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WHAT TIPS THE SCALE IN FAVOR OF HIRING A CEO WITH A LEGAL BACKGROUND?

FROM GIVING COUNSEL TO MAKING DECISIONS[†]

Jillian Alderman[*], Joetta Forsyth[**], Charla Griffy-Brown[***], Richard C. Walton[****]

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ABSTRACT

This paper examines potential pathways for professionals with a legal background to be hired as chief executive officer (CEO) at a large public company. We explore the theory behind hiring an executive with a legal background, including the theory of the firm, human capital, and signaling theory. We propose several benefits of having a legal specialist in the CEO role, such as the potential for lowering costs, increasing effectiveness, and sending important signals to external groups. In contrast, firms may be less likely to hire a legal specialist CEO when they are experiencing high growth or high research and development, or when they are in industries that require different expertise to successfully operate. To test these predictions, we examine key characteristics of S&P 1500 large public firms who chose to hire CEOs with a legal background. Finally, we confirm these key pathways to the CEO role by providing examples of CEOs with either a legal position or law degree. We find that large public companies rarely hire CEOs directly from a legal position. However, there are specific conditions under which firms are more likely to choose a CEO with a legal specialty, including increased exposure to regulatory oversight and complex legal situations. Additionally, we identify specific pathways to CEO for those who have a law degree combined with general business and management experience, which may be a more viable pathway to the CEO role in a larger variety of industries and firms.

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I. INTRODUCTION

This study explores the motivations for hiring a CEO with a legal background. We begin with an overview of the CEO role and the types of qualifications typically associated with new CEOs. Next, we consider advantages and disadvantages of hiring a CEO with a legal background. We then pursue our research questions empirically, examining the characteristics of large public firms who select a CEO with a legal background. Finally, we provide examples of CEOs with legal backgrounds to illustrate realistic paths for leveraging a legal background to reach the CEO role.

We explore the path to CEO in the context of the ongoing debate over whether hiring a specialist or generalist CEO is the best choice for firms. A specialist CEO typically comes equipped with expertise in a specific discipline, such as finance, IT, engineering, or law[1] In contrast, generalists may or may not come from a specialty, but they have broader experience in managing most areas of a business[2]

Our study explores how CEOs with a legal background fit into this framework. While literature has explored specialist CEOs in different disciplines, we are not aware of studies that examine lawyers as specialist CEOs. Our findings demonstrate two pathways for legal professionals and law students interested in achieving the role of CEO at a large public firm.

II. RELATED LITERATURE: CEO BACKGROUND AND EXPERIENCE

A. Generalist vs. Specialist CEOs

We first examine the role of the CEO and theoretical benefits of hiring a legal specialist. The CEO is arguably the most visible employee in a firm. However, what exactly does the role entail, and what types of skills are necessary to successfully fulfill the demands of the CEO position at a large public firm? According to a recent McKinsey study exploring 25 years of data on 2,500 CEOs, there are six key elements linked to high levels of CEO excellence: managing corporate strategy and resource allocation, fostering board engagement, managing shareholders, optimizing personal working norms, managing teams and processes, and obtaining organizational consistency among functions[3]

Individuals seeking the position of CEO can obtain the skills necessary for the role by developing human capital, which is defined as "the knowledge,

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1.*See* Alessandra Rizzi et al., Prior Peace Attainments of New ceos: How Task-Specific Human Capital Affects Executive Performance (Academy of Management, 2020).

2.*See* Mingxiang Li & Pankaj C. Patel, *Jack of all, master of all? CEO generalist experience and firm performance*, 30 The Leadership Quarterly 320 (2019).

3.Carolyn Dewer, Martin Hirt, & Scott Keller, *The mindsets and practices of excellent CEOs*, McKinsey & Company, (Oct. 29, 2019)., https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/the-mindsets-and-practices-of-excellent-ceos.

information, ideas, skills, and health of individuals".[4] As a person acquires training and experience in their profession, they continue to accumulate human capital, which shapes how they view and respond to situations. Different types of human capital in the CEO role can be an advantage or a disadvantage, depending on the industry or individual firm situation.

So what type of human capital allows the executive to be most effective in fulfilling the CEO role? Promoters of generalist CEOs may argue that broad management experience is the most reliable way to acquire these skills. Functional specialties can have competing interests. For instance, marketing may desire a product that is very difficult to manufacture. Therefore, a generalists' wider knowledge of different functional areas could improve the ability to bring people together, communicate across departments, and have a big picture view of the firm.

Furthermore, generalists tend to have a very valuable and unusual skill – agility. They can often handle the mathematical requirements of managing the financial functions of the firm. Yet they also have managerial skills, such as empathy, effective communication, teamwork, and trust-building, that make them effective at managing and inspiring people. This experience with soft-skills becomes even more important at the CEO level[5] Perhaps as a result of these strengths, generalists demand higher compensation, are more likely to be hired as CEO, and are linked to many other positive outcomes in companies[6]

Proponents of hiring a specialist must answer a fundamental question: "Specialists can always advise the CEO, who has access to their expertise. Why is it necessary to have the specialist make the actual decisions?" Arguably, specialist expertise is available to the firm even when the specialist is not the CEO. In order for a firm to put a specialist in charge, there must be a sufficient advantage of the specialist making the decisions, rather than just giving advice from their functional area role.

Past findings show unique situations in which specialists may be preferred. For example, specialist CEOs are linked to innovation and higher R&D investments[7], illustrating specialist CEOs are advantageous in these specific circumstances. Financial expert CEOs are linked to higher initial public offering (IPO) survival rates, and are less likely to engage in misleading financial reporting after an IPO[8] In contrast, some studies have linked generalists to negative outcomes such as lower firm performance[9], lower credit ratings, higher risk-taking, and higher interest rates on borrowing[10] Overall, although the preference in practice tends to skew to hiring generalists,

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4.Gary Becker, *The Age of Human Capital*, (2002). https://media.hoover.org/sites/default/files/documents/0817928928_3.pdf

5.*See* Boris Groysberg, L. Kevin Kelly, and Bryan MacDonald, *The New Path to the C-Suite*, HARV. BUS. REV. (Mar. 2011), https://hbr.org/2011/03/the-new-path-to-the-c-suite.

6.*See* Gkillas, K., & Magerakis, E. *General Managerial Ability and Corporate Cash Holdings.* (Dec. 23, 2019)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3718453.

7.*See* Agnihotri, A., & Bhattacharya, S., *Generalist versus specialist CEO and R&D commitment: evidence from an emerging market*, CAMBRIDGE UNIV. PRESS (2021)

8.*See* Gounopoulos, D., & Pham, H. (2018). *Specialist CEOs and IPO survival*, 48 J. OF CORP. FIN. 217 (2018).

9.Li & Patel, *supra* note 2, at 322

10.*See* Zhiming Ma et al., *Generalist CEOs and Credit Ratings*, CONTEMP. ACCT. RES. (Nov. 23, 2020),

there is an emerging body of evidence that specialist CEOs provide advantages for firms who desire specific strengths that they can provide.

B. Benefits of a Legal Background as CEO

Given that evidence demonstrates other functional area specialists provide benefits to companies with unique needs, arguably, a legal background provides specialist experience that could benefit certain companies as well. Therefore, our research question is, *What tips the scales in favor of hiring a CEO from a legal background?* We divide this discussion into three parts; when hiring a CEO from a legal background lowers costs of the firm, when it increases the effectiveness of the CEO, and when it sends helpful signals to internal and external groups.

i. Lowering Costs

In Ronald Coase's seminal article, The Nature of the Firm[11], he argues that firms exist because they reduce transaction costs. Transactions in an external market place can be costly for a number of reasons. These include costs associated with searching for a transaction partner, bargaining with them, and verifying that they have fulfilled their side of the transaction. Coase argues that when these costs are lower within a firm, then a firm will conduct the transaction internally, rather than having independent parties transacting in a market place.

This perspective on transactions costs provides our first lens for understanding why firms may choose to hire someone with a legal background as a CEO. Whenever a CEO seeks legal advice, they must contact corporate counsel. Each consultation requires duplication of effort, as both parties must be informed and knowledgeable about the situation. However, a CEO with a legal background would likely still confer with corporate counsel to sufficiently scrutinize legal situations. Therefore, from a frequency of transactions approach, a CEO with a legal background may not decrease firm costs.

Examining the cost of total communication time may be a more fruitful approach. The more complex the legal problems that a firm faces, the more time and effort is required for legal counsel to communicate with the CEO. A CEO with a legal background can more efficiently understand complex situations and make informed legal decisions, reducing the total communication time spent with counsel. Therefore, we expect that firms facing more complex legal situations will be more likely to choose a CEO with a legal background.

What types of companies exhibit these characteristics? We expect larger firms to have more complex legal issues due to their increased exposure to potential litigants, perceived deep pockets, potential involvement in multiple industries, and the complexities of maintaining systems of internal controls required for larger public companies. Therefore, larger public firms are more likely to hire CEOs with legal backgrounds to reduce costs of supporting these necessary functions. Firms with higher assets per employee may also experience heightened litigation risk, as there are more assets at risk to be awarded to

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https://doi.org/10.1111/1911-3846.12662.

11.R. H. Coase. *The nature of the firm*. Economica (Nov. 1937), https://doi.org/10.2307/2626876.

employees if they prevail in a lawsuit against the company. Therefore, we expect that firms with few employees compared to assets ("employee asset intensity") would be more likely to hire a CEO with a legal background.

Finally, we expect that firms in industries with complex and varying legal and regulatory issues hire CEOs with legal backgrounds more frequently, as doing so would lower costs to the firm. For instance, some industries are more concentrated with larger firms, and are more exposed to complex antitrust issues than others. Therefore, we intend to examine the type of industry as a motivator of hiring a legal specialist as CEO, given the potential for firms in certain industries to reduce costs.

ii. Reducing Risk and Increasing Effectiveness

Firms may also benefit from hiring a CEO with a legal background when their relevant knowledge, skills, and personality traits highly align with the firm. Doing so would likely reduce risk and increase CEO effectiveness during the new CEO's transition period. For instance, lawyers tend to be more averse to taking risks. As such, firms that benefit from low levels of risk may hire a CEO with a legal background to restrain firm risk-taking. We explore three firm-specific characteristics that are associated with risk. First, since increasing debt is known to increase the risk of bankruptcy, we predict that firms with lower debt levels will be more likely to hire a CEO with a legal background. Additionally, we predict that firms with a lower return on assets (associated with lower risk) will be more likely to hire a CEO with a legal background.[12] Last, since stock-based compensation is associated with risk-taking[13], we predict that firms hiring a CEO with a legal background will have lower CEO stock ownership.

Arguably, industries with more legal consequences and complex regulatory requirements may benefit from hiring a CEO with a legal background, due to the high match between the specialist's knowledge and the challenges faced in the industry. For example, a CEO with a legal background will have the skills and experience to recognize when a decision has legal consequences, assess the size of potential damages, and implement complex multi-phased business plans that guard the firm against future liability. Overall, a CEO with a legal background may be more effective at implementing legal advice, especially when the legal situation requires a nuanced, and dynamic response. Therefore, these skills are best matched to industries where CEOs face these complex legal and regulatory environments.

This important procedural knowledge is part of the development of human capital that those with a legal background can expect to have acquired. However, additional soft skills that lawyers develop such as creativity, strategic thinking in the face of opponents, negotiating, and anticipating others' behavior, can be a strategic advantage for a CEO role. Those who choose to pursue legal careers also likely exhibit specific characteristics demanded by the profession, such as integrity, persistence, critical-thinking and analytical skills, conservative attitudes towards risk, a

12.Return on assets is a measure of profits earned, in comparison to the total investment made by investors in the firm. Low risk firms typically yield a lower return on assets to investors.

13.*See* Zhiyong Dong et al. *Do executive stock options induce excessive risk taking?* 34 J. OF BANKING & FINANCE 2518 (2010)

dedication to hard work, and the ability to effectively give and receive criticism[14] These types of skills, traits, and characteristics are nurtured and developed in law programs and in the daily demands of the legal profession.

Arguably, the characteristics discussed in the above paragraphs can contribute positively to anyone in a CEO role. Therefore, those with a legal background may be effective CEOs for companies in highly regulated industries, or heavily involved in lobbying efforts with lawmakers, due to their strong experience with negotiations and knowledge of regulations and legal terminology. However, what does choosing a CEO with a legal background signal to external groups? We explore this in the following section.

iii. Signaling

Signaling theory suggests that firms can send signals to both internal and external groups that communicate important aspects of the future of the business[15] Attributes of the CEO have been explored for their role in sending signals, with findings that suggest that firms tend to choose leadership and board members that are associated with the signals they wish to send. Additionally, relevant groups often respond in the expected way to these signals[16] Therefore, CEO selection can be an effective way for firms to signal their priorities and future directions.

Since lawyers' human capital aligns with the legal profession, hiring a CEO with a legal background can send a strong signal to various groups, and these signals can be beneficial or deleterious. For example, regulators may receive the impression that the firm plans to take regulations more seriously. Shareholders may think that the new CEO is being hired to assist with legal and regulatory challenges. Both parties may believe that the firm is serious about cleaning up behavior that has led to excessive legal peril for the firm.

C. Barriers to Hiring Legal Specialists as CEO

While a CEO with a legal background can benefit some companies, arguably there are conditions under which firms may choose an alternative. We propose that firms will be less likely to hire a legal specialist when general knowledge or other specialty knowledge is more important. Some firms may choose a generalist CEO or a specialist CEO with a different functional expertise due to the specific needs of the firm.

14.*See* Bruce R. Jacob, *Developing Lawyering Skills and the Nurturing of Inherent Traits and Abilities*. 29 STETSON L. REV. 1058 (1999).

15.*See* Connelly et. al., *Signaling Theory: A Review and Assessment,* 37 J. OF. MGMT. 39 (2011).

16.*See* Yang Zhang & Margarethe F. Wiersema, *Stock Market Reaction to CEO Certification: The Signaling Role of CEO Background*, 30 STRATEGIC MGMT. J. 693 (2009)

i. Firms with High R&D and Growth

Firms going through a significant amount of growth or engaging in research and development may desire a CEO with experience tailored to these goals. A different type of specialty, such as engineering or operations, could meet the need to support the growth and innovation phase. Or, they may prefer a CEO with finance expertise to raise capital through the issuance of new stock, which is often necessary to grow and innovate. These firms will typically have higher research and development expenditures, and a higher market-to-book ratio, which is commonly used in the finance literature to measure expected firm growth.[17] Therefore, while there are arguments that a legal specialist could still benefit these firms in some ways, firms may prioritize different skills matched to their needs during high growth and high innovation periods.

In addition to the desire for different specialist expertise, a CEO with a general managerial background may be desired over a legal specialist in these circumstances, due to the unique soft skills acquired through a career spent managing people and organizations. While people skills are critical in the legal profession, generalists may have different leadership approaches from those of legal specialists, and have experience leading with an inspirational style that is necessary to engage employees in the creative pursuits necessary to innovate and grow.

ii. Industry-Specific Needs

Some industries may also be less likely to desire the signaling to external groups that accompanies the hire of a CEO with a legal background. For example, industries with a large presence of labor unions such as utilities, which have very high union membership[18], may take a different path and hire a non-legal specialist CEO to signal a more neutral stance.

Others may wish to align the expertise of their new CEO with the industry in which their firms operate. For example, the finance industry may be more likely to go a different direction and hire a finance professional as CEO, which would match the CEOs' specialist experience with the firm's day to day operations. However, financial firms can also face serious legal consequences. It may be beneficial to these firms to hire a CEO that has worked in finance as a career, but also has a legal degree. We further explore this pathway to CEO in the sections below.

17.The market-to-book ratio compares the market value of the stock with the book value. The market value of the stock will be higher with growth opportunities because it reflects the value of future increases in profits brought on by growth. The book value of equity is an accounting measure of the investment made in the firm by shareholders. Therefore, a high market-to-book ratio indicates that firms have high future earnings growth potential in comparison to the investment made in them, with a higher ratio indicating more growth.

18.*See* U.S. Bureau of Labor Statistics, Economic News Release, T3, (last modified Jan. 22, 2021), https://www.bls.gov/news.release/union2.t03.htm

D. Types of Legal Specialists with a Potential Path to CEO

While we have presented several advantages of hiring a CEO with a legal background (lowering costs, decreasing risks, increasing effectiveness, and signaling), and some conditions under which firms may take a different path (high growth, high R&D, and industry-specific needs), we have yet to explore the types of legal background that would generate these advantages, and how we would expect this to impact hiring practices of large public companies. Let us now consider two ends of a spectrum; someone who received a law degree and then worked their way up by being engaged in business, and someone who worked their way up practicing law. These career backgrounds may have different implications for the CEO hiring decision.

i. A Career Law Practitioner (Specialist)

Someone who has pursued a career in law will have stronger skills as a legal specialist, because of the additional legal training and experience that they have received. All noted advantages of a legal background will be stronger, such as the cost savings and effectiveness aspects discussed in the prior section. However, they will likely be less trained in other areas of business, and therefore more susceptible to lacking vital business knowledge needed for a CEO position.

Hiring a CEO directly from a position with legal responsibilities, such as general counsel, could also send a very powerful signal. This is someone who is tipped very far on the legal spectrum. Their legal knowledge is very high, the signal they send from pursuing law as a career is very strong, and their business skills may be relatively weaker. Signaling and human capital are much more likely to be issues that tip the scales in favor of hiring a law practitioner as a CEO — or avoiding them, depending on the specific qualities of the firm.

If strong legal skills are valuable in a CEO, then it would be more likely that the CEO selected will be a career law practitioner. It is also highly likely that when CEOs are hired directly from a legal function, they will be more likely to come from the same industry. The reason is that specific legal knowledge is very important in these circumstances, and legal knowledge will vary by industry. For instance, corporate counsel that is highly skilled at defending their firm from antitrust actions has a very different set of skills than an attorney that works in a highly competitive industry with significant product liability problems.

ii. A Business Practitioner with a Law Degree (Generalist)

Alternatively, someone that got a law degree, and then engaged in a business career is at the lower end of the spectrum in terms of having a legal background, and much higher on the spectrum of attaining business knowledge. However, they will have the advantage of jointly having both skills, which may prove to be the best of both worlds.

This type of experience aligns with the concept of a generalist, with the bonus of having a legal knowledge in the form of a law degree. Therefore, compared to

other generalists, a CEO with a law degree may be more efficient at communicating with legal counsel. They may also be more aware of legal dangers and thus more able to avoid them, and more effective at implementing legal policies. On the business side, this individual has pursued business as a career, and has therefore obtained vital business skills.

The potential for positive or negative signals associated with a legal background are arguably lower for this type of career path than for a career attorney, because their most recent activities are not focused on practicing law. They may also have some of the personality characteristics of people that select a legal occupation, and some of people that select a general business occupation. Overall, this type of background and experience combination can bring the advantages of a generalist and specialist to the table. Therefore, the combination of a law degree and generalist business experience may be more frequently observed in a CEO role.

E. Summary of Predictions

To summarize our above predictions, we argue that firms will be more likely to hire a CEO with a legal specialty or background under conditions that require the most legal expertise to reduce costs, reduce risk, and increase effectiveness. In contrast, firms may be less likely to hire a CEO with a legal specialty or background if they are experiencing high growth, high R&D, and are in industries that require different types of expertise in the CEO role to successfully operate. To summarize:

Legal Complexity and Importance: Firms will be more likely to hire a CEO with a legal specialty or background when they are larger in size, and have high exposure to litigation, regulation, or lobbying.

Signaling: Firms will be less likely to hire a CEO with a legal specialty or background when this sends an unhelpful signal to unions.

Risk: Firms will be more likely to hire a CEO with a legal specialty or background when they have low investing returns, low existing debt, and low CEO stock ownership.

Growth and Innovation: Firms will be less likely to hire a CEO with a legal specialty or background when they exhibit high growth, exhibit high levels of R&D and are in industries that demand a different type of expertise.

In the sections below, we examine these predictions using data from large public companies who have experienced a CEO turnover. We then provide examples of CEOs with a legal specialty and a legal background to illustrate the pathways to the CEO role.

III. ANALYSIS OF CEO HIRING TRENDS IN U.S. PUBLIC FIRMS

A. Overview of Data Collection and Methodology

First, to examine our two potential pathways to CEO for those with a legal background, we collect data from *Execucomp* for CEO turnovers for large public firms listed on the S&P 1500 from 2010 through 2016. We identify the past roles of new CEO hires, noting when the individual was hired from a role with a legal title.

We then collect data from *Compustat* on each hiring firm and the firm's industry in the year before the departing CEO leaves the company, to explore characteristics of firms during the time period before they hire the new CEO. This process is intended to understand the types of companies who have hired CEOs from roles with a legal title.

Specifically, we collect data on whether the firm is a utility or in the finance industry, and financial securities data comprising CEO stock ownership, debt, growth opportunities (that are reflected in the stock price), and stock sales. At the industry level, we measure firm size, employee asset intensity, investing returns, and research and development intensity. The median (middle) firm value for each variable is used to represent the typical value of that variable for the industry. We analyze this first set of data to explore differences in firms who have, and have not hired a CEO directly from a legal role, which represents our first pathway to the role for career law practitioners (legal specialists).

As a follow-up analysis, we explore our second potential pathway to CEO by identifying when a CEO was not hired directly from a legal role, but does have a law degree. We collect the same information for these firms to identify the differences between firms who do and do not hire a CEO with a law degree.

B. Hiring Trends of CEOs with a Prior Legal Title

The most striking result of our analysis is that it is exceptionally rare for an executive with a legal title to be hired as CEO: less than 1% of the replacement CEOs in our sample previously had a job title related to law. Those executives who did become CEO typically already had long careers within the firm and limited experience outside the firm. This is consistent with our prediction that CEOs with prior legal titles will come from the same industry.

Table 1 below shows differences between firms that selected legal executives as a replacement CEO and firms that did not. There were 1,265 observations (CEO turnover events) in the sample, but each variable could have fewer observations due to missing values. For each variable, these differences are in the predicted direction.

Table 1

Hiring Firm Variable	Prediction for a Legal Executive Hire	Firms That Hired a Legal Executive (Average)	Firms That Hired Other (Average)	Statistical Significance[b]
Legal Complexity and Importance:				
Finance Firms (% of All Firms)	Bigger✓	44.4%	15.3%	
Industry Typical Asset Size (Millions)	Bigger✓	$3,972	$3,204	

Industry Typical Employee Asset Intensity (Employees per $ Million Assets)	Smaller✓	1.51	3.37	***
Signaling:				
Utility Company (% of All Firms)[a]	Smaller✓	0.0%	4.1%	***
Risk:				
Industry Typical Return on Assets	Smaller✓	2.7%	4.3%	***
CEO % of All Shares Outstanding	Smaller✓	49.2%	172.3%	***
Debt (Short-Term Debt Plus Long-Term Liabilities as a % of Assets)	Smaller✓	10.0%	36.0%	***
Growth and Innovation:				
Market-to-Book (Stock Value versus Investment)	Smaller✓	1.49	3.14	***
Stock Sales as a % of Assets	Smaller✓	0.8%	2.4%	***
Industry Typical Research and Development Intensity (% of Sales)	Smaller✓	0.5%	2.4%	***

[a] There are 51 utility companies in the sample, none of whom hired a CEO with a legal background. Given the small number of utilities, the utility results may not be robust.

[b] Asterisks in this column represent the statistical significance of the differences between the two groups of firms: "***" indicates that the probability that the average value are the same within the two groups is less than 1%. With the exception of two variables, there is less than a 1% chance that the two groups have the same average value, indicating a high degree of significance.

Among legal title hiring firms, 44.4% were in the finance industry. Among other firms, the average is lower at 15.3%, as predicted. However, the difference between these two types of firms fails to be significant. This may indicate that hiring a business practitioner with expertise in finance is more important in the finance industry.

Firms that hire executives with legal titles are larger in size than other firms, as measured by their assets ($3,972 million versus $3,204 million). However, the difference fails to be significant, which may be due in part to the small sample size of CEOs hires that have law titles. Employee asset intensity conforms to our prediction that firms with greater assets (subject to litigation risk) compared to employees are more likely to hire a CEO from a legal position. Fewer employees per assets increases the likelihood that a CEO will be hired from a legal position.

Not a single utility hired a CEO from a legal position. This supports the hypothesis that doing so may send the wrong signal to unions, since utilities are the most heavily unionized non-governmental industry. All three risk variables indicate that firms with a conservative posture towards risk are more inclined to hire a CEO from a legal position. These firms have a lower investing return (return on assets), a lower CEO percent ownership of the stock, and a lower debt level, as predicted.

All three variables that address growth and innovation indicate that high growth firms are less likely to hire a CEO from a legal position, as predicted. The market-to-book ratio is higher (high growth), the stock sales as a percent of assets variable is higher (there are more stock sales with growth), and research and development intensity are higher for firms that do not hire their CEO from a legal position.

C. Hiring Trends of CEOs with a Law Degree

Although still not common, executives with a law degree were much more likely to become CEO; 5.9% of the replacement CEOs in our sub-sample held a law degree. Those executives generally had less experience inside the firm and more experience outside the firm.

Table 2 below shows some of the important differences between the firms that selected legal executives as a replacement CEO and firms that did not. The table shows the mean values of various measures for the two groups of firms. As expected, since business practitioners with law degrees are at the low end of the legal spectrum and have experience in business, they show less of the characteristics of a legal background than CEOs that came from a position with a legal title.

Table 2

Hiring Firm Variable	Prediction for a Legal Executive Hire	Firms That Hired a Legal Executive (Average)	Firms That Hired Other (Average)	Statistical Significance[b]
Legal Complexity and Importance:				
Finance Firms (% of All Firms)	Bigger✓	31.8%	12.4%	*
Industry Typical Asset Size (Millions)	Bigger✓	$4,295	$2,555	**
Industry Typical Employee Asset Intensity (Employees per $ Million Assets)	Smaller✓	2.59	3.44	
Signaling:				
Utility Company (% of All Firms)[a]	Smaller×	4.5%	2.0%	

Risk:				
Industry Typical Return on Assets	Smaller✓	3.5%	4.6%	**
CEO % of All Shares Outstanding	Smaller✓	126.3%	179.9%	
Debt (Short-Term Debt Plus Long-Term Liabilities as a % of Assets)	Smaller×	35.2%	33.3%	
Growth and Innovation:				
Market-to-Book (Stock Value versus Investment)	Smaller✓	2.20	3.01	*
Stock Sales as a % of Assets	Smaller✓	.5%	3.9%	***
Industry Typical Research and Development Intensity (% of Sales)	Smaller✓	1.2%	2.9%	**

[a] There are 51 utility companies, none of whom hired a CEO with a legal background. Given the small number of utilities, the utility results may not be robust.

[b] Asterisks in this column represent the statistical significance of the differences between the means: "***" indicates the probability of the means being equal is less than 1%, "**" indicates the probability of the means being equal is less than 5%, and "*" indicates the probability of the means being equal is less than 10%.

Finance firms are more likely to hire a CEO with a law degree. This indicates that generalists or alternatively, specialists in finance have an additional advantage when they have a law degree, since potential losses from legal liability in the finance industry are large. Firms that hire CEOs with law degrees are larger (have more assets). These CEOs may be better at implementing and monitoring legal control systems for large firms.

While employee asset intensity conforms to predictions, it fails to be significant. Generalist CEOs with law degrees are more dispersed across industries, although there are more of them in our sample, and have less of a preponderance in industries where employee litigation puts assets at higher risk.

Since we expect signals relating to a legal background to be weaker for CEOs that were not hired directly from a law position, it is not surprising that heavily unionized utilities do not hire significantly fewer of them. However, while insignificant, the opposite is true; there are more CEOs with a law degree that are hired by utilities. With a weak negative signal, the relative advantages of understanding regulation and communicating with regulators appears to prevail.

Both Industry Typical Return on Assets, and CEO % of All Shares Owned match predictions, although only Return on Assets is significant. Both are consistent with firms with a conservative posture towards risk hiring more CEOs with a law degree. The level of debt for firms that hire a CEO with a law degree is higher, which is the opposite of the predicted direction. However the difference is not statistically

significant, and the values are very close to each other. There does not appear to be a big difference in debt levels, based on hiring a CEO with a law degree. The results regarding growth and innovation match the results from Table 1, as all three measures of growth are lower for firms that hire a CEO with a law degree.

IV. CASE EXAMPLES: HIRING A CEO WITH A LEGAL BACKGROUND

We now expand on our analysis to provide illustrations of individuals who have risen to the CEO role with either a legal specialty or a law degree, to provide concrete examples of the pathways to CEO with a legal background.

