2(h)(4)(i)(B).
[21] 8 U.S.C. § 1182(n) (2013).
[22] *Id.*
[23] 8 C.F.R. § 214.2(h)(4)(i)(B)(2).
[24] *Id.* § 214. 2(h)(2)(i)(A).
[25] 8 U.S.C. § 1184(g)(4).

certification process, the congressional yearly quota, and most recently the Buy American and Hire American executive order. But many argue these restrictions are unnecessary and do more harm than good for the economy, especially in the technologically mobile society we live in today.

Research shows that the H-1B program strengthens the economy by meeting the labor shortages in technology and other highly specialized fields, and by furthering innovation and research. According to the National Foundation for American Policy, four out of our six high-profile U.S. tech companies, Amazon (2,515), Microsoft (1,479), Intel (1,230), and Google (1,213) were among the top ten employers approved for H-1B petitions for initial employment in FY 2017.[26] Furthermore, these companies match up with the U.S. companies that spend the most on research and development (R&D), which is vital to the country's economic growth.[27] In addition, although nearly two-thirds of requests for H-1B workers are for STEM occupations, there is a high demand for workers in healthcare, business, finance, and life sciences industries. HTC Global, Wal-Mart, Merrill Lynch, Educational Testing Service, Caterpillar Inc., Credit Suisse, JPMorgan Chase & Co., Bank of America, Wells Fargo Bank, and the Mayo Clinic have been top H-1B employers as well.[28]

H-1B workers also tend to positively impact job creation and wages even for U.S. workers. From the creation of the H-1B program in 1990 to 2010, H-1B-driven increases in STEM workers were associated with a significant increase in wages for college-educated, U.S. born workers in 219 U.S. cities.[29] The median salary of H-1B workers (as measured in 2016 dollars) rose from $69,455 in FY 2007 to $80,000 in FY 2016.[30] Furthermore, the median salary of all computer and mathematical workers (foreign-born and native-born) grew from $73,979 to $75,036 during the same period.[31] Research indicates that an increase in H-1B visas could create an estimated 1.3 million new jobs and add around $158 billion to Gross Domestic Product in the United States by 2045.[32] Furthermore, H-1B visa holders come to the U.S. not just as employees but also as employers. In a

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[26] *H-1B VISAS BY The NUMBERS: 2017–18*, National Foundation for American Policy, 7 (Apr. 2018), https://nfap.com/wp-content/uploads/2018/04/H-1B-Visas-By-The-Number-FY-2017.NFAP-Policy-Brief.April-2018.pdf.
[27] *Id.*
[28] *The H-1B Visa Program: A Primer on the Program and Its Impact on Jobs, Wages, and the Economy*, American Immigration Council (Apr.16, 2019), https://www.americanimmigrationcouncil.org/research/h1b-visa-program-fact-sheet.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*

study of immigrant entrepreneurship in America, around 25% of U.S. firms are founded by immigrants, and this share rises to above 40% in states like California and New York. These immigrant-founded firms provide jobs and innovations to the U.S. economy, positively impacting the lives of natives.[33]

From the research, it is clear that expanding the H-1B cap will expand economic growth and job creation. Thus, business leaders, particularly those in the high-tech industry heavily criticize the current restrictions. They contend the restrictions create anxiety for thousands of their employees while threatening to disrupt their companies' operations.[34] In a jointly signed letter to Kirstjen Nielsen, the former secretary of homeland security, leaders from many of the largest companies, including Timothy D. Cook of Apple, Ginni Rometty of IBM, Jamie Dimon of JPMorgan Chase, Laurence Fink of BlackRock, and Marc Benioff of Salesforce, spoke out against President Trump's immigration policies.[35] They called the enforcement guidelines promulgated by the USCIS "arbitrary and inconsistent" thereby discouraging talented and highly skilled individuals from pursuing career options in the U.S. and undermining the economic growth and competitiveness of the country.[36] In fact, reports find that many foreign professionals are moving to countries like Canada where in 2017 Prime Minister Justin Trudeau's government launched the Global Talent Stream, a program designed to fast-track work authorization for those with job offers in high-demand realms of science and technology.[37]

Concerned political leaders also recognize the need for highly-skilled workers to work in the United States and many state that the current cap does not reflect the demand for services from U.S. employers. According to a recent jobs report, although the U.S. has the strongest labor market that it has seen in decades,[38] there is a severe shortage of STEM workers especially in

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[33] Sari Pekkala Kerr & William R. Kerr, *Immigrant Entrepreneurship in America: Evidence from the Survey of Business Owners 2007 & 2012,* 2 (Apr. 2018), https://www.hbs.edu/faculty/Publication%20Files/18-098_2d797478-6174-4cd0-9b3d-a807d3c1dfaf.pdf.

[34] Chuck Robbins et al., *Letter to Department of Homeland Security on Immigration Policies*, 1 (Aug. 23, 2018), https://www.businessroundtable.org/letter-to-department-of-homeland-security-on-immigration-policies.

[35] *Id.*

[36] *Id.*

[37] Emily Rauhala, *Trump's immigration policy has foreign tech talent looking north of the border*, The Washington Post (Jan 11, 2019), https://www.washingtonpost.com/world/the_americas/trumps-immigration-policy-has-foreign-tech-talent-looking-north-of-the-border/2019/01/10/c199bf4a-03bb-11e9-958c-0a601226ff6b_story.html?utm term=.ef45fdd51442.

[38] Bureau of Lab. Stat. Rep. (May 3, 2019 8:30 am), https://www.bls.gov/news.release/empsit.nr0.htm.

rust belt states such as North Dakota, South Dakota, Iowa, and Nebraska.[39] In some of these states, there are as many as fifteen job postings for every unemployed STEM worker.[40] In response to this type of shortage, Republican Senators Orrin Hatch and Jeff Flake introduced the Immigration Innovation or "I-Squared" bill, which would allow for an expansion of the H-1B program.[41] The bill would allow an additional 110,000 H-1B visas to be available, if vacancies remained after the initial visa cap was met, to continue to provide work authorization for spouses of H-1B visa holders, and remove arbitrary per-country limits for employment-based green cards and adjust caps for family based green cards.[42] The bill would also raise the minimum salary companies pay their employers.[43] Unfortunately, many predict the bill will be lost in the current divisive immigration debate even though the bill aims to balance the need for highly-skilled workers with protecting the interests of American workers.

If restrictions continue to be placed on the H-1B program, business leaders and government officials fear that American companies will move projects outside of the U.S. where skilled workers are more available, and that smaller business will never be able to succeed, or that the next technology company will not be created in the United States, but rather overseas. Yet, despite these concerns, one recent step to limit the H-1B program in favor of the fraud-based approach is the Buy American and Hire American executive order.

V. BUY AMERICAN AND HIRE AMERICAN

The Buy American and Hire American order aims to protect American workers by creating higher wages and employment rates for U.S. workers.[44] It contains a clause specifically addressing the H-1B program, and calls on the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security to propose reforms to ensure that H-1Bs are awarded to the most-skilled or highest-paid applicants.[45] It also directs these

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[39] *Sizing Up the Gap in our Supply of STEM Workers*, New American Economy Research Fund (Mar. 29, 2017), https://research.newamericaneconomy.org/report/sizing-up-the-gap-in-our-supply-of-stem-workers/.
[40] ***Id.***
[41] **Immigration Innovation Act of 2018, S.2344, 115th Cong. (2018).**
[42] S. 2344 §§ 101-206.
[43] S. 2344 § 206.
[44] *See supra* note 4.
[45] *See supra* note 4, § 5(b).

agencies to propose new rules and issue guidance to combat fraud and abuse in the U.S. immigration system.[46]

While the Buy American, Hire American executive order is stated in the positive, as directing federal agencies to ensure that H-1B visas are awarded to the most-skilled or highest-paid beneficiaries, the negative corollary is the implicit directive that USCIS must deny H-1B petitions for beneficiaries who are less skilled or less highly compensated despite meeting the legal requirements for H-1B classification. It is this directive that USCIS seems to be carrying out. According to a recent report from the National Foundation for American Policy, the rate of H-1B denials in the third quarter of Fiscal Year 2017 (FY 2017) was 15.9% and rose to 22.4% the following quarter (a 41% increase).[47] The report also finds that the number of H-1B RFEs issued in the first, second, and third quarters of FY 2017 combined totaled 63,599 while the fourth quarter of FY 2017 alone resulted in issuance of roughly the same number, i.e., 63,184. This represents a roughly 67% increase in the total number of H-1B RFEs during the months of July, August, and September of 2017.[48] USCIS is denying petitions and prioritizing higher skilled workers based on their construction of the immigration statute and rules and more specifically by changing the selection process for H-1B petitions, narrowing the definition of specialty occupation, and requiring additional evidence for third party placements.

A. *Selection of H-1B Petitions*

First, to meet the mandate of the executive order and to prioritize higher-skilled, higher-paid workers, USCIS reversed the order by which they select H-1B petitions.[49] Previously, when USCIS received more H-1B petitions than the number permitted under the annual statutory caps, petitions were automatically subjected to a lottery system, whereby USCIS randomly selected the advanced degree exemption first followed by petitions under the regular cap. Effective April 1, 2019, USCIS now selects H-1B petitions submitted on behalf of all beneficiaries under the regular cap, including those that may be eligible for the advanced degree exemption. USCIS then selects

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[46] *See supra* note 4, § 5(a).
[47] H-1B DENIALS AND REQUESTS FOR EVIDENCE INCREASE UNDER THE TRUMP ADMINISTRATION, 1 (July 2018), https://nfap.com/wp-content/uploads/2018/07/H-1B-Denial-and-RFE-Increase.NFAP-Policy-Brief.July-2018.pdf.
[48] ***Id.*** **at 1.**
[49] *See* U.S. Citizenship & Immigr. Servs., News Release on Final Rule for a More Effective and Efficient H-1B Visa Program (Jan. 30, 2019), https://www.uscis.gov/news/news-releases/dhs-announces-final-rule-a-more-effective-and-efficient-h-1b-visa-program.

from the remaining eligible petitions to reach the master's cap.[50] Changing the order by which USCIS counts these allocations will likely increase the number of petitions for beneficiaries with a master's or higher degree from a U.S. institution of higher education.[51] Specifically, the change is estimated to increase the number of advanced-degree holders by 16 percent, or 5,340 workers each year according to USCIS.[52]

However, Congress designed the H-1B category to award visas to anyone who qualifies for a job offer with a U.S. employer in a specialty occupation. Generally, any U.S. job that requires a bachelor's degree in a specific specialty for entry into the profession qualifies a foreign national to obtain the H-1B visa classification. The H-1B visa category was not legislatively designed to award visas to the most-skilled or highest-paid beneficiaries. Thus, changing the order by which H-1B visas are selected in favor of advanced degree holders appears contrary to the plain language of the Immigration and Nationality Act.

B. *Narrowing the Definition of "Specialty Occupation"*

USCIS increased the number of denials and RFEs in part by limiting the term *specialty occupation*. For example, in a line of cases, USCIS denied H-1B petitions for the proposition that the term *degree* in the statute and regulations refers not to just any baccalaureate or higher degree but to one in a specific specialty that is directly related to the occupation.[53] Although a general-purpose degree without more will usually not justify a finding that a position is a specialty occupation, federal courts have held that positions may be specialty occupations even where there is more than a single acceptable degree so long as the acceptable degrees are closely related.[54] Despite multiple court rulings on this issue, USCIS continues to assert this narrow reading of specialty occupation.

USCIS' 2017 computer programmer memo further limits what is considered a specialty occupation.[55] The memo rescinds prior guidance indicating that a computer programmer is a specialty occupation, based on

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[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *See* Royal Siam Corp. v. Chertoff, 484 F. 3d 139, 80 A.L.R. Fed.2d 487 (1st Cir. 2007).
[54] *See* Raj and Co. v. U.S. Citizenship and Immigration Services, 85 F. Supp. 3d 1241 (W. D. Wash. 2015).
[55] *See* U.S. Citizenship & Immigr. Servs., Policy Memorandum on the Rescission of the December 22, 2000 Guidance memo on H-1B computer related positions, 2 (Mar. 31, 2017), https://www.uscis.gov/sites/default/files/files/nativedocuments/PM-6002-0142-H-1BComputerRelatedPositionsRecission.pdf.

evolutions of the job and requirements over time. Although a higher level or more complex programmer jobs may be a specialty occupation, a computer programmer is not categorically a specialty occupation since an individual with an associate's degree may enter the occupation.[56] However, in making this determination, adjudicators are incorrectly directed to apply the wage level designated by the petitioner in their Department of Labor certification. In particular footnote 6 of the memo states:

> Officers are reminded that "USCIS must determine whether the attestations and content of [a Labor Condition Application (LCA)] correspond to and support the H-1B visa petition." See Matter of Simeio Solutions, LLC, 26 I&N Dec. 542, 546 (AAO 2015). Accordingly, USCIS officers must also review the LCA to ensure the wage level designated by the petitioner corresponds to the proffered position. If a petitioner designates a position as a Level I, entry-level position, for example, such an assertion will likely contradict a claim that the proffered position is particularly complex, specialized, or unique compared to other positions within the same occupation.[57]

This interpretation of the guidelines is problematic since the wage level of a position has no bearing on whether a position is a specialty occupation. The law was not written to issue visas only to those who are higher compensated as the policy memo insinuates. As the Administrative Appeals Office noted, a job that requires a bachelor's degree can still fall into the wage level 1 category and at the other end, a higher wage level does not necessarily mean that an occupation qualifies as a specialty occupation if that position does not require at least a bachelor's degree or higher.[58]

C. *Third-Party Placements*

Finally, USCIS is denying petitions and requesting additional evidence in cases in which the beneficiary is employed at a worksite other than

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[56] *Id.*
[57] *Id.*
[58] Matter of B-C-, Inc., Non Precedent Decision of the Administrative Appeals Office, (Jan. 25, 2018), https://www.uscis.gov/sites/default/files/err/D2%20-%20Temporary%20Worker%20in%20a%20Specialty%20Occupation%20or%20Fashion%20Model%20(H-1B)/Decisions_Issued_in_2018/JAN252018_01D2101.pdf.

petitioner's normal place of business.[59] Under the Trump administration, USCIS published an additional memorandum regarding third-party H-1B worksite petitions. The memo notes that in order to for an H-1B petition involving a third-party worksite to be approved, the petitioner must show by a preponderance of evidence that among other things, the beneficiary will be employed in a specialty occupation and the employer will maintain an employer-employee relationship with the beneficiary for the duration of the requested validity period.

To reduce the likelihood of violations, USCIS requires that third-party petitioners provide copies of contracts and work orders between the petitioner and the company at whose worksite the beneficiary will perform the qualifying duties to ensure that work is available for the duration of the petition period. The petition validity will be limited to the duration of such qualifying contracts in place at the time of filing.[60]

This scenario often arises in the information technology industry and, in practice, makes consulting firms' business models unworkable. Many contracts and work orders are extremely limited in duration, such as six months. Although they are renewed in six-month increments for years, the petitioner cannot document that this will occur. Therefore, USCIS will only issue a six-month approval notice. This makes premium processing a necessity but with one order temporarily rescinding the option of paying for faster application processing, this made the process especially burdensome for consulting firms who employ a large number of H-1B workers.

USCIS' implementation of the Buy American and Hire American executive order reflects a change in their interpretation and application of the immigration statute and their own rules and regulations. But with the Supreme Court moving immigration cases more firmly into the mainstream of administrative law, the agency deference doctrine, a longstanding principle of administrative law, has guided courts in reviewing agency action even in the immigration context. This doctrine was created by a series of Supreme Court cases discussed below, and requires courts to respect an agency's interpretation of an ambiguous statute if it is reasonable and to defer to an agency's interpretation of its own rules and regulations unless it is plainly erroneous or inconsistent with the regulation.[61] Increasingly,

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[59] *See* U.S. Citizenship & Immigr. Servs., News Release on Protections to Combat H-1B Abuses (Feb. 22, 2018), https://www.uscis.gov/news/news-releases/uscis-strengthens-protections-combat-h-1b-abuses.

[60] *Id.*

[61] The agency deference doctrine derives from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which instructed reviewing courts evaluating agency interpretations of statutes to consider first whether the meaning of the relevant statute is clear, and if it's not, then whether the agency's resolution of the statutory ambiguity is

however, the Court is moving toward reclaiming some of its interpretive power on the ground that the agency deference doctrine violates the separation of powers doctrine.

VI. SEPARATION OF POWERS DOCTRINE

The powers of the legislature, judiciary, and executive are identified in the United States Constitution. Although the powers may overlap at the margins, the Constitution and the rule of law serve to embody a system of separation of powers. These checks and balances protect individuals from arbitrary and oppressive exercise of power from one branch of government. But historically the judicial and executive branches have struggled over the scope and meaning of their respective powers especially in the current administrative state. This section discusses the judicial interpretive role in administrative law cases and argues that, under the separation of powers theory, the excessive concentration of power placed in administrative agencies goes beyond the scope of their authority and represents a usurpation of judicial power.

Article III of the Constitution vests the judicial power of the United States with the Supreme Court.[62] This provision is generally interpreted under *Marbury* and confers on the courts the authority "to say what the law is," [63] including the ability to override the executive and construe statutes. Under this framework, it is the judiciary's role to interpret what a statute means rather than deferring to an agency's interpretation of the law unless foreclosed by the statute.

This separation of powers doctrine was reinforced in 1946 when Congress enacted the Administrative Procedure Act (APA).[64] The APA was enacted in response to the growing number of agencies created with the New Deal. The APA set forth the basic structure delineating the power between the courts and agencies and reserved for the courts the powers "to decide all relevant questions of law" and interpret constitutional and statutory provisions."[65] The APA further directed courts to invalidate agency actions

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reasonable and Auer v. Robbins, 519 U.S. 452 (1997), which instructed reviewing courts to defer to an agency interpretation of its own rules and regulations unless plainly erroneous or inconsistent with the regulation.

[62] U.S. Const. art. III, § 1.

[63] Marbury v. Madison, 5 U.S. 137, 177-78 (1803).

[64] Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 5510559 (2006)).

[65] *Id.*

that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[66]

Following the enactment of the APA, courts exercised their power to interpret statutes and to mark the boundaries of agency authority, while at the same allowing for agencies to exercise their expertise and to design policies. In essence, a*gencies did not receive deference when they resolved issues involving pure questions of law, but did receive some level of deference when they resolved issues involving questions of law application.*

Although the Supreme Court dramatically increased the executive's power to make and interpret the law since its 1984 decision in Chevron v. Natural Resources Defense Council (*Chevron*),[67] and subsequently in *Auer v. Robbins,*[68] the Court recently narrowed the scope of judicial deference to agency interpretation in the case of *Kisor v. Wilkie.*[69] The Court's decision in *Kisor* makes this an opportune time to reassess *deference doctrines and move toward restoring the judiciary's role as an important check on the executive branch. This Part discusses the evolution of the deference doctrines created by case law and argues that interpretive power should be restored to the judiciary rather allowing administrative agencies to interpret and state what the law is.*

A. *Skidmore Doctrine*

Skidmore v. Swift & Co.[70] is a 1944 case where the Supreme Court first announced the level of deference that should be accorded to an administrative agency. There, seven employees of the Swift & Company packing plant in Fort Worth, Texas, brought an action under the Fair Labor Standards Act of 1938 to recover overtime, liquidated damages, and attorneys' fees.[71] The employees were required to stay on the packing plant's premises when they were not on the clock. In the action brought by the employees to recover overtime for the periods that they spent on call, the district court ruled that the time employees spent waiting to respond to alarms did not count as hours worked.[72] The Administrator, in contrast, argued that the calculation of working time should depend on the time employees are free to engage in personal activities while on call and the

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[66] 5 U.S.C. § 706(2)(A) (2006).
[67] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
[68] Auer v. Robbins, 519 U.S. 452 (1997).
[69] Kisor v. Wilkie, 139 S. Ct. 2400 (2019).
[70] Skidmore v. Swift & Co., 323 U.S. 134 (1944), *rev'd* 136 F. 2d 112 (5th Cir.1943).
[71] *Id.* at 136.
[72] *Id.*

number of consecutive hours the employee is on call without actively working.[73]

However, the United States Court of Appeals for the Fifth Circuit affirmed the lower court's decision and the employees appealed to the Supreme Court. The Supreme Court reversed and addressed the deference that should be accorded to an agency decision. The Supreme Court stated that while the rulings, interpretations and opinions of the Administrator are "not controlling upon the courts by reason of their authority, they do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." [74]

Furthermore, the court ruled that the weight given to an agency's decision will depend on the thoroughness of the agency's investigation, the validity of its reasoning, the consistency with earlier and later pronouncements; and other persuasive powers of the agency.[75]

The Skidmore doctrine allowed courts to exercise their power to interpret statutes and to mark the boundaries of agency authority, consistent with the separation of powers theory while at the same time allowing space for agencies to exercise their expertise and to design policies. However, in the decades following *Skidmore*, the Supreme Court appeared to equivocate on the scope of judicial interpretive authority, sometimes emphasizing judicial authority to interpret statutes and other times emphasizing deference to agency determinations. With the *Chevron* holding, the Court attempted to clarify the appropriate framework for courts' and agencies' interpretive roles but in the process shifted statutory interpretive power to administrative agencies.

B. *Chevron Doctrine*

In 1984, the Supreme Court issued a test most believed to replace the Skidmore test in the case of *Chevron v. Natural Resources Defense Council*.[76] There, a petition was filed to review an Environmental Protection Agency (EPA) order allowing states to treat all pollution-emitting devices within the same industrial grouping as though they were encased within a single bubble as a permissible construction of the term *stationary source* in the Clean Air Act Amendments.[77] The Court, in its opinion by Justice

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[73] *Id*.
[74] 323 U.S. at 140.
[75] *Id.*
[76] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
[77] *Id.*at 841-42.

Stevens upheld the EPA's interpretation and in doing so set a new legal standard:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter…If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on permissible construction of the statute.[78]

The Court also held that if Congress explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. If the delegation of authority is implicit, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." [79]

Therefore, under *Chevron*, a new political administration was authorized to change the interpretation of an ambiguous provision of a statute as long as it engaged in reasonable decision-making. In particular, the *Chevron* decision acknowledged that when Congress has declined to resolve an issue intentionally or unintentionally, policy-making responsibilities should be resolved directly by an accountable executive rather than judicial branch.

This standard was confirmed in the 2005 case of *National Cable & Telecommunications Association v. Brand X Internet Services.*[80] In *Brand X,* the Court addressed the scope of stare decisis over agency decision-making. In that case, the Supreme Court reversed the appellate court's holding where they rejected the Federal Communications Commission (FCC) interpretation of the term, *telecommunications* service, because it conflicted with prior Ninth Circuit precedent construing the same term.[81] The Supreme Court in its reasoning stated even agency interpretations inconsistent with prior agency precedent would be owed deference as an ambiguity existed in the statute and the agency's change in position was sufficiently justified.[82] *Brand X* has

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[78] *Id.* at 842-43.
[79] *Id.at 843.*
[80] Nat's Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005), rev'g Brand X Internet Servs. v. FCC, 345 F.3d 1120 (9th Cir. 2003).
[81] *Id.*
[82] *See id*. at 983.

been cited often in immigration cases and is one of the key tools for USCIS when arguing for deference in its interpretation of the immigration statute.

Brand X and *Chevron* in particular reshaped and restricted the judicial role in interpreting statutes. Although *Chevron* stated that "the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent," [83] the case mandated deference to reasonable agency interpretations where there was statutory silence or ambiguity.

C. *Auer Doctrine*

However, the Supreme Court in *Auer v. Robbins*[84] went a step further than the *Chevron* case and held that while *Chevron* refers to an interpretation of an agency statute, deference should also be accorded to an agency interpreting its own rules and regulations.

In *Auer*, the petitioners were sergeants and a lieutenant employed by the St. Louis Police Department in Missouri.[85] They sued respondents, the St. Louis Board of Police Commissioners for overtime pay they believed was owed to them under the Fair Labor Standards Act of 1938.[86] The respondents argued that the petitioners were exempt from overtime pay since they were paid on a salary basis, a test promulgated by the respondents.[87]

The District Court found for the respondents and on appeal, the Eighth Circuit Court of Appeals also rejected the petitioner's argument. The Supreme Court affirmed and in the process stated that an agency's interpretation is of controlling weight unless it is "plainly erroneous or inconsistent with the regulation." [88]

However since the *Auer* decision, several members of the Court have criticized or questioned the use of the *Auer* doctrine as a violation of the separation of powers theory. For example, in *Talk America, Inc. v. Michigan Bell Tel. Co.*,[89] although the Court found that the Federal Communications Commission's interpretation of its regulations was permissible because it was "neither plainly erroneous nor inconsistent with the regulatory text," Justice Scalia, in his concurring opinion, declared that he would have reached the same decision without relying upon *Auer*. He also observed: "It seems

[83] Chevron U.S.A. Inc., 467 U.S. at 843.
[84] Auer v. Robbins, 519 U.S. 452 (1997).
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.* at 461.
[89] Talk America, Inc. v. Michigan Bell Tel. Co., 564 U.S. 50 (2011).

contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well."[90] Notably, Justice Scalia stated that he would be receptive to reconsidering *Auer* in a future case.

More recently in *Perez v. Mortgage Bankers Assoc.*,[91] Justices Alito, Scalia, and Thomas pointedly questioned the continuing validity of *Auer*. In *Perez*, the appellee suggested that interpretive rules were entitled to *Auer* deference. The Court did not specifically address the argument, but observed that "[e]ven in cases where an agency's interpretation receives *Auer* deference, however, it is the court that ultimately decides whether a regulation means what the agency says."[92] In a concurrence, Justice Scalia observed that §706 of the APA specifically requires courts to clarify ambiguities in statutes and regulations.[93] As such, he would "restore the balance originally struck by the APA with respect to an agency's interpretation of its own regulations, not by rewriting the [a]ct in order to make up for *Auer*, but by abandoning *Auer* and applying the [a]ct as written."[94] Justice Thomas took his critique a step further:

> Interpreting agency regulations calls for that exercise of independent judgment. Substantive regulations have the force and effect of law.
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> ***
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> But the agency, as part of the Executive Branch, lacks the structural protections for independent judgment adopted by the framers, including the life tenure and salary protections of Article III. Because the agency is not properly constituted to exercise the judicial power under the Constitution, the transfer of interpretive judgment raises separation-of-powers concerns.[95]

Justice Alito in his concurring opinion wrote that Justice Scalia and Justice Thomas "offered substantial reasons why the [agency deference] doctrine may be incorrect" and he awaited a case to examine its validity.[96]

Nonetheless, the framework established in *Chevron* and *Auer* are still key in determining the validity of an agency's interpretation of a statute or

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[90] *Talk America*, 564 U.S. at 67 (Scalia, J., concurring).
[91] *Perez v. Mortgage Bankers Assoc.,* 135 S. Ct. 1199 (2015).
[92] *Id.* at 1208.
[93] *Id.* at 1211 (Scalia, J., concurring).
[94] *Id*. at 1212.
[95] *Id.* at 1219-1220 (Thomas, J., concurring).
[96] *Id.* at 1210-11 (Alito, J., concurring).

rule. However, in the recent Supreme Court case, *Kisor v. Wilkie*,[97] the Court reinforced and expanded the limitations of *Auer* deference, thus narrowing the scope of judicial deference to agency interpretation.

D. *Kisor v. Wilkie*

In *Kisor v. Wilkie*,[98] the Supreme Court was asked to overrule *Auer* and the related case *Bowles v. Seminole Rock & Sand Co.*[99] *Although* a narrow majority of the Court declined to overrule *Auer* in light of prior precedence, the Court imposed further limitations on its use leading Justice Gorsuch in his concurrence to characterize the *Auer* doctrine as "maimed and enfeebled"[100] and the opinion more of a "stay of execution than a pardon."[101]

The dispute underlying *Kisor* was whether the claimant, a veteran, was entitled to certain benefits for post-traumatic stress disorder. The Department of Veterans Affairs denied the claimant's request for those benefits. Its decision rested on the meaning of the word *relevant* in a regulation governing the reopening of the veterans' claims.[102] A panel of the Federal Circuit held that, as used in the regulation, *relevant* is ambiguous. Deferring under *Auer*, the panel gave the term the meaning given by the Board of Veterans Appeals, with the result that the claimant was denied the benefits he sought.[103]

The Federal Circuit denied the claimant's request for *en banc* rehearing, but three judges dissented from that decision.[104] They argued that "granting *Auer* deference to the [Department of Veterans Affairs'] interpretation of its own ambiguous regulations flies in the face of ... the longstanding canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."[105] According to the dissenters, there was no reason to apply *Auer* because applying the veteran

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[97] Kisor v. Wilkie, 139 S. Ct. 2400 (2019).
[98] Kisor v. Wilkie, 139 S. Ct. 2400 (2019).
[99] *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (declaring that "the ultimate criterion [in construing an ambiguous regulation] is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.")
[100] Kisor, 139 S. Ct. at 2425 (Gorsuch, J., concurring).
[101] *Id.*
[102] Kisor v. Shulkin, 869 F.3d 1360, 1367-68 (Fed. Cir. 2017).
[103] *Id.* at 1368.
[104] Kisor v. Shulkin, 880 F.3d 1378 (Fed. Cir. 2018) (en banc order).
[105] *Id.* at 1380. *See also Henderson v. Shinseki,* 562 U.S. 428, 441 (2011) (quoting *King v. St. Vincent's Hosp.,* 502 U.S. 215, 220 (1991)) for the proposition that the Court has long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.' "

friendly Armed Services canon should have resolved any doubts about the meaning of "relevant" in that case.[106] At the circuit level, then, *Kisor* boiled down to a disagreement about the proper order in which to apply conflicting principles of interpretation (including deference doctrines).

Kisor filed petition for writ of certiorari to the Supreme Court asking two questions. First, whether *Auer*, as well as the related case *Seminole Rock* should be overturned, and second, whether the canon of interpretation requiring courts to construe interpretive ambiguity in favor of veterans trumps *Auer* deference.[107] The Supreme Court granted the petition on the first question only.[108]

As to Kisor's specific case, the Court unanimously ruled to vacate the Federal Circuit's decision and remand to the Federal Circuit for reconsideration in light of the requirements set forth in the opinion.[109] However, when asked to overrule *Auer* and *Seminole Rock*, five justices, in an opinion written by Justice Kagan, held that doing so would be inappropriate in light of strong stare decisis considerations.[110] Before reaching that conclusion, however, Justice Kagan's majority opinion put in place a number of requirements on the doctrine.

First, a court should not apply *Auer* deference unless the regulatory text is "genuinely ambiguous."[111] This requires courts to exhaust all traditional tools of statutory construction taking into consideration the text, history, and purpose of a regulation.[112] Second, if ambiguity exits, an agency's regulatory interpretation must be reasonable.[113] That is, the reading must "come within the zone of ambiguity the court has identified after employing its interpretive tools."[114] This is a real test, and one that "an agency can fail."[115]

Third, deference must be appropriate.[116] Even if the court has determined that an agency has indeed offered a reasonable interpretation of its ambiguous regulation, the court must nonetheless determine whether providing *Auer* deference to that interpretation is appropriate. The Court

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[106] *See id.*
[107] Brief for Petitioner at 1, Kisor v. Wilkie, 139 S. Ct. 2400 (2019), (No. 18-15), 2018 WL 3239696.
[108] Order Granting Certiorari, Kisor v. Wilkie, No. 18-15, 139 S. Ct. 657, 2018 WL 6439837 (Dec. 10, 2018) (Mem.).
[109] Kisor, 139 S. Ct. at 2424.
[110] *Id.* at 2422.
[111] *Id.* at 2415.
[112] *Id*.
[113] *Id.*
[114] *Id.* at 2416.
[115] *Id.*
[116] *Id.*

offered three "especially important markers"[117] to aid courts in making that determination: the interpretation must emanate from an authoritative or official position; [118] the agency must have expertise in resolving the ambiguity;[119] and the agency's interpretation should not create an "unfair surprise" to the parties or disrupt their expectations by substituting one rule for another.[120]

In his concurrence, Justice Gorsuch, joined in relevant parts by Justices Thomas, Alito and Kavanaugh, agreed with the majority that the lower court had gotten Kisor's case wrong. Justice Gorsuch, however, rested his opinion on very different grounds.[121] He would have made the "easy" decision "to say goodbye" to *Auer* deference, finding that Auer cannot be reconciled with the APA and the Constitution.[122] In particular, Justice Gorsuch wrote that *Auer* violates the separation of powers doctrine under the Constitution by allowing the executive branch to make, enforce, and interpret the laws.[123] Further, the *Auer* deference allows an agency to "control a judge's interpretation of an existing and equally binding regulation"[124] and he warned against "placing a judicial *imprimatur* on what is, in fact, no more than an exercise of raw executive power."[125]

Although it is unclear at this point how the *Kisor* opinion will affect agency decision-making or how the courts will implement *Kisor* in practice, Chief Justice Roberts commented that the distance between *Auer*, as narrowed by the *Kisor* majority, and Justice Gorsuch's proposed return to *Skidmore* deference is "not as great as it may initially appear."[126] Moreover, the majority opinion did not touch upon *Chevron*. As Chief Justice Roberts properly pointed out, *Auer* deference issues are very different than those involved in *Chevron* deference.[127] C*hevron* requires courts to give deference to agency interpretations of charging statutes rather than an agency's own regulations like in *Auer*. Thus, there may be a similar challenge to *Chevron* in the near future, perhaps again altering the interpretive boundaries between courts and agencies.

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[117] *Id.*
[118] *Id.* at 2416-2417.
[119] *Id.* at 2417.
[120] *Id*. at 2417-2418.
[121] *Id*. at 2425 (Gorsuch, J., concurring).
[122] *Id*.
[123] *Id*. at 2438.
[124] *Id.*
[125] *Id.*
[126] *Id*. at 2424 (Roberts, C.J., concurring in part).
[127] *Id.* at 2425.

VII. CONCLUSION

Congress designed the H-1B visa program in 1990 to fulfill the labor shortages in the U.S., and to further innovation and research. Over the past twenty years, major businesses have been employing H-1B professionals with research showing the program positively impacting economic growth and wages even for American workers. However, since its establishment, the executive and legislative branches of government have attempted to reform the H-1B program in various ways to protect jobs for American workers and ensure salaries do not decrease due to the increase in foreign labor. Although many business leaders, political officials, and immigrants' rights advocates have heavily criticized the procedures put in place to limit the program, in April 2017, President Trump signed the Buy American and Hire American executive order. This order was expressly issued to protect jobs for American workers and ensure salaries do not decrease due to the increase of foreign labor. However, in an effort to implement the order, USCIS issued decisions incompatible with the legislative intent of the Immigration Act of 1990, and inconsistent with the agency's own regulations interpreting the statute.

Yet, under the current deference doctrines created by Supreme Court cases like *Chevron*, *Brand X*, and *Auer*, courts are forced to defer to agency discretion without an opportunity for meaningful oversight thereby violating the model of separation of powers. However, with the recent decision in *Kisor*, and the limitations imposed on *Auer*, the hope is that the judicial role will be strengthened to ensure administrative agencies like the USCIS reach their decisions using quality procedures especially in the H-1B context where deference issues have been of heightened significance in light of the Buy American and Hire American executive order.

THE RIGHT-TO-WORK BATTLE RAGES ON AT BOTH THE FEDERAL AND STATE LEVELS

Denise Oas*
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I. INTRODUCTION

American workers struggled to improve their working conditions in the 18th and 19th centuries. While employees could join unions and withhold their services from their employers during a dispute, if the employees exercised those rights, their employers could fire them. During hard economic times, it was more difficult for an employee to find work than it was for an employer to find another employee. Thus, employees were often wary of joining unions.