A. A CEO with a Legal Specialty

Timothy Mayopoulos became CEO and President of Federal National Mortgage Association (also known as Fannie May) in June 2012. Prior to this appointment, he served simultaneously as Chief Administration Officer, General Counsel and Corporate Secretary. He also managed various operating departments (including the Human Resources and Communications and Marketing Services departments)[19] Neither Mr. Mayopoulos' predecessor nor his successor had experience as a general counsel. Unlike most general counsels in our sample that became CEO, Mr. Mayopoulos had considerable experience, both legal and operational, in other firms having worked in general counsel and managing director positions with Bank of America Corporation, Deutsche Bank AG and Credit Suisse First Boston[20] According to the Chairman of the Board, an important reason for his selection was his "deep understanding of the unique challenges Fannie Mae is facing and his effective working relationships with our regulator, management, the board, and external partners"[21]

From the beginning of his tenure Mr. Mayopoulos faced unique circumstances. First, following the economic turmoil of 2008 the company entered into conservatorship and was managed in the interest of taxpayers rather than for the benefit of its shareholders. Agreements made with the U.S. Treasury in exchange for financial support included covenants placing strict limitations on the firm's business activities. Second, there had been considerable turnover with "[more] than 80% of our current senior management team, and every member of our management committee, has been hired or promoted into their current role since we entered into conservatorship. More than half of our employees were hired after conservatorship began.[22]" The problem of retaining top executives was exacerbate by restrictions placed on the size and structure of executive compensation by the GSE Act and other regulation

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19.S&P Capital IQ, Timothy J. Mayopoulos, Professional Summary, https://www.washingtonpost.com/business/economy/fannie-mae-names-timothy-j-mayopoulos-as-new-ceo/2012/06/05/gJQAn9w8GV_story.html

20.Federal National Mortgage Association, Annual Report (Form 10-k), p. 171, (Dec. 31, 2012)

21.Press Release, Fannie Mae, Timothy J. Mayopoulos Appointed CEO of Fannie Mae (June 5, 2012) https://www.fanniemae.com/newsroom/fannie-mae-news/timothy-j-mayopoulos-appointed-ceo-fannie-mae.

22.Federal National Mortgage Association, *supra* note 20, at 1

(e.g. the 2012 "STOCK Act")[23] Finally, regulation and legislation following the Great Recession of 2008 created considerable uncertainty about the future of the mortgage market.

Given such an environment, legal expertise was clearly important for a CEO trying to manage the firm within the restrictions of the new and evolving legal agreements, and laws and regulations directly affecting the firm. Consistent with our earlier prediction, hiring a CEO with legal expertise credibly signals to regulators and sometimes-skeptical lawmakers that the firm takes legal and regulatory compliance very seriously. Similarly, as these restrictions intruded into the operational decisions of a complex market, even routine operational decisions had a legal dimension.

B. A Generalist CEO with a Law Degree

Mr. James A. Hughes was appointed CEO in 2012 within two months of joining First Solar. He had a law degree but his experience was predominantly operational. He had "nearly 20 years in the global energy industry"[24] having served as CEO of the power generation firm AEI Services, Chief Operating Officer (COO) of Prisma Energy International and in several regional COO roles for Enron Corporation[25] Neither his predecessor nor his successor as CEO at First Solar had legal backgrounds.

While power generation is subject to regulation and First Solar benefited from public support programs (including "feed-in-tariffs ("FiTs") … tax incentives, grants, loans, rebates[26]" and other incentives), the key issues at the beginning of Mr. Hughes' tenure at First Solar were operational: improving cost competitiveness and completing a restructuring of its worldwide operation, which included factory closures and mass layoffs. Mr. Hughes' business expertise was important for implementing the firm's Long Term Strategic Plan[27] but his legal expertise was also important for exploiting support programs offered in many different state, national and international jurisdictions[28]

V. DISCUSSION AND CONCLUSIONS

Overall, our findings suggest that it is rare for large public firms to hire a new CEO with a legal background. However, we have illustrated two viable pathways to the CEO role: a legal position in a company that is strategically aligned with obtaining benefits from a legal specialist CEO, or having a law degree combined with the development of generalist business experience.

23.Federal National Mortgage Association, *supra* note 20, at 48

24.Press Release, First Solar, First Solar Appoints James Hughes CEO (May 3, 2012) https://investor.firstsolar.com/news/press-release-details/2012/First-Solar-Appoints-James-Hughes-CEO/default.aspx

25.First Solar, Inc., Annual Report (Form 10-k), p. 12, (Dec. 31, 2012)

26.First Solar, *supra* note 22, at 8

27.First Solar, *supra* note 22, at 3

28.First Solar, *supra* note 22, at 10

We provide preliminary empirical evidence from S&P 1500 firm CEO hiring trends that firms who hire their new CEO directly from a legal specialty role are in industries with lower returns on assets and are associated with lower levels of risk and lower growth opportunities. They have less CEO stock ownership, less debt, and more assets per employee. Additionally, firms who hire CEOs with a law degree are more likely to operate in industries with a larger than average firm size and lower returns on assets. They are also associated with lower growth and innovation.

Our case examples provide concrete illustrations of CEOs with a legal background. The CEO for Fannie Mae provides an example of how developing a long career with a legal specialty is a viable path to CEO for a company with complex legal agreements and high regulatory and political exposure. Additionally, the CEO of First Solar, who had a law degree but obtained general business and management experience prior to being hired as CEO, illustrates that this combination may be beneficial for companies who are facing complex operational challenges with restructuring, layoffs, and closures of business centers, but who also face lobbying and regulatory exposure.

While our results provide existing pathways for achieving the CEO role with a legal background, we hope that this article also makes the case for the benefits of hiring a CEO with this specialty for firms with specific needs. Given the small representation of legal specialists in CEO roles, we also hope our paper encourages more legal professionals to seek the role of CEO under the conditions we have argued as most beneficial of their expertise. Large public companies who are bigger in size, exposed to high regulations and political contexts, and have a conservative posture towards risk, could greatly benefit from the lower costs, higher efficiency, and signaling provided by hiring a legal specialist as CEO.

A FRAMEWORK FOR IMPROVED PROTECTION OF TRADEMARKS

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ABSTRACT

The increasing importance of trademarks is reflected in the very high number of new trademark applications and the investments made to develop and advertise registered trademarks. This situation, however, also influences the extent and magnitude of trademark infringements. This empirically-informed research aims to provide a framework for improved protection of trademarks. The article, based on a comprehensive examination of over three hundred cases of trademark infringement, from a number of jurisdictions, categorizes and analyzes the main practical cross-cutting aspects. Based on the findings, the article proposes a number of measures that could provide an improved, more effective global protection of trademarks.

KEYWORDS: trademark, infringement, confusion, counterfeit, cyber misconduct

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1. INTRODUCTION

Intellectual property rights (IPR) play a very important role in the modern economic development paradigm. An essential category of IPR is represented by trademarks. Trademarks play a very important role in organizations' strategies and an essential role in identifying and advertising goods or services, with respect to source, quality level, safety standard, etc. This fact is demonstrated by the very impressive number of trademark registrations: for illustration, in 2019 alone, the global trademark filings reached 15.2 million[1]; in the fiscal year 2019, in the United States (U.S.), were registered 396,836 trademarks[2]; in 2020, the European Union Intellectual Property Office (EUIPO) registered over 153,000 trademarks.[3]

Digitization, an essential feature in numerous products and services, raises ever-growing challenging issues pertaining to the protection of IPR, in particular regarding copyright.[4] and trademark rights.[5] As marketing, commerce, and other activities are carried increasingly online, thus raising the susceptibility of trademark to infringements, it is vital for stakeholders to improve the protection available. This is a necessary endeavor, as the effective trademark protection increases trade prospects, the conditions for sustainable economic development, and supports a number of the U.N. Sustainable Development Goals, such as Goal 3 (well-being), Goal 8 (inclusive and sustainable economic growth, employment, and decent work), and Goal 9 (foster innovation).[6] The actual importance attached to effective trademark protection is underlined by the numerous notable worldwide legal modernization efforts.[7] The significant attention received from scholars further highlights the importance of trademark protection.[8] This empirically-informed research aims to provide a framework

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1 WORLD INTELLECTUAL PROPERTY ORGANIZATION, WIPO IP FACTS AND FIGURES 2020 7 (2020).

2 UNITED STATES PATENT AND TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT 43 (2020).

3 EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE, EUIPO STATISTICS FOR EUROPEAN UNION TRADE MARKS 2.1-2.4 (2021).

4 S*ee* Ioana Vasiu & Lucian Vasiu, *Criminal Copyright Infringement: Forms, Extent, and Prosecution in the United States*, 4 UNIV. BOLOGNA L. REV. 229 (2019).

5 WORLD INTELLECTUAL PROPERTY OFFICE, STUDY ON APPROACHES TO ONLINE TRADEMARK INFRINGEMENTS (2017).

6 U.N. Sustainable Development Group, The 17 Sustainable Development Goals (2015), https://www.undp.org/sustainable-development-goals.

7 *See generally* U.S. Trademark Modernization Act of 2020, H.R. 6196, 116th Cong. (2020); Ley Federal De Protección A La Propiedad Industrial [Federal Law for the Protection of Industrial Property] DOF (2020) (Mex.); Laney Zhang, *China: Trademark Law Revised, Prohibiting Bad-Faith Trademark Filings*, LAW LIBRARY OF CONGRESS, (July 30, 2019), https://www.loc.gov/item/global-legal-monitor/2019-07-30/china-trademark-law-revised-prohibiting-bad-faith-trademark-filings/; Antonio Piu, *In Depth Analysis of the News Introduced by the Legislative Decree N. 15/2019,* BREVETTINEWS.IT*,* (June 5, 2019), https://brevettinews.it/en/trademarks-design/in-depth-analysis-of-the-news-introduced-by-the-legislative-decree-n-15-2019/; INTERNATIONAL TRADEMARK ASSOCIATION*, Implementation of the New Trademark Law in Greece, International Trademark Association (July 22, 2020), https://www.inta.org/implementation-of-the-new-trademark-law-in-greece/; 2017 O.J. (L 154) 16.6.*

8 *See* Lisa P. Ramsey, *Brandjacking on Social Networks: Trademark Infringement by Impersonation of Markholders*, 58 BUFF. L. REV. 851 (2010); William McGeveran, *The Trademark Fair Use Reform Act*,

for improved protection of trademarks. The article proceeds as follows. Section 2 described the rationale, objectives, and methodology of this research. Section 3 discusses theoretical protection and infringement aspects. Section 4 presents the analysis of the practical aspects encountered in trademark infringement cases. Finally, the article outlines the implications of the findings.

2. RATIONALE, OBJECTIVES, AND METHODOLOGY

Trademark-intensive economic sectors have a major contribution to GDP and employment.[9] Trademarks can play a major role in economic competition and be highly valuable organizational assets. This statement is supported by the very high number of trademark in force.[10]

A trademarks is an "authentic seal," which "vouches for the goods which bear it."[11] To develop and advertise trademarks, organizations spend large amounts of money, in certain cases, up to hundreds of millions of U.S. dollars (e.g., Lexus, Audi, 3M, etc.).[12] However, as recent studies show, trademarks are infringed on a massive scale; moreover, the phenomenon is on the rise, resulting in losses of

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90 B.U. L. REV. 2267 (2010); Robert C. Bird & Joel H. Steckel, *The Role of Consumer Surveys in Trademark Infringement: Empirical Evidence From the Federal Courts,* 14 UNIV. PA. J. BUS. L. 1013 (2013); Miriam Bitton, *Rethinking the Anti-Counterfeiting Trade Agreement's Criminal Copyright Enforcement Measures*, 102 J. CRIM. L. & CRIMINOLOGY 67 (2013); Rebecca Tushnet, *What's the Harm of Trademark Infringement?,* 49 AKRON L. REV. 627 (2015); Jake Linford, *A Linguistic Justification for Protecting Generic Trademarks,* 17 YALE J. L. & TECH 110 (2015); Larisa Ertekin et al., *Hands Off My Brand! The Financial Consequences of Protecting Brands Through Trademark Infringement Lawsuits*, 82 TEX A&M UNIV. J. MKTG. 45 (2018); Alexandra J. Roberts, *Trademark Failure to Function*, 104 IOWA L. REV. 1977 (2018); Joseph M. Levy, *The Confusion of Trademark Territoriality*, 18 CHI.-KENT J. INTEL. PROP. 324 (2019); Robert G. Bone*, Rights and Remedies in Trademark Law: The Curious Distinction Between Trademark Infringement and Unfair Competition*, 98 TEX. L. REV. 1187 (2020); Barton Beebe & Jeanne C. Fromer, *Fake Trademark Specimens: An Empirical Analysis*, 120 COLUMBIA L. REV. 217 (2020); Martin Senftleben & Femke van Horen, *The Siren Song of the Subtle Copycat—Revisiting Trademark Law with Insights from Consumer Research*, 111 TRADEMARK REPORTER, 739 (2021).

9 *See, e.g.,* EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE & EUROPEAN PATENT OFFICE, IPR-INTENSIVE INDUSTRIES AND ECONOMIC PERFORMANCE IN THE EUROPEAN UNION (2019) (discussion of the sectors that use trademarks intensively contribute 37% to the GDP of the E.U. and involve 46.7 million jobs); INTERNATIONAL TRADEMARK ASSOCIATION, TRADEMARKS IN LATIN AMERICA: ECONOMIC IMPACT IN 10 LATIN AMERICAN AND CARIBEAN COUNTRIES (2019) (in the countries surveyed, the trademark-intensive sectors contribute 18% of employment, 22% of the GDP); FRONTIER ECONOMICS, THE ECONOMIC CONTRIBUTION OF TRADEMARK-INTENSIVE INDUSTRIES IN INDONESIA, MALAYSIA, THE PHILLIPPINES, SINGAPORE, AND THAILAND, REPORT PREPARED FOR THE INTERNATIONAL TRADEMARK ASSOCIATION (2017) (the direct contributions of the trademark-intensive sectors represents between about a fifth to a third of the national GDPs).

10 *See Intellectual Property Data Center*, WORLD INTELLECTUAL PROPERTY OFFICE (2021), https://www3.wipo.int/ipstats/IpsStatsResultvalue (illustrating in 2019, the total number of trademark in force for the U.S. (2,779,113), Canada (617,968), Italy (505, 684), France (1,527,702), India (2,038,798), and Singapore (326,506).

11 *Yale Elec. Corp. v. Robertson*, 26 F.2d 972, 972-3 (2d Cir. 1928).

12 *Toyota Motor Sales, U.S., Inc. v. Tabari*, 610 F.3d 1171 (9th Cir. 2010); *Volkswagen Grp. of America v. Varona,* No. 19-24838-CIV-GOODMAN (S.D. Fla. Jan. 25, 2021); *3M Co. v. CovCARE, Inc.*, No. 21-CV-01644 (E.D.N.Y. May 5, 2021).

hundreds of billions U.S. dollars every year.[13] On the other hand, the infringements of trademark rights, while often highly lucrative, are usually associated with a relatively low detection likelihood risk and can involve criminal enterprise schemes.[14]

Trademark infringement is a global, large-scale phenomenon. Virtually all sectors are exposed and affected by trademark infringements claims: luxury brands;[15] pharmaceutical;[16] orthodontic devices;[17] beer;[18] rolling papers;[19] bread products;[20] fast-food restaurants;[21] education;[22] watchmaking;[23] cryptocurrency exchange;[24] blockchain technologies;[25] streaming video services;[26] jewelry;[27] automotive;[28] vaginal-health products;[29] swimwear;[30] sex toys;[31] running products;[32] etc.

The consequences of trademark infringements can be severe, ranging from customer confusion to undesirable associations, from mark erosion to loss of revenues and complex litigations.[33] Further, infringement can pose significant public health and safety, and cybersecurity risks, as these infringements can be vectors for frauds, phishing, dissemination of malware, etc. To effectively address issues and inefficiencies, this article proposed a framework that categorizes and analyzes the main practical cross-cutting aspects of trademark infringement cases. This empirically-informed research involved the analysis of over three hundred cases brought to courts from the U.S., the E.U., Canada, Singapore, and India, disputes decided at the WIPO Arbitration and Mediation Center, and cases reported by law enforcement agencies and international organizations. The method used was content analysis, to systematically identify and code essential characteristics, used for grouping into an

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13 CompuMark, *The Trademark Ecosystem*, CLARIVATE ANALYTICS (2020); OECD/EUIPO, *Trends in Trade in Counterfeit and Pirated Goods, Illicit Trade*, OECD PUBLISHING (2019); *Global Brand Counterfeiting Report*, R STRATEGIC GLOBAL (2018).

14 *U.S. v. Babichenko*, 508 F.Supp.3d 774, (D. Idaho 2020).

15 *Burberry Ltd. v. Megastar Shipping Pte Ltd.*, SGCA 01 (2019).

16 *Ferring Pharm. Inc. v. Watson Pharm. Inc*., 765 F.3d 205 (3d Cir. 2014).

17 *Tomy Inc. v. Dentsply Sirona Inc.,* SGHC 105 (2020).

18 *Biscayne Bay Brewing Co., LLC v. La Tropical Holdings, B.V.*, Civil Action No. 20-24180-Civ-Scola (S.D. Fla. Apr. 9, 2021).

19 *BBK Tobacco & Foods, LLP v. Galaxy VI Corp*., 408 F.Supp.3d 508 (S.D.N.Y. Sept. 30, 2019).

20 Boulangerie Vachon Inc. v. Racioppo, [2021] FC 308 (Can.).

21 *Two Pesos, Inc. v. Taco Cabana, Inc*., 505 U.S. 763 (1992).

22 *Total Eng. Learning Glob. Pte Ltd. & anor v. Kids Couns. Pte Ltd.* SGHCR 22 (2013).

23 *Rolex S.A. v. FMTM Distrib. Ltd.* SGIPOS 6 (2020).

24 *Safex Found. Inc. v. Safeth Ltd.,* Civil Action No. 21-cv-161 (D.D.C. Mar. 26, 2021).

25 *Zamfir v. Casperlabs, LLC*, 528 F.Supp.3d 1136, (S.D. Cal. Mar. 26, 2021).

26 *WReal, LLC v. Amazon.com, Inc.* 840 F.3d 1244 (11th Cir. 2016).

27 *Tiffany (NJ) Inc. & Tiffany and Co. v. eBay, Inc*. 600 F.3d 93 (2d Cir. 2010).

28 *Toyota Motor Sales, U.S., Inc. v. Tabari*, 610 F.3d 1171 (9th Cir. 2010).

29 *Combe Inc. v. Dr. August Wolff GmbH & Co. KG Arzneimittel, USA*, No. 19-1674 (4th Cir. Apr. 13, 2021).

30 *A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc.,* 237 F.3d 198 (3d Cir. 2000).

31 *Blush Fashion Group, Inc. v. Vee International, Inc.*, TMOB 21 (2020).

32 *Fleet Feet, Inc. v. NIKE, Inc.*, 986 F.3d 458 (4th Cir. 2021).

33 CompuMark, *The Trademark Ecosystem*, Clarivate Analytics (2020); Takuya Satomura et al., *Copy Alert: A Method and Metric to Detect Visual Copycat Brands*, 51 J. Mark. Res. 1 (2014).

analytic framework. This comprehensive approach allowed the identification and analysis of the most important forms, characteristics, and legal arguments.

3. THEORETICAL ASPECTS

3.1. Protection

A trademark is a communication device that conveys to consumers information, which allows the identification of goods or services, with a view to acquire, evaluate, or avoid.[34] Trademarks can be encountered in a large variety of types: word; phrase; figurative (with or without word elements); shape (with or without word elements); position; pattern; color (single or combination); sound; motion; multimedia; hologram. Trademark registration is not mandatory, the owners of unregistered trademarks are also able to use the marks in commerce and enforce their related rights against infringers. However, the registration gives trademark owners valuable benefits and constitutes *prima facie* evidence of the trademark validity.[35] In most jurisdictions, trademarks are registered for product classes, as per the International Classification of Goods and Services, under the Nice Agreement. The use of the Nice Classification is mandatory for the national registration of trademarks in countries party to the Nice Agreement and for the international registration of trademarks with the International Bureau of WIPO, under the Madrid Agreement. Trademark registrations are valid for ten years, after which the registration, to remain valid, must be renewed.

A trademark can be inherently distinctive (identifying a certain source) or it can acquire distinctiveness (secondary meaning). As underlined in a decision of the Supreme Court of Canada, the distinctiveness of a trademark resides in its ability "to indicate the source of a particular product, process or service in a distinctive manner, so that, ideally, consumers know what they are buying and from whom."[36]

In increasing distinctiveness order, marks were classified as generic; descriptive; suggestive; arbitrary; or fanciful.[37] Trademarks that are merely descriptive or informational, or *publici juris* to the trade in the case (without secondary meaning), do not qualify as distinctive and cannot enjoy protection.[38] The analysis of whether a mark is suggestive or descriptive can be complex.[39] According to the Canada Trademarks Opposition Board. "in determining whether a trademark is clearly descriptive, the mark must not be dissected into its component elements and carefully analyzed but must be considered in its entirety, as a matter of immediate impression, from the point of view of the average consumer or user of the associated goods or

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[34] *Matal v. Tam*, 137 S.Ct. 1744 (2017); *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U.S. 205, 212 (2000).
[35] *Iancu v. Brunetti*, 139 S.Ct. 2294 (2019).
[36] *Kirkbi AG v. Ritvik Holdings, Inc.*, 3 SCR 302 (U.S. 2005).
[37] *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (1976).
[38] *View, Inc. v. EUIPO*, Case T-49/19 (E.C.J. 2020); *In re Wal-Mart Stores, Inc.*, 129 U.S.P.Q.2d 1298 (T.T.A.B. 2019).
[39] *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522 (4th Cir. 1984).

services."[40] At E.U.-level, in order to align the EUIPO's procedures with the decisions of the Court of Justice of the European Union (CJEU), new Guidelines for the Examination of E.U. trademarks are in force from March 1, 2021.[41]

A trademark can be declared invalid if the registration was made in bad faith. However, the "bad faith" concept is "not defined, delimited or even described in any way in the legislation."[42] Further, trademark protection can be lost in a number of situations, such as genericity, improper licensing, or abandonment. The latter can happen when the use of the trademark is discontinued, without a clear intent to later resume its use, which can be inferred from the actual circumstances. Non-use for several year, for instance, is construed as *prima facie* evidence of abandonment.

Nonetheless, there can be situations where the owner of a trademark that has never been used, therefore, the rights in the trademark revoked for lack of use within the five-year period following the registration, can claim compensations for the "injury sustained owing to the use by a third party, before the date on which the revocation took effect, of a similar sign for identical or similar goods or services causing confusion with his trade mark."[43] This issues was addressed by the CJEU, who held that, even though "the fact that a trade mark has not been used does not, in itself, preclude compensation in respect of acts of infringement that have been committed, that remains an important factor to be taken into account in determining the existence and, as the case may be, the extent of the injury sustained by the proprietor and, accordingly, the amount of damages that he or she might claim."[44] In the case, the Court ruled that Member States have the option of allowing the owner of trademarks whose rights have been revoked on expiration or for failure to make genuine use of the trademark to "claim compensation for the injury sustained as a result of the use by a third party, before the date on which the revocation took effect, of a similar sign in connection with identical or similar goods or services that is liable to be confused with his or her trade mark."[45]

3.2. Trademark Infringement

The trademark proprietor has a number of exclusive rights, which protect against misuse, with a view to prevent unfair competition. Two examples of unfair competition related to trademarks are infringement (passing off or palming off) and reverse passing off (reverse palming off). Trademark infringement can be defined as appropriation or imitation that is likely to deceive consumers into accepting the goods of one entity as those of another (that is, the offering of goods or services passed off as those of another). The elements of the tort of passing off are the goodwill, "the

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40 *SD Pero Holdings, Inc. v. Cannoli Queens, Inc.*, TMOB 94, 42 (2020).

41 *Guidelines for Examination*, EUIPO (2021), https://guidelines.euipo.europa.eu/binary/1922895/2000140000.

42 *Aeroporto di Villanova d'Albenga SpA v. EUIPO*, Case T-398/20 (E.C.J. 2021).

43 *AR v. Cooper International Spirits LLC*, Case C622/18, 1 (2020).

44 *Id.* at 47.

45 *Id.*

legal property that the law of passing off protects;"[46] the misrepresentation (the "tapping" on a trademark owner's established goodwill); and the damage. Reverse passing off, on the other hand, involves the misrepresentation of the source through the removal, obliteration, or replacement of an original trademark with other signs.[47] It can take an express form, where the original trademark is replaced with infringer's trademark, or implied, where the infringer removes the original trademark without affixing a new trademark (debranding).

Trademark infringement claims are based on two theories of consumer confusion: forward confusion, when consumers believe that goods bearing the junior mark came from, or were sponsored by, the senior mark holder, and reverse confusion, when consumers dealing with the senior mark holder believe that they are associated or affiliated with the junior mark.[48] For trademark infringement findings, there is no need to demonstrate the intent to confuse consumers.[49]

4. Analysis of Practical Aspects

4.1. Likelihood of Confusion

The backbone of trademark infringement is "consumer confusion." Confusion can be direct, in situations where the goods or the services are trademark's owner, or indirect, where consumers would falsely believe that there is a relationship (i.e., licensing, partnership, cooperation, etc.) between the provider of the infringing goods or services and the trademark owner.

The likelihood of confusion is the "paramount question" in trademark infringement claims.[50] These cases are centered on "the probable reactions of prospective purchasers of the parties' goods."[51] The determination of the likelihood of confusion can involve factual-intensely analyses. In general, courts endorsed the trademark infringement theory of "initial-interest" confusion, which is "confusion that creates initial customer interest, even though no actual sale is finally completed as a result of the confusion."[52] In *Masterpiece v. Alavida Lifestyles*, for example, the Supreme Court of Canada held that such confusion must be "assessed from the perspective of the first impression of the consumer [. . .T]he possibility that careful research could later remedy confusion does not mean that no confusion ever existed or

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46 *In the Matter of a Trade Mark Application by Golden Cala Trading Est and Opposition thereto by Florian Mack*, SGIPOS 5 (2020).

47 *John Bean Tech. Corp. v. B GSE Group, LLC*, No. 1:17-cv-142-RJS-DAO (D. Utah Aug. 13, 2020); *OTR Wheel Engineering, Inc. v. West Worldwide Serv., Inc.*, 897 F.3d 1008 (9th Cir. 2018); *Mitsubishi Caterpillar Forklift Europe BV v. Duma Forklifts NV*, Case C-129/17 (E.C.J. 2018).

48 *Ronhawk Tech., Inc. v. Ropbox, Inc.*, No. 19-56347 (9th Cir. Apr. 20, 2021); *SportFuel, Inc. v. PepsiCo, Inc.*, 932 F.3d 589 (7th Cir. 2019); *Marketquest Group, Inc. v. BIC Corp.*, 862 F.3d 927 (9th Cir. 2017).

49 *Brookfield Comm. v. West Coast Ent. Corp.*, 174 F.3d 1036 (9th Cir. 1999).

50 *Streamline Productions Sys., Inc. v. Streamline Manufacturing, Inc.*, 851 F.3d 440, 453 (5th Cir. 2017).

51 *Pirone v. MacMillan, Inc*., 894 F.2d 579, 584 (2d Cir. 1990).

52 *Select Comfort Corp. v. Baxter,* 996 F.3d 925 (8th Cir. 2021).

that it would not continue to exist in the minds of consumers who did not carry out that research."[53]

To demonstrate the likelihood of consumer confusion, the plaintiffs must show the probability of confusion (that is, more than the mere "possibility" of confusion).[54] In the E.U., this is a national procedural rules matter.[55] The E.U. General Court, however, held that the likelihood of confusion must be "assessed globally," according to the "relevant public's perception of the signs and goods or services in question," considering "all factors relevant to the circumstances of the case, in particular the interdependence between the similarity of the signs and that of the goods or services covered."[56] Such factors include, *inter alia*, their nature, the intended purpose, the method of use, the distribution channels, etc.[57] However, the Directive (EU) 2015/2436 contains no mention of the terms "relevant public" or '"actors relevant," nor there is a widely accepted methodology for determining that. Moreover, it is unclear whether the same factors must be use, irrespective of the goods being directly competing or non-competing. Further, a study by the General Court decisions shows that actually the most important factors considered in the determination of the likelihood of confusion were similarity of the marks and of the goods.[58]

To determine the likelihood of confusion, the U.S. Circuits use a number of non-exclusive factors, as apt to the particular facts in each case, taken together, none determinant.[59] Relatively similar, however, not identical, some of these factors, as per each case's circumstances, would, strongly or minimally, favor the plaintiffs or the defendants, or would not apply. The balance of the factors, nevertheless, determines the finding of likelihood of confusion, with some notable differences among Circuits in the outcome.[60]

For noncompeting goods, for an illustration, in the U.S. Third Circuit, the likelihood of confusion test involves up to ten factors.[61] The Court uses the terms "typical consumer,"[62] nevertheless, without clarity as to how that determination can

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[53] *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2 S.C.R. 387 (S.C.C. 2011).