By creating the National War Labor Board in 1918, President Woodrow Wilson recognized the right of employees to organize in industrial unions and to collectively bargain through representatives of their own choosing.[1] However, as unions got progressively stronger, what started as an effort to promote peace between labor and management turned into a lengthy and difficult struggle, as some pushed back against what many have termed "compulsory unionism,"[2] preferring a right to work instead.[3]

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[1] NLRB, *Pre-Wagner Act Labor Relations*, *available at* http://www.nlrb.gov/who-we-are/our-history/pre-wagner-act-labor-relations (last visited May 31, 2019).

[2] See National Right to Work Committee, *Compulsory Unionism, available at* https://nrtwc.org/about/the-problem (last visited May 31, 2019).

[3] See National Right to Work Legal Defense Foundation. *Right to Work Frequently-Asked Questions, available at* http://www.nrtw.org/right-to-work-frequently-asked-questions/ for an explanation of right-to-work (last visited May 31, 2019).

While for many years a dormant issue, right-to-work has made a pronounced comeback in the twenty-first century. Between 1977 and 2011, three states passed such legislation: Idaho (1985), Texas (1993) and Oklahoma (2001).[4] Since then, Indiana (2012), Michigan (2012), Wisconsin (2015), and West Virginia (2016) have passed right-to-work laws.[5] In 2017, Kentucky became the twenty-seventh right-to-work state[6] and Missouri became the twenty-eighth right-to-work state,[7] meaning that at that time more than half of the states were right-to-work states. Some say that there is good reason to believe that this recent push to pass right-to-work laws could "profoundly change the future of American politics."[8]

This paper discusses a brief history of collective bargaining rights in the United States and how the right-to-work concept came to be recognized at the national level. It also explores the right-to-work controversy and highlights right-to-work battles at both the state and federal levels, the latter of which was impacted by the 2018 precedent-changing United States Supreme Court decision in the *Janus* case. Battles flared in many states, including Wisconsin, West Virginia, Kentucky, New Mexico, Illinois and Delaware where, following the passage of right-to-work laws, the union movement fought furiously for their repeals, and in Missouri, where the battle field moved from the state capital to the grass-roots level. It concludes with a prescriptive view of how the American labor movement can use the grass-roots approach to deal with right-to-work.

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[4] See National Conference of State legislatures, *Right-To-Work Resources*, *available at* http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx (last visited June 17, 2019).
[5] See *id.*
[6] Steve Bittenbender, *Kentucky Lawmakers Pass 'Right-to-Work' Legislation*, Reuters (January 7, 2017), *available at* https://reuters.com/article/us-kentucky-unions/kentucky-lawmakers-pass-right-to-work-legislation-idUSKBN14R0BN (last visited May 31, 2019).
[7] Reid Wilson, *Missouri Governor Signs Right to Work Law*, The Hill (February 2, 2017), *available at* https://www.thehill.com/homenews/state-watch/318072-missouri-governor-signs-right-to-work-law (last visited May 31, 2019).
[8] Sean McElwee, *How the Right's War on Unions is Killing the Democratic Party*, The Nation, January 22, 2018, available at https://www.thenation.com/article/right-to-work-laws-are-killing-democrats-at-the-ballot-box/ (last visited May 31, 2019).

II. NATIONAL HISTORY OF COLLECTIVE BARGAINING AND THE RIGHT-TO-WORK

A. *The National War Labor Board (NWLB)*

President Woodrow Wilson created the National War Labor Board in an effort to promote peace between labor and management during World War I.[9] The NWLB recognized employees' "right to organize in trade unions and to bargain collectively through chosen representatives."[10] While the NWLB lacked enforcement powers, both labor and management agreed to defer to mediation by the NWLB during the war.[11] Unfortunately, the truce ended with the conclusion of the war and the return to hostility between labor and management in the 1920s.[12]

B. *The National Labor Relations Act (NLRA)*

In 1935, Senator Robert Wagner introduced the National Labor Relations (Wagner) Act[13] to Congress, noting: "Democracy cannot work unless it is honored in the factory as well as the polling booth."[14] With its passage, the NLRA introduced a new national labor policy of encouraging collective bargaining "by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[15]

The NLRA provided employees the right to organize and bargain collectively,[16] and prohibited employers from interfering with employees' exercise of those rights.[17] While employers immediately mounted campaigns

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[9] NLRB, *Pre-Wagner Act Labor Relations*, *available at* http://www.nlrb.gov/who-we-are/our-history/pre-wagner-act-labor-relations (last visited May 31, 2019).
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] 29 U.S.C. §§151 et seq. (1935).
[14] NLRB, *80 Years of Protecting Employee Rights* at 10, *available at* https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1536/NLRB%2080th%20Anniversary.pdf (quoting Senator Robert F. Wagner in 1935, upon introducing the bill that was to become the National Labor Relations Act) (last visited May 31, 2019).
[15] 29 U.S.C. §151 (1935).
[16] 29 U.S.C. §157 (1935).
[17] 29 U.S.C. §158(a) (1935).

against the NLRA,[18] employees freely exercised their newfound rights and in the two years following the passage of the NLRA, the country experienced "incessant strikes and fear-inducing economic instability."[19] In 1945 alone, employee strikes resulted in an estimated 38 million man-days of lost labor.[20]

Many considered the Wagner Act to be radical legislation for its time.[21] Justifying such a view, Karl Klare, an early twentieth century labor writer, concluded that its aims were threefold: equalizing the balance of power between employers and workers, securing workers' right of association, and providing economic stimulation through supply and demand. It was, in effect, the "governmental blessing to powerful workers' organizations that were to acquire equal bargaining power with corporations, accomplish a redistribution of income, and subject the workplace to a regime of participatory democracy."[22] Such would represent a substantial threat to employers.

For the American labor movement, the NLRA set the table for the way labor relations would be conducted in the United States. U.S. national industrial relations policy has largely been centered on what is generally described as the Wagner Framework.[23] The framework creates an adversarial, or confrontational, model to formalizing the collective bargaining process. The parties to the model, union and employer/management, have fundamentally different philosophies, but in either case their position is based on self-interest. Unions are primarily looking at "getting a bigger piece of the employer's pie," while the employer is focusing on keeping labor costs to a minimum so that revenue will be maximized.[24] For over eighty years, the Wagner Framework has created the parameters for the union-management relations process.

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[18] NLRB, *80 Years of Protecting Employee Rights* at 26, *available at* https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1536/NLRB%2080th%20Anniversary.pdf (last visited May 31, 2019).
[19] *Id.* at 25.
[20] Jordan Ludwig, *The Passage and Events Surrounding the Taft-Hartley Act: An Analysis* at 2, JANUS (Spring, 2007), *available at* http://www.janus.umd.edu/issues/sp07/Ludwig_Taft-HartleyAct.pdf (last visited May 31, 2019).
[21] Raymond Hogler and Steven Shulman, *The Law, Economics, and Politics of Right to Work: Colorado's Labor Peace Act and Its Implications for Public Policy,* 70 U. Colo L. Rev. 871 (1999).
[22] Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 Minn. L. Rev. 265, 285 (1977).
[23] Steven Popejoy and Deni Oas, *An Environmental Approach to Union Decline* at 1, 2017 Proceedings, Academy of Legal Studies in Business *available at* http://www.alsb.org/wp-content/uploads/2017/12/DP-2017-Popejoy-An-Envtl-Approach-1.pdf (last visited May 31, 2019).
[24] *Id*. at 1.

C. *The Taft-Hartley Act*

"By 1947, the public no longer regarded organized labor as an underdog, but rather as having too much economic and political power."[25] This was the popular sentiment reflected throughout the Republican Party. While the NLRA prohibited certain employer labor practices, it had never addressed union labor practices. Congress thus sought a redistribution of power which would reflect the changing political waters.[26] Seeking to balance the scales, Republican Senator Robert Taft and Republican Congressman Fred Hartley, Jr. introduced a bill in Congress that would prohibit certain union labor practices.[27] The Labor-Management Relations Act of 1947, also known as the Taft-Hartley Act, amended the NLRA by giving employees the right to refrain from joining labor organizations[28] and by prohibiting unions from interfering with employees' exercise of that right.[29] The Taft-Hartley Act also authorized states to adopt right-to-work laws that would prohibit agreements requiring membership in a labor organization as a condition of employment.[30]

III. THE RIGHT-TO-WORK CONTROVERSY

The right-to-work controversy stems from disagreements about whether or not an employee should be forced to join a union or to pay union dues. Right-to-work supporters argue that the laws are necessary to eliminate "forced unionism" and to allow workers the "right to work" without forcing them to pay union dues.[31] Union supporters, on the other hand, argue that right-to-work laws allow "free riders" to reap the benefits of union representation without paying for them.[32] The stakes are high for unions, employers and employees, and whenever a state is considering right-to-work legislation, both sides engage in extensive lobbying and advertising.

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[25] NLRB, *80 Years of Protecting Employee Rights* at 31, *available at* https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1536/NLRB%2080th%20Anniversary.pdf (last visited May 31, 2019).
[26] *Id.* at 31.
[27] *Id*. at 32.
[28] 29 U.S.C. §157 (1947).
[29] 29 U.S.C. §158(b)(1) (1947).
[30] 29 U.S.C. §164(b) (1947).
[31] Celeste Bott, *Right to Work: Here's What you Need to Know*, St. Louis Post-Dispatch (February 2, 2017), *available at* http://www.stltoday.com/news/local/govt-and-politics/right-to-work-here-s-what-youneed-to-know/article_59b15bbe-2096-5c85-81c2-0e957da5c5be.html (last visited May 31, 2019).
[32] *Id.*

Historically, the *closed shop* (defined as a union security agreement which required union membership as a condition of employment) had been used by the NLRA during World War II as an enticement offered to labor unions in exchange for maintaining labor discipline.[33] Following the war, the government exercised greater control over labor unions, and with the passage of Taft-Hartley, outlawed closed shops. This led to the emergence of other types of security agreements such as the *union shop* and the *agency shop*, both of which were less restrictive at forcing workers to join a union.[34]

As the right-to-work battle spreads across the country, right-to-work supporters seem to be gaining the upper hand, no doubt encouraged by big Republican victories in the fall 2016 national and state elections. As mentioned earlier, Kentucky[35], and Missouri [36] both passed right-to-work-laws in 2017, reflecting Republican political power in both states.

There are statistical arguments both supporting and opposing right-to-work laws. Right-to-work supporters can point to studies such as a NERA Economic Consulting Group report comparing right-to-work states and non-right-to-work states, finding that: employment grew faster in right-to-work states, seven of the ten states with the highest GDP growth rates were right-to-work states, and personal income grew faster in right-to-work states.[37] Also, Zax and Ichniowski (1991) found that there was negative impact on unions caused by the presence of free riders.[38] Right-to-work opponents on the other hand can point to contradictory findings, such as Gould and

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[33] Denise Oas, Mary McCord, and Steven Lance Popejoy, *Right-to-Work: A Legal Rights Perspective*, 67 Labor Law Journal 437 (2016).

[34] *See also* Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 Mich. L. Rev. 169 (2015) (for a discussion of how it has become more difficult to compel workers to join unions due to less restrictive union security agreements), and Ariana R. Levinson, Alyssa Hare, and Travis Fiechter, *Federal Preemption of Local Right-to-Work Ordinances*, 54 Harv. J. on Legis. 457 (2017) (for a mildly controversial discussion that union shops no longer exist as of Communication Workers v. Beck, 487 U.S. 735 (1988)).

[35] Steve Bittenbender, *Kentucky Lawmakers Pass 'Right-to-Work' Legislation*, Reuters (January 7, 2017), *available at* https://reuters.com/article/us-kentucky-unions/kentucky-lawmakers-pass-right-to-work-legislation-idUSKBN14R0BN (last visited May 31, 2019).

[36] Reid Wilson, *Missouri Governor Signs Right to Work Law*, The Hill (February 2, 2017), *available at* https://www.thehill.com/homenews/state-watch/318072-missouri-governor-signs-right-to-work-law (last visited May 31, 2019).

[37] See Jeffrey A. Eisenach, *Right-to-Work Laws: The Economic Evidence* at 4*,* Nera Economic Consulting (June, 2015), *available at* http://www.nera.com/content/dam/nera/publications/2015/PUB_Right_to_Work_Laws_0615.pdf (last visited May 31, 2019).

[38] Jeffrey S. Zax and Casey Ichniowski, *Excludability and Effects of Free Riders: Right-to-Work Laws and Local Public Sector Unionization*, 19 Public Finance Quarterly 293 (1991).

Kimball (2015) (finding lower wages in right-to-work states),[39] Mishel (2001) (also finding lower wages in right-to-work states),[40] and Kendrick (2001) (finding higher taxes in right-to-work states).[41]

Much of the debate on the right-to-work issue focuses on the power of a business to make its own decisions, the power of government to stop forced unionism, and the power of a union to protect its financial base. However, while the stakes are high for business, government and labor, the right to work is a personal issue, too. Both sides claim that fairness is on their side. Right-to-work supporters argue that it is not fair to force workers to join a union or to pay union dues when they do not want to be a part of the union.[42] Right-to-work opponents, on the other hand, argue that it's not fair for free riders to reap the benefits of union representation without paying for them.[43]

IV. RIGHT-TO-WORK BATTLES

A. *Federal Battles*

1. Executive Branch

In 2016, then presidential candidate Donald Trump said right-to-work is "better for the people"[44] because workers should be permitted to decide for themselves whether or not they want to support unions.[45] Such pro right-to-work leanings, however, brought about an international response. During NAFTA negotiations in 2017, Canadian officials pressed the United States to pass a national law prohibiting states from passing right-to-work legislation

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[39] See Elise Gould and Will Kimball, *"Right-to-Work" States Still Have Lower Wages*, EPI Briefing Paper at 4 (April 22, 2015), *available at* http://www.epi.org/files/pdf/82934.pdf (last visited May 31, 2019).

[40] Lawrence Mishel, *The Wage Penalty of Right-to-Work Laws*, Data Zone, Economic Policy Institute (2001) *available at http://www.epi.org/publication/datazone_rtw_index/* (last visited May 31, 2019).

[41] David Kendrick, *Midwest Right-to-Work States Still Outperform Forced Union States in Jobs and Real Income*, National Institute for Labor Relations Research (2001).

[42] See Celeste Bott, *Right to Work: Here's What you Need to Know*, St. Louis Post-Dispatch (February 2, 2017), *available at* http://www.stltoday.com/news/local/govt-and-politics/right-to-work-here-s-what-youneed-to-know/article_59b15bbe-2096-5c85-81c2-0e957da5c5be.html (last visited May 31, 2019).

[43] See *id.*

[44] Sean Higgins, *Trump 'I Like Right to Work Better'*, Washington Examiner (February 23, 2016), *available at* http://www.washingtonexaminer.com/trump-i-like-right-to-work-better/article/2583977 (last visited May 31, 2019).

[45] *Id.*

because right-to-work laws put Canadian businesses "at too much of an economic disadvantage compared with the U.S."[46]

In 2019, as the United States looks ahead to the 2020 elections, Democrats are pushing back against right-to-work. Bernie Sanders pledges to run the first unionized presidential campaign in history and to ban right-to-work laws if he is elected president. [47] Kamala Harris pledges that banning right-to-work laws will be one of the first initiatives that she will undertake if she is elected president.[48]

2. Legislative Branch

On February 2, 2017, soon after Trump was sworn in as president of the United States, Republicans introduced a national bill that would make right-to-work available to everyone.[49] The bill, brought by Representative Steve King (R-Iowa), is known as the National Right-to-Work Act, and has been presented in Congress on numerous occasions in the past[50] without ever making it to a vote. However, based on the success of the Republican Party nationwide in the previous two years, it appeared that: this time it might gain traction in both the House and the Senate, where a companion bill under the same name was introduced by Senator Rand Paul (R-Kentucky) on March 9, 2017.[51] The general focus of the bills is to repeal five provisions in the National Labor Relations Act and one in the Railway Labor Act (RLA) that authorize the termination of workers for refusing to pay union dues or fees.[52]

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[46] Sean Higgins, *Canada pushing US in NAFTA talks to ban right-to-work***,** Washington Examiner (September 11, 2017), *available at* http://www.washingtonexaminer.com/canada-pushing-us-in-nafta-talks-to-ban-right-to-work/article/2634029 (last visited May 31, 2019).
[47] Adam Klasfeld, *Bernie Sanders Calls for Ban on Anti-Union Laws*, Courthouse News Service (April 8, 2019), available at https://www.courthousenews.com/bernie-sanders-calls-for-ban-on-anti-union-laws/ (last visited June 3, 2019).
[48] Joseph Simonson, *Kamala Harris calls for a ban on right-to-work laws*, Washington Examiner (April 27, 2019), available at https://www.washingtonexaminer.com/news/kamala-harris-calls-for-a-ban-on-right-to-work-laws (last visited June 3, 2019).
[49] For details about the bill, See *H.R.785 - National Right-to-Work Act,* Congress.Gov, *available at* https://www.congress.gov/bill/115th-congress/house-bill/785 (last visited May 31, 2019).
[50] Earlier versions of The National Right-to-Work Act were introduced as H.R. 612 (114th Congress), H.R. 946 (113th Congress), H.R. 2040 (112th Congress), and H.R. 4107 (111th Congress). See *National Right-to-Work Act, H.R. 785, 115th Cong. (2017),* GovTrack, *available at* https://www.govtrack.us/congress/bills/115/hr785 (last visited May 31, 2019).
[51] For details about the bill, See *S. 545 – National Right-to-Work Act*, Congress.Gov, *available at* https://www.congress.gov/bill/115th-congress/senate-bill/545 (last visited May 31, 2019).
[52] For explanation of repealed provisions, See *H.R. 785 – National Right-to-Work Act*, Congress.Gov, *available at* https://congress.gov/bill/115th-congress/house-bill/785 (last visited May 31, 2019).

On September 19, 2017, Democrats countered the Republican bill with a bill of their own, introduced by Senator Elizabeth Warren (D – Massachusetts), that would repeal the part of Taft-Hartley that permits states to adopt right-to-work laws. [53] Both bills died in committees in 2017.[54] However, in 2019, Senator Rand Paul introduced yet another National Right-to-Work Act[55] in the Senate and Representative Robert Scott (D – Virginia) introduced the Protecting the Right to Organize Act of 2019[56] in the House. Both of these acts have been referred to their respective committees on labor.

3. Judicial Branch

a. The *Janus* Case

Pro right-to-work forces scored a major success in the judicial arena in 2018 in a case involving the power of labor unions to collect fees from non-union members, although a distinction was made between private and public employers, that greatly aided the right-to-work movement in the public sector. Under the Taft-Hartley Act, union security agreements in the private sector are generally allowed under state law. *Abood v. Detroit Board of Education*, [57] a 1977 United States Supreme Court case, held that these agreements were constitutional in the public sector also. In September of 2017, the Supreme Court agreed to hear the case of *Janus v. American Federation of State, County and Municipal Employees, Council 31*.[58] The *Janus* case involved an Illinois public employee who was required by Illinois law to pay his "proportionate share of the costs of the collective bargaining process" [59] (commonly referred to as an "agency fee") to the American Federation of State, County and Municipal Employees (AFSCME) against

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[53] For details about the bill, See *S. 1838 – Protecting Workers and Improving Labor Standards Act*, Congress.Gov, *available at* https://www.congress.gov/bill/115th-congress/senate-bill/1838 (last visited May 31, 2019).
[54] See *H.R.785 - National Right-to-Work Act,* Congress.Gov, *available at* https://www.congress.gov/bill/115th-congress/house-bill/785 (last visited May 31, 2019) and *S. 1838 – Protecting Workers and Improving Labor Standards Act*, Congress.Gov, *available at* https://www.congress.gov/bill/115th-congress/senate-bill/1838 (last visited May 31, 2019).
[55] See *S. 525 – National Right-to-Work Act*, Congress.Gov, available at https://www.congress.gov/bill/116th-congress/senate-bill/525/text (last visited June 3, 2019).
[56] See *H.R. 2474 Protecting the Right to Organize Act of 2019*, Congress.Gov, available at https://www.congress.gov/bill/116th-congress/house-bill/2474/text (last visited June 3, 2019).
[57] Abood v. Detroit Bd. Of Educ., 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 261 (1977).
[58] Janus v. AFSCME, Council 31, 138 S. Ct. 54, 198 L. Ed. 2d 780, 86 U.S.L.W. 3148 (2017).
[59] 5 ILL. COMP. STAT. 315/6(e) (2017).

his will.[60] Janus' agency fee was approximately seventy-eight percent of full union dues.[61] Janus asked the Court to find public sector agency fees unconstitutional under the First Amendment.[62] The Court granted certiorari and heard oral arguments in the case on February 26, 2018.[63]

On June 27, 2018, "delivering a victory to Illinois GOP Governor Bruce Rauner and a blow to organized labor,"[64] the Supreme Court ruled that the provision of the Illinois Labor Relations Act requiring public employees to subsidize a union, even if they do not belong to the union and object to positions that the union takes, "violated the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern."[65] As a result, states and public sector unions are no longer allowed to extract agency fees from nonconsenting employees.[66] The decision has been declared "the biggest victory for workers' rights in a generation."[67]

The path to the Supreme Court decision, however, was long and twisted. On February 9, 2015, Illinois Governor Rauner issued an executive order directing the state to suspend deducting fair share fees from employee paychecks and sending the money to employee unions.[68] The order affected approximately 6,500 Illinois state employees who chose not to join unions, but were currently paying fair share fees in lieu of union dues, but did not

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[60] See Janus v AFSCME, Council 31*, Petition for Certiorari* at 3*, available at* http://www.scotusblog.com/wp-content/uploads/2017/06/Janus-Cert-Petition-FINAL.pdf (last visited May 31, 2019).
[61] See *id.* at 5.
[62] See Janus v. AFSCME, Council 31, *Petition for Certiorari, available at* http://www.scotusblog.com/wp-content/uploads/2017/06/Janus-Cert-Petition-FINAL.pdf (last visited May 31, 2019).
[63] See Janus v. AFSCME, Council 31*, available at* http://www.scotusblog.com/case-files/cases/janus-v-american-federation-state-county-municipal-employees-council-31/ (last visited May 31, 2019).
[64] Lynn Sweet and Jon Seidel, *In a Blow to Unions, Government Workers no Longer Have to pay 'Fair Share' Fees*, Chicago Sun-Times (June 27, 2018), *available at* https://chicago.suntimes.com/columnists/ruling-mark-janus-afscme-council-31-supreme-court-unions-fair-share-fees-collective-bargaining-bruce-rauner/ (last visited May 31, 2019).
[65] Janus v. AFSCME, Council 31, 138 S. Ct. 2448 at 2460, 201 L. Ed. 2d 924, 86 U.S.L.W. 4663 (2018).
[66] Janus v. AFSCME, Council 31, 138 S. Ct. 2448 at 2486 (2018).
[67] Pat Hughes, *Janus Decision Biggest Victory for Workers' Rights in a Generation*, Chicago Sun-Times (June 28, 2018), *available at* https://chicago.suntimes.com/opinion/janus-decision-biggest-victory-for-workers-rights-in-a-generation/ (last visited May 31, 2019).
[68] Monica Davey and Mitch Smith, *Illinois Governor Acts to Curb Power of Public Sector Unions,* The New York Times (February 9, 2015), *available at* https://www.nytimes.com/2015/02/10/us/illinois-governor-bruce-rauner-acts-to-curb-power-of-public-sector-unions.html, (last visited May 31, 2019).

affect the approximately 42,000 state employees that belonged to unions.[69] On the same day, he filed a federal lawsuit challenging the constitutionality of collecting fair share fees and seeking confirmation that his executive order not to comply with the portion of the Illinois Public Labor Relations Act providing for collection of such fees was enforceable.[70] The defendants responded with motions to dismiss on the grounds that Rauner did not have standing.[71] While those motions were pending, Janus and two other state employees filed a motion to intervene in the case.[72] Governor Rauner then filed an amended complaint adding the three state employees as plaintiffs and a motion to dismiss the defendants' motion to dismiss as moot.[73] On May 19, 2015, the court ruled that Governor Rauner did not have standing to bring the case, but allowed the complaint filed by Janus and the two other state employees to go forward.[74] However, on September 13, 2016, acknowledging that it was bound by the Supreme Court decision in *Abood v. Detroit Board of Education*[75] upholding the constitutionality of such fair share fees, the district court dismissed the *Janus* case.[76] On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the district court's dismissal of the case, noting that only the Supreme Court of the United States can overrule *Abood*.[77]

On June 6, 2017, Janus filed a petition for writ of certiorari to the Supreme Court of the United States.[78] The petition was granted on September 28, 2017,[79] oral arguments were heard on February 26, 2018,[80] and the Court issued its opinion on June 27, 2018.[81]

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[69] Monica Davey and Mitch Smith, *Illinois Governor Acts to Curb Power of Public Sector Unions,* The New York Times (February 9, 2015), *available at* https://www.nytimes.com/2015/02/10/us/illinois-governor-bruce-rauner-acts-to-curb-power-of-public-sector-unions.html, (last visited May 31, 2019).
[70] Rauner v. AFSCME, Council 31*,* 2015 U.S. Dist. LEXIS 65085, (N.D. Ill. May 19, 2015).
[71] *Id*.
[72] *Id.*
[73] *Id*.
[74] *Id*.
[75] Abood v. Detroit Bd. of Educ., 431 U. S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977).
[76] Janus v. AFSCME, Case No. 15-C-1235 (N.D. Ill. September 13, 2016) *available at* https://ljc-assets.s3.amazonaws.com/2015/03/Rauner-v.-AFSCME-150-Order-granting-dismissal-2016.09.16-2.pdf, (last visited May 31, 2019) (citing Abood v. Detroit Board of Education, 431 U.S. 209 (1977)).
[77] Janus v. AFSCME, Council 31, 851 F.3d 746 (7th Cir. Ill., 2017).
[78] See Janus v AFSCME, Council 31*,* Petition for Certiorari*, available at* http://www.scotusblog.com/wp-content/uploads/2017/06/Janus-Cert-Petition-FINAL.pdf (last visited May 31, 2019).
[79] Janus v. AFSCME, Council 31, 138 S. Ct. 54, 198 L. Ed. 2d 780, 86 U.S.L.W. 3148 (2017).

Addressing the precedential value of *Abood*, which upheld a similar statute in Michigan, the Court found that the *Abood* opinion was "poorly reasoned"[82] and "inconsistent with other First Amendment cases."[83] The Court noted that "forced associations that burden protected speech are impermissible"[84] and that "no reliance interests on the part of public sector unions are sufficient to justify the perpetuation of the free speech violations that *Abood* has countenanced for the past 41 years,"[85] and overruled *Abood*. "As Jefferson famously put it, 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.'"[86]

The Court then turned to the core issue of the permissibility of the fair share or agency fees. Janus argued that the appropriate standard of review was strict scrutiny, while AFSCME argued that the proper standard was the rational-basis test.[87] The Court rejected the rational-basis test but found that it did not need to use the strict scrutiny test because the Illinois statute could not survive even under the more permissive "exacting" scrutiny standard.[88]

AFSCME argued that agency fees are necessary to prevent "free riders" (nonmembers enjoying the benefits of union representation without having to pay for those benefits).[89] Janus objected to the free rider label, arguing that "he is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage."[90] The Court dismissed the free rider argument finding that such free rider arguments are generally insufficient to overcome First Amendment objections and to hold otherwise could produce "startling consequences."[91] The Court noted that many private groups advocate government action that could benefit nonmembers, but nonmembers are not required to pay for

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[80] See Janus v. AFSCME, Council 31 timeline, *available at* http://www.scotusblog.com/case-files/cases/janus-v-american-federation-state-county-municipal-employees-council-31/ (last visited May 31, 2019).
[81] Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 201 L. Ed. 2d 924, 86 U.S.L.W. 4663 (2018).
[82] *Id*. at 2460 (2018).
[83] *Id*. at 2460 (2018).
[84] *Id*. at 2463 (2018).
[85] *Id*. at 2460 (2018).
[86] *Id*. at 2464 (2018) (citing A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) (emphasis deleted and footnote omitted).
[87] *Id*. at 2465 (2018).
[88] *Id*. at 2465 (2018).
[89] *Id*. at 2466 (2018).
[90] *Id*. at 2466 (2018).
[91] *Id*. at 2466 (2018).

that.[92] For example, if a particular group advocates on behalf of what it thinks are the needs of senior citizens, could all senior citizens be forced to pay for that service even if they object? The Court noted that has never been thought to be permissible.[93] "Private speech often furthers the interests of nonspeakers," but "that does not alone empower the state to compel the speech to be paid for."[94] "The First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay."[95] The Court thus found that the free rider argument was insufficient to justify fair share or agency fees.[96]

Having determined that *Abood* was improperly decided and that agency fee arrangements violate the First Amendment, the Court next looked at whether *stare decisis* cautioned against overruling *Abood,* but determined that it did not.[97] The Court noted that while *stare decisis* is the preferred course because it promotes predictability and consistency in developing legal principles, the principle is at its weakest when interpreting the Constitution, particularly when applied to decisions that wrongly denied First Amendment rights.[98] "This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)."[99] The Court identified five considerations to be taken into account when deciding whether *stare decisis* required the Court to stand by the Abood decision: 1) the quality of the reasoning, 2) the workability of the precedent it established, 3) its consistency with other decisions, 4) subsequent factual and legal developments, and 5) justifiable reliance on the decision.[100] After analyzing these factors, the Court found sufficient justification for overruling *Abood* and holding that states and public sector unions are no longer permitted to extract agency fees from nonconsenting employees.[101]

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[92] *Id*. at 2466 (2018).
[93] *Id*. at 2466 (2018).
[94] *Id*. at 2466, 2467 (2018) (citing Lehnert v. Ferris Faculty Assn., 500 U. S. 507, 556, 111 S. Ct. 1950, 114 L. Ed. 2d 572 (1991)).
[95] *Id*. at 2467 (2018).
[96] *Id*. at 2469 (2018).
[97] *Id*. at 2478, 2479 (2018).
[98] *Id*. at 2478 (2018).
[99] *Id*. at 2478 (2018) (citing Federal Election Comm'n v. Wisconsin Right to Life, Inc., 551 U. S. 449, 500, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007)).
[100] *Id*. at 2478, 2479 (2018).
[101] *Id*. at 2486 (2018).

b. The *Bierman* Case

Pro right-to-work forces did not fare so well in a later case that asked a court to determine whether Minnesota's certification of an exclusive representative under Minnesota's Public Employer Labor Relations Act ("PERLA") infringed upon plaintiffs' First Amendment rights to freedom of association and freedom of speech.[102] PERLA gave public employees the right to designate an exclusive representative to negotiate the terms and conditions of their employment.[103] Under Minnesota's Individual Providers of Direct Services Act, for purposes of PERLA, individual homecare providers were considered to be public employees.[104] The plaintiffs in *Bierman v. Dayton*,[105] were in-home health care providers who objected to SEIU being their certified exclusive representative.

The United States District Court for the District of Minnesota found that although SEIU had been certified as the plaintiffs' exclusive representative, the plaintiffs were not forced to associate with SEIU, to join SEIU or to financially contribute to SEIU.[106] The plaintiffs' freedom of association was not impaired by SEIU's certification because the plaintiffs were not required to become members of SEIU and were, in fact, free to form whatever advocacy group they liked.[107] SEIU's certification as the plaintiffs' exclusive representative simply meant that the state of Minnesota had chosen to restrict who they would listen to on matters regarding homecare programs.[108] Plaintiffs "have no constitutional right to force the government to listen to them" and "a person's right to speak is not infringed when the government simply ignores that person while listening to others."[109]

The court went on to hold that Minnesota's certification of SEIU as the plaintiffs' exclusive representative did not infringe on the plaintiffs' First Amendment rights and granted the defendants' Motion for Judgment on the Pleadings.[110] The plaintiffs appealed to the United States Court of Appeals for the Eighth Circuit, which affirmed the judgment of the district court.[111]

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[102] See Bierman v. Dayton, 227 F. Supp. 3d 1022 (D. Minn., 2017).
[103] Minn.Stat. §179A.06, subd. 2. (2016).
[104] Minn.Stat. §179A.54, subd.2. (2013).
[105] Bierman v Dayton, 227 F. Supp. 3d 1022 (D. Minn., 2017).
[106] *Id.* at 1029.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] Bierman v. Dayton, 227 F. Supp. 3d 1022 (D. Minn., 2017).
[111] Bierman v. Dayton, 900 F. 3d (8th Cir. Minn., 2018).

The plaintiffs then petitioned the U.S. Supreme Court for a Writ of Certiorari but it was denied, leaving the holding of the district court intact.[112]

B. *State Battles*

1. Wisconsin

Wisconsin Governor Scott Walker led the efforts to pass a right-to-work law in his state in 2015, making Wisconsin the 25th right-to-work state.[113] Before the law became effective, the International Association of Machinists District 10 and its Local Lodge 1061 filed a lawsuit in the Dane County Circuit Court challenging the constitutionality of the law.[114] The circuit court first found that the unions had a legally protected property interest in the money they expended on behalf of nonmembers.[115] The court then found that by requiring the unions to represent non-members without compensation, Wisconsin's right-to-work law created an unconstitutional taking and declared the challenged provisions of the law null and void.[116] On appeal, the Wisconsin Court of Appeals found that the law did not deprive the unions of compensation for mandated services, but merely prohibited employers from conditioning a person's employment on the payment of money to the union.[117] Thus, the appellate court found that the law did not create an unconstitutional taking of property and reversed and remanded the case to the circuit court with directions to dismiss the complaint.[118]

In September 2016, International Union of Operating Engineers Local 139 and International Union of Operating Engineers Local 420 filed a lawsuit in the United States District Court for the Eastern District of Wisconsin claiming that Wisconsin's right-to-work law was preempted by the NLRA and violated the Fifth Amendment to the U.S. Constitution.[119] The district court noted that their disposition of the case was largely controlled by the

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[112] Bierman v. Dayton, 2019 U.S. Lexis 3379 (2019).
[113] See National Conference of State legislatures, *Right-To-Work Resources*, *available at* http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx (last visited June 17, 2019).
[114] Int'l Ass'n of Machinists Dist. 10 & its Local Lodge 1061 v. State, 378 Wis. 2d 243 at 249 (Wis. Ct. App.2017).
[115] *Id.* at 250.
[116] *Id*. at 250, 251.
[117] *Id*. at 249.
[118] *Id*. at 249.
[119] Int'l Union of Operating Eng'rs Local 139 & Int'l Union of Operating Eng'rs Local 420 v. Schimel, 210 F. Supp. 3d 1088 (E.D. Wis. 2016).