[54] *Xtreme Lashes, LLC v. Xtended Beauty, Inc.*, 576 F.3d 221, 226 (5th Cir. 2009).

[55] Council Directive 2015/2436, art. 16, 2015 O.J. (L 366) 1 (EU).

[56] *Italy Spa v. EUIPO*, Case T-191/20 (E.C.J. 2021).

[57] *Id.* at 31.

[58] Ilanah Fhima & Catrina Denvir, *An Empirical Analysis of the Likelihood of Confusion Factors in European Trade Mark Law*, 46 INT'L REV. INTELL. PROP. & COMPETITION LAW 310 (2015).

[59] *See*, *IIP Lund Trading ApS v. Kohler Co.*, 163 F.3d 27, 43 (1st Cir. 1998); *Sports Auth. Inc. v. Prime Hosp. Corp.*, 89 F.3d 955, 960 (2d Cir. 1996); *A&H Sportswear v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 211 (3d Cir. 2000); *Combe Inc. v. Dr. August Wolff GMBH & Co.*, No. 19-1674 (4th Cir. 2021); *Elvis Presley Enter. Inc. v. Capece,* 141 F.3d 188, 194 (5th Cir. 1998); *Daddy's Junky Music v. Big Daddy's Fam. Music,* 109 F.3d 275, 280 (6th Cir. 1997); *Eli Lilly & Co. v. Nat'l Answers, Inc.*, 233 F.3d 456, 461-2 (7th Cir. 2000); *Select Comfort Corp. v. Baxter*, No. 19-1077 (8th Cir. 2021); *Brookfield Comm. v. West Coast Ent.*, 174 F.3d 1036, 1053-4 (9th Cir. 1999); *King of the Mountain Sports v. Chrysler Corp.*, 185 F.3d 1084, 1089-90 (10th Cir. 1999); *Dieter v. B & H Indus. of Southwest Florida*, 880 F.2d 322, 326 (11th Cir. 1989) (relevant for each Circuit respectively).

[60] *See* Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581 (2006).

[61] *A&H Sportswear*, 237 F.3d at 211.

[62] *Id.* at 206.

be made. The U.S. Eleventh Circuit considers seven factors when analyzing the likelihood of confusion; however, the consideration of all factors is not mandatory in each and every case, as some factors may be "less relevant," and their absence would not undermine a finding of the likelihood of confusion.[63] The factors are weighted based on what the particular situation "calls for," without a calculation of the number of factors that would favor or be against a conclusion.[64]

Hence, legal scholars are understandably critical of these approaches. Professor Bone, for instance, considers that the analysis of the likelihood of confusion "in a state of disarray."[65] Such approached were deemed as treating the consumer as "passive, ignorant, and gullible."[66] Moreover, these methodologies are problematic also in that they provide very little with respect to the assessment of consumer's perception. These determinations largely ignore consumer surveys, or other forms of empirical research, which would be the way to provide "direct evidence about consumer perceptions that expert testimony lacks and elicit multifaceted information about perceptions that mere visual comparison does not provide."[67] Furthermore, surveys are regarded as being capable to "provide direct evidence about consumer confusion or dilution that may be difficult to obtain by visual comparisons or expert testimony alone."[68] This is concerning in that the courts may "properly infer that there is no likelihood of consumer confusion from this absence of survey evidence."[69]

The approach is further questionable when some of the factors used in such analyses are deemed "neutral,"[70] making these analyses unpredictable. Additionally, as trademarks can share one or more similar features, the result of the application of the similarity of the marks factor, very prominent in these analyses, also lacks precision. More questions can be asked over this: To what extent partially identical trademarks can, in fact, confuse consumers? What tilts the balance in cases where the trademarks are found to be somewhat distinct? etc.

In particular situations, for instance, involving special goods, such as equipment which would be "purchased primarily by fitness industry professionals,"[71] ascertaining the average consumer's likelihood of confusion seems inadequate. Finally, these analyses do not address the "more fundamental values such as fair competition or informative communication."[72]

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63 *Savannah C. of Art & Design v. Sportswear, Inc.*, 983 F.3d 1273, 1280-1 (11th Cir. 2020).

64 *Id.* at 1281.

65 Robert G. Bone, *Taking the Confusion Out of "Likelihood of Confusion": Toward a More Sensible Approach to Trademark Infringement*, 106 NW. U. L. REV. 1307 (2015).

66 Dustin Marlan, *Is the Word "Consumer" Biasing Trademark Law?,* 8 TEX. A&M L. REV. 367 (2020)

67 *See* Robert C. Bird & Joel H. Steckel, *The Role of Consumer Surveys in Trademark Infringement: Empirical Evidence from the Federal Courts*, 14 U. PA. J. BUS. L. 1013 (2012) (only 16.6% of cases examined discussed survey evidence).

68 Katie Brown, Natasha T. Brison, & Paul Batista, *An Empirical Examination of Consumer Survey Use in Trademark Litigation*, 39 LOY. L.A. ENT. L. REV. 237 (2019).

69 *Universal City Studios v. T-Shirt Gallery, Ltd.*, 634 F.Supp. 1468 (S.D.N.Y. 1986).

70 *FocusVision Worldwide, Inc. v. Info. Builders, Inc.*, No. 2020-2054 (Fed. Cir. 2021).

71 *Max Rack, Inc. v. Core Health & Fitness, LLC*., No. 2: 16-cv-01015 (S.D. Ohio Aug. 24, 2020).

72 William McGeveran & Mark P. McKenna*, Confusion Isn't Everything*, 89 NOTRE DAME L. REV. 253 (2013).

Consequently, these multi-factor tests are rightly criticized by legal scholars.[73] Nevertheless, they "appear to be the least worst alternative, if not the only alternative, to a wideopen 'totality of the circumstances' or 'rule of reason' type of analysis."[74]

The likelihood of confusion can be claimed even when a trademark was registered honestly, and used for several years in a certain jurisdiction, to preclude the likelihood of confusion. For instance, in a case brought to the High Court of Delhi, the plaintiff, proprietor of the world renowned trademark H&M, asked for an injunction against the defendant's use of trademark HM. Even though the defendant argued that the disputed trademark was derived from its directors' names initials, the Court held that the trademark gives the unacceptable impression of association between the parties, therefore prohibited the defendants from using that trademark, in any manner.[75]

4.2. Claims

The uses of other's trademarks can be encountered in connection with competing goods or services; with non-competing goods or services, however, under circumstances which could allow for reasonable inferences that the goods or services involved are linked to the trademark owner; or with non-competing goods or services, the use, however, precluding identification or confusion between the two marks.[76] The first two situations provide grounds for infringement actions.

Trademark infringements constitute *per se* injuries and are legally actionable by the owner of the trademark. A legal action may be launched against infringement even in situations where the defendants did not generated sales involving the protected trademark. Actions can involve lawsuits or the use of the Uniform Domain Name Dispute Resolution (UDRP) mechanism. The liability for trademark infringement can involve significant damage awards, however, if trademark proprietors do not defend their rights timely, they may lose them.[77] Where the national security, economic interests, or health or safety of consumers are threatened, the private enforcement of trademark rights can be accompanied by criminal enforcement, including seizure of counterfeit goods and the prosecution of perpetrators.

The facts involved in trademark infringement can be complex, with claims and counterclaims,[78] requiring a profound understanding of relevant and

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[73] *See* Ann Bartow, *Likelihood of Confusion*, 41 SAN DIEGO L. REV. 721 (2004); Robert G. Bone, *Taking the Confusion Out of "Likelihood of Confusion": Toward a More Sensible Approach to Trademark Infringement*, 106 NW. U. L. REV. 1307 (2015) ("deeply flawed," as it "support an open-ended and relatively subjective approach that generates serious litigation uncertainty, chills beneficial uses of marks, and supports socially problematic expansions of trademark law"); Lotte Anemaet, *The Fairy Tale of the Average Consumer: Why We Should Not Rely on the Real Consumer When Assessing the Likelihood of Confusion*, 69 GRUR INTERNATIONAL 1008 (2020).

[74] Beebe, *supra* note 60, at 1649.

[75] *H&M Hennes v. HM Megabrands Pvt. Ltd. & Ors*., (2018) 74 PTC 229 (India).

[76] *Champion Paper & Fibre Co. v. Nat'l Ass'n of Mutual Ins. Agents*, 249 F.2d 525 (D.C. Cir. 1957).

[77] *Dropbox, Inc. v. Thru, Inc.*, No. 15-cv-01741-EMC (N.D. Cal. 2016).

[78] Loblaws, Inc. v. Columbia Ins. Co., [2019] FC 961 (Can.).

circumstances, and, in certain cases, involving perspectives (i.e., visual, phonetic, conceptual),[79] a "nasty court fight"[80] or lengthy procedural histories,[81] or requiring advanced expertise.[82] Successful trademark claims must demonstrate that the allegedly infringed trademark was used in commerce (including services offered via Internet) and that such use created a likelihood of confusion, "the *sine qua non* of trademark infringement,"[83] and/or dilution for that trademark (e.g., by blurring or tarnishment). There are numerous forms of infringement, as discussed in the following subsections.

4.2.1. Counterfeiting

Counterfeiting, "a rampant, immoral market phenomenon,"[84] is the most egregious form of trademark infringement, and involves tangible goods.[85] Counterfeiting not only infringes trademarks, and allows for substantial profits for organized crime groups, it, in certain cases, can involve harmful or dangerous products (for instance, in cases of electrical equipment, auto parts, prescription drugs, food or beauty products, etc.), which can exposes consumers to a number or health or safety risks.[86]

While even reasonably-close calculations of damages produced by this phenomenon are impossible, it is very clear that it presents an unsettling scope and an alarming magnitude. For illustration, the U.S. Customs and Border Protection[87] reports annual seizures of tens of thousands of counterfeit products, totaling an estimated manufacturer's suggested retail price of well over one billion U.S. dollars,

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79 *Regent University v. EUIPO*, Case T-538/15 (E.C.J. 2017).

80 *Eli Lilly & Co. v. Nat'l Answers, Inc.*, 233 F.3d 456, 461-2 (7th Cir. 2000).

81 *Arcona, Inc. v. Farmacy Beauty, LLC*, No. 2:17-cv-7058-ODW-JPR (C.D. Cal. June 14, 2021); *Arcona, Inc. v. Farmacy Beauty, LLC*, 976 F.3d 1074 (9th Cir. Oct. 1, 2020); *Arcona, Inc. v. Farmacy Beauty, LLC*, No. 2: 17-cv-07058-ODW-JPR (C.D. Cal. Mar. 19, 2019); *Arcona, Inc. v. Farmacy Beauty, LLC*, No. 2: 17-cv-07058 ODW-JPR (C.D. Cal. May 8, 2019); A*rcona, Inc. v. Farmacy Beauty, LLC*, No. 2: 17-cv-07058 ODW-JPR (C.D. Cal. June 7, 2018).

82 *See, Azurity Pharm. Inc. v. Edge Pharma, LLC*, Civil Action No. 20-CV-10280-RWZ (D. Mass. 2021) ("thorny questions that may require the FDA's expertise").

83 *Network Automation, Inc. v. Advanced Systems Concepts, Inc*., 638 F.3d 1137, 1142 (9th Cir. 2011).

84 Moty Amar et al., *How Counterfeits Infect Genuine Products: The Role of Moral Disgust,* 28 J. CONSUMER PSYCHOL. 329 (2018).

85 *See* OECD/EUIPO, *Global Trade in Fakes: A Worrying Threat*, OECD PUBLISHING (2021) (presents a quantitative analysis of the value, scope, and magnitude of global trade in counterfeit and pirated goods).

86 U.S. DEP'T HOMELAND SECURITY, COMBATING TRAFFICKING IN COUNTERFEIT AND PIRATED GOODS: REPORT TO THE PRESIDENT OF THE UNITED STATES (2020); EUR. COMMISSION, COUNTERFEIT AND PIRACY WATCH LIST (2018); WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), STUDY ON APPROACHES TO ONLINE TRADEMARK INFRINGEMENTS (2017).

87 U.S. CUSTOMS AND BORDER PROTECTION, INTELLECTUAL PROPERTY RIGHTS: FISCAL YEAR 2019 SEIZURE STATISTICS (2020).

while a 2021 study quantified the impact of the counterfeit trade on the Swiss economy to billions of francs, resulting in 10,000 lost jobs.[88]

The trade in counterfeited goods involves numerous participants, which manufacture, transport, import, export or attempt to export, by various means, infringing goods. The selling of counterfeited goods can take place through physical warehouse, online channels, or a combination of the two.[89] The trademarks and the trade dresses can be so nearly identical to the authentic goods that they require a "close analysis" to detect differences.[90]

These cases can inflict very significant damage on trademark holders,[91] and 'pose a risk to the health and safety of customers.'[92] A good does not necessarily has to be non-genuine, in order to be considered a counterfeit good: it suffices to demonstrate that "the combination of a particular good and mark result in a product likely to leave consumers deceived, confused, or mistaken as to the good's actual origin or quality."[93] Nonetheless, trademark counterfeiting claims must demonstrate the likelihood of confusion, for the product as a whole.

Where counterfeit products are involved, the likelihood of confusion element is satisfied by the demonstration that the respective goods "are, in fact, counterfeit and that the defendant sold those items or offered them for sale."[94] In a different form of infringement, in *Arcona v. Farmacy Beauty*, the plaintiff-appellant alleged counterfeiting, based on the defendants use of their trademarked on skincare products.[95] However, the Court held that, apart from the use of the trademark, the "two products packaging looked different, when viewed in their entirety, do not remotely resemble each other."[96]

In strong relation with this aspect, a major concern is the use of online selling vectors.[97] This include Facebook, websites, marketplaces, such as eBay, or WeChat

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88 ORG. ECON. COOPERATION & DEV., COUNTERFEITING, PIRACY AND THE SWISS ECONOMY (2021).

89 Louis Vuitton Malletier v. Singga, [2011] FC 776 (Can.).

90 *BBK Tobacco & Foods, LLP v. Galaxy VI Corp.*, 408 F.Supp.3d 508, 525 (S.D.N.Y. 2019).

91 This is reflected in the potential legal awards: in the U.S., for illustration, in cases involving the use of a
counterfeit mark, mark holders can recover "not less than $1,000 or more than $200,000 per counterfeit mark" in statutory damages. 15 U.S.C. § 1117(c)(1); When trademark infringement is willful, the court can award "not more than $2,000,000 per counterfeit mark . . . as the court considers just." 15 U.S.C. § 1116(c)(2).

92 *See, Versah, LLC v. UL Amin Industries*, No. 2: 20-cv-12657-TGB-RSW (E.D. Mich. Dec. 9, 2020) (involving the counterfeit of medical devices used in oral surgeries).

93 *United States v. Edwards*, No. 16-20070-01/02-CM (D. Kan. Oct. 15, 2019).

94 *3M Co. v. CovCare, Inc.*, No. 21-CV-01644 (DG) (JRC) (E.D.N.Y. May 5, 2021) (involving sale of suspected counterfeit respirators).

95 *Acrona, Inc. v. Farmacy Beauty, LLC*, 976 F.3d 1074, 1076 (9th Cir. 2020).

96 *Id.* at 1081.

97 EUR. UNION INTELL. PROP. OFF., RESEARCH ON ONLINE BUSINESS MODELS INFRINGING PROPERTY RIGHTS - PHASE 2 (2017); Mark Fiore, *How We're Proactively Combating Counterfeits and Piracy*, META
(May 19, 2021), https://about.fb.com/news/2021/05/how-were-proactively-combating-counterfeits-and-piracy/. (Facebook reported, for the period From July-December 2020, the proactive removal of

accounts,[98] potentially allow the defendants to reach very large numbers of potential buyers.[99] Numerous cases illustrate the online aspect, such as *Mattel v. Betterlover*,[100] where counterfeit Barbie products were offered online to, potentially, millions of consumers. In a Complaint filed jointly by Facebook and Gucci, the plaintiffs claimed that the defendant used, on Facebook and Instagram the GUCCI marks on counterfeit products (handbags, shoes, clothing, and accessories), which likely will lead consumers into believing that the "products are manufactured by, licensed by, sponsored by, approved by, or otherwise associated with Gucci."[101] In other cases, counterfeit products from several categories, such as suits, handbags, jewelry, etc., bearing the trademark of a high-end luxury products manufacturer, were offered on websites and e-commerce stores.[102]

4.2.2. False Advertising

False advertising involves, among other things, misrepresentations, or false statements of facts, which aim to attract consumers into scams, either by directly stating or by implying that the undertaking is operated, endorsed, or approved by the trademark owner (often with a visible display of the trademarks involved). Such schemes can easily deceive consumers, making them likely to be influenced in the purchasing decision-making. For illustration, false statements can regard ownership of facilities,[103] compliance with certain standards, products characteristics, affiliation, or endorsement implications, with a view to derive benefits from that.

However, statements, in order to be construed false advertising, must be capable of deceiving consumers. For illustration, in *3M Co. v. Performance Supply*, the plaintiff alleged that, context of the COVID-19 pandemic, the defendant falsely represented as having an association, connection, or affiliation with 3M, and used protected trademarks to perpetrate a price-gouging scheme, involving N95 masks.[104] Based on a thorough examination, the Court concluded that the defendant engaged in "unlawful conduct likely to confuse and deceive the public about the source and quality of purported 3M-brand products" and issued a preliminary injunction.[105]

In *Apple Inc. v. Amazon.com*, on the other hand, the plaintiff argued that Amazon's use of the mark APP STORE should be considered trademark infringement and false advertising, as Amazon's service (Appstore) did not have the

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335,765,018 pieces of suspected counterfeit content, before they were reported by a rights holder, while on Instagram, the counterfeit-related proactive removals amounted to 2,696,272 pieces of content).

98 Louis Vuitton Malletier S.A. v. Wang, [2019] FC 1389 (Can.).

99 *Chanel, Inc. v. Chanelcf.com*, No. 0:2021-cv-61238 (S.D. Fla. June 14, 2021); *Arbonne International, LLC v. Semerciyan*, No. 2: 18-CV-1378 JCM (GWF) (D. Nev. Mar. 27, 2019).

100 *Mattel, Inc. v. Betterlover*, No. 18-cv-11644 (PKC) (S.D.N.Y. June 8, 2020).

101 *Facebook, Inc. v. Kokhtenko*, No. 3:21-cv-3036, 64 (N.D. Cal. Apr. 26, 2021).

102 *Chanel, Inc. v. RealReal, Inc*., 449 F.Supp.3d 422 (S.D.N.Y. 2020); *Chanel, Inc. v. Besumart.com*, 240 F.Supp.3d 1283 (S.D. Fla. 2016).

103 *Skydive Ariz., Inc. v. Quattrocchi*, 673 F.3d 1105, 1110 (9th Cir. 2012).

104 *3M Co. v. Performance Supply, LLC*, 458 F.Supp.3d 181, 185 (S.D.N.Y. 2020).

105 *Id*. at 198-9.

characteristics and qualities the public to expects from the name APP STORE.[106] However, the Court was not persuaded that implicit statements should suffice in supporting a false advertising claim.[107] The Court held that "Apple has failed to establish that Amazon made any false statement (express or implied) of fact that actually deceived or had the tendency to deceive a substantial segment of its audience," the "mere use of "Appstore" by Amazon to designate a site for viewing and downloading/purchasing apps cannot be construed as a representation that the nature, characteristics, or quality of the Amazon Appstore is the same as that of the Apple APP STORE."[108]

Important, courts have admitted that the intent to copy non-protected attributes cannot automatically be construed as intent to deceive. For instance, the intent to provide competing products by imitating certain features of other products cannot be equal with the intent to deceive consumers regarding the source of products.[109] For illustration, the intent to sell jewelries that look like those produced by the iconic Tiffany, as opposed to the intent to present the jewelries as Tiffany's, in an attempt to confuse customers, cannot be construed as bad faith on the part of the defendant.[110]

To succeed in false advertising claims, trademark owners must demonstrate that either the defendants advertisement is literally false or implicitly false (that is, the advertisement is true, completely of partially, or ambiguous, yet misleading). A good example for this aspect is *Chanel v. RealReal*,[111] where the advertising regarding the authenticity of the products sold was literally false. The linking of words, such as, for example, "inside" with a trademark, such as CHANEL, to register the domain name <insidechanel.com>, as held by a WIPO Panel, do not differentiate enough from the plaintiff's trademark, "operates as a preposition and means "within Chanel"".[112]

Google v. Pacific Webworks, is another good example of false advertising, as it concerned participation in a falsely designated "Google-sponsored" program, which attracted consumers through websites, by explicitly stating or implying that it was connected with Google (i.e., including the prominent display of the Google name, logo, and other trademarks, such as GOOGLE ADWORK, GOOGLE ATM, GOOGLE BIZ KIT, GOOGLE CASH, etc.), and which also included GOOGLE in the domain name address, for instance <www.googlefortunemembers.com> or <www.googlemoneyprofits.com>.[113]

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[106] *Apple, Inc. v. Amazon.com, Inc.*, 915 F.Supp.2d 1084, 1090-1 (N.D. Cal. 2013).

[107] *Id.* at 1088.

[108] *Id.* at 1090.

[109] *George Basch Co. v. Blue Coral, Inc.*, 968 F.2d 1532, 1541 (2d Cir. 1992) ("Absent confusion, imitation of certain successful features in another's product is not unlawful and to that extent a 'free ride' is permitted.")

[110] *Tiffany and Company v. Costco Wholesale Corp.*, 971 F.3d 74, 87 (2d Cir. 2020).

[111] *Chanel, Inc. v. RealReal, Inc.*, 449 F. Supp. 3d 422, 429 (S.D.N.Y. 2020).

[112] *Chanel, Inc. v. Above.com Domain Privacy*, Case No. D2012-1065 (WIPO Arb. and Mediation Center, 2012).

[113] *Google, Inc. v. Pacific Webworks, Inc.*, Case No. 2:09-cv-1068-BSJ (D. Utah, 2011).

The CJEU also addressed the potential trademark infringement by Google search results.[114] As the owner has the right to prevent all parties from using, in the course of trade, protected trademarks without consent, the CJEU examined the meaning and scope of the term "using." The Court reasoned that is must be construed as involving "active conduct and direct or indirect control of the act constituting the use. However, that is not the case if that act is carried out by an independent operator without the consent of the advertiser".[115]The Court concluded that "a person operating in the course of trade that has arranged for an advertisement which infringes another person's trade mark to be placed on a website is not using a sign which is identical with that trade mark where the operators of other websites reproduce that advertisement by placing it online, on their own initiative and in their own name, on other websites."[116]

Within this infringement form, there can be encountered several types of claims. Online search engine advertising claims, for instance, can entail a more nuanced approach, as not all uses of trademarks are prohibited. For instance, the use as search engine keywords, to display product advertisement, the outcome of such claims depending on what consumers can see on the screen, and what they would reasonably believe.

In *Network Automation v. Advanced Systems Concepts*, for illustration, the Court of Appeals for the U.S. Ninth Circuit examined whether the use of the trademark of another party as a search engine keyword, in connection with the Google AdWords program, with a view to trigger one's own product advertisement, violates trademark rights.[117] While the plaintiff-counter-defendant-appellant (Network) argued that its use of the trademark of the defendant-counter-claimant-appellee (Advanced) is legitimate "comparative, contextual advertising," which presents sophisticated consumers with clear choices, the trademark proprietor construed this behavior as "misleading consumers by hijacking their attention with intentionally unclear advertisements."[118] The Court underlined that, even though Network did not clearly "identified itself in the text of its ads, Google and Bing have partitioned their search results pages so that the advertisements appear in separately labeled sections for "sponsored' links."[119]

For the likelihood of confusion determination analysis, the Appeal Court found relevant several factors, including trademark strength, actual confusion evidence, the "degree of care likely to be exercised by the purchaser," and "the labeling and appearance of the advertisements and the surrounding context on the screen displaying the results page."[120] Based on the analysis, the Appeal Court reversed the District Court's order granting Advanced motion for a preliminary injunction,

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[114] *Mk Advotaken GbR v. MBK Rechtsanwälte GbR* , 2020, Case C-684/19 (Ger.).

[115] *Id.* at 23.

[116] *Id.* at 31.

[117] *Network Automation, Inc. v. Advanced Systems Concepts, Inc.*, 638 F.3d 1137, 1142 (9th Cir. Mar. 8, 2011).

[118] *Id.* at 1145.

[119] *Id.* at 1154.

[120] *Id.*

vacated the injunction, and remanded for further proceedings consistent with this opinion.[121]

Another useful analysis for this aspect can be found in a British Columbia Supreme Court case, where the petitioner requested an order that would prohibit the respondents from using the business names of other institutions in connection with their Internet advertising strategy.[122] The form used involved was keyword advertising in a pay-per-click scheme, which involves the payment to search engines for links to certain websites to be displayed as "sponsored links," alongside organic search results.[123] The respondents used this advertising extensively, on over 7,000 keywords, through the Google and Yahoo services, including the business names of other entities, which resulted in the display of sponsored link when consumers searched for different organizations.[124] The Court, however, held that the respondents did not use names to misidentify themselves or to mislead anyone, as the use of the Keyword Advertising service, including the use of competitors' names, is a practice also used by organizations, and that this provides opportunities for consumers to consider other options, consequently such strategy cannot be construed as "false, deceptive or misleading."[125]

Misrepresentation claims also include the use of metatags. Such actions consist of the use of words or phrases that describe the contents of websites, and which are used by the search engines to index pages. The use of metatags can result in luring consumers to websites that they never intended to visit, even though trademarks are not displayed to visitors, and the websites do not mention products related to protected trademarks. The Court of Appeals for the Ninth Circuit, in *Brookfield Communications v. West Coast Entertainment*, held that "using a competitor's trademark in the metatags of such web site is likely to cause what we have described as initial interest confusion."[126]

However, even where online searches based on trademarks point consumers to non-related or non-affiliated websites, the likelihood of confusion must be demonstrated, with respect to the source of the goods or services. An exemplary examination can be found in *Red Label Vacations v. 411 Travel Buys.*[127] In the case, the plaintiff, claimed trademark infringement by the use of the Plaintiff's metatags.[128] The Court, however, held that "the use of metatags in a search engine merely gives the consumer a choice of independent and distinct links that he or she may choose from at will, rather than directing a consumer to a particular competitor."[129] Since the likelihood of confusion could not be demonstrated, the Court concluded that the "use of

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121 *Id.*

122 Private Career Training Institutions Agency v. Vancouver Career College, (Burnaby) Inc., [2011] BCCA 69 (Can.).

123 *Id*. at 15.

124 *Id*. at 29-30.

125 *Id*. at 81-4.

126 *Brookfield Comm. v. West Coast Ent.*, 174 F.3d 1036, 1066 (9th Cir. 1999).

127 Red Label Vacations, Inc. v. 411 Travel Buys Limited, [2015] FC 18 (Can.).

128 *Id*. at 9-10.

129 *Id*. at 115.

a competitor's trademark or trade name in metatags does not, by itself, constitute a basis for a likelihood of confusion, because the consumer is still free to choose and purchase the goods or services from the website he or she initially searched for."[130]

4.2.3. Cybersquatting

Cybersquatting is a very often encountered and concerning form of trademark infringement.[131] It consists in the registration of domain names that involve, usually, prominent, well-known trademarks, most often for illegitimate financial gains. This form misleads by give the impression that the owner would have a commercial connection or relationship with the trademark holder, even where this is not implied or suggested directly. However, to amount to infringement, there must be demonstrated that the use of such domain names causes a likelihood of confusion, with respect to the source of goods or services sold on the site.

Additionally, potential infringers may take advantage of given up domain names that involve trademarks. For illustration, according to EUIPO,[132] over a period of just one year, there were 566 <.dk> domains re-registered by suspected infringers, shortly after the domains became available. Often, the real purpose for registering such domain names is to extort money, not to engage in legitimate economic activities.

Cybersquatting cases are often referred to the WIPO's UDRP;[133] however, in certain jurisdictions, trademark owners can bring a lawsuit against infringers.[134] The large number of country code Top-Level Domains (ccTLD) poses significant registration challenges to trademark owners, however, for the purpose of assessing confusing similarity, the WIPO UDRP Panels can ignore the ccTLD, find infringement, and transfer the domain name to the Complainant.[135]

In *Rolls Royce Motor Cars v. Maria Stephen*,[136] for an illustration, the complainant produced evidence that it has not licensed or otherwise authorized the respondent to use its trademark in the domain names <rollsroycepromotions.com>, <rollsroycepromotions.org>, and <rollsroycepromo.net>, registered abusively, for fraudulent purposes. Consequently, the domain names were transferred to the complainant.

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130 *Id.*

131 *See* EUIPO, FOCUS ON CYBERSQUATTING: MONITORING AND ANALYSIS (2021) (quantifying the phenomenon and describing methods and models used by cybersquatters).

132 EUIPO, RESEARCH ON ONLINE BUSINESS MODELS INFRINGING INTELLECTUAL PROPERTY RIGHTS – Phase 2 (2017).

133 *See* WIPO, INDEX OF WIPO UDRP PANEL DECISIONS (2021) (This mechanism is extensively used: as of April 2021, the number of WIPO UDRP Panel Decisions under "Industry and Commerce'"surpassed 66,000).

134 *See, e.g.,* Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d).

135 *Swarovski AG v. Oztas*, Case No. DNU2019-0002 (WIPO Arb. and Mediation Center, 2019).

136 *Rolls-Royce Motor Cars Ltd. v. Stephen*, Case No. D2006-0152, 2006 (WIPO Arb. and Mediation Center, 2006).

This form of infringement can be encountered under the guise of fundamental rights exercise, such as legitimate criticism, commentary, or reporting. An example of this is a case concerning the domain <sanofi.sucks>, which fully reproduced the SANOFI trademark, and was allegedly used as blog for criticisms about the pharmaceutical company Sanofi. The WIPO Arbitration and Mediation Center, however, held that the respondent, with a pattern of abusive registrations, acted in bad faith, the real purpose of registration being the increase of its sale price.[137]

Nevertheless, not any trademark incorporation in the URLs can be construed as infringement. For example, in a U.S. Sixth Circuit case, the Court held that the use of the plaintiff's trademark as part of the post-domain path is not likely to cause confusion because the URL post-domain path do not usually signify the source, as the path "merely shows how the website's data is organized with the host's computer's files."[138]

Typosquatting, a variation of cybersquatting, involves slight variations of trademarks, anticipating what consumers might type mistakenly. For example, by adding a letter to the trademark[139] or between the terms of a trademark,[140] by omitting a letter,[141] or by substituted a letter.[142] The forms of infringement is, therefore, difficult to address proactively by trademark owners, as the number of potential variations can be very high. Typosquatters aim to financial benefit from such practices, therefore the abusively registered domain names are often used as an instruments of fraud, to divert to payments,[143] collect personal data, generate pay-per-clicks,[144] link websites, or to resell for profit.

Cases of typosquatting can also be addressed by trademark owners via complaints under the WIPO UDRP mechanism or through lawsuits. In *Swarovski v. Modern Empire Internet*,[145] for instance, the dispute domain name was <swarvoski.com>. The respondent had no rights or legitimate interest in the disputed domain name, consequently the domain name at issue was transferred to the trademark owner. In *Shields v. Zuccarini*,[146] case brought to a U.S. Court of Appeals in the Third Circuit, the defendant registered a number of domain names that closely resembled <joecartoon.com>, with a few additional or deleted letters, or by rearranging the order of the words (e.g., <joescartoon.com>, <joecarton.com>, <joescartons.com>, etc.). The strong similarity between these domain names and <joecartoon.com> were

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[137] *Sanofi v. Privacy Hero, Inc.*, Case No. D2020-2836 (WIPO Arb. and Mediation Center, 2020).

[138] *Interactive Products Corp. v. A2Z Mobile Office Solutions, Inc.*, 326 F.3d 687, 696-7 (6th Cir. 2003).

[139] *Siemens AG v. Wall*, Case No. D2020-2342 (WIPO Arb. and Mediation Center, 2020).

[140] *Tommy Bahama Group, Inc. v. Registration Priv., Domains by Proxy, LLC*, Case No. D2020-0501, 2020 (WIPO Arb. and Mediation Center, 2020).

[141] *Royal Bank of Canada v. Domain Admin.*, Case No. D2020-2709 (WIPO Arb. and Mediation Center, 2020).

[142] *Corning, Inc. v. Song Lan*, Case No. D2021-036 (WIPO Arb. and Mediation Center, 2020).

[143] *No Limit, LLC v. Game Boy*, Case No. D2020-3298 (WIPO Arb. and Mediation Center, 2021).

[144] *Royal Bank of Canada*, Case No. D2020-2709.

[145] *Swarovski AG v. Mod. Empire Internet*, Case No. D2006-0148 (WIPO Arb. and Mediation Center, 2006).

[146] *Shields v. Zuccarini*, 254 F.3d 476 (3d Cir. 2001).

construed as confusingly similar, which could result in damages to plaintiff's reputation and loss of goodwill, should the defendant be allowed to operate the offending websites.[147]

Username squatting or Facesquatting, which involve the use of trademarks on social media services (e.g., Facebook, Twitter, LinkedIn, Instagram, etc.), increasingly used by organizations as marketing tools, can also be encountered as sub-categories.[148]

4.2.4. Exceeding Authorized Use

Exceeding trademark authorized use can be encountered as a form of Contract breach, or in violation of non-compete clauses or confidentiality provisions. Such claims can involve Agreement clauses, which set boundaries regarding, for instance, the scope transferred rights, the acceptable usage (i.e., use of the trademark only in connection with certain applications), or aspects regarding the Agreement termination.[149]

The use of channels unauthorized by the trademark holder, in breach of Agreement requests or past the end of a Partnership Agreement, in disregard of requirements to discontinue the use of certain trademarks, also fall within this category.

4.2.5. Alikeness

Claims can arise even if trademarks are distinguishable, if, under the circumstances of use, the marks can be found to be similar enough to confuse consumers with respect to the products origin or association.[150] Claims can concern even phonetically identical trademark.[151] This kind of claim involves examinations that aim to determine whether the marks are substantially indistinguishable, and actually mislead consumers.[152] Nevertheless, the similarity of trademarks alone, does not necessarily lead to consumer confusion.

Similarity analyses can be complex, as there is a number of aspects that are taken into consideration, such as conceptual similarity, appearance, sound, meaning; trademark strength; alleged infringer's intent; evidence concerning actual confusion;

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[147] *Id.* at 486.

[148] *See*, Nine West Dev. Corp. v. Does, 1:07-cv-07533 (S.D.N.Y. 2007) (unauthorized creation of the account "NineWest Shoes" on Facebook).

[149] *See* Stonewater Group of Restaurants, Inc. v. Mikes Restaurants, Inc., 2005 ABQB 799 (Can.); *Zoom Video Comm., Inc. v. RingCentral, Inc.*, Case 4:21-cv-01727-DMR (N.D. Cal. 2021); *Sköld v. Galderma Labs*, Case: 17-3148 (E.D. Penn. 2018); *TWiT LLC v. Twitter, Inc.*, Case No. 18-cv-00341-JSC (N.D. Cal. 2018).

[150] *Xtreme Lashes, LLC v. Xtended Beauty, Inc.*, 576 F.3d 221, 228 (5th Cir. 2009).

[151] *See*, *McKeon Prod., Inc. v. Leight*, No. 20-2279 (6th Cir. Oct. 8, 2021) (the plaintiff used the brand name
MACK'S, while the defendant used the marks MAX and MAX-LITE).

[152] *Colgate-Palmolive v. JMD All-Star Import*, 486 F.Supp.2d 286 (S.D.N.Y. 2007).

goods similarity; marketing aspects; etc.[153] According to the E.U. case law, two trademarks can be considered similar where, from the viewpoint of relevant public, "they are at least partially identical as regards one or more relevant aspects, namely the visual, phonetic and conceptual aspects."[154] Further, it is "necessary, in particular, to examine whether other elements of the mark are likely to dominate, by themselves, the relevant public's recollection of that mark."[155]

Figurative marks oppositions also allow for interesting examinations. In *Case T-398/16*, for example, the E.U. General Court held that the consumers perceive marks as a whole, and do not perform an analysis of the marks' constitutive elements or details.[156] Consequently, even though the dominant elements may be completely different, the other elements are not negligible in the overall impression given by the marks, therefore it must be, in particular, examined "whether other elements of the mark are likely to dominate, by themselves, the relevant public recollection of the mark."[157] The Court went on and held that the likelihood of confusion must be "assessed globally," considering all the relevant factors.[158] Consequently, in the case, the E.U. General Court reasoned that the Board of Appeal erred in ruling out any similarity between the marks and erred in not carrying out an overall assessment of the likelihood of confusion.[159]

Analyses can render the marks overall dissimilar even in cases where trademarks have some common elements. In fact, in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, the U.S. Supreme Court made the important point that trademark law was not designed to protect originality or creativity and does not provide for plagiarism actions.[160] A strong illustration in this regard can be found in *Case T-44/20*, which concerned the application for registration of an E.U. trademark by Huawei Technologies, for a figurative sign, which, according to Chanel, was similar to their highly reputed trademark.[161] According to the former, the mark applied for is similar to their mark, "overall to an average degree, or even to an average to low degree when they are viewed in the orientation in which they are applied for and to an average to high degree when the mark applied for is rotated by 90 degrees."[162] The E.U. General Court, however, underlined that the marks comparison should be done taking into account in the form registered, respectively "in the form in which it was applied for," irrespective of any possible rotation in their use on the market.[163]

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[153] *Alfwear, Inc. v. Mast-Jägermeister US, Inc.*, 2021 WL 364109 (D. Utah 2021); The Intellectual Property Office of Singapore [2020] SGIPOS 6; *Blush Fashion Group, Inc. v. Vee International, Inc.*, TMOB 31 (2020).

[154] *Harman International Industries, Inc. v. OHIM*, Case T-212/07 (OHIM 2008).

[155] *Regent U. v. EUIPO*, Case T-538/15 (E.C.J. 2017).

[156] *Starbucks Corp. v. EUIPO*, Case No. T-398/16 (E.C.J. 2018).

[157] *Id.* at 55.

[158] *Id.* at 69.

[159] *Id.* at 71.

[160] *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

[161] *Chanel v. EUIPO*, Case T-44/20 (E.C.J. 2021).

[162] *Id.* at 20.

[163] *Id.* at 49.

Based on that approach, the E.U. General Court found that the marks were dissimilar overall and dismissed the action.[164]

An exemplary analysis of a case that involved a claim concerning non-competing goods can be found in *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée.*[165] The Supreme Court of Canada analyzed whether the trademark VEUVE CLICQUOT, owned by the prominent French champagne house, was infringed in the marketplace by the respondents, which used the registered trademark CLIQUOT in women's clothing shops.[166] The appellant claimed that consumers will likely be confused to the point of thinking that the women's clothing and the champagne originate with the same source, thereby infringing the appellant's registered trade-marks, and would depreciate the value of the goodwill attaching to its mark.[167] The SCC underlined that the respondents never used the appellant's registered trade-mark as such, and, while the use of a misspelled trademark (CLIQUOT) would actually suffice if consumers would associate the mark used by the respondents with the mark of the appellant, the trial judge found that a consumer who saw the word CLIQUOT, used in the respondents' stores, would not make any link or connection to the appellant's mark.[168] The SCC rhetorically asked, while acknowledging that the VEUVE CLICQUOT trademark "carries an aura beyond its particular products, and that the extended aura carries significant goodwill, in what way is the value of that goodwill likely to be diminished by the respondents' 'use' (if use there be) of the appellant's registered trade-mark?"[169] The Court went further and stated that the possibility that depreciation "*could* occur is not acceptance of the assertion that on the facts of this case depreciation is *likely* to occur, still less that depreciation *did* occur."[170] According to the SCC, the appellant is required only to prove the *likelihood*, however, it held that, in the evidentiary record, there is nothing from which to infer the likelihood.[171] The SCC reasoned that, while there is undisputable goodwill attached to the VEUVE CLICQUOT mark, which does "extend beyond wine and champagne," if the ordinary consumer does not associate the respondents' mark with the trademark of the champagne maker, there can be no impact on the goodwill attached to the VEUVE CLICQUOT, trademark, which "would continue to distinguish without depreciation."[172]

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[164] *Id.* at 53-4.

[165] *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée*, [2006] S.C.R. 23.

[166] *Id.* at 5.

[167] *Id.* at 14.

[168] *Id.* at 35.

[169] *Id.* at 67.

[170] *Id.*

[171] *Id.*

[172] *Id.* at 55-6, 68.

4.2.6. Takeover

Interesting examinations allow also cases where the trademark registration lapsed or the associated products are no longer made. In *Corus Radio Inc. v Harvard Broadcasting*,[173] for instance, the plaintiffs requested an injunction to restrain the defendant from using the POWER 107 name or logo in its radio broadcasting business. The plaintiffs had acquired trademarks for POWER 92 and POWER 107; however, for failure to renew, the trademarks were expunged from the registry.[174] After the defendant rebranded a radio station to POWER 107, the plaintiffs claimed that it traded "wrongfully" on the reputation and the goodwill of the brand built by Corus over many years, and, through this action, deprived them from the opportunity to use the trademark in the future, thus violating trademark protection.[175] The Court performed a "balance of convenience," an analysis consisting of several factors, to identify which party would suffer the greater harm from the granting or refusal of the injunction.[176] Based on that analysis, the Court granted an injunction.[177]

Another important form in this category regards trademarks for discontinued products. In the E.U., an illustrative recent case involved a trademark regarding a car model, for which the production has stopped (the TESTAROSSA trademark).[178] The Court reasoned that the trademark protection can remain valid, in cases where, for example, the owner continues to provide services, or continues to resells second-hand goods under that trademark.[179]

4.2.7. Contributory Infringement

Contributory trademark infringement also represents a major concern, particularly with a view to the expanding use of e-commerce sites. This form occurs in cases where the defendant can be held liable for the role played in hosting online services that infringed directly trademarks. There are numerous complaints that address this infringement form. Daimler, for example, claimed that Amazon was selling or facilitating the sale of an "exorbitant number of counterfeit and infringing goods;" the maker of upscale sunglasses sued the owners of a shopping mall for contributory trademark infringement;[180] etc.

The U.S. Supreme Court admitted that the liability for trademark infringement can be extended "beyond those who actually mislabel goods with the mark of another."[181] Further, as underlined in *Tiffany v. eBay*, service providers are not

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[173] *Corus Radio Inc. v. Harvard Broadcasting Inc*., [2019] ABQB 880 (Can.).

[174] *Id.* at 8.

[175] *Id.* at 2.

[176] *Id.* at 105.

[177] *Id.* at 108.

[178] *Ferrari SpA v. DU*, Case C-720/18 (E.C.J. 2020).

[179] *Id.* at 60.

[180] *Luxottica Group v. Airport Mini Mall, LLC*, 932 F.3d 1303 (11th Cir. August 2019).

[181] *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982).

allowed to display "willful blindness," and cannot not shield themselves "from learning of the particular infringing transactions by looking the other way."[182]

The defendants can be found guilty of contributory trademark infringement even when the websites they controlled are not directly involved in the direct infringement activity. For illustration, in *Louis Vuitton Malletier SA v. Akanoc Solutions*,[183] the defendants hosted a number of websites, which listed an e-mail address, to be used by interested parties to initiate transactions regarding goods that infringed the Louis Vuitton's trademarks.[184] In the case, the defendants had actual knowledge of the illicit activities and deliberately disregarded Louis Vuitton's notifications.[185]

The CJEU addressed this issue in a case regarding the sale in the Amazon marketplace of perfumes, with valid trademark rights, by a third-party seller, unauthorized by the owner.[186] The Court reasoned that "a person who, on behalf of a third party, stores goods which infringe trade mark rights, without being aware of that infringement, must be regarded as not stocking those goods in order to offer them or put them on the market for the purposes of those provisions, if that person does not itself pursue those aims."[187] Consequently, the Court ruled that "a person who, on behalf of a third party, stores goods which infringe trade mark rights, without being aware of that infringement, must be regarded as not stocking those goods in order to offer them or put them on the market for the purposes of those provisions, if that person does not itself pursue those aims."[188]

5. Conclusion and Implications

Trademark infringement is a wide-spread, global phenomenon, with major actual or potential consequences. The infringement, committed usually with a view to benefit economically directly or to extort the trademark owners, can have very serious consequences for victims, such as loss of revenue, goodwill depreciating, consumer confusion, and even health or safety risks, resulting, globally, in thousands of lawsuits filed every year.

The main objective of this research was to provide a framework that enhances the understanding of the issues involved in trademark infringements, with a view to improve the protection of trademarks, from multiple perspectives. This article, based on a systematic review of trademark infringement cases from several jurisdictions, with an emphasis on the U.S., the E.U., and Canada, identified, categorized, and analyzed the most important cross-cutting practical aspects. The article corollary of this article is that trademarks are highly susceptibility to infringements, both in the offline and online environments, with virtually all economic sectors exposed.

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[182] *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 109 (2d Cir. 2010).

[183] *Louis Vuitton Malletier SA v. Akanoc Solutions*, 658 F.3d 936 (9th Cir. 2011).

[184] *Id.* at 940.

[185] *Id.* at 941.

[186] *Coty Germany GmbH v. Amazon Services Europe Sàrl*, Case C-567/18 (E.C.J. 2020).

[187] *Id.* at 53.

[188] *Id.*

The findings of this article can be used in a number of ways: devising educational and training materials; designing critical analysis clinics; improving the legal framework and the litigation of these cases; reaching a more unified, global approach to trademark protection; and, based on a risk analysis that takes into account actual, objective circumstances for proprietors, developing a strategy and measures for adequate protection of their marks.

The protection and enforcement of trademark rights help fair competition and development and, overall, cybersecurity, as certain infringement forms are significant cyber misconduct vectors. The multi-faceted nature of trademark protection requires a holistic, three-pronged approach, which would involve all stakeholders, addressing, respectively, the legal framework, trademark proprietor measures, and consumer's education.

In the context of trademark congestion and rising infringement claims, it is necessary to more clearly define the methodology of likelihood of confusion determination, to improve the accuracy and legal certitude or predictability of the litigation outcome. At least in case where there the determination is in balance, or some factors are undecided, the use of consumer surveys must be made mandatory.

Counterfeit activity should be addressed though improved international cooperation and a significant increase in the inspection of goods, with a view to swiftly detect and seize counterfeit products and identify the manufacturers and wholesalers; awareness raising campaigns, including on social media; and, as appropriate to the context, based on comprehensive risk and cost-benefit analyses, use of electronic (e.g., RFID, NFC, etc.), marking (e.g., holograms, barcodes, special inks, etc.), and mechanical technologies (e.g., laser engraving, security threads, etc.). Further, the review of cases showed a disproportionately small number of criminal prosecution, considering the figures found in numerous reports, suggesting that much more needs to be done in this direction.

Regarding the online infringing activity, much more must be done to effectively address a number of aspects, through the proactive use of tools that search for infringing products; enforceable Agreement terms; streamlined procedures for the invalidation of abusive registrations and for obtaining injunctions against infringers; effective mechanisms for the blocking of financial transactions and for obtaining actionable data on infringers and bank accounts used; use of tracing, anti-counterfeiting, authenticity verification (e.g., digital watermarks, shared ledger technologies, etc.), and filtering technology; secure social media handles for the trademarks, associated with the proactive monitoring for detecting infringing activity; enabling of more efficient algorithmic and non-algorithmic complaint systems for the reporting of rights violations, used in connection with capabilities to determine whether there legally the trademarks involved can be used in the respective manner; website-blocking mechanisms for infringing instances; development of models for the proactive rejection of cybersquatting and typosquatting registrations; and more effectively use of the Online Dispute Resolution (ODR) mechanism and the wider implementation of the ICANN's Uniform Rapid Suspension System (URS).

MANAGING CHANGE ETHICALLY:

INCORPORATING CHANGE MANAGEMENT AND PROJECT MANAGEMENT INTO THE BUSINESS ETHICS DISCUSSION

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I. INTRODUCTION

> "Change is inevitable. Growth is optional."
> John Maxwell[1]

> "In life, change is inevitable. In business, change is vital."
> Warren G. Bennis[2]

> "Those who expect moments of change to be comfortable and free of conflict have not learned their history."
> Joan Wallach Scott[3]

Change is hard and yet, as the introductory quotes note, it is inevitable. Change in organizations impacts people, resources, and operations. It requires planning, implementation, and assessment. Change requires broad thinking and thorough analysis as these different stages are completed. Planning and implementing successful change also require a consideration of ethics.

This paper provides a framework for contextualizing ethics in a larger decision-making process. In addition to understanding ethical theories and possibly using decision-making models that incorporate ethics to help evaluate alternatives, this paper proposes that business law and ethics must be understood as an overarching theme in the change process and in its interactions with project management and change management concepts. By encouraging this integration or synergy between the different disciplines and demonstrating how ethics can and should be woven throughout the process, this paper adds to the literature by expanding the potential reach of ethics discussions in business law and ethics courses to a higher, interdisciplinary integration. This paper builds on the encouragement of others, such as organizational change expert Gabrielle O'Donovan, who argued that the high failure rate of projects in business was linked to a disconnect in the components of change decisions.[4]

Part II of this paper briefly reviews some of the concepts and terminology related to the change process. In Part III, this paper addresses some different constructs that might be useful in teaching ethical decision making. Part IV of this paper provides explanation of the application of the ethical decision-making model to the broad concept of change, including concepts of change management and project management, including the use of a business scenario to generate questions and

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[1] Asad Meah, 40 Inspirational John C. Maxwell Quotes on Success, AWAKEN THE GREATNESS WITHIN, (Nov. 16, 2016), https://www.awakenthegreatnesswithin.com/40-inspirational-john-c-maxwell-quotes-on-success/. John C. Maxwell is a New York Times bestselling author, coach, and speaker.

[2] Warren Bennis, AZQUOTES, https://www.azquotes.com/quote/1366058?ref=change-is-inevitable (last visited May 25, 2021). Warren Bennis is considered a pioneer in the field of Leadership Studies.

[3] Joan Wallach Scott, INSPIRINGQUOTES.US, https://www.inspiringquotes.us/author/1249-joan-wallach-scott (last visited May 25, 2021). Dr. Joan Wallach Scott is a Professor Emerita of Social Sciences at the Institute for Advanced Study.

[4] *See* Gabrielle O'Donovan, Creating a Culture of Partnership Between Project Management and Change Management, 7 PM WORLD JOURNAL 1 (2018).

discussion about the process and the role of ethics throughout. But we begin with a discussion of some vocabulary of change.

II. FOUNDATIONS OF ETHICS AS PART OF THE CHANGE SYSTEM – COMPONENTS OF CHANGE

To fully address or discuss the integration of ethical decision making with change management and project management in what this paper terms the "change process," it is important to outline the different theoretical constructs or definitions of each. For faculty to teach how ethics plays a critical role in the components of a change, it is first necessary to understand that basic components of the change: change management and project management.

a. The Change Process

As Bernard Burnes notes, "At a practical level, organizational change has been a preoccupation of employers since the advent of the Industrial Revolution."[5] Change, or the change process, consists of identifying, implementing, and assessing change in an organization.[6] This definition describes the entire process and includes the processes of change management and project management as well as the inclusion of ethical analysis throughout the process.

While change may be inevitable as noted in the Introduction, it is almost never spontaneous.[7] That something could be an external trigger, such as bad publicity about a product, a change in laws or regulations, or an external audit.[8] It could be internal, such as an internal audit, a strategic planning process, or the utilization of an internal complaint process.[9] And sometimes the "trigger" could be based on inspiration of a manager to make a change to improve product, process, or policy.[10] The urgency or magnitude of the trigger may influence how ethics are included, or ignored, in the change process.

As an example, in 2013, several employees of Wells Fargo were reported to have created new accounts in the names of existing customers without the permission or application of those customers.[11] Brian Tayan, of Stanford University, noted that

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5 Bernard Burnes, Reflections: Ethics and Organizational Chance – Time for a Return to Lewinian Values, 9 J. OF CHANGE MGMT, 359, 62 (2009).

6 Devra Gartenstein, What Is the Meaning of Organizational Change, CHRON, Mar. 12, 2019, https://smallbusiness.chron.com/meaning-organizational-change-35131.html.

7 Max H. Bazerman & Don A. Moore, JUDGMENT IN MANAGERIAL DECISION MAKING, 2-3, Wiley (2013). See also, Syed Hussain, et al, Kurt Lewin's Change Model" A Critical Review of the Role of Leadership and Employee Involvement in Organizational Change, 3 J. INNOVATION & KNOWLEDGE 123, 124 (2018).

8 *Id.*

9 *Id.*

10 *Id.*

11 Brian Tayan, *The Wells Fargo Cross-Selling Scandal*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Feb. 6, 2019) https://corpgov.law.harvard.edu/2019/02/06/the-wells-fargo-cross-selling-scandal-2/. A copy of Tayan's full paper is available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2879102&download=yes.

cross-sales and product-per-household metrics were included in branch-level employees bonus calculations.[12] In the case of Wells Fargo, internal policies and metrics instigated a change in behavior by employees.[13] The pressure to succeed (magnitude) and need of some employees to receive a year-end bonus (urgency) contributed to the unethical decisions to open "fake" accounts.

Volkswagen went through a similar cycle in their "dieselgate" scandal.[14] According to an internal investigation, a group of engineers struggled to find a solution within a given "time frame and budget" to develop an engine that met U.S. emissions standards.[15] It seems that a "tightening" of emissions standards by the Environmental Protection Agency caused the technical problems of compliance, which led to the implementation of a "timeline and budget" for finding a solution.[16] Both the external regulation changes and the internal setting of potentially unreasonable parameters triggered a need for change.[17] And again, the magnitude and urgency of the trigger contributed to the unethical decisions.

Once a change is triggered, organization leaders must make a decision. Making this decision should incorporate ethical decision making, project management, and change management.

Embedded in the change process are the logistical components of the change – project management – and the human components of change – change management. In the next section, we look at the definition and context of project management. Appendix A summarizes the stages of the change process and how project management, change management, and ethical decision-making interact once change is triggered.[18] Appendix A demonstrates how these three processes happen simultaneously and how ethics overlays the other two processes.

b. Project Management

According to the Project Management Institute, project management is "the application of knowledge, skills, tools, and techniques to project activities to meet the project requirements."[19] Project management looks at processes used to initiate, plan, execute, monitor, and close a project.[20] For our purposes, project management focuses on the logistics of the change. This includes the logistics prior to implementation (what information is available, what are our financial constraints, etc.) and logistics related to implementation (how long will this alternative take to fully

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[12] *Id.*

[13] *Id.*

[14] Leah McGrath Goodman, Why Volkswagen Cheated, NEWSWEEK MAGAZINE (Dec. 15, 2015), online at https://www.newsweek.com/2015/12/25/why-volkswagen-cheated-404891.html.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Appendix A includes the specific change management, project management, and ethical decision-making model steps that will be used in a discussion of the business example in Appendix C.

[19] Project Management Institute, What is Project Management, https://www.pmi.org/about/learn-about-pmi/what-is-project-management (last viewed May 25, 2021).

[20] *Id.*

implement).[21] A project management concern would be "what training is required so that people can implement this change."[22]

Larson and Gray define the life cycle of a project in four stages.[23] First is the definition stage, where the project goals, specifications, tasks, and responsibilities are outlined.[24] Second is the planning stage, where schedules and budgets are built, people and resources are identified and allocated, and risks are assessed.[25] Third is the execution stage where the work is done, status reports are prepared, quality control is initiated, products or processes are tested and finalized.[26] Finally, the closing stage is where the project is turned over to the end-user or customer with training and assessment of the process.[27] There are other theories of project management, but this paper uses the Larson and Gray stages. [28]

Ethics should be incorporated into each of Larson and Gray's stages. Even at a conceptual level, leaders should have discussion about the possible unethical decisions that could be made in defining, planning, and executing a project, as well as turning a project over to a client. Whether it is a discussion about too short of a timeline for completion, underfunding for materials or training, or lack of disclosure of potential implementation problems, potential decision makers can brainstorm how ethics overlays the project management process.

c. Change Management

Implementing change was the focus of Kurt Lewin's seminal paper in 1947, from which the concept of "unfreezing – moving – freezing" emerged.[29] But prior to Lewin's "unfreeze" stage come several other stages – the impetus or need for change (caused by internal or external factors), an analysis of change options, and an analysis of the implications to various stakeholders of the different change options.[30] If done properly, these preliminary activities will serve to prepare the organization for the

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[21]ERIK W. LARSON & CLIFFORD F. GRAY, PROJECT MANAGEMENT: THE MANAGERIAL PROCESS 102-105 (7th ed. 2018) [hereinafter Larson & Gray].

[22]Larson & Gray at Chapter 8.

[23]*Id.* at 8.

[24]*Id.*

[25]*Id.*

[26]*Id.*

[27]*Id.*

[28]*See* JEFFREY K. PINTO, PROJECT MANAGEMENT: ACHIEVING COMPETITIVE ADVANTAGE 12 (5TH ed. 2019). According to Jeffrey K. Pinto, the Project Management process has four components. First, the project must be conceptualized, meaning the goals and technical specifications for the project are outlined and the key contributors are informed and a part of the process. Second, the project is planned, meaning detailed specifications, timelines, and assignments are made. Third, the project is executed, when the project work is done. Finally, the project is terminated, meaning the final project is transferred to the customer and the project management team no longer has responsibility for the project.