Seventh Circuit's decision in *Sweeney v. Pence*.[120] In a 2-1 decision in the *Sweeney*[121] case, in which the Seventh Circuit was presented with similar challenges to Indiana's right-to-work law, the Seventh Circuit held that Indiana's law was not preempted by the NLRA[122] and, though not necessary to the decision in that case, also held that the law did not create a taking.[123] The parties in the Wisconsin case did not dispute, and the court agreed, that the *Sweeney* holding regarding the preemption claim and its dicta regarding the taking claim "all but control" applied to the disposition of the claims in the current case. The court concluded that the Wisconsin right-to-work law was not preempted by the NLRA and did not create an unconstitutional taking.[124] On appeal to the Seventh Circuit Court of Appeals, the court found no reason to revisit the precedent set in the *Sweeney* case where there was no strong dissent in that case nor a close vote to rehear the case *en banc*, and the unions failed to introduce evidence that undermined its validity. Thus, the court held that the unions' claim was properly dismissed by the district court.[125]

2. West Virginia

In 2016, West Virginia became the twenty-sixth state to pass a right-to-work law.[126] However, Judge Bailey of the Circuit Court of Kanawha County issued a preliminary injunction on February 24, 2017,[127] putting the law known as the Workplace Freedom Act on hold until plaintiffs' claims that the law 1) infringes on their constitutional right to associate,[128] 2) constitutes a taking,[129] and 3) deprives them of their constitutional right to due process[130] could be reviewed. On appeal to the Supreme Court of Appeals of West Virginia in September 2017, the appellate court held that the circuit court

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[120] *Id*. at 1090 (E.D. Wis. 2016).
[121] Sweeney v. Pence, 767 F.3d 654 (7th Cir. Ind., 2014).
[122] *Id*. at 665
[123] *Id*. at 665, 666.
[124] Int'l Union of Operating Eng'rs Local 139 & Int'l Union of Operating Eng'rs Local 420 v. Schimel, 210 F. Supp. 3d 1088 at 1097 (E.D. Wis. 2016).
[125] Int'l Union of Operating Eng'rs Local 139 v. Schimel, 863 F.3d 674 (7th Cir. Wis., 2017).
[126] See National Conference of State legislatures, *Right-To-Work Resources*, *available at* http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx (last visited June 17, 2019).
[127] West Virginia AFL-CIO v. Tomblin, Case No. 16-C-959-969 (Circuit Court of Kanawha County, WV 2017) *available at* http://www.courtswv.gov/supreme-court/calendar/2017/briefs/sept17/17-0187order.pdf (last visited May 31, 2019).
[128] *Id*. at 10
[129] *Id*. at 11.
[130] *Id*. at 12.

erred in granting the preliminary injunction because the plaintiffs failed to show a likelihood of success on the merits, dissolved the preliminary injunction, and remanded the case to the circuit court to conduct a final hearing on the merits.[131] On February 27, 2019, Judge Bailey issued an opinion declaring that parts of the Workplace Freedom Act were unconstitutional because requiring unions to represent workers who refuse to pay union dues constitutes an impermissible taking of the union's property.[132] In her ruling, she also issued a 30-day stay, preventing her ruling from taking immediate effect and giving the parties time to appeal her decision.[133] However, on March 29, 2019, the Supreme Court of Appeals of West Virginia granted an indefinite stay preventing Judge Bailey's ruling from taking effect for an undetermined amount of time,[134] thus leaving the Workplace Freedom Act in effect.

3. Kentucky

Kentucky became the twenty-seventh right-to-work state in January 2017.[135] In January 2018, Kentucky's right-to-work law survived its first court challenge[136] as Franklin County Circuit Judge Thomas Wingate dismissed a lawsuit challenging the constitutionality of the law.[137] The plaintiffs in that case, the AFL-CIO and Teamsters Union, argued that the law was discriminatory because it treated unions differently than other similarly situated organizations that collect fees to provide services.[138] Judge Wingate disagreed, saying that the law does not treat unions differently than

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[131] Morrisey v. W. Va. AFL-CIO, 804 S.E.2d 883 (W. Va. 2017).
[132] See Brad McElhinny, *Circuit judge strikes down West Virginia right-to-work law*, WV Metro News (February 27, 2019), available at http://wvmetronews.com/2019/02/27/circuit-judge-strikes-down-west-virginia-right-to-work-law/ (last visited June 5, 2019).
[133] See Lacie Pierson, *WV Supreme Court stops right-to-work ruling from taking effect*, Charleston Gazette-Mail (March 29, 2019), available at https://www.wvgazettemail.com/news/cops_and_courts/wv-supreme-court-stops-right-to-work-ruling-from-taking/article_b30ea376-0b42-5e1d-b060-0c69ca7d4a50.html (last visited June 5, 2019).
[134] *Id*.
[135] Steve Bittenbender, *Kentucky Lawmakers Pass 'Right-to-Work' Legislation*, Reuters (January 7, 2017), *available at* https://reuters.com/article/us-kentucky-unions/kentucky-lawmakers-pass-right-to-work-legislation-idUSKBN14R0BN (last visited May 31, 2019).
[136] Zuckerman v. Commonwealth of Kentucky, No. 17-CI-00574 (Franklin, Ky., Cir Ct. filed May 25, 2017).
[137]Daniel Desrochers, *Judge Dismisses Unions' Attempt to Block Kentucky's Right-to-Work Law,* Lexington Herald Leader (January 24, 2018), *available at* http://www.kentucky.com/news/politics-government/article196385174.html (last visited May 31, 2019).
[138] *Id*.

similarly situated organizations because "unions are unique, federally created entities." [139] The plaintiffs also argued that the law constituted an impermissible taking of the union's property.[140] Judge Wingate disagreed again saying that the law's limitation of employees from whom unions can collect dues is not a taking, but a prevention of compulsory union dues.[141] The plaintiffs filed an appeal on February 21, 2018.[142]

On March 2, 2018, both parties filed motions to transfer the case to the Kentucky Supreme Court.[143] The motions were granted on April 18, 2018,[144] and oral arguments were heard on August 10, 2018.[145] The Kentucky Supreme Court was asked to consider whether Kentucky's right-to-work law violated the plaintiffs' right to equal protection and whether it permitted a taking of private property without just compensation.[146] Addressing the equal protection claim, the court first noted that the proper standard of review was rational basis because the right-to-work law was expressly permitted by the Taft-Hartley Act. [147] The court then found that the legislature's goal of promoting economic development and job growth within the state and leveling the economic playing field with neighboring states clearly established a rational basis for the law.[148] Thus the law did not violate the plaintiff's right to equal protection.[149] The court then turned to the plaintiff's claim that the law permitted a taking of private property without just compensation. The court found that because the plaintiff's designation as the exclusive bargaining unit "fully and adequately compensates" them for free-riders, the law did not permit a taking of private property without just

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[139] *Id*.
[140] *Id*.
[141] *Id*.
[142] Tim Pearce, *Kentucky Unions Appeal After Court Says They Don't Have a Right to Workers Wages*, The Daily Caller (February 21, 2018), *available at* http://dailycaller.com/2018/02/21/teamsters-afl-cio-appeal-kentucky-right-to-work/ (last visited May 31, 2019).
[143] See Kentucky Appellate Court website, *available at* https://appellate.kycourts.net/CA/COADockets/CaseDetails.aspx?cn=2018CA000289 (last visited May 31, 2019).
[144] See Kentucky Appellate Court website, *available at* https://appellate.kycourts.net/CA/COADockets/CaseDetails.aspx?cn=2018CA000289 (last visited May 31, 2019).
[145] See news release from the Supreme Court of Kentucky (July 31, 2018), *available at* https://courts.ky.gov/Documents/Newsroom/MA_SCarguments_073118.pdf (last visited May 31, 2019).
[146] Zuckerman v. Bevin, 565 S.W.3d 580 (KY 2019).
[147] *Id*. at 595.
[148] *Id*. at 598.
[149] *Id*. at 598.

compensation.[150] By a 4-3 split, the Kentucky Supreme Court then held that trial court did not err in dismissing plaintiffs' claims and therefore affirmed the Franklin Circuit Court's Order dismissing the challenges to the law.[151]

4. Missouri

Missouri became the twenty-eighth right-to-work state in 2017[152] after a long and very public battle between the candidates in its gubernatorial race.[153] Chris Koster, the Democratic candidate, believed that "right-to-work is an attack on working people,"[154] while Eric Greitens, his Republication opponent, ran on the slogan "Right-to-Work: Right for Missouri."[155] Less than a month after Eric Greitens became the governor of Missouri on January 9, 2017,[156] he signed Missouri's right-to-work law (hereafter referred to as "SB 19").[157] However, even before Greitens was elected, and knowing he was running on a right-to-work platform, right-to-work opponents, including the Missouri AFL-CIO, filed requests to circulate petitions that would reverse any right-to-work law Greitens might pass while in office.[158] In December 2016, the Missouri AFL-CIO filed ten petitions proposing to

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[150] *Id*. at 603.
[151] Zuckerman v. Bevin, 565 S.W.3d 580 (KY 2019).
[152] See National Conference of State legislatures, *Right-To-Work Resources*, *available at* http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx (last visited June 17, 2019).
[153] Kevin McDermott, *Right-to-Work Debate puts National Spotlight on Missouri Governor's Race*, St. Louis Post-Dispatch (August 29, 2016), *available at* http://www.stltoday.com/news/local/govt-and-politics/right-to-work-debate-puts-national-spotlight-on-missouri-governor/article_dc8ebece-40f7-5062-9e2c-f53b988c0d3a.html (last visited May 31, 2019).
[154] See Chris Koster on Jobs, *Right-to-Work is an Attack on Working People*, On The Issues, *available at* http://www.ontheissues.org/Governor/Chris_Koster_Jobs.htm (last visited May 31, 2019).
[155] See *Right-to-Work: Right for Missouri,* Greitens Governor, *available at* https://ericgreitens.com/right-to-work-in-missouri/ (last visited December 7, 2017).
[156] Jason Hancock, *Eric Greitens Takes the Oath of Office as Missouri Governor,* The Kansas City Star (January 10, 2017), available at http://www.kansascity.com/news/politics-government/article125380344.html (last visited May 31, 2019).
[157] Richard L. Connors, Brian J. Christensen, Philip B. Rosen and Adam C. Doerr, *Missouri Enacts Right to Work Law*, The National Law Review (September 15, 2017), available at https://www.natlawreview.com/article/missouri-enacts-right-to-work-law (last visited May 31, 2019).
[158] Celeste Bott, *Right-to-Work Advocates in Missouri File Lawsuits Against Labor-Backed Ballot Initiative*, St Louis Post-Dispatch (January 23, 2017), *available at* http://www.stltoday.com/news/local/crime-and-courts/right-to-work-advocates-in-missouri-filelawsuits-against-labor/article_0c0513ab-90cf-50b5-b2ea-8c1574e826e7.html (last visited May 31, 2019).

amend Article I of the Missouri Constitution to make right-to-work laws illegal.[159] In February 2017, after SB 19 passed, the Missouri AFL-CIO filed another petition certifying a veto referendum on that law.[160]

Backed by the National Right to Work Foundation, two lawsuits were filed in the Circuit Court of Cole County, Missouri, challenging the petitions on the ground that the summaries were "unfair" and "insufficient."[161] In *Hill v. Ashcroft*,[162] the pro right-to-work plaintiffs challenged the language in the summary statements of the ten petitions proposing to amend the Missouri Constitution. Considering the language in those petitions[163] and ruling on a motion for summary judgement, the court found the summaries to be unfair and insufficient.[164] In *Stickler v. Ashcroft*,[165] the plaintiffs challenged the language in the petitions to veto SB 19. The court in that case again found that the language was "unfair and insufficient."[166] The rulings in both cases were appealed to the Missouri Court of Appeals in the Western District.

On appeal in the *Hill v. Ashcroft*[167] case, the appellate court found that the language in the summary statements of the first eight petitions was, in

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[159] Hill v. Ashcroft, Case No. 17AC-CC00030 at 3 (Circuit Court of Cole County, MO 2017) *available at* https://www.courts.mo.gov/fv/c//Judgment_FINAL.pdf?l=SMPDB0004_CT19&di=1038493 (last visited May 31, 2019).

[160] Stickler v. Ashcroft, Case No. 17AC-CC00196 at 3 (Circuit Court of Cole County, MO 2017) *available at* https://www.courts.mo.gov/fv/c//judgment_FINAL.pdf?l=SMPDB0004_CT19&di=1104598 (last visited May 31, 2019).

[161] See Hill v. Ashcroft, Case No. 17AC-CC00030 (Circuit Court of Cole County, MO 2017) *available at* https://www.courts.mo.gov/fv/c//Judgment_FINAL.pdf?l=SMPDB0004_CT19&di=1038493 (last visited May 31, 2019) and Stickler v. Ashcroft, Case No. 17AC-CC00196 (Circuit Court of Cole County, MO 2017) *available at* https://www.courts.mo.gov/fv/c//judgment_FINAL.pdf?l=SMPDB0004_CT19&di=1104598 (last visited May 31, 2019).

[162] Hill v. Ashcroft, Case No. 17AC-CC00030 (Circuit Court of Cole County, MO 2017) *available at* https://www.courts.mo.gov/fv/c//Judgment_FINAL.pdf?l=SMPDB0004_CT19&di=1038493 (last visited May 31, 2019).

[163] For the language of the petitions, see Hill v. Ashcroft, Case No. 17AC-CC00030 at 4-6 (Circuit Court of Cole County, MO 2017) *available at* https://www.courts.mo.gov/fv/c//Judgment_FINAL.pdf?l=SMPDB0004_CT19&di=1038493 (last visited May 31, 2019).

[164] *Id.* at 9.

[165] Stickler v. Ashcroft, Case No. 17AC-CC00196 (Circuit Court of Cole County, MO 2017) *available at* https://www.courts.mo.gov/fv/c//judgment_FINAL.pdf?l=SMPDB0004_CT19&di=1104598 (last visited May 31, 2019).

[166] *Id.* at 6-9.

[167] Hill v. Ashcroft, 526 S.W.3d 299 (MO. Ct. App. 2017).

fact, "fair and sufficient."[168] The court found that the language in the summary statements of the last two petitions was insufficient because it lacked specificity,[169] but the court added language to the end of those petitions and approved the revised language.[170] On appeal in *Stickler v. Ashcroft*,[171] the appellate court found that none of the deficiencies noted by the circuit court made the language in the summary statements "unfair" or "insufficient."[172]

The plaintiffs in both cases filed requests for transfer to the Missouri Supreme Court, but both requests were denied.[173]

While the lawsuits were working their way through the legal system, right-to-work opponents were busy gathering signatures for the petitions. On August 18, 2017, they submitted over 300,000 signatures to the Secretary of State's office.[174] The issue was placed on the ballot on August 7, 2018[175] and Missouri voters overwhelmingly rejected the right-to-work law by a margin of more than two to one.[176] Thus, Missouri is no longer a right-to-work state.

5. New Mexico

New Mexico tried addressing the right-to-work issue one county at a time. The trend started with Sandoval County, which passed a local right-to-work law on January 19, 2018.[177] It was followed by similar local laws in

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[168] *Id.* at 328.
[169] *Id*. at 328.
[170] *Id.* at 328,329.
[171] Stickler v. Ashcroft, 539 S.W.3d 702 (Mo. Ct. App. 2017).
[172] *Id.* at 719.
[173] See Hill v. Ashcroft, 2017 Mo. LEXIS 442 (MO 2017) and Stickler v. Ashcroft, 2017 Mo. LEXIS 421 (MO 2017).
[174] Jason Hancock, *Unions Turn in 310,000 Signatures to Repeal Missouri Right-to-Work Law*, The Kansas City Star (August 18, 2017), *available at* http://www.kansascity.com/news/politics-government/article167997712.html (last visited May 31, 2019).
[175] Robert W. Stewart, *Will Missourians Finally Have the "Right to Work"?,* The National Law Review (November 28, 2017), *available at* https://www.natlawreview.com/print/article/will-missourians-finally-have-right-to-work (last visited May 31, 2019).
[176] Kurt Erickson and Jack Suntrup, *Democrats, unions declare victory as 'right to work' loses by wide margin in Missouri,* St. Louis Post Dispatch (August 8, 2018), available at https://www.stltoday.com/news/local/govt-and-politics/democrats-declare-victory-as-vote-tallies-show-right-to-work/article_d75fc640-45e0-5ecc-93c9-91cecca36113.html, (last visited May 31, 2019).
[177] Kevin Mooney, *Court Challenges Loom as Right to Work Gathers Steam in New Mexico*, The Daily Signal (June 12, 2018), *available at* https://www.dailysignal.com/2018/06/12/court-challenges-loom-as-right-to-work-gathers-steam-in-new-mexico/ (last visited May 31, 2019).

Otero County on April 12, 2018 and Lincoln County on May 15, 2018.[178] On May 21, 2018, Chaves County became the fourth county with a local right-to-work law.[179] Organized labor pushed back, though, and in a statement issued by the Federation of Labor, it said that such ordinances would "disable the ability of New Mexico workers to bargain for fair wages and benefits for their families" and "take away the freedom of businesses to negotiate contracts."[180] In response, on March 27, 2019, New Mexico Governor Lujan Grisham signed a bill that invalidated county right-to-work laws. [181] The new law provides that no political subdivision of the state may adopt or continue in effect any rule that prohibits agreements requiring membership in a labor organization as a condition of employment and that the state has exclusive jurisdiction to prohibit the negotiation, execution or application of such agreements. [182] It also stated that "(a)n employer or labor organization anywhere in the state may execute and apply an agreement requiring membership in a labor organization as a condition of employment to the full extent allowed by federal law."[183] The new law thus declared that New Mexico is not a right-to-work state.

This follows closely with established law flowing from the doctrine of preemption. The NLRA is federal law, and in preempting the field of private sector labor law, was intended to create stability and predictability across the field. The right-to-work provision of section 14(b) is the only part of the law that confers on states an ability to exercise power. The fact that it provides "states" an exercise of power has generally been interpreted as "states only," and not lower-level governmental bodies. [184] By preserving stability and predictability, it lessens having to "expend resources to bargain multiple different union-security agreements, even by the same union and company when they operate across county lines."[185]

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[178] *Id*.
[179] *Id*.
[180] See New Mexico Federation of Labor, AFL-CIO website, *New Mexico Federation of Labor Files Lawsuit Against Sandoval County 'Right to Work' Ordinance* (February 16, 2018) *available at* https://www.nmfl.org/news/new-mexico-federation-labor-files-lawsuit-against-sandoval (last visited May 31, 2019).
[181] See New Mexico Legislature website, *House Bill 85*, *available at* https://www.nmlegis.gov/Legislation/Legislation?chamber=H&legtype=B&legno=85&year=19 (last visited June 5, 2019).
[182] *Id*.
[183] *Id*.
[184] Ariana R. Levinson, Alyssa Hare, and Travis Fiechter, *Federal Preemption of Local Right-to-Work Ordinances*, 54 Harv. J. on Legis. 457 (2017).
[185] *Id.* at 471.