[29]Stephen Cummings, Todd Bridgman & Kenneth G. Brown, Unfreezing Change as Three Steps: Rethinking Kurt Lewin's Legacy for Change Management, 69 HUMAN RELATIONS 33 (2015).

[30]Max H. Bazerman & Don A. Moore, JUDGMENT IN MANAGERIAL DECISION MAKING, 2-3, Wiley (2013). See also, Syed Hussain, et al, Kurt Lewin's Change Model" A Critical Review of the Role of Leadership and Employee Involvement in Organizational Change, 3 J. INNOVATION & KNOWLEDGE 123, 124 (2018).

"unfreezing." Next, the implementation of change, akin to Lewin's "moving" includes a variety of activities rooted in both project management and change management.[31] The final activity is the assessment of the change implemented, including analysis of whether the change met its goals and how to continue to solidify the change, though if done well, Lewin's "freezing" should occur naturally as part of the implementation.[32] Embedded in the change process are the logistical components of the change – project management – and the human components of change – change management.

While the origins of change management rest with Lewin, the modern concept of "change management" really became part of business terminology in the 1990's.[33] The Association of Change Management Professionals (ACMP) defines change management as, "the practice of applying a structured approach to transition in an organization from a current state to achieve expected benefits."[34] To distinguish it from project management, the ACMP notes that change management "provides value by enabling ***people*** to adopt the change and operate in the future state" [emphasis added] and is focused on the impact on people, as opposed to the logistics of implementing the change.[35]

According to the ACMP Standard for Change Management©, there are five different groups of activities that comprise change management.[36] These are first, evaluate change impact and organizational readiness.[37] This includes defining the change and the reasons for it, articulating a vision for the change, assessing how the change fits the culture of the organization, and assessing the risks of failing to make the change.[38] Second, formulate the change management strategy.[39] This entails creating the plan for communication and engagement of the stakeholders, identifying the "sponsors" or key leaders responsible for the change, developing a learning strategy to ensure those impacted by the change have the skills and tools needed to accept the change, and to define and disseminate the success criteria.[40] The third stage is to develop the change management plan.[41] This entails documenting who will complete the tasks outlined in the second phase and adding details to the strategies already outlined.[42] Phase 2 may include identifying those to whom the project team communicates and phase 3 outlines the timing and text of the communications.[43] The

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[31]*See infra* Part IV.

[32]*See infra* Part IV.

[33]Prosci, note 4.

[34]Association of Change Management Professionals, Change Management as a Profession, https://www.acmpglobal.org/page/change_management (last viewed May 25, 2021).

[35]*Id.*

[36]Association of Change Management Professionals, STANDARD FOR CHANGE MANAGEMENT© AND ACMP CHANGE MANAGEMENT CODE OF ETHICS, 14 (2019).

[37]*Id.*

[38]*Id.*at 15.

[39]*Id.*

[40]*Id.*at 22-31.

[41]*Id.*at 32.

[42]*Id.*

[43]*Id.*

fourth phase is to execute the change management plan.[44] This includes gathering feedback, continually communicating and constant assessment to ensure plan goals are being met.[45] The ACMP's final stage is to complete the change management effort.[46] This final stage includes evaluation of the change against the objectives.[47]

Jeffrey Hiatt, founder of Prosci and the Change Management Learning Center, created a model to help businesses through the change process.[48] According to Hiatt, once a change has been identified, success of that change can be improved by using his ADKAR method.[49] ADKAR stands for Awareness, Desire, Knowledge, Ability, and Reinforcement.[50] Awareness relates to communication about the need for the change and why the particular alternative for the change was selected.[51] Desire is about each individual's commitment to the change.[52] Knowledge relates to the technical skills and tools to allow the individuals to implement the change.[53] Ability is the implementation of the change – the use of the knowledge to begin to work within the parameters of the change.[54] Finally, reinforcement is the sustainability of the change through rewards, continued discussion, assessment, and outcomes.[55]

It is the position of this paper that an effective change process should incorporate ethics into the stages and principles of project management *and* change management. In both aspects of the change process, different stages or steps are completed and there is a risk of ethical lapses at each stage, step, or level. And so, an ethical framework must be applied to the process in both the process and people management aspects of change.

III. FOUNDATIONS OF ETHICS AS PART OF THE CHANGE SYSTEM – THEORETICAL CONSTRUCTS FOR ETHICAL DECISION MAKING

There are many models in existence to help decision makers analyze options from an ethical perspective.[56] Many of these models specifically build in ethical

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[44]*Id.*at 40.

[45]*Id.*

[46]*Id.* at 48.

[47]*Id.*

[48]Jeffrey M. Hiatt, ADKAR: A MODEL FOR CHANGE IN BUSINESS, GOVERNMENT AND OUR COMMUNITY (Prosci Research, 2006).

[49]*Id.*at 1.

[50]*Id.*at 2.

[51]*Id.*

[52]*Id.*

[53]*Id.*

[54]*Id.*

[55]*Id. at 3*

[56]*See, e.g.*, Markkula Center for Applied Ethics, A Framework for Ethical Decision Making, https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/a-framework-for-ethical-decision-making/ (last viewed May 25, 2021), and Jennifer Mitchell & Eric Yordy, *COVER It: A Comprehensive Framework for Guiding Students through Ethical Dilemmas*, 27 J. LEG. STUD. EDUC., 35-59 (2010) [hereinafter COVER].

philosophies.[57] For example, the Cross/Miller Legal Environment of Business textbook outlines the IDDR (I Desire to Do Right) model.[58] That model includes four steps: Inquiry (identification of problem and helpful theories), Discussion (analysis of potential actions, including application of ethical theories), Decision (selection of the most appropriate action based on the Discussion), and Review (assessment of the results of the decision).[59] This decision making model is simple and easy to remember, and, while specific theories are not built in to the steps of the model, the example in the text applies different ethical approaches.[60]

A second model has been outlined by Professor Hosmer in her managerial ethics textbook.[61] Professor Hosmer proposes seven activities to analyze a decision from an ethical perspective.[62] Those include 1) understanding the different goals, norms, beliefs, and values of the stakeholders or interested parties; 2) Recognizing the harms and benefits to different constituencies as well as the impact on the rights of those constituencies; 3) Defining the moral problem; 4) Determine the economic outcomes; 5) Considering the legal requirements; 6) Evaluating the ethical duties; and 7) Proposing a convincing moral solution.[63] This model has built in several different philosophical theories. For example, steps 2 and 4 likely are based in utilitarianism.[64] Step 6 likely is based in duty-based philosophy as well as utilitarianism.[65] While this model more explicitly requires the decision maker to incorporate different philosophies in the analysis, it lacks certain key traits, such as ease of remembrance.

Professor Connie Bagley created a decision making tree to aid in the ethical analysis of actions.[66] Professor Bagley first asks if an action is legal.[67] Second is a consideration of whether it maximizes shareholder value.[68] If so, the third step is to ask, "Is it ethical?"[69] The guidance for this third step instructs the decision maker to balance the effect on various constituencies against the benefit to shareholders.[70] If the answer to the second question about shareholder value maximization is "no," then

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[57]The Markkula Center model incorporates utilitarianism, rights theory, justice theory, and virtue ethics. *See*, Markkula Center for Applied Ethics, How to Make an Ethical Decision, https://www.scu.edu/media/ethics-center/ethical-decision-making/A-Framework-for-Ethical-Decision-Making.pdf (last viewed May 25, 2021). The COVER model includes utilitarianism, the categorical imperative, and values-based ethics. *See*, COVER.

[58]Frank Cross & Roger Miller, THE LEGAL ENVIRONMENT OF BUSINESS: TEXT AND CASES (11th ed. Cengage, 2021) at 56-8.

[59]*Id.*

[60]*Id.*

[61]LaRue Tone Hosmer, THE ETHICS OF MANAGEMENT: A MULTIDISIPLINARY APPROACH (7th ed. McGraw-Hill Irwin, 2011) at 2.

[62]*Id.*

[63]*Id.*

[64]While Hosmer does not cite to utilitarianism specifically, she does ask the decision maker to conduct a cost-benefit analysis to ask who might be harmed or benefitted by the decision.

[65]Hosmer at 10-13.

[66]Constance Bagley, The Ethical Leader's Decision Tree, HARVARD BUS. REV. (Feb 2003) https://hbr.org/2003/02/the-ethical-leaders-decision-tree.

[67]*Id.*

[68]*Id.*

[69]*Id.*

[70]*Id.*

the model instructs the decision maker to ask "would it be ethical not to take the action?"[71] Again the guidance is to balance any negative shareholder impact against the impact on other stakeholders.[72] While this simple model can help a decision move through the process, it is less instructive on helping the decision maker determine if the action is ethical based in a wide range of philosophical approaches.[73]

One final example is the COVER model, initially published in 2010 by Professors Jennifer Mitchell and Eric Yordy.[74] This model sets up a "due diligence" stage with four activities: discovery of facts, identification of the ethical issues, brainstorming alternative actions, and assessing and prioritizing the stakeholders.[75] The model then guides the decision maker through five different ethical or philosophical approaches to ethics: Code (law), Outcome (utilitarianism), Values (duty-based ethics), Editorial (application of values to negative publicity outcomes), and Rule (based in Kant's categorical imperative).[76] The COVER acronym is easy to remember and the use of multiple approaches encourages decision makers to expand their thinking beyond what might be their default mode of analysis.[77] For example, some managers are very outcome focused and may "default" to analyzing a situation based in utilitarianism.[78] That manager may be tempted to justify what may be a bad decision because of a failure to view the alternate actions through the other philosophical lenses.[79] Appendix B contains a graphic version of the COVER model with some guidance on questions to ask in each section of the model.

To really understand the application of these models, and the overlap and integration between project management, change management, and ethical decision-making, Part IV will apply the Larson and Gray stages of project management, the ADKAR stages of change management, and the components of the COVER model for ethical decision-making to a short business example. The purpose of the business example is not to serve as a case study or a training guide where decision-makers find resolution, but to demonstrate how these different models work together and to show how the models generate thoughtful and thorough analysis of a problem.

IV. INTEGRATION OF ETHICS, CHANGE MANAGEMENT, AND PROJECT MANAGEMENT

To better understand the interaction between these change concepts, Appendix C contains a short business scenario. In this scenario, the trigger for change is a new Chief Executive Officer who was hired to increase efficiency and profit margin for a restaurant company. One of his first actions was to announce the centralization of several functions, including marketing. The example puts the decision maker in

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[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *See* COVER, *supra* n. 56.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*

the position of the Chief Marketing Officer and asks the reader to analyze and implement this centralization change. The purpose of this scenario is not to serve as a comprehensive case study with a thorough analysis and answer, but instead to serve as a platform for engaging in the process and to determine the questions to be asked, the resources and information to gather, and the people to include in the discussion.

As an application exercise, the following sections will proceed in the order outlined in Appendix A – first project management (Larson and Gray) concerns, then change management (ADKAR) concerns, and finally ethical concerns (COVER) and how ethics can inform and overlay the other two. We begin with the Due Diligence stage of the decision-making process.

A. Due Diligence

Per Appendix A, the first stage of the process is the Due Diligence. In project management, change management, and ethical decision-making processes, the first series of activities relate to preparation for the decision.

1. Project Management Activities

Under Larson and Gray's definition stage, the goals of the project must be outlined.[80] The decision maker should address the trigger for the change – asking what problem the organization is trying to solve. The leadership needs to define what the outcome of the project will be and how the company or unit will look, act, react, process, or engage after the change has been implemented.[81] Objectives must be articulated so that the alternatives can be evaluated to align most effectively with those project objectives.[82] In addition, those responsible for carrying out the change are identified.[83] This could include the communication team that will help with the change management process.[84] Before a project can be fully planned, the parameters of the project need to be defined.[85] Decision makers need to identify what information is needed from a logistics standpoint. This may include what business roles will be involved (accountant, lawyer, engineer), what resources exist currently, and what the preliminary budget parameters are.[86] In addition, in this stage, the decision maker begins to brainstorm different alternatives for analysis.

From our business scenario, there are eight teams of five marketing people. The goal of the project is to centralize processes and procedures as well as reduce costs. As we identify alternatives in this due diligence section, we need to include questions about the "right" size of a marketing department. Questions about whether all marketing functions are covered already, how many people it would take to be

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[80] Larson & Gray, *supra* note 24 at 8-9.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*

effective in each function for a company of FamFunival's size. Decision makers should brainstorm several alternatives in this scenario, such as a truly centralized department where all employees work in one location or a system where each brand has a "liaison" in the marketing department and the marketing employees are cross trained to perform different activities. Some alternatives could include:

a) Maintain current employee numbers and location.
b) Maintain employee locations but decrease the number of employees at each location.
c) Maintain employee numbers but relocate all employees to a central location, waiting for natural attrition to occur to reduce numbers.
d) Relocate employees to a central location and decrease the number of employees through layoffs.

2. Change Management Activities

Change management adds the people component.[87] Where project management might identify the types or work titles of people involved (a CPA, an engineer), change management begins to look at individuals who are involved and who will be impacted. Decision makers begin to develop a plan to help them understand the triggering event or why change is being made.[88] This awareness also includes information about the nature of the change and the risk of not changing.[89] Leadership should address the "why" and "why now" questions to increase buy-in for the change and decrease future discontent with the change.[90]

In addition, leadership should begin to assess the readiness of the organization for the upcoming change. This includes a review of how many people affected by the possible change view a need for the change or will need to be convinced. This should include a review of how many major changes the organization has undergone in recent history, the culture of the organization related to change generally, and the scope of the change being assessed.[91] Finally, it includes a review of the success of past changes and the credibility of the decision maker in the eyes of those being affected.[92] For example, prior change resulting in unexpected or denied consequences will lead to more resistance or hesitancy about future change.[93]

In our business scenario, leadership should identify those who will be impacted by the impending change. This will include the forty people in the various marketing departments. It also might include managers of each restaurant who may have had in-person or quick access to the marketing people who held expert

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87 Hiatt at 5.
88 *Id.*
89 *Id.*
90 *Id.*at 6.
91 *Id.*
92 *Id.*
93 *Id.*

knowledge about the particular restaurant theme and who now will have to work through a centralized process and compete with more restaurants for services.

3. Ethical Decision-Making Activities

Under the COVER model, the due diligence phase includes four different activities.[94] First, the decision maker must determine what facts are known and what facts need to be determined.[95] Second, the decision maker identifies the potential ethical implications of the decision.[96] Third, the decision maker begins to brainstorm alternative solutions or outcomes.[97] The final activity in the due diligence phase is to determine which stakeholders will be impacted by the decision.[98] This due diligence process is a circular process where the generation of alternatives may lead to a need for more facts, which may lead to the identification of different stakeholders, and so on.[99]

In our scenario, some of the COVER model due diligence duplicates information from the project management and change management processes. The alternatives should be identical to those identified in the project management function. There may be facts that are discussed as part of the ethics analysis that did not come up in the project management function but those should be added to project management or change management discussions if they impact the logistics of personnel respectively.

The stakeholder list likely will include the list of people generated in the change management process but might be broader to include customers who might be impacted by a change in marketing or branding. The decision maker should brainstorm and prioritize the stakeholders. In this situation stakeholders include the employees (whose lives may be significantly altered by the ultimate decision), the owners (whose profit or income may be impacted), the other employees in each division who rely on marketing (whose jobs may be impacted by the relocation of marketing personnel), customers (who may be impacted by changes in branding), and Mr. Wong (whose job and possible income may be impacted based on the magnitude of the increase in profits and efficiency). Based on the mission and values of the company, a decision maker may prioritize customers as the highest priority, with employees as second (based on the value of cultural awareness and the impact that has on marketing).

B. Analysis

The second function as outlined in Appendix A is the analysis. Broadly defined, this is where the decision maker narrows down the alternatives to the one that

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94 COVER, *supra* note 56.
95 *Id.*
96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.*

will become the focus of the remaining steps of implementation and assessment. This analysis requires activities in project management, change management, and ethical decision making.

1. Project Management Activities

The project management activities will include an analysis of the logistical aspects of each alternative. This will include costs of any materials involved, as well as timelines to complete activities. In our business scenario, this might include an analysis of space availability (can we simply relocate a team, or do we need to find a new space that will hold the team). This also will include an assessment of salaries and what the savings would be under different alternatives. Timelines for each alternative may be reviewed and refined.[100] In addition, preliminary discussions with necessary contractors might begin.[101] Feasibility studies may be completed on the different alternatives. An analysis of resources, including technological resources, staffing resources, material resources, and financial resources required for each alternative should be completed.

2. Change Management Activities

While analysis of alternatives is being completed in the project management and ethical decision-making functions, the change management function moves forward with communication.

Under change management, leadership continues to build awareness but also begins to attempt to build desire in the personnel for the change.[102] This desire is the extent to which the personnel "buy in" or support the change. Through appropriate communications, the leadership begins to demonstrate how the change will improve efficiency, profitability, working conditions, customer service, and/or other aspects of the business.[103] Leadership may choose to include a feedback loop at this stage, outlining several different alternatives and asking for input from the workforce on which alternatives seem most feasible and most appropriate.[104] Often stakeholders who will be impacted by the decision will understand complications or consequences of an alternative better than management who may be removed from the daily impact.[105] Through empowerment and appropriate response to the things that motivate the stakeholders, leadership can facilitate an increase in desire for the change.[106] Stakeholders need to understand "what's in it for me?"[107] They need to believe that

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100 Larson & Gray at Chapter 5.

101 *Id.*

102 Hiatt at 5-22.

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id*.

107 *Id.* at 19.

the change will be implemented fairly across similarly-situated groups.[108]While leadership cannot control what each individual stakeholder values, the leadership can generate communication from a variety of perspectives to address multiple intrinsic motivations.[109] If a change is going to increase profitability, but also reduce time on task, or make processes more efficient, different stakeholders will respond differently to each of those outcomes.[110] Leadership needs to be aware of the different motivations and consciously address them to maximize stakeholder buy-in.[111]

For this change, the Chief Marketing Officer should communicate with the marketing staff at each concept about the coming changes. Depending on the culture of the company and the constraints on the decision (short timeframe for example), the decision maker may want to disclose the potential alternatives and collect input from employees who might be impacted. In addition to communication with the employees who may face termination, layoff, or a change in job duties or location, the management should communicate with others who might be impacted. For these individuals, such as restaurant managers, information shared should increase real awareness of the need for change at this time and begin to set the stage for generating excitement, or desire, for the change.

3. Ethical Decision-Making Activities

Using the COVER model, the decision maker analyzes each alternative using the five philosophical approaches of COVER – Code, Outcome, Values, Editorial, and Rule.[112] This analysis may use information generated in project management of change management discussions thus far. A summary of the analysis process is outlined below.

The Code analysis evaluates the legality of each alternative as well as how any codes of ethics or codes of conduct in the organization or industry will inform the decision.[113] Decision makers should identify generally the areas of law for which consultation with corporate counsel might be needed. This could include employment law, labor law, and contract law. For this centralization of marketing, focused on the employee issue, the decision maker should address contract issues such as whether a layoff would trigger any contractual damages. Experienced managers may mention the WARN Act, though given the facts in the case it is unlikely that the WARN Act would be an issue. If used as a training or classroom exercise, participants may be asked to simply identify legal issues or may be asked to conduct research to address the result of a legal analysis. Assuming there are no contract issues, it does not appear that any alternative should be eliminated for Code reasons. The participant or

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108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

112 COVER, *supra* note 56. The author has a worksheet structured for a full cover model analysis. For the sake of efficiency, this paper only includes the summary of each section of what might be a full analysis

113 *Id.*

decision maker also will want to list a review of any corporate policies or industry codes that might impact the decision.

The Outcome analysis is a cost-benefit analysis (based in the utilitarian philosophy).[114] This analysis should include the financial information from the project management discussions. It also should include discussions from change management on the impact of the people involved both directly and indirectly. In addition, we should address positive or negative publicity that may result from each alternative, any impact on physical safety (likely to be none in this case), and potential impact on morale. Finally, the cost/benefit analysis should address any changes in operational results – timeliness of production of materials, complications of having fewer people manage different and distinct web pages, etc. It appears under this analysis that retaining employees in their current positions and locations would be the most expensive but the least disruptive. Reducing the number of employees, either while leaving people at their locations or in centralization will disrupt the lives of those employees. Relocation, however, will allow for better absorption of the activities of the laid off employees than having smaller teams try to take on that extra work. Through project management activities, the decision maker will receive information on cost associated with reconfiguring a centralized space if needed, the cost (or savings) of consolidating software programs, and other technical aspects of the alternatives.

The Values analysis applies the mission, vision, and organization culture to the different alternatives to determine which is the best fit.[115] FamFunival's mission statement is, "To be financially successful by providing intentional dining experiences in a relaxed, fun, family environments." Each alternative should be evaluated as it relates to the mission statement. For example, if one alternative is to maintain current marketing staff numbers and locations, it is useful to ask how that alternative might improve the chances that the company will be financially successful.

The Editorial analysis, which also could be called the mirror test or the grandma test, asks the decision maker to determine the most negative publicity that could be associated with each alternative and then apply the mission and values of the organization to determine if it is possible to respond to the negative publicity and remain true to the mission and vision.[116] For the purposes of this business scenario, each alternative is analyzed to determine the most negative "news story" or criticism that would come to the company. For example, if the company decides to simply lay off several employees at each location, they may be seen as a harsh employer with no care for employees and a focus solely on the bottom line. The mission-statement includes the term "family", and the company may be accused of ignoring their family focus when it comes to employees. Under this analysis, the company will need to be ready to address why the alternative was selected. This could include why the alternative really is aligned with the mission, why the mission is agnostic on this issue, or why the company had to make the decision (and possibly what mitigating actions were taken) despite being "off value." It may be in this scenario that the mission is

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114 *Id.*

115 *Id.*

116 *Id.*

not helpful. That can open a valuable conversation about making ethical decisions with incomplete information or in a situation where some information is not helpful.

The Rule analysis, based in Kant's categorical imperative, asks the decision maker to analyze whether each alternative would seem "right" if everyone in a similar situation chose it.[117] The purpose of this analysis is to eliminate the temptation to select a "bad" alternative because the impact of this organization making that decision is small (one company that pollutes just a little bit so that the contribution to the overall environmental harm seems negligible but "if everyone" made this choice, the consequences may be disastrous).[118] In this scenario, decision makers brainstorm the broader implications of each alternative. If *all* companies centralized marketing to a single location and created a "ticket" system to get marketing activities done, the analysis evaluates the impact on the world in terms of values – looking at who might be hurt, what the impact on the economy might be on both the macro and micro scales, and what the cost to consumers and employees might be.

In completing the analysis, decision makers may be able to limit the alternatives to one or two viable alternatives.

C. Decision

Using the analyses under project management, change management, and ethical decision making, the decision maker selects the alternative that best matches the needs of the company. From a project management perspective, the decision should align with the values of the company as well as the project outcomes.[119]

From a change management perspective, the leadership should clearly communicate the alternative that was selected, as well as the reasons for the selection.[120] The team should develop a more specific change management plan, including a communication plan with a timeline for communication (either by date or by specific benchmarks in the project).[121] Communication continues to be key as the decision maker begins the process of Knowledge and Ability by working with employees to select equipment and software, planning a training regime for any new equipment, and working with employees to ensure they have the ability to do the job (both during the transition and after the move).

From an ethical perspective, the decision maker documents the rationale for the decision and generates a plan to address any of the negative fallout anticipated through the ethical analysis. For example, if there is negative publicity expected, the marketing and public relations team should begin to draft the response. Once the decision has been made, the ethical components of the decision-making will take less of a front-line position, though ethics will remain a concern throughout the planning and implementation stages.

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117 *Id.*

118 *Id.*

119 Larson & Gray at 46.

120 Hiatt at 84.

121 Prosci, Change Management Plans, https://www.prosci.com/resources/articles/change-management-plans (last viewed May 25, 2021).

Just as in "real life" at this stage, the decision maker has selected the best decision for the company and preparation for implementation becomes more technical. Decision makers can be challenged to think through this preparation from an ethical perspective. For example,

project management activities potentially will include solidifying the cost of moving employees, evaluating the space uses in the existing locations as well as identifying space for the employees at the central location, identifying software and hardware necessary to allow for seamless use for the difference concepts, and solidifying the proposed timeline for activities that was generated in the analysis stage. Decision makers should brainstorm the potential ethical issues in each of these questions and preparations. For example, if current software is sufficient, is it ethical to spend the time and money to train employees on a new product? If brands have spent significant time and effort to build a sense of community, is it ethical to move non-marketing people around to make room for a central marketing office?

D. Implementation of the Decision

As the planning and execution of the project begin in earnest, the leadership team should run parallel processes through project management and change management with ethics as a common theme for each decision made.[122] The project management activities will focus on the logistics of the implementation while the change management activities will focus on the staffing "buy in."

1. Project management Activities

Decision makers should follow the detailed project plan, including milestones for status reports and checkpoints for quality assurance.[123] At this point, the leadership might collect bids if necessary for work to be done.[124] If there were no activities that would go through a bidding process, then the project management team begins the logistical planning.[125]

2. Change management Activities

Through change management activities, the leadership continues its plan to make personnel aware of the change and the process as well as reinforce the desire of the staff to accept or embrace the change.[126] Leadership also moves in through the Knowledge and Ability phases of change management.[127] During the Knowledge

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122 *See* Table 1.

123 Larson & Gray at 9, 460.

124 *Id.* at 460.

125 Abid Mustafa, Doing the Bidding, 28 PM NETWORK 7 (2014). https://www.pmi.org/learning/library/bid-management-project-offices-duty-2195.

126 Hiatt at 63-102.

127 *Id.* at 103-118.

phase, leadership determines whether the personnel have the necessary knowledge to implement the change or if there is a need for training.[128] Once the training needs are determined, leadership implements that training as part of the Ability stage.[129] While training is essential, this stage requires organization leadership to assess whether the stakeholders impacted by the change have the intellectual, psychological, and physical abilities to work with the change.[130] For example, if a process is moving from a paper-process to an online process, the analysis is whether those who must work in the new system are capable of learning the technology and using the equipment. Leaders must ensure that staff know where to get assistance moving forward (continued training or troubleshooting).[131]

3. Ethical Decision-Making Activities

Though project management and change management become the focus of the change, the COVER model (or another ethical decision-making process) must remain a part of the discussions. Decision makers may believe that once they have made a "right" or ethical choice, that ethics is no longer necessary or relevant. It is our position that this could not be further from the truth. In fact, it may be easier to make unethical choices in the details of the implementation than in the bigger-picture work of choosing an alternative because the stakes may seem lower, or the work may seem more technical. But many implementation decisions have ethical implications. Consider the ethics of a bidding process. There is risk of a conflict of interest if one potential bidder has a relationship of some sort with the decision maker.[132]

In our business scenario, leadership will need to work with employee to set up training sessions and to ensure that each employee has the necessary equipment to do their job. If a centralized software system is selected, there may be ethical implications as to the choice of product. If space needs to be reconfigured, the decision maker must continue to pay attention to ethical issues such as access, privacy concerns if any, and impact on the employees.

Just as there are ethical pitfalls in the project development, there are ethical risks inherent in the change management activities. Fair assessments of the knowledge needed, and the dedication of appropriate resources to achieve the knowledge, are essential.[133] Ethical concerns may include the expectation that employees adapt to a new system without adequate training. If there are options related to training, the COVER model should be used to assess those alternatives from an ethical perspective to increase the likelihood that the best training materials are selected (not merely the cheapest). There also may be ethical issues related to the location of the new marketing team. For example, placing the team in a rural or suburban

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128 *Id.* at 103-112.

129 *Id.* at 113-18

130 *Id.*

131 *Id.*

132 *See, e.g., Eric* D. Yordy, M. David Albritton & Taylor Snell, *The Big Red Mess: The University of Phoenix Stadium Concessions Contract*, 22 J. LEGAL STUD. EDUC. 27 (2016).

133 *Id.*

area without adequate public transportation options may create an undue burden on various populations of people, increasing their costs to work.

A new process that requires more time for senior staff to learn may or may not necessitate terminating the senior staff, but any decision to change staffing should be evaluated with an ethics perspective. In addition, legal issues (such as discrimination laws) may require a modification of the change for some staff members.[134]

E. Reflection

After the change is implemented, the project management team delivers the project, or turns over control of the project to the organization leadership.[135] This should include a plan to train customers (akin to the change management processes of Knowledge and Ability).[136] Project managers may remain involved to evaluate the change against the objectives of the plan.[137] Under project management, there should be a review of the process to determine what went well and what could have gone better.[138]

Under change management principles, the leadership continues to reinforce the change through policy and communication.[139] Reinforcement is intended to recognize and reward those who adopt the change successfully and to continue to assess the change through accountability measures.[140] While the ADKAR system refers to the final stage as "reinforcement" it may be more efficacious to refer to this final stage as "reflection." Under this approach, leadership continues to communicate with "on the ground" staff to determine if the change is fulfilling its purpose, if the goals are being met, and if the change is acceptable as implemented or if there are further refinements needed to ensure a satisfactory implementation.[141]

In our business scenario, both project management and change management actions continue to need ethical analysis. The project management team should schedule turning off access to old software programs, which should include an analysis of the need for access to old files and how those files might be converted or used in the future. From a change management perspective, the leadership should recognize the work of the employees who underwent the transition. Those who excelled can be recognized. Public celebrations of the outcomes might occur. How and when those recognitions occur, and who is recognized, might be seen as having ethical implications if the management might be considered to favor certain employees. Since employees likely were laid off during this process, remaining employees may see it as unethical if the management spends money on the recognitions or

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134 *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. §621 (1967).

135 Larson & Gray at 8 and Chapter 14.

136 *Id*.

137 *Id.*

138 *Id.* at 8-9 and 525-9.

139 Hiatt at Chapter 12.

140 *Id.* at 41.

141 *Id.* at 123-4.

celebrations to the extent that it might have delayed or avoided a lay off. Ethics should be considered as a part of each decision.

V. Conclusion

Change is hard. Change done poorly is even harder. A good change process will include consideration of the logistics of the change, the impact of those logistics on people, and the ethics of both the decision and the implementation. By integrating proven project management processes with change management concepts and an ethical decision-making model, decision makers will work through a thoughtful process that will give them a broad and deep understanding of the choice that should be made and implemented. Through the examples of Larson and Gray's project management process, the ADKAR change management technique, and the COVER model for ethical decision-making, this paper provides an example of how this integration can work. With a firm belief that informed decision making will result in better decisions, this paper urges decision makers to incorporate the three concepts into business processes and practices to improve the process and the outcomes that are inevitable when change occurs.

Appendix A: The interaction or overlap of ethical decision-making with change management and project management. The following table is meant to apply once a change is triggered.

	Project Management	Change Management (ADKAR)	Ethics (COVER model)
Due Diligence	Preliminary information gathering on costs and resources. ***Ethics overlay*** as these activities will inform, and be informed by, the COVER model due diligence work.	Awareness: Evaluate change impact and organizational readiness. **Ethics overlay** as the impact on people is evaluated.	Facts, Issues, Alternatives, Stakeholder Analysis
Analysis	***Ethics overlay*** as this logistical analysis contributes to the COVER model "Outcome" analysis.	*Awareness* and *Desire*: formulate change management strategy. ***Ethics overlay*** as the communication strategy and needs of people are assessed.	Code, Outcome, Values, Editorial, Rule
Decision	Defining or conceptualization of the project. Logistical parameters set.	*Awareness:* Develop change management plan for specific change	Conclusion
Implementation	Planning and Execution. ***Ethics overlay*** as decisions are made regarding how to execute the plan.	Awareness, Desire, Knowledge and Ability: Execute plan **Ethics overlay** as leadership continues to communicate and make decisions that impact people.	COVER model used in each component of implementation, evaluating the ethical impact of decisions on logistics and people.
Reflection	Delivery of project to the client or termination of the project. ***Ethics overlay*** as management makes decisions related to how the project went.	*Reinforcement*: Evaluate plan against objectives to determine if the impact on people was minimized and addressed. **Ethics overlay** as celebrations and future work is planned.	Analysis of whether the decisions were the right decisions ethically

Appendix B: The COVER model

Appendix C: This business scenario is meant to be used to generate questions and frame how a decision-making process would unfold. It is not a case study to be assessed by outside of a class or training situation for a complete decision as the information intentionally is incomplete, generating the production of questions and an analysis of the steps of the process, not an analysis of the situation specifically.

Centralized Marketing

Mitchell Wong recently was hired as CEO of FamFunival, Inc, a holding company which owns several different restaurant/activity center concepts. Each of the concepts was acquired at some point and each concept has a leadership and administrative team located in different cities. FamFunival's mission statement is, "To be financially successful by providing intentional dining experiences in a relaxed, fun, family environments." The company values include environmental stewardship, wholesome entertainment, cultural awareness, and fun.

FamFunival has eight different restaurant concepts, which include Carter's Carnival, a restaurant which caters to families with small children and has a county fair fell to it with small rides, free games, and food stations set up to look like food trucks. Ashton's Arcade caters to families with children a bit older with video arcade machines, opportunities to win prizes, and a more modern feel. Jacqueline's is a more formal, upscale French restaurant which targets an adult clientele with more expensive cuisine and a much more subdued atmosphere. It retains the "activity center" component of FamFunival's mission through its French décor, theme nights, and small vineyards. Each concept has several restaurants in the regional area and FamFunival's total number of employees is more than 5000.

Each of these concepts was structured as a separate entity, with separate management. Each handled its own marketing, supply chain, menus and pricing, activities and events calendars, and other operations. There were minimal guidelines about use of the FamFunival logo. Each concept, while structured slightly differently, had approximately five people dedicated to marketing: a marketing director, a print media expert, a webmaster and search engine optimization expert, a communications specialist, and a social media expert. As each concept grew separately, each marketing department also adopted software and programs with which the teams had experience or high levels of comforts. This resulted in each concept using different marketing tools and programs to generate materials.

Mitchell was hired by the Board of Directors to increase efficiency and profit-margin. He has announced that the first step in this move will be the centralization of several functions, including marketing. You have been the marketing director of Ashton's Arcade and have been selected by Mitchell to oversee the centralization of marketing. While there are many issues related to a centralization process, as the new Chief Marketing Officer your initial concern is with the disruption to employees.

BROADER GOVERNMENTAL OVERSIGHT WARRANTED FOR UNREGULATED TATTOO INK

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ABSTRACT

Tattoos have increased in popularity during the past decades. While state and federal regulators have provided some oversight of the tattoo industry, there are no direct regulations regarding the ink used for this process. This paper proposes more oversight of tattoo ink based on a recent European Union comprehensive study of tattoo ink prompting regulation therein, the United States medical community's awareness of the health hazards associated with the ink, and the disparate impact of no regulation on protected classes. Additional, tattoos acceptance in society warrants resolve of this matter. A broad range of resolutions exist through full regulation of the ink to keeping the status quo; however, a pragmatic solution is the implementation of a conspicuous contractual clause, providing adequate consumer notice until the appropriate authorities undertake further action.

KEYWORDS: tattoo, ink, health, hazards, disparate impact, medical, consumer, regulation, warnings

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I. INTRODUCTION

Tattoos, an art once associated with offenders, sailors, and sideshows in the United States, have crossed over to the mainstream. An estimated 20 million people in the United States have at least one tattoo ranging from students to industry workers to professionals.[1] Additionally, individuals are not merely getting tattoos for decorative reasons but cosmetic and medical purposes too. This increase in tattoo usage has given rise to a plethora of legal issues ranging from intellectual property to constitutional matters. However, the ink used for tattoos has been given little discussion or regulation as both state and federal agencies have overlooked this product. Recently, however, there has been an increase in knowledge relating to ink content and awareness of its discriminatory impact on certain protected classes.

This article explores the safety of tattoo ink by first discussing in Part II the historical background of tattoos, including but not limited to their usages throughout the world. This practice was not limited to Europe or Asia as explorers observed tattoos used by indigenous people upon the American explorations. Tattoos in the United States are discussed, focusing on their decline and rise in popularity over the years. Part III discusses the various methods of tattooing and the different forms of material used to ink the design. Part IV discusses current federal regulation that provides only oversight of the ink to the lack of state regulation concerning tattoo ink. This section also provides case law concerning tattoo ink. Part V explores reasons why more oversight of tattoo ink is warranted which includes 1) recent data released by the European Union (EU) prompting full regulation;[2] 2) the United States (U.S.) medical community's awareness of potential health hazards of tattoo ink, and 3) the disparate impact of no regulation on protected classes.[3] These factors warrant governmental action. Part VI provides various solutions, including, but not limited to, mandatory conspicuous consumer notices as to risks associated with the ink. The article concludes that sufficient data warrants some type of governmental action to address these health concerns.

II. OVERVIEW OF TATTOOS

A. Tattoos: Historical Perspective

The word tattoo was introduced by Captain James Cook in a narrative of his first voyage in the South Pacific, referring to the word *tattaw* derived from the

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1. Jessica C. Dixon, *The Perils of Body Art: FDA Regulation of Tattoo and Micropigmentation Pigments*, 58 Admin. L. Rev. 667 (Summer 2006), noting that researchers have place this number as high as 40 million.

2. Paola Piccinini, Sazan Pakalin, Laura Contor, Ivana Bianchi, Chiara Senaldi; *Safety of Tattoos and Permanent Make-up. Final report*; EUR 27947 EN; doi: 10.2788/011817 (European Atomic Energy Community, 2016)

3. *Id.*

Tahitian "ta," which in several Polynesian languages meant to *knock* or *strike*.[4] The term tattooing, as used today, meaning the puncturing of the skin with the insertion of dye or pigment into the skin, is traceable to ancient Egypt.[5] Tattooing spread from "the Mideast to the Pacific Islands by way of India, China, and Japan."[6] Notably, tattooing can be broadly defined as "many forms of irreversible body alteration that can include scarification, cicatrization, piercing, and branding."[7] This practice dates back by archaeologists to 12,000 B.C., with evidence of marks or cutting on discovered bodies.[8]

Historically, most tattoos were typically obtained for religious or magical purposes, providing a means of identification or protection in the afterlife."[9] Other cultures used tattoos for decorative art, to distinguish social status, and to identify criminals or other "social undesirables."[10] Ancient Greece and Romans primarily used tattoos to mark and identify criminals, slaves, and gladiators.[11] However, Romans adopted tattoos to commemorate military accomplishments after viewing markings on inhabitants of the British Isles during their conquests. Notably, the term Briton is from a Breton word meaning "painted in various colors."[12] Tattoo practices continued during the crusades, wherein crusaders "marked their body with religious images to ensure a Christian burial should they die in a foreign land."[13] Although the

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4.George Burchett*, Memoirs of a Tattooist* (London, 1958), noting that the art was advance at the times to include family crests and tribal symbols. Prior to this time, it was referred to as "pricking."

5.Jane Caplan, *Written on the Body*, p. xi, Princeton Press (2000).

6.Clinton R. Sanders, *Customizing the Body : The Art and Culture of Tattooing*, p. 9, Temple University (1989)

7. *Id.*

8.*See generally*, D.W. Hambly, *The History of Tattooing and Its Significance* (1925). The Ice Man or Ötzi found in 2009, dates back 5300 years ago and had over 61 tattoos, which scientist believe were for medical purposes; see also, María Isabel Carrasco Cara Chards, *Ötzi The Iceman's Tattoos: What The Oldest Tattoos Ever Discovered Meant For Our Copper Age Ancestors*, https://culturacolectiva.com/technology/otzi-the-iceman-tattoos-meaning (July 17, 2018). *See also*, Krista Langlois, *Inked Mummies, Linking Tattoo Artists with Their Ancestors*, New York Times, (July 5, 2021), available at https://www.nytimes.com/2021/07/05/science/mummies-tattoos-archaeology.html (noting increase of archeologist expanding use of tattoo mummies).

9.*Id.* p. 11.

10.*Id.* See also Samuel M. Steward, PhD, *Bad Boys and Tough Tattoos: A Social History of the Tattoo with Gangs, Sailors and Street-Corner Punks*, (1950-1965), p 184 (Harrington Park Press 1990).

11.The practice was referred to as stigmata referring to the Greek verb stizein formed from the root, stigma (to prick). See Caplan, *supra*, note 6, citing Aetius Amidenus, Tetrabiblon 8, 12+ Alessandro Olivieri, Corpus Medicorum Graecorum VIII/2 (Berlin 1950), pp. 417-418. Notably, this practice was also adopted by the Nazi regime during World War II in which they tattooed prisoners of war as well as individuals based on their beliefs or religions. See generally, *Tattoos and Numbers: The System of Identifying Prisoners at Auschwitz,* United States Holocaust Museum Washington DC, available at https://encyclopedia.ushmm.org/content/en/article/tattoos-and-numbers-the-system-of-identifying-prisoners-at-auschwitz.

12.Sanders, *supra* note 12 *citing*, Jocelyn Paine, *Skin Deep: A Brief History if Tattooing*, Mankind 6 (May 1979). Notably, Julius Ceaser commented in his memories, that "the Britons were colored in blue and carried design that made them 'frightful to look upon in battle.'" *See also*, Stephan Oettermann, An Art as Old as Humanity, Introduction to Tattoo, by S. Richter, 11-17. London, Quartet

13.Sanders *supra* note 12, at 14

Vatican later condemned tattooing, proclaiming that it "violated God's handiwork,"[14] it continued in the Greek Catholic and Orthodox Churches as well as in Britain.[15]

Tattoos faded from Europe for some time, but they returned with "a vengeance as European explores rediscovered them in other parts of the world by the eighteenth century."[16] Britain continued to practice tattooing simultaneously, encouraging soldiers to get tattoos for camaraderie and identification purposes, while criminals were also marked with tattoos by the 1800s.[17] There also grew an interest in displaying tattooed people, and by 1850 a large number of "heavily tattooed Europeans were making a living by exhibiting themselves to the public and meetings of prestigious medical associations."[18] While the "tattoo rage did not impact the European middle class," nobility often got tattoos in Asia, including Czar Nicholas II of Russia, King George of Greece, King Oscar of Sweden, and Kaiser Wilhelm of Germany, and members of the British royal family.[19]

B. United States

The tattoo trend in Europe eventually made its way across the Atlantic to the United States. However, the concept of tattooing was not new in this territory as there are records that tattooing was a vital part of shared religious beliefs among Native Americans dating back to the 1200s.[20] The practice extended to North and South America, with one explorer observing that "the more they were tattooed, the more valiant and brave they were considered."[21] The tattoo process was described as similar to those obtained in Jerusalem. Yet, instead of religious symbols, indigenous people used images of animals or other nature symbols "pricked into the surface of the flesh over different times" until the process was completed.[22]

There is some record of early European settlers in the Americas getting tattoos, but they did not publicize it given social norms.[23] There also exist records of colonists during the Revolutionary War getting tattoos for identity purposes.[24] Still,

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14.*Id.* at 13.

15.Steward, *supra* note 11, at 186-188.

16.Carl Zimmer, *Science Ink, Introduction*, Sterling NY 2011

17.Veterans of Foreign Wars, *A Short History of Military Tattoos*, available at https://www.vfw.org/media-and-events/latest-releases/archives/2016/8/a-short-history-of-military-tattoos; *see also*, Robert Shoemaker and Zoey Alker, *How Tattoos became Fashionable in Victorian England,*

available at https://theconversation.com/how-tattoos-became-fashionable-in-victorian-england-122487 (December 12, 2019).

18.*Sanders supra* note 12, at 14.

19.*Id.* at 15, *see also* Veterans, *supra* note 18. This practice could also be seen as a means to identify a body in the event of death.

20.Jarrett A. Lobell and Eric A. Powell, *Ancient Tattoos*, 66 Archaeology No. 6, (November/December 2013), Archaeological Institute of America, also available at https://www.jstor.org/stable/24363768

21.Gabriel Sagard, *Histoire du Canada et voyages que les frères mineurs recollects y ontfaicts pour la conversion des infidels* [1636] (Paris 1866) 347.

22. *Id.*

23.See Arnaud Blavay, *Tattooing and its Role in French-Native American Relations in the Eighteenth Century*, 9 French Colonial History, p. 7, Michigan State University Press, 2008, noting French colonist rarely admitted having a tattoo.

24.Veterans, *supra* note. 18.

tattoos became more prevalent during U.S. Civil War for identification purposes and to document their military accomplishments.[25] Similar to Europe, tattoos became more visual in the early 1900s when people covered their bodies with tattoos to support themselves by becoming attractions in sideshows or the circus.[26]

In 1876, Thomas Alva Edison patented an electric stencil pen modified in 1891 by Samuel O'Reilly. The latter also received a patent for the first electric tattoo machine or the tattaugraph,[27] which transformed the industry from a costly, time-consuming manual method to a more efficient mechanical tattooing.[28] During this period, the military, mainly sailors, would get tattoos to mark their patriotism and give homage to their loved ones back home. When social security numbers were introduced in the 1930s, many citizens elected to get their social security numbers tattooed on their bodies, which gave tattoos a functional purpose.[29] After WWII, the American Traditional tattoo of tattooing was born with bold black outlines filled with saturated reds, blues, and yellows. In the 1940's the increasing arrests of Latino migrants gave way to the black and gray Chicano style of tattooing.[30] By the 1950s, tattoos were used in various advertisements, and even famous cartoons such as Popeye displayed anchor tattoos on each arm, the overall popularity of tattoos declined.[31]

In the 1960s, research suggested a correlation between tattoos and work effectiveness, prompting various laws restricting or banning tattooing practices.[32] The Hepatitis B outbreak of 1961 in New York City made tattooing illegal.[33] Similarly, tattooing was made illegal in several other cities and states or had limitations placed on tattooing.[34] The countercultural movement of the 1970s marked the first time that tattoos were embraced by people other than veterans, prisoners, and sailors.[35] During this same time, the tattoo industry recognized the need to establish ethical and hygienic standards that would eventually overturn restrictions on tattooing.[36] By the 1980s and 90s, tattoos became more prevalent. Today three in ten Americans (29%) have at least one tattoo, and seven in ten (69%) have two or more tattoos, with thirty-

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25.Steward, *supra* note 11, at 189-190.

26.Margo De Mello, *Bodies Inscription: A Cultural History of the Modern Tattoo Community*, p.53-58 (Duke University Press 2000).

27. *Id.*

28.*Id* at 50.

29.De Mello, *supra* note 27, at 65-66; See also, British Pathé, Social Security (1937), https://www.youtube.com/watch?v=VCTJXpXvvIE.

30.De Mello, *supra* note 27, at 67-70; *see also*, Caplan, *supra* note 6, at 228.

31.Caplan *supra* note 6 at 229. There was also tattooing to identify blood type during the cold war "to enable rapid transfusions as part of a "walking blood bank" in case of atomic attack." *See*, Elizabeth K Wolf and Anne E Laumann, The use of blood-type tattoos during the Cold War, available at https://pubmed.ncbi.nlm.nih.gov/18280343/

32.Caplan *supra* note 6 at 232.

33.*Id.* The ACLU attempted to remove the ban, but it was upheld in 1966. In 1997—36 years later—the ban was lifted. The ban did not include the use by the medical profession.

34.I*d*. Cities were located in Oklahoma, Indiana, Connecticut, Massachusetts, Wisconsin, Arkansas, Ohio, Michigan and Virginia.

35.*Id.* at 233.

36. *Id.*

one percent (31%) of those getting tattoos being female.[37] While tattoos have become more prevalent within society, little federal or state regulation exists concerning tattoo ink.

III. METHODS OF TATTOOING

The tattooing method has evolved over the centuries, specifically concerning the ink used for this process. In ancient times, tattooing was performed by piercing, scratching, or pricking the skin with sharpened bones, branches, or needles; the wound was then rubbed with soot, crushed minerals, or berries or inserted with the tattooing instrument.[38] Today, the electric tattooing machine and manufactured inks are used throughout U.S. tattoo parlors and most of the world.[39] The ink currently used for tattoos are "manufactured by mixing pigments with auxiliary compounds that control viscosity, drying properties, homogeneity in terms of particle sedimentation, and shelf life of the ink."[40] To make a tattoo permanent, it is necessary to penetrate the outer layer and inject the ink into the dermis to the depth of between .25 and .5 cm.[41] The dermis is the second, deeper skin layer, containing nerves, blood vessels, lymphatics, and cutaneous appendages (pilosebaceous units, eccrine, and apocrine sweat glands).[42] Damage to these structures is just one of the risks of tattooing, as the ink deposited into this layer is not confined to one location. On the contrary, the ink becomes part of the fluids circulating throughout the body, subjected to other internal and external elements.[43] This ink remains unregulated by state and federal regulatory agencies.

IV. LAW

A. Federal Regulation

The Federal Food, Drug, and Cosmetic Act of 1938 (FDCA) created the first federal law for cosmetics regulation.[44] The Food and Drug Administration (FDA) regulates cosmetic pigments under the FFDCA, prohibiting the misbranding or

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37.Shannon-Missal L., *Tattoo takeover: three in ten Americans have tattoos and most don't stop at just one,* available at http://www.theharrispoll.com/health-and-life/tattoo_takeover.html.

38.Caplan, *supra* note 6, at 255.

39.Prior to manufactured tattoo ink, tattoo artist would make their own ink.

40.See generally, Giulbudagian,M., Schreiver, I., Singh, A.V. et al. *Safety of tattoos and permanent make-up: a regulatory view*. Arch Toxicol 94, 357–369 (2020). https://doi.org/10.1007/s00204-020-02655-z.

41. Id.

42.Tasneem Poonawalla, M.D., Dayna Diven, M.D., Department of Dermatology, University of Texas Medical Branch, available at . Core Concepts of Pediatrics. (c) 2008. https://www.utmb.edu/pedi_ed/CoreV2/Dermatology/page_03.htm

43.See Piccinini, *supra* note 2.

44.See Federal Food, Drug, and Cosmetic Act (FDCA), Pub. L. 75-717, 52 Stat. 1040 (June 25, 1938). For a discussion on the history of this act and its predecessors see, Mary Boyd*, Gender, Race & the Inadequate Regulation of Cosmetics,* 30 Yale J.L. & Feminism 275 (2018).

adulterating of cosmetics in interstate commerce.[45] The FDA does not regulate internal cosmetics such as tattoo ink.[46] However, regulation is limited with reference to external cosmetics through the Color Additive Amendments to the FFDCA in 1960, enacted for preventive measures.[47] Notably, this law is the only federal regulation requiring pre-marking approval of color additives in food, drugs, and cosmetics.[48] The law provides that certain color additives are prohibited unless certified as harmless and suitable for general use under a regulation that permanently lists the particular additive as permissible.[49] This process has only been adopted for color additives for external cosmetics; there is no federal regulation regarding color additives for internal usage or FDA review of this data.[50] Additionally, tattoo ink manufacturers do not have to comply with FDA labeling requirements because those requirements apply only to products sold to the general public and not professional salons.[51]

Although there are federal regulations for external cosmetics, the industry has become self-regulated.[52] Some scholars have noted that "[m]inimal government oversight reflects the low priority that Congress traditionally has placed on external cosmetics, believing that cosmetics pose only token health risks."[53] Notably, this rationale is similarly applicable to the FDA's lack of regulation for chemical pigments injected into the skin. While the FDA provides oversight by reporting contaminated ink and other generic risks,[54] the overall regulation of the ink and the tattoo process

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45.See Dixon, *supra* note 1.

46.See Pub. L. No.75-717, 52 Stat. 1040 (codified as amended at 21 U.S.C. §§301-397) (1938);

47.See Dixon, *supra* note 1. *See also*, Color Additive Amendments of 1960, Pub. L. No. 86-618, 74 Stat. 397 (codified as amended in the scattered sections of 21 U.S.C.)

48.*Id. citing* Thomas J. Donegan, Jr., *Fifty Years of Cosmetic Safety: A Government and Industry Partnership*, 50 Food & Drug L.J. 151, 152 (1995).

49.See FDA Color Additive History, reprinted *Food Safety Magazine* October/November 2003 issue (August 22, 2021), https://www.fda.gov/industry/color-additives/color-additives-history; *see also*, Color Additive Status List (August 22, 2001) https://www.fda.gov/industry/color-additive-inventories/color-additive-status-list (formerly called Appendix A of the Investigations Operations Manual (IOM), this list provides current information concerning color additives, and will enable you to determine the status and limitations of most color additives likely to be encountered in a food, drug, device, or cosmetic establishment).

50.See 21 U.S.C. § 321(t)(1)(A)-(B) (2000) (defining color additive as a "dye, pigment, or other substance. . . [that] when added or applied to a food, drug, or cosmetic, or to the human body or any part thereof, is capable (alone or through reaction with other substance) of imparting color thereto"). See also Dixon, supra Note 1.

51.See Dixon, *supra* note 1, citing James T. O'Reilly, *The Food and Drug Administration* § 17.1 (2d ed. 2005) (citing Letter from F. Young, FDA Comm'r to R. Wyden, Congressman (July 5, 1989)) (likening cosmetic regulation in the FDA to a "poor stepchild" of the agency's other initiatives). Note tattoo ink can be purchased on the internet, see, Amazon.com at https://www.amazon.com/Best-Sellers-Health-Personal-Care-Tattoo-Inks/zgbs/hpc/13226746011; See also, Walmart at https://www.walmart.com/browse/beauty/tattoo-ink-colors/1085666_1007040_6077339_6624882.

52.See generally, Dixon, supra note I.

53.See Thomas J. Donegan, Jr., *Fifty Years of Cosmetic Safety: A Government and Industry Partnership*, 50 Food & Drug L.J. 151, 152 (1995) (explaining that the cosmetics industry supported federal regulation of cosmetics largely because of the lack of national uniformity in the existing state laws).

54.See *FDA Tattoos & Permanent Makeup: Fact Sheet* (August 22, 2021), https://www.fda.gov/cosmetics/cosmetic-products/tattoos-permanent-makeup-fact-sheet

has been left to states' discretion under the principles of the 14th Amendment to the United States Constitution.[55]

B. State Regulations

Many states have enacted various regulations on the tattoo industry, given the potential health risks[56] but are often limited to the profession, not the ink. These state protocols have been enacted due to the risk of contamination resulting from unchanged ink tubes and improperly sterilized needles causing the spread of infectious diseases, including hepatitis, tuberculosis, leprosy, syphilis, and possibly HIV (AIDS).[57] The most common state or local regulations regarding tattoos are specific health mandates for tattoo artists to provide proof of Cardiopulmonary Resuscitation (CPR) certification, Hepatitis B Vaccination, and mandated proof of Bloodborne Pathogen Training Completion or First Aid Training.[58] No state laws regulate the pigments deposited into the dermis that can be repurposed from the textile, plastics, pens, pencils, printer ink cartridges, and car paint industries. [59] Yet, there exists case law discussing the content of ink and harm resulting therein.

C. Case law

Case law exists discussing various aspects of tattooing that range from freedom of speech[60] to the validity of criminal probation conditions prohibiting tattooing.[61] Litigation directly involving tattoo ink has been minimal. This absence of cases

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55.See generally, U.S. Const. amend. IVX, and X. See also, Jeanine deGagne, T*attoos and Body Piercing: Can Regulations Prevent Health Risks?* 29 McGeorge L. Rev. 695 (Spring 1998), citing *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (Steven, J., concurring) (quoting *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio L. Abs. 816, 54 A.L.R. 1016 (1926)).

56.See, National Conference of State Legislatures, *Tattooing and Body Piercing*, State Laws, Statutes and Regulations (March 13, 2019), https://www.ncsl.org/research/health/tattooing-and-body-piercing.aspx.

57.Marsha Mercer, *How safe and sanitary is 'body art'? Laws regulating tattoos, piercing vary widely*, (June 25, 2017) Washington Post, https://www.washingtonpost.com/national/health-science/how-safe-and-sanitary-is-body-art-laws-regulating-tattoos-piercing-vary-widely/2017/06/23/f6603cd4-55e5-11e7-b38e-35fd8e0c288f_story.html; see also, S. de A. Nishioka, T.W. Gyorkos, L. Joseph, J.P. Collet, and J.D. Maclean, *Tattooing and risk for transfusion-transmitted diseases: the role of the type, number and design of the tattoos, and the conditions in which they were performed*, Epidemiol. Infect. (2002), 128, 63–71 (Cambridge University Press 2002).

58.*See generally*, Bloodborne Certification, *How to Get a Tattoo License in the USA: Bloodborne Pathogen Tattoo Training and Certification*, (August 22, 2021), https://bloodbornecertification.com/how-to-get-a-tattoo-license-in-the-usa/

59.Sarah Everts, *What Chemicals are in your Tattoo?* Chemical and Engineering News, Volume 94, Issue 33 (August 15, 2016). It has been noted that some ink manufacturers do not even know the content of their ink. See generally, Giulbudagian, *supra* note 41.

60.*See*, Alicen Pittmant, *Tattoos and Tattooing: Now Fully Protected as "Speech" Under the Frist Amendment*, 38 W. ST. U.L. REV. 193(2011); see also, Wendy Rima, *The Human Body: The Canvas for Tattoos; The Public Workplace: An Exhibit For A New Form Of Art?* 66 Drake L. Rev. 705 (2018).