6. Illinois

In 2015, the village of Lincolnshire, Illinois adopted a similar ordinance that said that workers could not be forced to join a union as a condition of employment in the village.[186] A federal district court judge held that the ordinance was preempted by the NLRA, finding that "a local union-security provision would seriously undermine the objectives of the NLRA in any state that has not taken advantage of section 14(b) to forbid agency shops."[187] While the 7th Circuit Court of Appeals upheld that decision, other federal circuit courts have ruled that local right-to-work laws are permissible, resulting in a split among the federal courts.[188] On April 12, 2019, Illinois Governor J.B. Pritzker took matters into his own hands and signed the Illinois Collective Bargaining Freedom Act.[189] Like the New Mexico law discussed above, the Illinois law stated that the authority to enact legislation affecting union security agreements between an employer and a union rests exclusively with the state legislature.[190] It then provided that employers and unions covered by the NLRA may enter into agreements in Illinois requiring union membership as a condition of employment to the full extent permitted by the NLRA.[191] Thus, the Illinois Collective Bargaining Act declared that Illinois is not a right-to-work state.

7. Delaware

Delaware has also been tough on the right-to-work issue. On May 8, 2018, the Delaware Senate voted to pass a bill that would kill right-to-work in Delaware.[192] The measure passed the House on June 21, 2018 and was signed by Delaware Governor John Carney on June 30, 2018.[193] As enacted into law, it is now the policy of the state of Delaware "to encourage a harmonious and cooperative relationship between employers and their

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[186] See Lorraine Bailey, *Seventh Circuit Nixes Local Right-to-Work Law*, Courthouse News Service (October 1, 2018), available at https://www.courthousenews.com/seventh-circuit-nixes-local-right-to-work-law/ (last visited June 5, 2019).
[187] *Id.*
[188] Peter Hancock, *Pritzker signs ban on local government "right-to-work" laws*, Chicago Sun-Times (April 12, 2019), available at https://chicago.suntimes.com/2019/4/12/18313390/pritzker-signs-ban-on-local-government-right-to-work-laws (last visited June 5, 2019).
[189] 820 ILL. COMP. STAT. 12/1 (2019).
[190] 820 ILL. COMP. STAT. 12/20 (2019).
[191] 820 ILL. COMP. STAT. 12/15 (2019).
[192] See Delaware General Assembly website, *Senate Bill 165*, *available at* http://legis.delaware.gov/BillDetail?legislationId=26412 (last visited May 31, 2019).
[193] See *id*.

employees by allowing private sector labor organizations and employers to enter into union security agreements to the full extent allowed under the National Labor Relations Act." [194] To that end, the law provides that employers and labor organizations may enter into agreements that require membership in the labor organization as a condition of employment to the extent permitted by federal law. [195]

8. Ohio

Ohio, one of the few midwestern states that is not a right-to-work state, is trying to change that. On February 23, 2017, Representative John Becker (R-Union Township) introduced House Bill 53 to amend various sections of the Ohio statutes to remove any requirement that public employees join or pay dues to any employee organization. [196] The bill was referred to the finance committee the next day but never went any further. [197] Not willing to give up, On December 21, 2017, Representative Becker and Representative Craig Riedel (R-Defiance) introduced House Joint Resolution 7 to amend the Ohio Constitution to prohibit public union shops [198] and House Joint Resolution 8 to amend the Ohio constitution to prohibit private union shops[199]. The authors are trying to get the resolutions on the November 2020 state ballot; to do so, they will need a three-fifths majority vote in both the House and the Senate.[200] The resolutions were referred to the Government Accountability and Oversight Committee on January 16, 2018 and are still there as of June 17, 2019.[201]

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[194] DEL.CODE ANN. tit. 19, § 401 (2018).
[195] DEL.CODE ANN. tit. 19, § 403 (2018).
[196] See *H.B. 53 – Remove requirements to join public employee union,* Ohio Legislature website, *available at* https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HB-53 (last visited June 16, 2019).
[197] See *id*.
[198] See *HJR 7 – Prohibit public sector union shops*, Ohio Legislature website, available at https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HJR-7 (last visited June 16, 2019).
[199] See *HJR 8 – Prohibit private sector union shops*, Ohio Legislature website, available at https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HJR-8 (last visited June 16, 2019).
[200] Laura Bischoff*, Efforts underway to put 'right-to-work' issue on Ohio's 2020 ballot*, Dayton Daily News (January 26, 2018), *available at* https://www.daytondailynews.com/news/effort-underway-put-right-work-issue-ohio-2020-ballot/vhEJ8leGnV5rv7p3rDJ1vM/ (last visited June 16, 2019).
[201] See *HJR 7 – Prohibit public sector union shops*, Ohio Legislature website, available at https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HJR-7 (last visited June 16, 2019) and *HJR 8 – Prohibit private sector union shops*, Ohio Legislature

9. Virginia

Some lawmakers in Virginia, on the other hand, are trying to repeal Virginia's right-to-work law.[202] Virginia has been a right-to-work state since 1947 [203] but on January 9, 2019, Delegate Lee Carter (D-Manassas) introduced HB 1806 that would repeal the provisions of the Virginia code that prohibit making membership in a union a condition of employment.[204] The bill would allow collective bargaining agreements to include provisions establishing an agency shop or a union shop.[205] As of June 17, 2019, the bill is still in the Committee on Commerce and Labor.[206] Republicans say that that the right to work in Virginia will not go away as long as they have 51 seats in the House of Delegates.[207]

V. A FUTURE FOR RIGHT-TO-WORK?

This paper has attempted to look at the right-to-work controversy as it is being affected from a political perspective. Politics connotes power, and the right-to-work environment "power-brokers," including legislative bodies, courts, unions and big business, have been locked in a pier six brawl (to borrow a term from the wrestling world[208]) for the past half-dozen years. Not surprisingly, the time frame parallels the improving fortunes of the Republican Party following the 2010 mid-term elections. The *red wave*[209] brought Republicans into office, not only nationally, but in governors'

website, available at https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HJR-8 (last visited June 16, 2019).

[202] *Lawmaker Files Bill to Repeal Virginia's Right to Work Law*, The Republican Standard (December 30, 2018), *available at* https://therepublicanstandard.com/lawmaker-files-bill-to-repeal-virginias-right-to-work-law/ (last visited June 17, 2019).

[203] See National Conference of State legislatures, *Right-To-Work Resources*, *available at* http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx (last visited June 17, 2019).

[204] See *HB 108 – Right to work; union shops and agency shops*, Virginia's Legislative Information System, available at https://lis.virginia.gov/cgi-bin/legp604.exe?191+sum+HB1806 (last visited June 17, 2019).

[205] See *HB 108 – House Bill No. 1806*, Virginia's Legislative Information System, available at https://lis.virginia.gov/cgi-bin/legp604.exe?191+ful+HB1806 (last visited June 17, 2019)>

[206] See *HB 108 – Right to work; union shops and agency shops*, Virginia's Legislative Information System, available at https://lis.virginia.gov/cgi-bin/legp604.exe?191+sum+HB1806 (last visited June 17, 2019).

[207] *Virginia Democrats Flip. Launch Attach on Right to Work Laws*, The Republican Standard (May 15, 2019), *available at* https://therepublicanstandard.com/virginia-democrats-flip-launch-attack-on-right-to-work-laws/ (last visited June 17, 2019).

[208] Sometimes attributed to CWF wrestling announcer Gordon Solie.

[209] Loosely referring to Republican successes following the 2014 mid-term elections.

offices and state houses across the U.S.[210] The conservative Republican philosophy towards organized labor meant that a push for right-to-work was inevitable. As Republican politics acquired greater influence, the push for right-to-work made its way across the middle of the country, through state governments in West Virginia, Indiana, Kentucky, Michigan, Wisconsin, and Missouri, and finally culminating with the *Janis* decision, emanating so strongly from a conservative court that it overturned a 41-year-old precedent.

This recent sweep of a right-to-work philosophy was almost certainly influenced by the battle of the power-brokers, with conservative state governments, courts and big business pushing back on organized labor. The lone exception was in the state of Missouri. The Republican Party maintained control of both the House and Senate and saw Eric Greitens elected governor,[211] pushing a platform promising right-to-work.[212] Following the almost-immediate signing of the RTW law, organized labor went to work with a different strategy: turn it into a grass-roots movement. Rather than directly fighting government and business, unions from both inside and outside of Missouri poured dollars into campaign advertising aimed at the population and resulting in the referendum election that ended right-to-work in Missouri eighteen months after it came into being. Organized labor invested more than $15 million and dominated the campaign with yard signs, television ads and radio ads.[213] As it stands, the election was a solid victory for the union movement, which in the past few years had watched its power be diluted over and over again by the Supreme Court of the United States and

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[210] See, e.g., Greta Kaul and Briana Bierschbach, *Historic election puts Republicans in control of the Minnesota House and Senate*, Minnpost (November 9, 2016), *available at* https://www.minnpost.com/politics-policy/2016/11/historic-election-puts-republicans-control-minnesota-house-and-senate.

[211] Greitens was subsequently forced to resign seventeen months later under threat of impeachment following criminal indictment. See Jason Hancock and Bryan Lowry, *Missouri Gov. Eric Greitens resigns, ending political career once aimed at presidency*, Kansas City Star (May 29, 2018), *available at* https://www.kansascity.com/news/politics-government/article212114314.html, last visited May 31, 2019).

[212] Kevin McDermott, *Right-to-Work Debate puts National Spotlight on Missouri governor's Race*, St. Louis Post-Dispatch (August 29, 2016), *available at* http://www.stltoday.com/news/local/govt-and-politics/right-to-work-debate-puts-national-spotlight-on-missouri-governor/article_dc8ebece-40f7-5062-9e2c-f53b988c0d3a.html (last visited May 31, 2019).

[213] Kurt Erickson and Jack Suntrup, *Democrats, unions declare victory as 'right to work' loses by wide margin in Missouri*, St. Louis Post Dispatch (August 8, 2018), *available at* https://www.stltoday.com/news/local/govt-and-politics/democrats-declare-victory-as-vote-tallies-show-right-to-work/article_d75fc640-45e0-5ecc-93c9-91cecca36113.html June 29, 2019). (last visited May 31, 2019).

Republican-dominated state legislatures.[214] By putting the decision in the hands of the voters rather than the legislature, perhaps Missouri has shown unions a path that they may utilize in other states when the fight over right-to-work becomes intense.

November of 2018, however, saw a sea change in political power. Perceived dissatisfaction with the Trump Administration led to the Democratic Party gaining control of the U.S. House of Representatives[215] and prevailing in a number of hotly contested gubernatorial elections.[216] From a political perspective, this may have slowed the right-to-work movement where initiatives were being formed at the state legislative levels. Politics, however, are a dynamic cyclical in nature. While the political environment might currently not be favorable for the right-to-work movement, that could quickly change with the next election.

What is the end game for right-to-work? The National Labor Relations Act is still the law of the land, and has been the official industrial relations model used in the United States for the past 80-plus years. That is not likely to change any time soon. With that as a given, and recognizing that right-to-work significantly impairs the representative functions of American labor unions, does it make sense to have the union movement and right-to-work legislation co-exist in the same economy?

If right-to-work legislation will never be compatible with the American labor movement, unions will need to find a solution to the right-to-work problem. It is possible that the grassroots movement which occurred in Missouri could be used elsewhere to accomplish a similar result. Putting the decision in the hands of the people would certainly seem to be a much more democratic alternative than letting the decision be made by the governmental and business power-brokers.

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[214] Jeff Stein, *Missouri voters defeat GOP-backed "right to work' law, in victory for unions, Associated Press projects*, The Washington Post (August 7, 2018), *available at* https://www.washingtonpost.com/business/2018/08/08/missouri-voters-defeat-gop-backed-right-work-law-victory-unions-associated-press-projects/?noredirect=on&utm_term=.d83d32ef4aea (last visited May 31, 2019).

[214] BBC, *Mid-term Elections: Democrats Win House in Setback for Trump*, *available at* https://www.bbc.com/news/world-us-canada-46120373 (last visited June 29, 2019).

[216] Dylan Scott, *Democratic Wins in These 9 States Will Have Seismic Policy Consequences*, Vox (November 10, 2018), *available at* https://www.vox.com/policy-and-politics/2018/11/9/18075536/midterm-elections-2018-results-governors-state-legislatures-agenda (last visited June 29, 2019).

THE ANTITRUST OPTION: ADDRESSING ANTICOMPETITIVE PRICING IN INTERNATIONAL TRADE

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ABSTRACT

Over the past thirty years, antidumping activity has greatly increased around the globe with both developed and developing nations getting into the fray and yet many economists contend that the most commonly used antidumping protectionist measures, namely targeted product tariffs, actually contribute more harm than relief. This article addresses the major adverse effects of current antidumping policies and proposes a better approach to the problem. Given the adverse effects that antidumping measures have on consumers, import market companies, developing market companies, as well as the weakening of market efficiency overall, perhaps it is time to scale back the proliferation of antidumping agreements and related activity. Antitrust law remains an arguably more market efficient alternative for providing some measure of protection against anticompetitive behavior while also allowing markets to remain as free and unfettered as possible.

I. INTRODUCTION

In the midst of the recent U.S. Presidential campaign, then Presidential Candidate Donald Trump wrote an opinion piece for USA Today in which he set forth his opposition to the Trans Pacific Partnership (TPP) and his criticism of the North American Free Trade Agreement (NAFTA). In the piece, he complained, *inter alia*, that certain countries 'even engage in a tactic known as "product dumping"—where foreign competitors will dump huge quantities of underpriced goods into U.S. markets for the sole purpose of driving American factories out of business.' [1] While Trump did not

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[1] Donald Trump, *Disappearing Middle Class Needs Better Deal on Trade,* USA TODAY, (March 14, 2016)

specifically mention the World Trade Organization Antidumping Agreement or any other such agreement within multi-lateral treaties, he strongly suggested that the TPP and NAFTA seemingly allow this 'product dumping' to occur. Notwithstanding the realities of the WTO Antidumping Agreement and similar ADAs in the TPP and NAFTA, Trump's opinion piece intensified the national discussion on antidumping and other trade-related protectionist policies.

Thus far, Trump is attempting to live up to his campaign rhetoric. In his first full day in office, he issued an executive order removing the United States from the Trans Pacific Partnership[2] and soon thereafter moved for confirmation of his Commerce Secretary Nominee, Wilbur Ross, who had promised, during the campaign, to take a harder line on 'product dumping.'[3] Early into his tenure, Secretary Ross has begun to deliver on his promise as well.[4] On April 11, 2017, the United States Department of Commerce announced the results of an administrative review finding that Republic of Korea steel producers had been unfairly dumping oil country tubular goods (OCTG) into the U.S. market.[5] The ruling was based on the argument that the price of coil used to produce OCTG is distorted, which, along with a distortion in the price of Korean electricity, adversely affects American workers and businesses.[6] To remedy the situation, the Commerce Department will 'assess duties and collect cash deposits equal to the dumping margins found on all imports of the subject goods from Korea.'[7] Under the direction of Wilbur Ross, the Commerce Department is certain to continue the close examination of potential dumping violations for the foreseeable future. In fact, a Presidential Proclamation regarding tariffs targeting steel and aluminum imports pushed the debate concerning such tactics into the global spotlight in March, 2018.[8]

However, the overall legitimacy and effectiveness of antidumping measures have been debated since the beginning of their implementation. Many economists have concluded that the most commonly used antidumping

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[2] Antonio Graceffo, *Trump's New Protectionism: Economic and Strategic Impact*, FOREIGN POL'Y J., (February 1, 2017)
[3] Ylan Mui and Robert Costa, *Trump Expected to Tap Billionaire Investor Wilbur Ross for Commerce Secretary*, WALL ST. J., (November 24, 2016)
[4] Press Release, Department of Commerce , *Department of Commerce Finds Dumping of Oil Country Tubular Goods from the Republic of Korea in Groundbreaking Ruling*, (April 11, 2017)
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] Press Release, Department of Commerce*, Secretary Ross Statement on President Trump's Decision to Impose Tariffs on Imported Steel and Aluminum,* (March 8, 2018)

protectionist measures, targeted product tariffs, actually contribute more harm than relief and argue that the most effective policy for dealing with anticompetitive pricing tactics is to 'eliminate the economic distortions that make dumping possible, such as tariffs, subsidies and monopoly power.'[9] Therefore, while predatory pricing is regularly condemned by economists, the political nationalist pressure which results in aggressive antidumping policies as they are currently implemented does not seem to serve the greater good.[10]

This article is designed to address the adverse effects of current antidumping policies and propose a better approach to the problem. The article is organized as follows: Section I provides an introduction to the debate; Section II provides some historical background for antidumping measures in the United States; Section III examines the adverse effects on consumers, import market companies, export market companies, as well as other unintended effects of antidumping agreements; and Section IV proposes an alternative means by which to address anticompetitive practices within international trade and Section V concludes.

II. BACKGROUND OF ANTIDUMPING MEASURES IN THE UNITED STATES

Adam Smith, writing in the mid-eighteenth century, discussed the unfavorable government practice of stimulating exports by the grant of bounties (subsidies) which essentially resulted in prices lower than those which were present in the domestic market at the time.[11] While Smith did not use the term 'dumping,' and did not exactly suggest a remedy for the problem, he did suggest that the tactic was less than ideal for fair and competitive markets. [12] Nonetheless, Smith, as known through his monumental work, *The Wealth of Nations*, argued for unregulated trade and greatly criticized mercantilist policies that were designed to restrict trade in favor of economic nationalism.[13] Smith argued that if a nation can produce a good for an overall lower cost than another nation can produce the same good, essentially for whatever reason, it is beneficial to both parties to trade

[9] R.E. Baldwin, *The Political Economy of Reforming the Antidumping Laws,* THE WORLD ECON., 28, 5, pp. 745-747 (2005)
[10] *Id.*
[11] Jacob Viner, *The Prevalence of Dumping In International Trade,* THE J. OF POL. ECON., 30, 1, (1922)
[12] *Id.*
[13] Adam Smith, *The Wealth of Nations*, Book IV, Chapter 5

those goods. Smith further believed that, eventually, even the unfavorable use of subsidies would run its course in the face of free market competition.[14]

Accusations of product dumping greatly expanded following the onset of the industrial age, so much so that early American political figures, Alexander Hamilton among them, began to argue for protection against English manufacturers.[15] English manufacturers were accused of using the discriminatory pricing tactic with the 'deliberate purpose of crushing or, in the language of the time, "stifling" or "strangulating" the young American industries.'[16] Unfortunately, Hamilton's argument for protectionism caused even greater product dumping by English manufacturers who colluded together to try and eliminate the American competitors before any protectionism could be implemented.[17] This was just the beginning of the adverse effect and collateral damage problem when it comes to antidumping protectionist measures.

The potentiality for adverse effects did not slow down the use of tariffs to protect fledgling American industry in the nineteenth century. During the War of 1812, the United States congress set a war time tariff on imports to protect American industries from international competition. The tariffs, which were originally set to be temporary war time trade protection, stuck around immediately following the war as American politicians again accused English manufacturers of deliberately dumping their products in the United States in order to crush industries which had developed during the war.[18] These facts were substantiated by remarks from a member of the British House of Commons, Henry Brougham: 'it is well worthwhile to incur a loss upon the first exportation, in order, by the glut, to stifle in the cradle those rising manufacturers in the United States, which the war had forced into existence.'[19]

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[14] Adam Smith, *The Wealth of Nations*, IV.5.3. "The trades, it is to be observed, which are carried on by means of bounties, are the only ones which can be carried on between two nations for any considerable time together, in such a manner as that one of them shall always and regularly lose, or sell its goods for less than it really costs to send them to market. But if the bounty did not repay to the merchant what he would otherwise lose upon the price of his goods, his own interest would soon oblige him to employ his stock in another way, or to find out a trade in which the price of the goods would replace to him, with the ordinary profit, the capital employment in sending them to market. The effect of bounties, like that of all the other expedients of the mercantile system, can only be to force the trade of a country into a channel much less advantageous than that in which it would naturally run of its own accord."

[15] Maurizio Zanardi, *Antidumping: A Problem in International Trade*, EUR. J. OF POL. ECON., 22, 3, pp. 591-617 (2006)

[16] *Id.* at 592

[17] *Id.*

[18] Carol Sue Humphrey, *The Press of the Young Republic,* London, Greenwood Press, 1996

[19] *Id.* at 101

This extension of war time tariffs, which became known as the Tariff Act of 1816, was the first distinctly protectionist tariff of the United States and became a major policy driver setting the stage for future protectionist legislation. As it turns out, however, the Tariff Act of 1816 was not solely implemented as a measure to protect young American industry, it was also a budget deficit reduction strategy proposed by Treasury Secretary Alexander J. Dallas.[20] The tariff remained in force for several years until the budget deficit turned into a budget surplus, trade relations with Great Britain had strengthened and British trade monopolies had weakened.[21] By this time, the Southern states had moved away from the idea of supporting protectionist measures as a method of dealing with domestic economic challenges and congressional efforts to implement protectionist legislation became a great divide in U.S. trade policy.[22] The Northern states sought protectionist measures to expand their growing industrial base and the Southern states wanted free trade in order to expand their agricultural exports.[23] The tug of war between these two views continued to be a struggle until the Civil War when the Northern victory assured that the Republican protectionist viewpoint would be in favor into the twentieth, and now twenty-first, century.

Notwithstanding the use of various protectionist measures in early U.S. history, the first national law directed specifically at dumping behavior was actually enacted by Canada in 1904. At this time, Canada added an antidumping clause to its tariff legislation authorizing a tariff on imports equal to the difference between the 'fair market value' and the 'selling price.'[24] This form of protectionist tariff, and its method of calculating the price difference, has now become fairly standard practice for antidumping measures. Of course, irony is not lost on the fact that, while Canada initially passed this antidumping legislation to block steel imports from the United States, a century later, the U.S. steel industry is among the major users of the law to stop imports from around the globe.[25]

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[20] Norris W. Preyer, *Southern Support of the Tariff of 1816: A Reappraisal* (J. OF S. HIST., XXV (August 1959, pp. 306–322) in Essays on Jacksonian America, Ed. Frank Otto Gatell, Holt, Rinehart and Winston, Inc. New York, (1970)
[21] *Id.*
[22] *Id.*
[23] Spencer P. Morrison, *America's Protectionist Past: The Hidden History Of Trade*, NAT'L ECON. EDITORIAL, (December 23, 2016)
[24] Adam Shortt, *The Antidumping Feature of the Canadian Tariff*, THE Q. J. OF ECON., 20, 2, pp. 250-258 (1906)
[25] Douglas Irwin, *The Rise of US Antidumping Activity in Historical Perspective*, THE WORLD ECON., 28, pp. 651-668 (2005)

Even though both the Sherman Antitrust Act of 1890, which outlawed anticompetitive monopolistic strategies, and the Clayton Act of 1914, which outlawed unfair price discrimination, predated the Canadian antidumping tariff, the United States did not specifically address dumping until the Revenue Act of 1916.[26] It is also interesting that the antidumping measures in the Revenue Act of 1916 were actually criminal punishments. This very first U.S. antidumping act made it illegal to sell imported goods at significantly lower prices than to export market prices with the intent to injure a U.S. industry and the punishment for those found guilty by the U.S. court system were criminal fines and potential imprisonment.[27]

The criminal punishments set forth in the Revenue Act of 1916 were replaced with higher import duties with the Antidumping Act of 1921. Thus, the Antidumping Act of 1921 became the foundation for antidumping measures in the United States establishing the now familiar core elements of antidumping legislation: 'duties may be imposed if the exporter's sales price is less than the foreign market value, that foreign costs of production may be calculated if the foreign market value is not ascertainable, that the dumping must be related to injury suffered by the domestic industry, that higher import duties are the appropriate remedy.'[28] These elements were central in the foundation of the 'textual basis' for Article VI of the General Agreement on Tariffs and Trade in 1947.[29]

For the next fifty years, the major policy movements involving U.S. antidumping legislation centered on the less than fair value (LTV) determination. While, originally, the Department of the Treasury had responsibility for the LTV investigation, that responsibility was moved to the U.S. Tariff Commission (now the United States International Trade Commission) in 1954. The LTV investigatory responsibility was moved again in 1980 to the Department of Commerce, where it remains today. This administrative shift to the Department of Commerce was supported by the administration and congress because of a perceived indifference by the Treasury Department concerning the antidumping issue.[30]

There were reasons for this governmental indifference as throughout the early growth of antidumping legislation in the United States, legislative bodies adopted a very convoluted approach to the implementation of antidumping remedies which often mixed in a variety of elements from both antitrust and tariff legislation. As Dartmouth economics professor, Douglas

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[26] *Id.*
[27] *Id.*
[28] *Id.* at 653
[29] *Id.* at 654
[30] *Id.*

Irwin, explains, the 'unclear union of disparate elements drawn from tariff and antitrust law resulted in a marked ambivalence in the Tariff Commission's interpretation of the act's injury clause.'[31] Thus, the changes seen in the 1980s were designed to address that ambivalence. The move also split the process of determination with the Department of Commerce determining LTV, and the United States International Trade Commission determining the injury. The split system greatly increased the facilitation of petition filings and also increased 'the probability of import duties as being the final outcome.'[32]

The procedural and administrative changes adopted in the 1980s had a real, substantive impact as the results over the next three decades record significant increase in filings for antidumping protection in the United States. While the data shows that the number of products targeted for antidumping measures actually declined since the early 1980s, more firms began filing multiple petitions.[33] The data also reveals that, in addition to this increase in petition filings, now 'almost every case reaches the injury determination stage.'[34] Today, antidumping tariffs have become politically popular as a means to protect domestic industry and, ultimately, as is argued by American politicians, to protect domestic employment.

III. ADVERSE EFFECTS OF ANTIDUMPING MEASURES

By the United States Department of Commerce definition, product dumping can arise under two scenarios. It occurs when a product is sold for less than it is sold for in the domestic market (or third country markets) or it is sold for less than the production cost.[35] In order to seek protection from such situations, a company or industry must be able to show that product dumping occurred, that domestic companies or industries were injured and that there is a causal link between the two. In these situations, antidumping tariffs are permitted and the applicable antidumping agreement will regulate the specific conditions in which antidumping measures can be implemented. As addressed in most multi-lateral trading agreements, such as the WTO

[31] Douglas Irwin, *The Rise of US Antidumping Activity in Historical Perspective*, THE WORLD ECON., 28, pp. 651-668 (2005)
[32] *Id.* at 656
[33] *Id.* at 665
[34] *Id.* at 660
[35] Reference Terms of International Trade, United States Department of Commerce, International Trade Administration, Washington, D.C., p. 4 (1987)

Antidumping Agreement and the NAFTA Antidumping Agreement, tariffs are designed to be temporary relief measures.[36]

However, despite the prevalence of antidumping agreements in most multi-lateral trading agreements, the debate over the efficacy of protectionist remedies for product dumping continues to be debated. While many economists echo Adam Smith's viewpoint that a free market will eventually correct even unfair pricing tactics, most politicians and domestic business leaders tend to prefer government action to dissuade unfair pricing activity, whether that unfairness is real or perceived. To be sure, President Trump won the most recent U.S. Presidential campaign largely on his promises to bring back jobs and crack down on underpriced imports. The populist driven rhetoric, however, does not tell the full story regarding the impact of economic protectionism. Upon closer examination, economic protectionism, such as antidumping tariffs, does not come without very real adverse and collateral damage effects. Antidumping tariffs can have adverse effects on consumers, on domestic exporters and on developing markets. Not to mention the adverse effects on market efficiency as a whole.

Most obviously, antidumping tariffs negatively impact domestic consumers. Having the ability to obtain the most advantageous pricing for products is a key driver for consumer-driven economies like the United States. Any measures to place tariffs on imports essentially increases prices paid by American consumers. There is little doubt that taxes, tariffs and duties, however the legislation is worded, result in higher consumer prices. In the case of antidumping duties, 'domestic prices rise because the foreign firm raises its price to meet the antidumping constraint and the home firm follows suit as competition is relaxed.'[37]

Therefore, the very clear loser, as a result of increased enforcement of U.S. antidumping legislation, is the American consumer. In free and competitive markets, lower prices help raise the standard of living by providing greater value for the end consumer. Companies such as Walmart, love them or loathe them, have brought low prices to consumers in the U.S. and around the world. These low prices, as Walmart argues, help improve the quality of life for consumers and at least one study has shown that the lower prices for fruits and vegetables found at Walmart, such as Chilean and

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[36] Understanding the WTO: The Agreements, Antidumping, subsidies, safeguards: contingencies, etc. available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm

[37] Simon Anderson, Nicolas Schmitt, and Jacques-Francois Thisse, *Who Benefits from Antidumping legislation?* J. OF INT'L ECON., 38, pp. 321-337 (1995)

Mexican grapes, has helped consumers to have 'more total resources to devote consumption of both social capital and material.'[38]

While the importation of cheaper grapes and other agriculture has not helped the American farmer, it has been of great benefit to the American family. Placing tariffs on imported products such as table grapes from Chile and Mexico only serves to increase prices for the American consumer and adversely impact their quality of life.[39] Of course, this is not just a United States consumer argument. As Canadian economist Jean-Marc Leclerc writes in *Reforming Antidumping Law: Balancing the Interests of Consumers and Domestic Industries*: 'Why would a below-cost sale of a Korean car attract punitive damages? Should it not, rather, be welcomed as a transfer of wealth from Korean consumers to Canadian consumers?'[40]

In addition to the direct impact of foreign firms raising prices, antidumping measures can also adversely affect consumers by weakening overall market competition through an attrition of firms. If antidumping duties cause foreign firms to move to other trading partners, reducing the total number of firms active in the domestic market, then domestic market competition is weakened overall.[41] The negative impact on competition will, in turn, reduce the elasticity of demand in the given market and any first year economic student would know that a reduction in the elasticity of demand would move product prices higher. Even if firms do not go so far as to collude in order to affect pricing, which often is an option in the face of antidumping duties, the end result will, at the very least, be an increase in the equilibrium markup of price over cost.[42]

Of course the real problem with voicing the consumer concern is that protecting consumer interests is not as politically popular as protecting domestic industry. It is difficult to imagine an American politician running on a campaign of 'Vote for me and I promise more cheap imports!' 'I promise inexpensive 80" Chinese TVs in every living room and affordable Korean luxury cars in every garage!' Those campaign promises just do not have the same powerful ring as 'Vote for me and I promise to bring back American manufacturing!' At a time when special interest groups and American industry provide the bulk of campaign financing for American

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[38] Carden and Courtemanche., *Does Wal-Mart reduce social capital*? PUB. CHOICE, at 113 (2009)

[39] Andrea Miller, *The United States Antidumping Statutes: Can a trade agreement with the United States Be Both "Free" and Fair? A Case Study of Chile* 54 CATH. U. L. R. 2, pp. 627-660 (2005)

[40] Jean-Marc Leclerc, 'Reforming Antidumping Law: Balancing the Interests of Consumers and Domestic Industries' 44 MCGILL L. J. 111.

[41] *Id.*

[42] *Id.*

politicians, those views are going to be the views with the greatest political clout.

That being said, the consumer argument is not the only valid argument in opposition to current antidumping legislation. Recent studies have also shown that antidumping measures can have an adverse impact on domestic manufacturers themselves who seek to expand their exports. This adverse impact comes as a result of retaliatory measures from trading partners. As a number of recent studies reveal, protectionist trade policy actions, particularly the extensive use of antidumping protection, has led to a surge in reciprocal antidumping actions against the United States.[43] As Thomas J. Prusa discusses in his article, *On the Spread and Impact of Antidumping*, there is a very real danger of retaliation. As he describes, using antidumping duties to deter lower import prices may actually backfire on the complainant, writing that 'this deterrence may fail, resulting in a prisoner's dilemma with retaliation occurring instead.'[44]

This retaliatory reaction is a similar result as seen with the very early implementation of protectionist duties immediately following the American Revolution as mentioned previously. Following the strong words of Treasury Secretary Alexander Hamilton pushing for economic protectionism to protect American industry just in its infancy, British manufacturers colluded together to try and eliminate the American competitors before such protectionist duties could be implemented.[45] We see similar reactionary responses today. While collusion may not necessarily be the preferred method of retaliation today, it is clear that other nations are more than willing to use antidumping agreements to their own benefit as well.

Along with the marked increase in antidumping activity from the United States, there has also been a proliferation of foreign antidumping regulation aimed at the U.S. since that administrative change in LTV determination occurred in 1980.[46] To be sure, a trading partner is not likely to sit idly by and allow antidumping duties to become a one way street. Robert M. Feinberg and Kara M. Reynolds, both of American University, more fully explain this argument in their study, *Friendly Fire: The Impact of US Antidumping enforcement on US Exporters.* They examined WTO data over a ten year period finding that: 'Specifically, countries are on average 1.7 percentage points more likely to file an antidumping petition against an

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[43] Thomas J. Prusa, *On the Spread and Impact of Antidumping,* CAN. J. OF ECON., 34, 3, pp. 591-611 (2001)
[44] *Id.*
[45] Maurizio Zanardi, *Antidumping: A Problem in International Trade*, EUR. J. OF POL. ECON., 22, 3, pp. 591-617 (2006)
[46] *Id.*

industry within the United States if the US targeted it in an antidumping action the previous year. This represents a 100 percent increase in the predicted probability of filing against the United States.'[47]

If trading partners may respond with retaliatory measures of their own, what really is to be gained? Very interestingly, additional studies have revealed that the use of antidumping duties does not necessarily reduce the amount of targeted imports anyway. In a 2017 study published in the East Asian Economic Review, author Nakgyoon Choi noted that: 'Our results indicate that a 1% increase in the antidumping duties decreases the import of the targeted product by about 0.43~0.51%. The actual statistics, however, show that the total import of the targeted products increased by about 30 percent, while an antidumping duty was in force.'[48] Therefore, in order to protect a specific American industry through the use of antidumping duties, retaliation may occur to the detriment of American exporters and the numbers of targeted imports may actually increase. This does not sound like an effective tradeoff.

Thirdly, while antidumping measures can backfire and end up damaging the very country specific industries and companies they were designed to protect, these measures also disproportionately impact developing markets.[49] For many decades, antidumping actions were initiated almost exclusively by developed nations as they each competed for market share in a variety of industries. At first these actions were aimed at each other, however, over time, developed countries began to seek antidumping protection against developing nations who could undercut the market with low wages and other financial concessions which resulted in lower product prices. Certainly, when a developed market country initiates antidumping duties against a developing market country, the action has a dampening effect on the economic progress in the developing market, which may seem fair if antidumping actions would also move the other way. However, despite the growth of antidumping actions initiated by developing market countries, this increase in antidumping activity is not necessarily directed at developed market countries.

It is an accurate assessment that in today's economic climate, antidumping measures have greatly expanded across the globe, with many developing countries getting in on the action as well. This means that antidumping legislation and activity has exploded with greater levels of

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[47] Robert M. Feinberg and Kara M. Reynolds, *Friendly Fire: The Impact of US Antidumping enforcement on US Exporters*, REVIEW OF WORLD ECON., July 2008, 144, 2, pp 366–378.
[48] Nakgyoon Choi, *Did Antidumping Duties Really Restrict Import? Empirical Evidence from the US, the EU, China, and India*, EAST ASIAN ECON. R., 21, 1, pp. 3-27 (2017)
[49] Gunnar Nielsa and Adriaan ten Kateb, *Antidumping policy in developing countries: Safety valve or obstacle to free trade?* EUR. J. OF POL. ECON., 22, 3, pp. 618–638 (2006)

global support and, as researchers have noted, 'traditional antidumping proponents – the United States and the EU – are as likely to find supporters as detractors for their antidumping proposals among the developing countries.'[50] Essentially, this means that antidumping duties have expanded to the extent that developing market countries are now initiating their own antidumping actions to protect their domestic market companies.