61.*In Re Antonio C*, 83 C.A. 4th 1029, 100 C.R. 2d 218 (2000) (upholding probation conditions prohibiting a minor, age 15, who already had several unlawfully acquired tattoos, from acquiring additional tattoos or other skin markings and prohibiting piercing with gang significance or not in in compliance

can be attributed to many factors, including, but not limited to, lack of direct evidence of injury claims being resolved in small claims or enforcement of exculpatory clauses. Two cases directly discussing tattoo ink involve a warning notice to consumers under state law and a personal injury case.

In *American Environmental Safety Institute v. Huck Spaulding Enterprises, Inc*., a consumer group, American Environmental Safety Institute (AESI), brought an action against several tattoo ink manufacturers for their failure to comply with California's Safe Drinking Water and Toxic Enforcement Act of 1986, also known as Proposition 65 (Prop. 65), a ballot initiative approved by Californians.[62] Under California's Prop. 65 businesses must inform Californians about exposures to chemicals known to cause cancer, congenital disabilities, or other reproductive harms.[63] The regulation expressly provides the following:

> No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual.[64]

The court never resolved the issues in *AESI*. Instead, several consent orders were entered wherein the defendants agreed to either comply with the law due to nickel, arsenic, and mercury in tattoo ink or suspend selling their product in California.[65]

Another case involving tattoo ink is *American Chester v. Deep Roots Tattoo & Body Modification Inc. et al*., which presented the issue of whether a tattoo artist and shop were liable for injuries sustained by a patron from tattoo ink contamination.[66] The plaintiff, who had an underlying kidney condition, brought the action stating that the tattoo shop and the tattoo artist were liable for her injuries because they had prior notice that the ink was defective.[67] The trial court granted summary judgment for the defendants finding the tattoo shop and tattoo artist did not violate a statutory duty of care to use sterile ink because there is no regulatory requirement to use

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with state law). See also *In re Victor L*., 182 C.A. 4th 902, 106 C.R. 3d 584 (2010) (expanding probation when minor has reached 18 as valid).

62.See, *American Environmental Safety Institute v. Huck Spaulding Enterprises, Inc*., 2004 WL 1792453 (Cal.Super).

63.See, 27 CCR § 25249.6.

64.*Id.* Note that the law does provide exceptions.

65.See Revised Consent Judgment Only as to Defendant Unimax Supply Co. (September 30, 2005), https://oag.ca.gov/system/files/prop65/judgments/2003-00209J91.pdf; Consent Judgment Only as to Defendant Huck Spaulding Enterprises and Spaulding Color Corp. (November 16, 2005), https://oag.ca.gov/system/files/prop65/judgments/2005-00022J107.pdf; Consent Judgment Only as to Defendant Superior Tattoo Equipment Inc. d/b/a Superior Tattoo Equipment Co., (November 16, 2005), https://oag.ca.gov/system/files/prop65/judgments/2005-00022J108.pdf, See also case file, Case Number: BC319440, Los Angeles Stanley Mosk Courthouse Status: Court-Ordered Dismissal - Other (Other) 09/12/2006.

66.2014 WL 4421660 (Wash. Super. Ct. 2014).

67.*Id.*

sterile ink. Additionally, the patron failed to establish that the tattoo shop and artists owed a duty of care.[68]

Both cases illustrate the lack of guidance regarding tattoo ink regulation. In *AESI,* the ink manufacturers agreed to comply with the orders, but there was little oversight as to their compliance. Moreover, their consent was limited to California. The *Chester* case illustrates the burden that an injured party must meet to recover from an injury related to tainted ink. The lack of litigation as to tattoo ink suggests that government action is not required. Yet, recent developments may warrant some action so that people can get tattoos safely. These new occurrences include an extensive report by the EU, numerous reports by the medical profession linking tattoo ink to medical conditions and injuries, and the disparate impact on protected classes due to the absence of regulation.

V. NEW DEVELOPMENTS

A. European Union Report on Tattoos and Permanent Make-Up

In 2021, the EU acted on the Joint Research Centre's report entitled, *Safety of Tattoos and Permanent Make-up: Final report (2016),* a comprehensive study of the safety of tattoos.[69] The European Commission requested this report be conducted by the European Chemicals Agency (ECHA) with assistance from other nations' authorities "to assess the health risks of chemicals in tattoo inks and permeant makeup (PMU) and to examine the need for an EU-wide restriction on their use."[70] The focus was to investigate the existence of "carcinogenic, mutagenic, and toxic to reproduction (CMRs)" and other potential health risks and examine viable, safer alternatives.[71] The study also included any "socio-economic impact of restricting their use, considering its effects on manufacturing and service sector jobs."[72] This study was the first comprehensive report on this topic facilitated by any governmental regulator.

The report found that most tattoo inks on the EU market are imported from the U.S. The pigments in ink had low purity, were not authorized for cosmetic products. and were not specifically produced for tattoo applications.[73] The findings listed several hazardous chemicals in Tattoo/PMU that included Polycyclic aromatic hydrocarbons (PAH) (43%),[74] primary aromatic amines (PAA) (14%), including Azo

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68.*Id.*

69.*See* Paola Piccinini, *supra* note 2.

70.ECHA, Tattoo Inks and Permanent Make-Up, available at https://echa.europa.eu/hot-topics/tattoo-inks (

71.*Id.*

72.*Id.* The restriction proposal was submitted in October 2017 to the Committees for Risk Assessment (RAC) and Socio-Economic Analysis (SEAC) for their evaluation.

73.Id. p. 2. The findings noted that that most permanent make up is manufactured in Europe and several pigments should not be present according to current restrictions.

74.*Id.* See full report for further description. These chemicals occur naturally in coal, crude oil, and gasoline. See Polycyclic Aromatic Hydrocarbons (PAHs) Factsheet, Centers for Disease Control and Prevention, https://www.cdc.gov/biomonitoring/PAHs_FactSheet.html but can but can cause "carcinogenic and mutagenic effects and are potent immunosuppressants." See generally, AK Haritash, CP Kaushik,

dyes, azo-pigments, some can release carcinogenic aromatic amines.[75] Notably, the report found that chemical degradation may happen in or under the skin, particularly under solar/ultraviolet radiation exposure or laser irradiation.[76] Also found in this study were microorganisms (11%), heavy metals (9%), and preservatives (6%).[77]

Discussion on population impact was also investigated, finding that there was prevalence in young adults sometimes higher in women than in men, particularly in young generations, to get tattoos.[78] Overall, however, the report concluded that certain chemicals in tattoo ink cause cancer or genetic mutations because the chemicals were toxic to reproduction and skin sensitizers and irritants were also present.[79] The ECHA investigated the availability of safer alternatives and submitted[80] their findings with the associated costs and other social-economic impacts they found. Based on the content of these recommendations, the EU Member States supported various restrictions on certain chemicals and other regulations adopted by the European Commission in December 2020.

Although some Member States of the EU had existing tattoo regulations, the new regulations harmonize tattoo ink law across member states and equally protect all EU citizens. The new regulations amend the REACH (Registration, Evaluation, and Authorisation of Chemicals) to make the colors used in tattoos and permanent makeup safer and implement uniform labels. Specifically, the new measures are included in Annex XV of the REACH Regulation and are divided into two parts. Part one limits the chemicals in ink. The use of more than 4,000 inks for tattoos and PMU will be restricted, or their chemical composition will be limited. Two pigments: Blue 15 and Green 7, were added to the list of restricted substances because there are no safer, technically adequate alternatives.[81] The European Commission and the Member States have agreed on a transition period of 24 months to replace inks with safer alternatives and develop uniform labels that would list ingredients and relevant safety statements.[82]

Biodegradation aspects of polycyclic aromatic hydrocarbons (PAHs): a review, pp 1-15, J Hazard Mater, 169 (2009).

75.These chemicals have been directly related to various forms of cancer. See Paul L. Skiper, et. al., *Monocyclic Aromatic Amines as Potential Human* Carcinogens: Old is New Again, 31 (1) Carcinogenesis 5-58 (2010), *also available* at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2802674/.

76.See Paola Piccinini, *supra* note, *at* 2. The report also noted that "[o]ver 80% of the colorants in use are organic, and more than 60% of them are azo-pigments, some of which can release carcinogenic aromatic amines." This compound is found in raw materials in the manufacture of chemical materials. "Many PAAs have either a proven or suspected carcinogenic nature and are rated as highly toxic, so there are many potential health risks, which have led to worldwide regulations. Despite the toxic and carcinogenic nature of PAAs, they are an essential feedstock used in the production of many commodity products such as pharmaceuticals, pesticides, explosives, epoxy polymers, rubber, aromatic polyurethane products, and azo dyes." Jane Cooper, *Analysis of Primary Aromatic Amines in Cosmetics and Personal Care Products*, available at https://www.waters.com/webassets/cms/library/docs/720005355en.pdf.

77.See generally Paola Piccinini*, supra* note 2.

78. *Id.*

79. *Id.*

80.See ECHA *supra* note 71.

81. Id.

82. Id.

B. Awareness of Ink Health Hazards by U.S. Medical Community

In the United States, there have been different opinions on the EU's actions. Some tattoo artists find that the restrictions "do not make sense" or that the restrictions will be a continuum fallacy, leading to eliminating a majority of all palette colors.[83] Some U.S. medical professionals find the EU regulation "a cautious move" and question some of the findings," but others suggest some government oversight finding that "the process of tattooing exposes the recipient to risks of infections with various pathogens, some of which are serious and difficult to treat."[84] Numerous medical articles have also been written about the risk factors directly associated with tattoos and the ink, including, but not limited to, the transmission of hepatitis B virus (HBV), hepatitis C virus (HCV) infections, syphilis, and links to various forms of cancer. Additionally, other medical conditions have been reported ranging from minor infections to terminal conditions.[85] Notably, tattoo problems or skin reactions related to the ink can occur following initial placement or several years after the first.[86] These well-known facts have been scientifically established, but no action has been taken except for alerting physicians to possible health effects and warnings in patients.

C. Disparities on Protected Classes

Another reason to consider regulation of tattoo ink is the heightened impact on protected groups by not regulating tattoo ink. According to a 2012 Harris Poll, 20 percent of individuals getting tattoos are Caucasian.[87] The remaining 51 percent are African American or Hispanic.[88] The significance of this poll is the correlation that these protected classes are less likely to have health coverage or seek legal representation if injured.[89] Common factors contributing to this experience by these groups include, but are not limited to, inadequate access to education, employment, housing, and essential services. These factors are magnified for linguistic minorities such as

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83.Nell Greenfield Boyce, *What's In Tattoo Ink? Why Scientist Want to Know?* All Things Considered, NPR*, transcript available at https://www.npr.org/transcripts/965549858.*

84. Id.

85.Gavin Logan, *Hidden Dangers of Tattoos*, Life Extensions, Scientifically reviewed by: Dr. Kathy Wilson, Ph.D., NHD, on February 2021, https://www.lifeextension.com/magazine/2021/3/dangers-of-tattoos; see also, Jamie Ducharme, *The Risks of Getting a Tattoo Are Rare, But Real. Here's What to Know*, TIME (APRIL 12, 2019), https://time.com/5550901/tattoos-health-risks/

86.Christen Mowad and Kerry Lavigne*, Inflammatory Tattoo Reaction,* Dermatology Advisor, available at https://www.dermatologyadvisor.com/home/decision-support-in-medicine/dermatology/inflammatory-tattoo-reaction/

87.Corso RA: *One in Five U.S. Adults Have a Tattoo*. Rochester, NY, Harris Poll, 2012. https://theharrispoll.com/new-york-n-y-february-23-2012-there-is-a-lot-of-culture-and-lore-associated-with-tattoos-from-ancient-art-to-modern-expressionism-and-there-are-many-reasons-people-choose-to-get-or-not-get-p/ (accessed August 29, 2021).

88.*Id.* Not included in this survey were American Indian or Alaskan Natives, Native Hawaiian or other Pacific Islanders or Asians.

89.See Clare Pastore & John Pollock*, Into the Breach: Progress on the Right to Counsel in Civil Matters*, 41 L.A. LAW. 13, 13-14 (2018); see also, *Health Disparities Legislation*, National Conference of State Legislatures, available at https://www.ncsl.org/research/health/health-disparities-laws.aspx

Latinos, Chinese, Filipinos, and others who cannot effectively communicate to obtain legal services. Notably, "linguistic minorities have faced similar discrimination and disadvantage based on their race or ethnicity experienced by African Americans and other minorities."

Moreover, quantity and quality of medical care are most often contributors to racial disparities concerning health status. Minorities in the United States have lower levels of access to medical care due to the same factors contributing to legal access, such as "higher rates of unemployment and under-representation in good-paying jobs that include health insurance as part of the benefits package."[90] Failure to regulate tattoo ink harms protected classes' health and well-being by ignoring these factors, which effectively promulgates the problem. This point emphasizes the EU's purpose for regulating tattoo ink; failure to regulate has a disparate impact on under-served communities and fails to protect all citizens equally.

VI. SOLUTIONS

Many people have tattoos or, at the very least, know someone who does. Thirty-six percent of young adults in the United States have at least one tattoo, and the annual amount of spending on tattoos in the United States is $1,650,500,000.[91] Hence, tattoos have embedded themselves into the U.S. system and are not going away. The self-evident solution is to implement regulations similar to the EU. In complete contrast, there is the option to abstain and see the impact, if any, from EU regulation given that most tattoo ink imported to Europe is from the U.S. Of course, some may elect not to distribute in the EU at all. Another option, which ties into the former, is for the industry to regulate itself through the development of organic inks or a certification process similar to the external cosmetic industry, but this also begs the question of compliance.[92]

Another feasible option is to increase public knowledge through warnings similar to Proposition 65. While this is feasible, it might also warrant governmental actions to be effectively similar to other consumer warnings.[93] A practical solution might be offered by requiring tattoo parlors to adopt conspicuous provisions in their contracts warning consumers of the health risks. Most tattoo contracts contain an array of disclaimers and hold harmless clauses, and as such, this inclusion would not be an aberration from current practices.[94] A sample clause, to be translated in various languages, along with a signature line, would tentatively provide the following:

90.David R. Williams, Ph.D., M.P.H. and Toni D. Rucker, Ph.D., *Understanding and Addressing Racial Disparities in Health Care*, Health Care Financ Rev. 2000 Summer; 21(4): 75–90, also available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4194634/. Additionally, there has been an increase in women obtaining tattoos. See Corso, *supra* note 88 and Piccinini *supra* note 2.

91.Tattoo Statistics, STAT. BRAIN, http://www.statisticbrain.com/tattoo-statistics (last visited Jan. 12, 2017). See also Corso RA, *supra* note 88.

92.See Boyd*, supra* note 44, noting inadequate regulation of self-regulated cosmetic industry.

93.See generally, Lisa A. Robinson, W. Kip Viscusi, and Richard Zeckhauser, *Consumer Warning Labels Aren't Working*, Harvard Business Review, https://hbr.org/2016/11/consumer-warning-labels-arent-working (cautioning labels might need further assistance from governmental entities to be effective).

94.Sample contracts exclude liability for incorrect spelling, fading of tattoo, injury, and attorney fees,

THE INK USED FOR YOUR TATTOO CONTAINS CHEMICALS THAT ARE NOT REGULATED BY THE LOCAL, STATE, OR FEDERAL GOVERNMENT. THE CHEMICALS IN THE INK COULD CAUSE CANCER OR GENETIC MUTATIONS AND ARE TOXIC TO REPRODUCTION AND OTHER HEALTH RISKS, ALL OF WHICH CAN CAUSE MINOR TO SEVERE HEALTH RISKS THAT CAN OCCUR IMMEDIATELY OR AFTER A PROLONGED PERIOD. _____ (Patron's Acknowledgement)

This recommendation provides conspicuous and adequate notice as to 1) lack of regulation, 2) health risks, and 3) notice of future impact, thereby assuring that the consumers have full knowledge of all risks. This recommendation is for temporary resolve until appropriate governing bodies review further research and impact.

Conclusion

"Tattooing is as old as humanity."[95] However, awareness of the composition of tattoo ink, health risks, and easy accessibility to these chemicals online is new. Moreover, the disparate impact it has on protected groups warrants actions. There are various options to address these concerns without the complete elimination of tattoos. The type of regulation is subject to review; however, specific warnings, whether contractual or in conjunction with governmental action, may provide consumers with sufficient knowledge to make a fully informed decision.

95.Piccinini, *supra* note 2, at 2.

THE CASE AGAINST CALIFORNIA STATE PUBLIC BANKING

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ABSTRACT

The movement for public banking has regained an audience as a result of the COVID pandemic. In early 2020, the California legislature passed two bills authorizing the creation of state public and ten local municipal banks. Consequently, given its conceptual unpopularity and the contentious likelihood of unconstitutional challenges, the bills were amended and repurposed as AB310. This article will examine the material procedural issues and substantive flaws of AB310 to provide comprehensive and informative guidance for future legislatures. From the outset, the bill's absence of meaningful public input and inadequate governance structure raised severe risks of political corruption, self-dealing, and a potential conflict of issue concerns. As a result, AB310 not only encroaches upon the Taking Clause of the United States Constitution by failing to outline "just compensation" parameters but was grossly deficient in governance and compliance controls, monitoring, and reporting mechanisms when examined through the lens of various economic policy initiatives. In addition, the bill's compliance failure violated the US PATRIOT ACT and various federal Anti-Money Laundering statutes. Collectively, the requisite governance structures would have been prohibitively costly to build from its nascency and maintain, considering California's municipalities' size, scope, and complexity. Inevitably, California taxpayers would shoulder the cost of these expensive programs. In the alternative, many novel and innovative solutions exist to support the under and unbanked. Nevertheless, legislatures should partner with existing federal reserve member banks and federal regulatory agencies to expand existing initiatives to address a lack of capital access and promote programs to ensure socially equitable economic development opportunities; and foster public-private collaboration and innovation.

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I. INTRODUCTION

Public banks have been around since the early fifteenth century with limited success. As emerging economies mature, the trend towards private banking continues. Early in its nascency, the American financial system adopted a federal reserve banking system. Structurally, the Federal Reserve Bank retains a significant, unique, and necessary role as a separate and independent institution from the American polity. This separation serves as an essential tool to prevent money and politics from manifesting corrupting influences.[1,2]

Part I of this article offers a respective overview of private commercial banking by supplying a brief historical overview about the evolution of United States central banking and the modern Federal Reserve System. Additionally, the section explores public banking, the public bank movement initiatives, and current examples of public banks for comparison.

Part II begins with an overview of California's proposed public bank model and the subsequent amended and repurposed AB310. Upon examination, we find several critical substantive and procedural legal issues. First, AB310 converted the State Infrastructure Bank into a depository institution and created at least ten municipal public banks via its companion bill AB857. This structure is reminiscent of the failed California Redevelopment Agency as a model disbanded in 2012. Second, AB310 permitted the Pooled Money Investment Account (PMIA) to "equity invest" in public banks.[3] This provision potentially violated Title 6.7. Chapter 2. Article 2. Section 63031. Third, AB310 permitted the I-Bank and municipal public banks to take the title, sell, lease, mortgage real, or personal property without outlining "just compensation" parameters, thereby potentially violating the Taking Clause.[4] Fourth, 12 U.S.C. § 371(c) prohibits self-dealing by extending credit to its "affiliate." A public bank falls within the definition of an "affiliate" because the public bank would be owned and financed by the government by creating an "affiliate" status. This

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1.*See* Assemb. B., 310, 2019-2020 Leg., Reg. Sess. (Cal. 2019) (noting that if California Assembly Bill 310 and its companion bill AB857 were challenged, the courts would have deemed them unconstitutional, or at the least, raised critical conflict of interest issues).

2.*See* Cal. Const. art. XI § 5 (noting that these clauses outline to charter cities and counties their exclusive authority to regulate and determine their municipal affairs, unrestricted from state intrusion. The underpinning public policy principle is that municipality leaders are better equipped to address and recognize their constituents' needs and goals than the state); *See also* Popper v. Broderick, 123 Cal. 456, 53 (1899) (explaining that whether the proposed rule is precluded from the "home rule" provision, the court will ask whether there are good reasons, grounded on "statewide interests," for state law to preempt local law. The state law is reasonably related to resolving that concern and is "narrowly tailored" to limit unconstitutional incursion into municipal matters); *See, e.g.,* Johnson v. Bradley, 4 Cal.4th. 389 (1992) (within the Municipal Affairs Doctrine context, the bill violated Article XVI of the California Constitution and essential federal statutory laws and schemes regulating the banking sector).

3.*Equity Investment*, Lawinsider.com, https://www.lawinsider.com/dictionary/equity-investment (last visited Nov. 2, 2021).

4.*See* United States v. Miller, 317 U.S. 369, 374 (1943) (noting that the term "just compensation" is a legal term of art outlined in the Fifth Amendment of the US Constitution. The just compensation constitutes "a full and perfect equivalent for the property taken." Fair market value of the property is the general standard and in cases where the fair market value cannot be calculated or does not exist, then alternative sources may be used to yield a fair compensation determinant).

relationship thereby violates federal banking law.[5] Fifth, AB310 allowed "target borrowers" to apply for and receive credit without a tax identification number. It is also silent on which "prohibited businesses" are ineligible to receive credit. As written, AB310 would violate the federal PATRIOT Act, Bank Secrecy Act, and Anti-Money Laundering Statutes.[6]

Part III explores economic and ethical concerns and evaluates many critical financial and regulatory risks raised. The proposed models were grossly deficient in institutional governance and compliance controls, monitoring, and reporting systems from an economic and policy framework. Furthermore, given California's municipalities' size, scope, and complexities, these requisite governance structures were prohibitively costly to build and maintain from their nascency. In short, the creation of state and municipal banks was and continues to be an imprudent, irresponsible use of taxpayer funds nor sound economic policy to address California's innumerable and compounding economic development concerns.

Lastly, Part IV concludes with recommendations and suggested alternatives to address California's economic development initiatives from a banking perspective, all while promoting good governance, prudent use of taxpayer funding, and fostering private-public collaboration and innovation.

II. PRIVATE VS. PUBLIC BANKING: A HISTORICAL COMPARATIVE OVERVIEW

A. Private Banking in the United States: Central Banking and the Federal Reserve System

The philosophical cornerstone underpinning the American Financial system is the guiding economic principle that private markets are "efficient allocators"[7] of resources, unlike the monarchy, mercantilists, or government. Thus, only when markets produce suboptimal results would government action, through regulation, be

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5.*See* 12 U.S.C. § 371c(b)(1) (2010) (noting that the term "affiliate" member bank means: (A) any company that controls the member bank and any other company that is controlled by the company that controls the member bank; (B) a bank subsidiary of the member bank; (C) any company that is (i)controlled, directly or indirectly, by a trust or otherwise, (ii) by or for the benefit of shareholders who beneficially or otherwise control, directly or indirectly, by trust or otherwise, the member bank or any company that controls the member bank; (D) any investment fund concerning which a member bank or affiliate thereof is an investment adviser; and (E) any company that the Board determines by regulation or order to have a relationship with the member bank or any subsidiary or affiliate of the member bank, such that covered transactions by the member bank or its subsidiary with that company may be affected by the relationship to the detriment of the member bank or its subsidiary. The term "bank" includes a State bank, national bank, banking association, and trust company); *See also* 12 U.S.C. § 371c(b)(5) (2010) (noting that a "bank" operating as a large depository institution and whether it is federally insured, is subject to rules limiting risk to other depository institutions).

6.31 U.S.C.A. § 5318(1)(2)(B); 31 U.S.C.A. § 5336

7.*See, e.g., Allocative Efficiency*, Lawinsider.com, https://www.lawinsider.com/dictionary/allocative-efficiency (last visited Nov. 2, 2021) (noting that "Efficient Allocators" is an economic term in which those market participants whose marginal cost of producing goods and services reflect its price).

required.[8,9] Today, central banking in the United States through the Federal Reserve System is an example of a systemic institution operating as an efficient distributor and intermediary of capital movement.

These economic principles had a considerable influence on the Framers, namely Alexander Hamilton.[10] The Framers did not expressly provide for the creation of a central bank in the Constitution. Nonetheless, a debate ensued among the Framers about the merits of its design. Principally, the Framers recognized the nation's vital need to facilitate economic growth, finance the government's own development needs such as protecting its borders, and the importance of regulating state-chartered banks to manage the money supply, currency, and credit extension.[11] Alexander Hamilton acknowledged the Constitution's silence concerning the creation of a central bank. However, he argued that the "necessary and proper" clause espoused in Article I Section 8 of the Constitution granted Congress the authority to enact any laws that were "needful, requisite, incidental, useful or conducive to" the government fulfilling its duties.[12] Thus, on February 17, 1791, Congress approved the creation of America's first central bank.[13]

In subsequent years, the Supreme Court held in *McCulloch v. Maryland* (1819), reaffirming in *Osborn v. Bank of United States* (1824), the constitutionality of the central bank's creation and legitimacy of the bank's proper role to serve as "an instrument which is 'necessary and proper' for carrying the fiscal operations of the federal government." [14,15] After fits and starts, President Woodrow Wilson signed the Federal Reserve Act of 1913, and the Federal Reserve System was born.[16]

Today, state and federal agencies such as the Office of the Comptroller of the Currency (O.C.C.), U.S. Treasury, and Federal Deposit Insurance Company (FDIC) heavily regulate private commercial banks. But, collectively, said regulatory

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8.*See generally,* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 1723-1790 (1952) (noting that written in response to government and the elite mercantile class control of capital and pecuniary resources allocation).

9.Smith, *supra* (noting that the State's susceptibility to politics' corrupting influence and its high propensity to misallocate capital. "Civil government, so far as it is instituted for the security of property, is in reality instituted for the defense of the rich against the poor, or of those who have some property against those who have none at all," wrote Smith); *See also* ADAM SMITH, THE WEALTH OF NATIONS BOOK V, CHAPTER 1, PART II 798 (Modern Library Eds., Random House Inc. 2000) (noting that Smith's response was an economic system whereby the private market, through the "invisible hand," would distribute resources more efficiently and expeditiously, empowering the impoverished with means and resources to rise from poverty); ADAM SMITH, THE THEORY OF MORAL SENTIMENTS, PART IV, CHAPTER 1, 280 (3rd ed. London 1759) (noting that in his view, the government comprises a smaller set of gross economic output calculus, and the consumer was the sovereign).

10.Michael W. Strong, *Rethinking the Federal Reserve System: A Monetarist Plan for a More Constitutional System of Central Banking*, 34 IND. L. REV. 371-394 (2001).

11.*See id*. (noting that by the late 1700s, America's economy was rapidly growing from a small, agrarian economic society into an emerging economy. In response, the number of state-chartered banks grew rapidly with minimal coordination and oversight. To their credit, the Framers recognized the need to create a central federal bank to monitor, regulate, and coordinate state-chartered bank functions).

12.Strong, *supra* note 10, at 373.

13. *Id.*

14.McCulloch v. Maryland, 17 U.S. 316 (1819).

15.Osborn v. Bank of U.S. 22 U.S. 738 (1824).

16.Strong, *supra* note 10, at 375.

agencies and participatory member banks remain an integral partner to the private sector, ensuring a robust and sustainable economy.[17]

Nonetheless, monetary policy remains principally the domain of the Board of Governors of the Federal Reserve. Even in its genesis, policymakers recognized monetary policy as an essential economic policy lever— distinct and independent — from fiscal policy, a lever controlled exclusively by the government. The prevailing justification for maintaining the separateness and independence of the Central Bank is the need to insulate its governing board from short-term political pressure. Without this separation, the Federal Reserve might be influenced or strong-armed by unscrupulous, election-minded politicians or even a heavy-handed, unrestrained President and Executive Administration. Thus, the Federal Reserve retains a significant, unique, and necessary role as a separate and independent institution from the American polity. It is based on these enduring principles that the widespread adoption of public banking remains deeply unpopular.

B. Public Banking in the World

In general terms, when a government owns greater than fifty percent or more of the bank, it constitutes a public bank. Today, a public bank is a government-owned financial institution whereby the state, municipality, county, tribe, or other public actors principally funds, owns and controls the enterprise.[18] Its principal motive is not profit generation or maximization but to distribute capital to state or government-backed initiatives. Thus, the entity is principally accountable to the government, and theoretically, if any revenue surplus amasses, it can pass through to public agencies or the general fund.[19]

The concept of public banking has been around for centuries. The primary role of early public banks was to create monetary instruments and establish a stable and liquid marketplace for these assets to circulate and trade.[20] As early as the fifteenth century, European city-states and nations have explored some variation of a public bank on either a national or municipal level.[21] All early public banks began with the express goal to create a liquid monetary asset, usually in the form of ledger money or bearer note, and to allocate capital to untapped, underdeveloped sectors. The reality, however, is that most attempts failed to succeed for any meaningful time.[22] Moreover, except for the Bank of England, as the public bank's user base increased over time, so did the entity's susceptibility to fiscal exploitation, bankruptcy, and defaults.[23]

17.YOLANDA K. KODRZYCKI & TAL ELMATAD, THE BANK OF NORTH DAKOTA: A MODEL FOR MASSACHUSETTS AND OTHER STATES? (New England Public Policy Center 2012) (2011).