However, to be clear, the majority of antidumping actions by developing countries have been taken against other developing countries and the end result does not always bode well for the expansion of trade in these developing markets.[51] In an article written by Hylke Vandenbussche and Maurizio Zanardi, study results indicated that when countries adopt an antidumping law into their national legislation, the bilateral imports of commodities and goods from all trade partners are likely to be reduced due to a variety of 'spillover effects.'[52] The researchers found that there is an overall negative, or 'trade chilling' effect, for those countries that are significantly involved in implementing antidumping protection.[53]

Therefore, as more developing market countries are pursuing the antidumping strategic approach, these countries can actually hurt themselves. For a case example, consider the implications of antidumping actions for a country like India, a country that has become a very frequent user of such actions. In the Vandenbussche and Zanardi article mentioned above, the researchers found that antidumping actions often resulted in trade losses that seriously offset any increase in trade volumes that had come about due to more positive economic developments such as the growth of trade liberalization policies in India. Unfortunately, the increased implementation of antidumping measures has had a significantly detrimental impact to the gains the country had made as a result of those new trade liberalization policies. As they noted, 'India started liberalizing in 1991, which led to an annual growth of 17.4% of its imports. Although India has had an AD law in place since 1985, it imposed its first AD measure in 1993 and became a very frequent user ever since. The results of this paper suggest that it suffered from a 6.8% annual loss in imports as a result of AD actions.'[54]

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[50] Thomas J. Prusa, *Antidumping: A Growing Problem in International Trade*, THE WORLD ECON.,
28, 5, pp. 683-700 (2005)
[51] *Id.*
[52] Hylke Vandenbussche and Maurizio Zanardi, *What Explains the Proliferation of Antidumping Laws*?
ECON. POL'Y, 23, 53, pp. 93-138
[53] *Id.*
[54] *Id.*

One final adverse effect of antidumping involves the effect on market efficiency overall. A number of economists have studied the impact of antidumping protection in terms of market efficiency and determined that antidumping measures have generally 'become a tool of industrial policy aimed at fostering the interests of inefficient industries.'[55] In another article by Hylke Vandenbussche, the researcher analyzed productivity results for over 4,000 producers involved in antidumping cases within the European Union in the mid-1990s. Within this study, the productivity results for firms that had applied for and obtained antidumping protection were compared against the productivity of similar firms that neither applied nor obtained protection. The analysis indicated that an 'average protected firm is much less productive than a similar firm prior to protection, which suggests that use of antidumping measures may have little to do with "unfair" practices by foreign firms.'[56]

As a conclusion of the article, Dr. Vandenbussche argues that antidumping duties end up protecting less efficient industries, which provides further evidence to the theory that antidumping is used more for policy purposes rather than as a real remedy to alleviate specific industrial harm. Interestingly, an additional finding in the study is that firms that do file for protection but do not receive it appear to have higher productivity levels prior to filing than the firms that file for and receive protection.[57] This article seems to suggest that, at least among firms that file for protection, the European Commission has historically preferred to grant protection only to the least efficient producers. Obviously, when these least efficient suppliers are politically powerful, they are able to successfully lobby the government to take antidumping actions against the more efficient foreign suppliers.[58]

Therefore, antidumping duties are most likely to be very targeted and discriminatory in real world practice.[59] To provide protection to domestic firms, countries seem to use the antidumping tactic to target the most efficient foreign suppliers to the domestic market. Since the most efficient foreign firms are likely to be most competitive in the marketplace, antidumping duties are used to level the playing field. So, essentially this means that in order to address perceived anticompetitive behavior, the import market nation actually becomes anticompetitive themselves. This challenges

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[55]Hylke Vandenbussche, *Antidumping protection: Good for bad firms but bad for good firms*, CEPR POL'Y PORTAL, (October 3, 2008)
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] Arvind Panagariya, *Antidumping: Let Us Not Shoot Ourselves in the Foot*, ECON. TIMES, (June 30, 1999)

the very nature of market efficiency. The truth of market competition is that when foreign producers are allowed to import cheaper goods without fear of antidumping retaliation, consumers, and the nation's economy as a whole, benefit from the more affordable supply of product, and, while inefficient domestic firms that produce similar goods may lose, overall market efficiency is strengthened.[60]

Ultimately, for the consumer, and the consumer-driven economy, if foreign firms wish to sell a product to domestic consumers below cost, politicians should be happy. From quality of life point of view, a nation should want its citizens to pay less for foreign goods, not more. Additionally, in the end, it should not matter whether the low price comes as the result of import sales that are below cost or whether it comes through a cheaper method of production, and it certainly should not matter if the price happens to be lower than what the firms charge in their own domestic market. Given the adverse effects of antidumping actions, it is fairly obvious that such actions are not advantageous to the import nation's economy as a whole.

IV. THE ANTITRUST OPTION

Even though there are very significant economic reasons why a nation would not want to implement antidumping duties as a protectionist measure, not having any legal recourse in the face of anticompetitive behavior, such as predatory pricing, could be problematic in the long run. With this consideration, the reason for seeking interventionist measures becomes just as important as the choice of remedy. The primary concern for Adam Smith and other similar thinking economists is the overall protection of free market competition not the protection of specific country industries or companies. The free market economist's view concerning the regulation of business is largely based on the importance of free market competition that can allocate resources most efficiently in order to offer the end consumer the lowest possible price. Politicians, on the other hand, who have to worry about domestic job losses and domestic tax revenue, continue to push for economic protectionist measures as a means to address specific industry and/or company issues.

Therefore, the political popularity of antidumping measures has led to the large global growth in such actions as previously mentioned. This global growth has, in turn, led to a move far away from the 'established standards of anticompetitive behavior' as the most recent antidumping agreements have

[60] Hylke Vandenbussche, *Antidumping protection: Good for bad firms but bad for good firms*, CEPR POL'Y PORTAL, (October 3, 2008)

been developed and implemented.[61] Arvind Panagariya, Indian-American economist and a professor of economics at Columbia University, wrote over a decade ago that 'trade economists regard antidumping to be the most pernicious instrument of protection. Its use is economically justified only if dumping is predatory, meaning that the offending firms sell the product below cost with the objective of driving other firms out of the market and then raising the price to the monopoly level.'[62]

The key to determining whether pricing is truly anticompetitive is that term *predatory* and, unfortunately, this has not been the pricing analysis standard used when testing the legitimacy of antidumping duties. Predatory pricing is a very specific pricing strategy and occurs when a firm prices its product below cost with the specific intention to drive its competitors out of business. Once competitors have been driven out of the market, the predator is free to raise prices, thus significantly damaging market efficiency and harming the end consumer. To test for the predatory pricing strategy, which falls under antitrust regulation, requires pricing versus cost determination. However, instead of using production cost, as is one method used under antidumping legislation, predatory pricing uses a slightly different cost analysis. In addition, determining predatory pricing is not dependent upon any analysis of price in the exporter's domestic market or price charged by the exporter in another country. It is simply a price versus cost comparison.

The reason why cost is the important factor in the predatory pricing analysis is to try and answer the specific intent question. As it is always quite challenging, from a legal perspective, to determine specific intent, the determination of predatory pricing relies on an examination of whether or not a firm has priced its product below its cost. Historically, in predatory pricing cases, the cost analysis used was price as compared to marginal cost.[63] At its basic root, marginal cost is the change in production cost when an additional unit is produced after the breakeven point has been achieved.[64] At the breakeven point in production, the fixed costs have been covered and only the variable costs remain.

Unfortunately, the problem with using marginal cost is that it can be very difficult to quantify depending upon the particular industry. Since marginal cost can be difficult to quantify, Philip Areeda and Donald Turner, noted antitrust attorneys and specialists on the Sherman Act and Clayton Act,

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[61] Bruce A. Blonigen and Thomas J. Prusa, *The Cost of Antidumping: the Devil is in the Details*, POL'Y REFORM, 6, 40, pp. 233-245. (2003)
[62] *Id.*
[63] R. Mark Isaac & Vernon L. Smith, *In Search of Predatory Pricing*, J. OF POL. ECON., 93, 2, pp. 320-345 (1985)
[64] *Id.*

proposed a different cost analysis standard to determine predatory pricing.[65] In their article, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, Areeda and Turner focused on average variable costs as a preferred method of determining predatory pricing. While in some industries, average variable costs can equal marginal costs, in other industries, especially those industries which require substantial capital investments the relationship is not necessarily equivalent.[66]

To be clear, for Areeda and Turner, who introduced their cost analysis over forty years ago, predatory pricing was not an antidumping issue but was instead an 'antitrust offense within the proscription of monopolization or attempts to monopolize in section 2 of the Sherman Act.'[67] Therefore, to test for the antitrust offense, Areeda and Turner developed a two-pronged test. First, the plaintiff would be required to show that the defendant was able, from the specifics of the market situation, to logically predict that a predatory pricing strategy would be successful in the particular market. Essentially, this means that the defendant was able to anticipate 'that the present costs of predation will be more than offset by the present value of a future period of monopoly profits, thus making the strategy a sound investment.' [68] In addition, the plaintiff would also be required to show 'that the defendant's prices over a significant number of sales were below a relevant measure of cost, presumptively average variable cost (AVC).' [69] Through this test, Areeda and Turner argued that determining whether or not a wannabe monopolist has engaged in predatory pricing was more accurately measured by examining the costs over the short term, using the AVC as a more easily quantifiable method instead of using marginal cost.[70]

This standard for determining predatory pricing in antitrust litigation became known as the Areeda-Turner test and has been used as the primary legal method to delineate illegal pricing strategies from healthy price competition. The economic reasons for determining this difference goes back to market efficiency and the consumer benefit. Healthy price competition is inherently 'pro-competitive' and is ultimately beneficial to the consumer while predatory pricing eventually harms consumers once the newly created

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[65] Philip Areeda & Donald Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 HARV. L. REV., pp. 697-733 (1975)
[66] *Id.*
[67] *Id.* at 697
[68] Herbert Hovenkamp, *Predatory Pricing under the Areeda-Turner Test*, U. IOWA LEGAL STUD. RES. PAPER No. 15-06, (March 15, 2015)
[69] Herbert Hovenkamp, *The Areeda-Turner Test for Exclusionary Pricing: A Critical Journal*, TINBERGEN INST., pp. 1 – 14 (2014)
[70] Herbert Hovenkamp, *Predatory Pricing under the Areeda-Turner Test*, U. IOWA LEGAL STUD. RES. PAPER No. 15-06, (March 15, 2015)

monopolist had driven out competitors and was free to raise prices.[71] Through the Areeda-Turner test, a court has the means to determine when a suspected monopolist deliberately set a price which, they were sure to know, would not be truly profit-maximizing until competitors were driven from the market.[72] While the Areeda-Turner test has had a number of critics over the past forty years, the test is still commonly used to determine predatory pricing within antitrust litigation in the United States.

Interestingly enough, one of the biggest critics of the Areeda-Turner test is University of Iowa law professor, Herbert Hovencamp, who had actually co-authored a book with Philip Areeda entitled, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*. Professor Hovencamp, along with other antitrust scholars and economists, believes that the Areeda-Turner AVC test is only useful in market equilibrium situations and that '*classic* predatory pricing is not an equilibrium strategy.'[73] Of course, the ultimate complaint that some have with the test is that the use of AVC makes it far easier for defendants to prevail in litigation, or prevent them from even going to trial in the first place. Hovencamp describes his reluctant acquiescence that 'the test nonetheless survives, mainly for two reasons. First, it tends to keep predatory pricing cases out of court and away from juries, two properties that make it attractive to judges. Second, and more importantly, no one has been able to come up with something better.'[74]

As mentioned in Section II of this article, current antidumping legislation addresses price discrimination and not necessarily predatory pricing. To this end, antidumping measures implement a far different method for determining anticompetitive pricing than average variable cost as is used in the Areeda-Turner test. For antidumping claims to be legally successful requires a less than fair value (LTV) determination as well as the determination of a specific domestic injury. In comparison to the Areeda-Turner (ACV) test, which is more lenient to the defendant, the LTV and specific injury method used in antidumping can be more lenient toward the plaintiff. Of course, this potential leniency toward the plaintiff ultimately depends on the definition and calculation of fair value.

In antidumping practice, two main methods have evolved to calculate fair value. This means either examining the price charged by the exporting firm in its own market (or a third market) for the same product or examining

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[71] *Id.*
[72] Herbert Hovenkamp, *The Areeda-Turner Test for Exclusionary Pricing: A Critical Journal*, TINBERGEN INST., pp. 1 – 14 (2014)
[73] *Id.* at 5
[74] Herbert Hovenkamp, *Predatory Pricing under the Areeda-Turner Test*, U. IOWA LEGAL STUD. RES. PAPER No. 15-06, (March 15, 2015)

the total production cost that is constructed from the firm's accounting information.[75] However, many economists see both of these definitions as very weak in terms of helping to determine anticompetitive pricing behavior.[76] From a practical standpoint, when an exporting firm sets pricing which is below the firm's domestic market pricing, it reflects a fairly common pricing strategy. Most firms, whether selling in the domestic market or the export market, set pricing according the requirements of the particular local market. Considering that reality, nearly all pricing is discriminatory pricing. In fact, as Bruce Blonigen and Thomas Prusa, observe: 'If countries do not worry about price discrimination by firms for different consumers in the domestic market, why should we worry about it across national borders?'[77]

Blonigen and Prusa go on in the same article to discuss the even greater ridiculousness of the second method used in antidumping cases. When a constructed production cost method is used it can be fairly easy to find situations of pricing below cost. As antidumping measures are implemented in many countries and they use the constructed cost method, they include not only an examination of fixed costs but also their own estimate for what a 'normal' profit should be in that specific market.[78] When costs are constructed in this way, it is not too difficult to make the costs higher than the prices charged in the export market with the end result punishing a firm for not making enough profit. Therefore, the constructed cost method has very little to do with helping to determine anticompetitive pricing behavior. As Blonigen and Prusa explain, 'In short, the concept of an antidumping act is unnecessary because the determination that goods are sold at less than fair value tells us nothing about the anticompetitive nature, purpose, or effect of import practices.'[79]

Instead of trying to determine fair value, or ascertaining the level of specific injury (certainly one could argue that all competition is injurious), the better argument is that antidumping policy should be directed only at reducing the impact of a specific anticompetitive practice, such as a means to address an issue like predatory pricing. With this frame of reference, antidumping policy fits much better as a part of competition policy. While competition policy is usually directed at domestic firms in the domestic market, the same anticompetitive standards can apply to the international

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[75] Bruce A. Blonigen and Thomas J. Prusa, *The Cost of Antidumping: the Devil is in the Details*, POL'Y REFORM, pp. 233-245 (2003)
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*

market as well. In real practice, any country with effective competition policies can also address anticompetitive situations occurring abroad that can impact the domestic market. Does it really make sense to have two separate set of rules, especially considering the tremendous growth in the number of antidumping measures that have become far too common in today's global economic climate? As Rodney de C. Grey questions in a 1999 UNCTAD working paper: 'why are the standards and administrative rules of the antidumping system not more consistent with competition law?'[80]

The idea of an antitrust option as a means to address product dumping is not new. In a 1965 article published in the Yale Law Review, the author described the Antidumping Act of 1921, the act on which subsequent antidumping legislation has been based, as 'a curious hybrid of traditional tariff ideas and price discrimination theories of antitrust law.'[81] The author goes on to discuss, that, while the protectionist tariff remedy set forth in the Antidumping Act of 1921 was designed to protect American companies from foreign competitive advantages, the major problem with such a tariff is that it is only selectively applied. Essentially, although it could be argued that there are many imports which hurt American business, the protectionist tariff penalty is only applied to those imports sold at discriminatory (not necessarily predatory) prices.[82] As the author explained back in 1964, 'Since, in the final analysis, there is nothing in the concept of dumping to merit a special system of governmental scrutiny, there seems to be no reason why trade in imports should not be relegated to the general standards of the Sherman Act.'[83]

In the end, the real economic argument for the protection of market efficiency in favor of the consumer requires no more than some level of protection against market disruption due to pricing. Antitrust remedies can provide that level of protection while continuing to allow for free trade and pro-competitive behavior. After all, as Adam Smith discussed, if a nation can produce a good for an overall lower cost than another nation can produce the same good, essentially for whatever reason, it is beneficial to both parties to trade those goods.[84] Smith would further argue that the invisible hand is always there to eventually correct even the most discriminatory pricing issues.

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[80] Rodney de C. Grey. *The Relationship between Antidumping Policy and Competition Policy*, UNCTAD Working Paper, (1999)
[81] *The Antidumping Act. Tariff or Antitrust Law*? 74 YALE L. J. 4, pp. 707-724 (1965)
[82] *Id.*
[83] *Id.*
[84] Adam Smith, *The Wealth of Nations*, Book IV, Chapter 5

V. CONCLUSION

As with domestic antitrust laws, the original purpose of antidumping legislation was to protect consumers by preventing the abuse of market power with the major objective to prevent degradation in overall market efficiency, rather than simply a means to protect market share for domestic producers. [85] By this regard then, as mentioned by a number of economists and international trade specialists and as previously mentioned in this article, antidumping laws are only economically justified as a means to protect against potential monopolistic behavior such as predatory pricing. With the ability to address such behavior through antitrust legislation, there is little need for specific antidumping agreements.[86] Additionally, with most trade agreements also providing protection against trade-distortive subsidies which go beyond agreed upon limits, there are other protective mechanisms to guard market efficiency as well.[87]

Unfortunately as antidumping measures have evolved, they have become much more politicized and protectionist in nature moving away from the market efficiency concern. Perhaps it is time to dial back the clock and make antidumping much more consistent with competition law.[88] Given the use of litmus tests like Areeda-Turner, the enforcement of predatory pricing cases may ultimately favor the defendant in the end but it is still a way of providing some measure of protection against anticompetitive behavior while also letting the markets remain as free and unfettered as possible.

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[85] Chad Brown and Rachel McCollough, *Antidumping and Market Competition: Implications for Emerging Economies,* BRANDEIS U. Working Paper Series, (August 13, 2012)
[86] Jean-Marc Leclerc, *Reforming Antidumping Law: Balancing the Interests of Consumers and Domestic Industries,* 44 MCGILL L. J. 111
[87] Subsidies and countervailing measures, World Trade Organization. Available at: https://www.wto.org/english/tratop_e/scm_e/scm_e.htm
[88] Rodney de C. Grey. *The Relationship between Antidumping Policy and Competition Policy*, UNCTAD Working Paper, (1999)

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