18.PUBLIC BANKING INSTITUTE, INTRO TO PUBLIC BANKING (2020).

19. *Id.*

20.FRANCOIS VELDE & WILLIAM ROBERDS, EARLY PUBLIC BANKS, FEDERAL RESERVE BANK OF CHICAGO (Working No. 2014-03, 2014).

21. *Id.*

22. *Id.*

23. *Id.*

In response to the rising industrial revolution in the late nineteenth and early twentieth century, the popularity of state public banking, primarily in developing and socialist countries, resurfaced again.[24] At the height of the anti-business and anti-bank sentiment, some constituents viewed public banks as a vehicle to provide countercyclical lending and a bridge to finance economic and social development initiatives and projects, such as agriculture, public infrastructure, and residential. However, instances of bias began to emerge even during that time, as early banks identified with their founder's political affiliation. Banks were inclined to favor parties to whom they loaned money. In general, a bank aligned with a political association of its founders and owners would be more inclined to extend credit disproportionally with equity ownership or credit access to party supporters.[25],[26]

Recent studies further validated assertions that public banks were less efficient than their private counterparts. More recently, a 2008 study explored the success of private, public, and foreign-owned banks in Russia. The research uncovered that foreign-owned banks, private commercial banks, operate more efficiently than Russia's private and public banks. Thus, the Russian banking system would benefit from greater competition with foreign-owned banks. [27] Today, government ownership of banks still exists worldwide. However, bank privatization continues as governments realign their role in the economy and countries become increasingly developed.[28]

Another study further reinforced the inefficiencies and inefficacies of public banks at the country level. Public bank advocates argue that public banks principally respond to a governments' needs. Since the government serves as the people's elected voice, public banks are appropriately situated to address the community's needs efficiently.[29] However, the 2013 International Monetary Fund (I.M.F.) study concluded otherwise. The study determined that allowing public sector access to non-traditional financing provided by the government may weaken government fiscal discipline.[30] Moreover, the I.M.F. study demonstrates that budgetary discipline is weaker in countries where the government heavily participates in the banking system.[31] As a result, the country's fiscal discipline, or lack thereof, strongly correlates with the soundness of the public bank.

Therefore, rather than being "efficient allocators" of resources, most public banks are uniquely susceptible to corruption, self-dealing, and mismanagement because of their "agency" relationship.[32] In its agency capacity and empowered with

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24.THOMAS MAROIS, STATE-OWNED BANKS AND DEVELOPMENT: DISPELLING MAINSTREAM MYTHS (2013).

25.HOWARD BODENHORN, BANK CHARTERING AND POLITICAL CORRUPTION IN ANTEBELLUM NEW YORK. FREE BANKING AS REFORM (2006).

26.*Id.* (noting that the Bank of North Dakota is a notable exception. Its success is primarily attributed to its conservative, fiscal management).

27.ALEXEI KARAS ET. AL., ARE PRIVATE BANKS MORE EFFICIENT THAN PUBLIC BANKS? EVIDENCE FROM RUSSIA, BANK OF FINLAND, INSTITUTE FOR ECONOMIES IN TRANSITION (2008).

28.*See generally* MAROIS, *supra*.

29. *Id.*

30.JESUS GONZALES-GARCIA & FRANCESCO GRIGOLI, STATE OWNED BANKS AND FISCAL DISCIPLINE, FISCAL AFFAIRS DEPARTMENT AND WESTERN HEMISPHERE DEPARTMENT. INTERNATIONAL MONETARY FUND (Working Paper No. 13-206) (2013).

31. *Id.*

32.*See id.* (noting that a public bank operates in an agency capacity of the government when it creates legal relations with a third party. As an agent for the government, the government either expressly or

the sole directive to finance itself and its public projects, a public bank significantly magnifies the deleterious risks and moral hazard behaviors inherent to the type of relationship. Moreover, this relationship enables a public bank to operate unrestrained and insulated from outside oversight.

C. North America Public Bank-Failure & Success

i. Puerto Rico Government Development Bank- Federal Level Public Bank Failure

In the United States, public banking gained interest in the late nineteenth and early twentieth centuries.[33] Populists passionately proposed public banks as a policy panacea to the time's economic, social, and political issues. In past decades, several states studied and explored the feasibility of implementing these enterprises, although unsuccessfully.[34]

To date, there are three relevant examples: the Puerto Rico Government Development Bank (1985), California's failed Redevelopment Agencies (1945), and the Bank of North Dakota (1919). This paper will explore them. To start, the Puerto Rico Government Development Bank (G.D.B.) is on record as the largest municipal bankruptcy in history.[35] The G.D.B. issued government bonds and continues to function as a fiscal agent and advisor of the Puerto Rico government.[36] In broad terms, the different executive agencies of the government of Puerto Rico and its government-owned corporations either issued bonds with the bank as a proxy or directly.

During its formative decade, G.D.B. financed infrastructure development projects, particularly affordable, low-cost housing and public utilities such as the Puerto Rico Water Resources Authority.[37] Puerto Rico, a dynamic, emerging economy, needed the requisite financing to fund its social and economic development programs. The Puerto Rican government established the G.D.B. with the express intent to step in and finance critical public infrastructure where private commercial banks were absent or reticent to do so. At one point, the G.D.B. issued over $1 billion in bonds to finance the economic development and infrastructure.[38] In 1956, G.D.B. underwrote Puerto Rico's first condominium complex and shopping centers and funded the project when private commercial lenders were reluctant to assume these

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implicitly, authorizes the public bank to operate and work under their exclusive control and on their behalf).

33.Public Banking Institute, *supra.*

34.Jesus Huerta de Soto, Money, Bank Credit, and Economic Cycles. Money, Bank Credit, and Economic Cycles, Ludwig Von Mises Institute (1st English ed. 1998).

35.John Dizard, "Puerto Rico Faces Worse Debt Crisis Than Argentina," Financial Times (2017).

36.*See Puerto Rico Department of the Treasury, Treasury Department Submits Commonwealth of Puerto Rico Comprehensive Annual Financial Report for FY 2011-2012,* PRNewswire (2013), https://www.prnewswire.com/news-releases/treasury-department-submits-commonwealth-of-puerto-rico-comprehensive-annual-financial-report-for-fy-2011-20120223965051.html.

37.Puerto Rico Fiscal Agency and Financial Advisory Authority,

Investor Relations: Background on Puerto Rico and PROMESA (2020).

38. *Id.*

risks.[39] As a result, government financing spurred the private sector's development and the country's continued economic development.

However, Puerto Rico faced an unprecedented fiscal emergency during the past decade (2007-2017) because of, among other things, economic decline, accumulated operating deficits, and excessive borrowing. At least three main endogenous systemic risks contributed to G.D.B.'s demise. The risks concern local government inefficiencies and inadequate revenue collection, failure to publish prompt and accurate reports, and an absence of meritocracy and rising political corruption.[40,41,42]

The economic, social, and fiscal impacts afflicting Puerto Rico are devastating. The unrelenting exodus of residents and businesses, coupled with burgeoning health care costs, was central to the Obama administration's declaration that Puerto Rico faced a potential "humanitarian crisis." [43] In response to this crisis, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) in 2016. PROMESA is codified in 48 U.S.C. § 2101 et seq. Today, the G.D.B. is closing the books and its operations under Title VI of the PROMESA.[44]

ii. California Redevelopment Agency-State level Public Bank Failure

At the state level, California has already experienced a similar failed public bank scenario. In 1945, the California legislature empowered city councils to establish redevelopment agencies (R.D.A.) and direct requisite redevelopment projects to address underdevelopment concerns.[45] Property tax revenues were appropriated to fund improvements. Additionally, redevelopment agencies leveraged Tax Increment Financing (T.I.F.) vehicles to subsidize development via increased sales tax receipts

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39. *Id.*

40.*See id*. (noting that Some newspapers, such as *El Vocero*, have said that the main problem is local government inefficiency rather than lack of funds. It asserts the Department of Treasury of Puerto Rico as incapable of collecting 44% of the Puerto Rico Sales and Use Tax, which equates to approximately $900 million. This discrepancy was apparent in the variances between what taxpayers reported as employment income on their tax reporting forms. Simply put, the Treasury did not accurately collect tax payments duly owed to it. An article by the *New York Times'* Mary Walsh also documents this and other poor bill collection practices. Walsh, Mary William, *How Free Electricity Helped Dig $9 Billion Hole in Puerto Rico. New York Times*, July 15, 2016).

41.*Treasury Department Submits Commonwealth Of Puerto Rico Comprehensive Annual Financial Report For FY 2011-2012*, PR NEWSWIRE (Sept. 16, 2013), https://www.prnewswire.com/news-releases/treasury-department-submits-commonwealth-of-puerto-rico-comprehensive-annual-financial-report-for-fy-2011-2012-223965051.html. (noting that the treasury department routinely published its comprehensive annual financial reports late, sometimes 15 months after a fiscal year end. At the same time, the government continually failed to comply with its disclosure obligations on a timely basis. The government's accounting, payroll, and fiscal oversight information systems and processes also had deficiencies that significantly affected its ability to forecast expenditures).

42.Bradley Wendt, *Puerto Rico Fiscal Reform: The End Of The Beginning*, LAW360 (June 14, 2017), https://media.crai.com/sites/default/files/publications/Puerto-Rico-Fiscal-Reform-The-End-Of-The-Beginning.pdf (noting that the government had also been unable to set up a meritocratic system. Many employees, particularly executives and administrators, merely lacked the required skills competencies necessary to perform their jobs).

43.DIZARD, *supra* note 35.

44.PROMESA, *supra* note 37.

45.Stewart Black, *Redevelopment in California: Its Past, Present and Possible Future*, 6(4) CAL. J. OF POL. & POL'Y 471-506 (2014)

as an alternative revenue source to residential property taxes.[46] However, over time, the use of T.I.F.s significantly drained the state's fiscal resources, dampened funding to older main cities, and created a competing dynamic between different intergovernmental agencies and municipalities over control for tax revenues, not to mention there had been documented evidence of abuses by certain R.D.A.s.[47]Thus, although California Redevelopment Agencies were not titled as public banks, they nevertheless operated as their function, scope, and purpose.

In an unprecedented move, California —the first state to support the creation of redevelopment agencies — had become the first state to eliminate them in January of 2012.[48] The demise of the G.D.B. and California redevelopment agencies further underscores the risks associated with creating a state public bank in an environment characterized by tight budgetary shortfalls and a state generally known for its absence of fiscal discipline and at times, flagrantly wasteful spending initiatives.[49]

iii. Bank of North Dakota-State Public Bank Success

The Bank of North Dakota (the BND) provides a contrasting example. The BND was founded in 1919 in response to economic hardship and rising anti-big-bank and anti-big-business sentiment.[50] The BND's express mission is to "promote agriculture, commerce, and industry" in North Dakota.[51] The BND aligns its efforts to support the state economy by providing local businesses with access to credit and augmenting the lending ability of regional commercial banks.[52]

The BND's success is attributed to its structural characteristics such as limited size, scope, and contours of government involvement. From a substantive perspective, the BND operates conservatively within a state climate that favors fiscal conservatism. As such, the BND places a high priority on managing public funds prudently. For example, the BND's financial accounts are separate from other state-sponsored entities undertaking risky or politically sensitive projects.[53] But most importantly, the BND weathered past economic recessions because of the overall fiscal discipline of its lawmakers.

Procedurally, the Industrial Commission of North Dakota governs the BND. The Governor, the attorney general, and the agriculture commissioner comprise the Commission's trifecta. In addition, the Governor retains the authority to appoint an advisory board of seven banking and finance experts to oversee the bank's board of directors. The FDIC does not insure the BND. Instead, the State of North Dakota

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46. *Id*.

47.Nicholas J. Marantz, *Drift and conversion in metropolitan governance: The rise of California's redevelopment agencies*, 40 J. OF URB. AFF., 901-922 (2018).

48. *Id.*

49.California High Speed Rail Accountability Team, *As Expected, Cost Soars For First Construction Segment Of California High-Speed Rail*, CITIZENS FOR CALIFORNIA HIGH SPEED RAIL ACCOUNTABILITY (last visited Oct. 7, 2020), https://cchsra.org/as-expected-cost-soars-for-first-construction-segment-of-california-high-speed-rail.

50.KODRZYCKI & ELMATAD, *supra* note 17.

51.BANK OF NORTH DAKOTA, FROM SURVIVING TO THRIVING: 2019 ANNUAL REPORT (2019).

52. *Id.*

53.KODRZYCKI & ELMATAD, *supra* note 17.

financially backs the BND's deposits. However, the BND is a member of the Federal Reserve Bank of Minnesota, and as such, it abides by federal KYC/AML, OFAC requirements.[54]

The BND's finances are inextricably linked to the State of North Dakota. The Governor presents a state budget to the legislature and suggests a transfer from the BND to the general fund. Under joint consultation with the legislature and the BND's president, the transfer is approved or amended.[55] Unlike BND's structure, California's AB310 in key material ways, both procedurally and substantively. The paper explores this further below.

PART II. THE CASE AGAINST AB310: CA PUBLIC BANK ACT

A. AB310: Legal Issues and Concerns

The AB310 bill's genus began with creating the California Infrastructure and Economic Development Bank (I-Bank) & Commission.[56] As introduced, the bill expanded the I-bank capacity dramatically.[57,58] In August 2021, AB310 was amended and repurposed. Nonetheless, we will discuss the repurposed bill's critical issues.

i. California I-Bank & Bank of North Dakota: A Comparison

There are significant structural differences between the CA I-Bank and the Bank of North Dakota. First, under AB310, the I-Bank Commission shared a governance structure more like Puerto Rico, and the prior failed disbanded California redevelopment agencies than with the BND.[59] Procedurally, the I-Bank Commission consisted of the State Governor, Treasurer, and the Controller. The I-Bank Commission would supervise the I-Bank.[60] The I-Bank's Board of Directors would be nine voting and two non-voting members, only three of whom are required to be finance industry

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54.BANK OF NORTH DAKOTA, *supra* note 51.

55.KODRZYCKI & ELMATAD, *supra* note 17.

56.*See generally* CAL. GOV'T CODE §§ 63000-63089.98 (1994) (noting that in 1994, California created the I-Bank according to the Bergeson-Peace Infrastructure and Economic Development Bank Act in California. The proposed I-Bank would be located within the Governor's Office of Business and Economic Development).

57.*See AB 130: California State Public Bank Act (Santiago)*, CAL. PUB. BANKING ALL. (last visited Sept. 19, 2020), https://ab310.org/docs/AB310-FactSheet.pdf. (noting that in January 29, 2019, assembly member Miguel Santiago of 53rd Assembly District introduced AB310, a bill designed to expand the I-Bank's capacity dramatically. In its proposed structure, it was designed to achieve three objectives: (1) expand lending capacity; (2) convert the I-Bank into a depository institution; and (3) establish public municipal banks).

58.*See* A.B. 857, 2019 Cal. Leg., Reg. Sess. (Cal. 2019) (noting that in October 2019, Governor Gavin Newsom signed A.B. 857, a new law granting cities and counties the authority to start public banks. These municipal banks would be governed by an independent board of directors and owned by cities and counties).

59.*See* Cal. A.B. 310 Sec. 14, § 63021(a) (noting that the I-Bank falls under the supervision of the I-Bank Commission. Section 14. Section 63021(a). Nine voting and two non-voting members include the I-Bank's Board of Directors).

60.CAL. GOV'T CODE § 63021(a) (2013).

experts. This composition is similar to Puerto Rico's G.D.B., which acted as the sole financial advisory and reporting agency to the Governor, the Treasurer, and the Executive Council.[61]

In contrast, North Dakota's Industrial Commission governing the BND is comprised of the Governor, Attorney General, and Agricultural Commissioner. North Dakota's Industrial Commission is limited to providing lending to "*promote agriculture, commerce, and industry" and* serve as a "banker's bank" access through existing regional private commercial banks.[62] It does not compete with or replicate services provided by existing commercial private banks and credit unions. Unlike California I-Bank Commission, this narrow lending purview is a critical distinction and deters unscrupulous, undisciplined lending practices.

Furthermore, the North Dakota Attorney General serves on the Industrial Commission, unlike the California Attorney General. The California Attorney General's notable absence from the I-Bank Commission is an equally critical distinction. The Attorney General's presence ensures the Commission operates within the bounds of its legal purview and its activities comport with the state's laws and citizens' interests. In California's case, the state's "top cop" would not be a member. As written, the bill provided unfettered discretionary power to the Governor's office to appoint members to the bank.[63],[64] It is not a stretch of the imagination to see how the absence of the Attorney General may invite activities that may violate state laws and infringe upon the state's citizens' interests.

In addition to the above-mentioned structural deficiencies, there is a strong public policy argument for strict, separate governance between government branches and banking entities. In finance, moral hazard and fiscal exploitation are rampant risks to be diligently managed. The political branch's involvement, which plays a role in deciding what, when, how much, and to whom to allocate capital, magnifies these inherent risks. These competing dynamics and related issues were prevalent during the early 1800s when the American banking system was in its infancy, closely aligned with political parties, and unrestrained by centuries of regulation, case law, and precedent. Today, this level of political closeness between California's executive branch and the public bank risks materially contributing to the ongoing danger of political corruption, self-dealing, and at the least, the potential for and perception of a serious conflict of issue. As citizens, we risk repeating the same mistakes of our past.

Second, the expansion of the California I-Bank's current lending capacity and purview is another point of concern. Under the Tenth Amendment of the U.S. Constitution, the federal government encompasses only the powers expressly granted

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61.PROMESA, *supra* note 37.

62.KODRZYCKI & ELMATAD, *supra* note 17.

63.*See* Cal. A.B. 310 Sec. 14, § 63021(a) (explaining that the I-Bank falls under the supervision of the I-Bank Commission. The I-Bank's Board of Directors will be formed of nine voting and two non-voting members. The Governor would appoint the I-Bank's Executive Director; and upon California Senate confirmation, the Executive Director would report to the Board of Directors, some of whom would be the Governor's appointees or members of his executive branch).

64.*See* Cal. A.B. 310 Sec. 16, § 63021.2(a)(C). (explaining that while the duties of the I-Bank are transferred from the Governor's office to the I-Bank Commission, the Governor's office and his political appointees would retain full control, voting, jurisdiction, and oversight of the Commission and its governance of I-Bank).

to it by the Constitution. States and their residents enjoy all the powers not denied by the Constitution. States have the authority to ensure the health, safety, and well-being of their citizens. Under this authority, States will draw upon their revenue sources to fund social, economic, and development programs to meet these Constitutional objects. The issue here concerns the contours of the state's authority and how it achieves its objectives.

Substantively, the powers and responsibilities granted to the State via AB310 broadly exceeded the state's constitutional authority. First, AB310 directed the I-Bank's use of capital from PMIA funds to lend to local governments and small business COVID-19 recovery.[65] Second, the bill authorized the I-Bank to expand its existing small business loan guarantee programs and directly partner with Community Development Finance Institutions (CDFIs), municipal public banks, credit unions, and banks, referred to as "participating lenders." [66] Third, the bill required the existing small business loan guarantee program to target 60% of loan guarantee dollars towards underserved and disadvantaged small businesses in urban and rural areas.[67] By doing so, the bill purported to encourage and direct necessary monies to underserved, unbanked, and under-resourced businesses that may not traditionally qualify for credit. Ideally, increased funding access would aid business owners' efforts to start a new business, expand their operations, or cover working capital shortfalls due to the COVID-19 restrictions. The overarching policy goal aimed to support small businesses and thus help drive local economic growth—spurring investment, consumers spending, employment, and ultimately tax revenues.

However, AB310 principal issue centered on whom the funds support. AB310 referred to fund recipients as "Target Borrowers." [68] This definition is material because the bill permitted "Target Borrowers" who otherwise lack federal identification to receive financing. The absence of AB310's exclusionary criteria immediately subjects the I-Bank and the participating lenders to PATRIOT Act/Bank Secrecy Act (B.S.A.) violations and Anti-Money Laundering (A.M.L.) risks.[69] More importantly, the CARES ACT Payment Protection Program (P.P.P.) compelled fund recipients to satisfy PATRIOT Act/Bank Secrecy Act requirements.[70] Failure by participating lenders to comply with the federal statutory requirements and to collect the necessary details will subject the lender to criminal and civil penalties under federal law.

The bill did not outline the types of "prohibited business" excluded from receiving financing to compound the risks further.[71] As a result, businesses explicitly

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65.AB 310, 2019 Leg. Reg. Sess. (Cal. 2019).

66.*Id.* at §24 §63088.3(2)(p).

67.*Id.* at §25 §63089.85(c)(1).

68.*See* AB 310, 2019 Leg. Reg. Sess.§25 at §63089.85(C)(i)-(iii) (Cal. 2019) (explaining "Target Borrower" is defined as a business of which fifty-one percent is owned by persons who: either lack a social security number or I-TIN and is not required to have one, live in a disadvantaged community, or are low income, women, indigenous, minority, non-documented immigrants, or formerly incarcerated).

69.KODRZYCKI & ELMATAD, *supra* note 17.

70.A bank requirement for all PPP funds requires applicants to disclose material, identifying information in compliance with PATRIOT Act/BSA statutes.

71.AB 310, 2019 Leg. Reg. Sess. §20 at §63025.10(h)(3) (Cal. 2019).

or covertly engaged in illicit financings, such as drug, illegal pornography[72], money-laundering, and human and sex trafficking could seek financing from public banks, either explicitly or through a proxy. Again, these restrictions were delineated in the PPP/CARES ACT eligibility requirements to which all Federal Reserve member banks were compelled to abide by. When a state public bank fails to implement protective measures against "activities and businesses" deemed and designated as "prohibitive" from a federal standpoint, the public bank violates federal statutes. Had California's public bank purposefully violated and usurped federal law, upon challenge, the public bank's actions and authority, as an agent of the State of California, would be deemed unconstitutional and violative of the Supremacy Clause.

Third, the I-Bank's participation in allocating real estate capital is another facet under AB310's authority that may have been constitutionally challenged. Under AB310, a bank board may be allowed to issue bonds directly to pay for all costs associated with financing any real estate project. A bank may also acquire, take title to, and sell land structures, real or personal property, including franchises, easements, or interest in a land otherwise located within the state, or transition property as the I-Bank deems necessary. This authority also extended to mortgaging, leasing, and assigning all or a portion of the assets.[73]

This broad unfettered authority was not unlike the expansive powers granted to the Puerto Rico Development Bank and should have given Californians pause. For example, at one point in its growth development stage, the G.D.B. issued over $1 Billion in bonds to finance shopping centers, hotels, and other housing developments when private commercial banks were unwilling to participate.[74] At first, the projects contributed to a boom in real estate. But, progressively, with time, unrestrained public development led to rampant over-building, reckless lending practices, and a widening market dislocation that was economically unsustainable.

Unlike Puerto Rico, California benefits from the presence of numerous major banks, private capital providers, and community development financial institutions (CDFI/MDFI)[75] with an expressed interest, resources, and willingness to allocate capital to real estate development projects, including low income and affordable housing. Private capital providers are by no means hesitant to deploy pecuniary resources. On the contrary, they are eager to lend with proper government incentives and a more efficient, smarter regulatory environment. Creating a state bank to address this challenge was a wasteful, inefficient, and ineffective use of limited taxpayer resources. Moreover, it fuels California's dependence on federal bailouts.

72.Due to regulatory and reputational risk, most if not all Federal Reserve member banks decline to do business with operators in the "adult entertainment" industries.

73.AB 310, 2019 Leg. Reg. Sess. §19 at §63025.1(g),(k),(l),(n) (Cal. 2019).

74.PROMESA, *supra* note 37.

75.Community Development Financial Institutions/Minority Development Financial Institutions(CDFI/MDFI) are privately-owned local banks, serving traditionally underserved and under-banked communities, and possess a primary focus and mission geared towards social responsibility and inclusion, and profit secondary.

Fourth, AB310 also authorized the conversion of the I-Bank into a State public bank—a depository institution.[76,77] A State officer would have control over the money belonging to or in the state's custody. The State public bank would also accept deposits and handle accounts for California local agencies and governments. In short, the I-Bank would function as a public bank for local agencies, similar to the failed California Redevelopment Agency model.

In sum, AB310 carried significant substantive, procedural and constitutional challenges. The bill replicated a failed, corrupt and wasteful California Redevelopment Agency model and repackaged it with a trendy, progressive name as a "public bank." A well-known adage defines insanity as the act of repeating the same activity again and again and expecting different results. For California and the rest of the states flirting with the concept of public banks, no truer, wiser words were ever spoken.

B. Critical Economic and Ethical Concerns: Significant Costs, Redundancies, and Erosion of Public Trust

i. Significant Startup and Infrastructure Costs

The critical and central economic issue concerning the public bank's adoption is the high startup costs and ongoing capital investment necessary to maintain the expensive infrastructure.[78] In 2020, California faced critical budget shortfalls, declining tax revenues, and an exodus of businesses and high taxpayers. In early 2021, the state received $150 billion from federal COVID relief funds and an additional $15.5 billion one-time funding windfall. However, the Governor's administration elected to use only $700million to restore budget resilience, a necessary condition to protect the state from the next economic downturn.[79] So, the legislature's adoption of yet another costly, ill-conceived endeavor remains fiscally irresponsible and unfeasible.[80,81]

The question is, how much does it cost to create a state-owned public bank? A 2011 Federal Reserve Bank study found that approximately $325 million would be required to capitalize a public bank of comparable size to the Bank of North

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76.AB 310, 2019 Leg. Reg. Sess. §20 at §63025.10(A)(i) (Cal. 2019) (explaining The Department of Business Oversight would charter the I-Bank as a depository institution by January 1, 2022).

77.AB 310, 2019 Leg. Reg. Sess. §20 at §63025.10(a)(1)(A)(i),(ii) (Cal. 2019) (explaining The Treasurer would be required to transfer 20% of state deposits into the I-Bank within one year of it becoming a depository institution; and 100% of State deposits within five years).

78."Startup Cost" refers to the aggregated costs and expenses incurred, and assets required to establish and launch the business venture prior to its operation. Ongoing capital investment refers to money allocated by the firm to invest in its assets and operations to support its growth and infrastructure. In public finance, capital investments would be directed towards technology, equipment, and compliance-governance systems, as well as labor and staff.

79.LEGIS. ANALYST'S OFF. THE CAL.LEG. NONPARTISAN FISCAL AND POL'Y ADVISOR, THE 2020-2021 BUDGET OVERVIEW OF THE GOVERNOR'S BUDGET (2021). https://lao.ca.gov/Publications/Report/4309

80. *Id.*

81.Los Angeles Times, *L.A.'s Budget Crisis Worsens With Deficit Possibly Climbing to $600 Million, Analysts Warn,*, L.A. TIMES, Oct. 25, 2020.

Dakota after adjusting for inflation and growth.[82] Scaling up to the State of Massachusetts's size and economic needs, Massachusetts required an initial capitalization outlay of at least $3.9 billion.[83]

The same study also concluded that the state's aggressive withdrawal rate from these private institutions would have a meaningful negative impact on the state's economy.[84] Lenders would be hindered in their ability to lend and respond to their local markets and communities' needs money, both in the medium and long term. These contractionary actions by public and private actors contribute to downstream negative economic costs.

To further reinforce the excessive cost and financial burden underpinning the endeavor, the San Francisco Office of the Treasurer and Tax Collector conducted a feasibility study in 2019.[85] The task force's purpose was to perform a cost-benefit analysis for creating a municipal bank and outline policy and operational considerations.[86] The study was narrow in scope and refrained from stating a conclusory policy recommendation. Nonetheless, the report elucidated the significant costs and uncertain outcomes resulting from establishing a public bank, either at the state or municipal level.[87] These findings are meaningful considerations for Californians because a municipal bank would take at least a decade to break even without any guarantees, all while draining diverting necessary taxpayer funds and priorities.

ii. Process Redundancies and Costly Inefficiencies

Under the 2008 Dodd-Frank Act, federal agencies have expanded their authority over large and systemically important institutions.[88] Due to their increasingly expansive overview, private financial institutions must follow and implement costly, and at times onerous compliance, monitoring, reporting, and governance systems. This infrastructure necessitates ongoing capital investments, which assume a more significant share of the institution's cost of funds and impact the bank's net income.

82.ELMATAD, supra note 17.

83. *Id.*

84. *Id.*

85.MOLLY COHEN, ET AL., MUNICIPAL BANK FEASIBILITY TASK FORCE, SAN FRANCISCO OFFICE OF TREASURER AND TAX COLLECTOR (2019).

86. *Id.*

87.*See Id.* (noting that the first model, "Model One: Reinvestment," would require $1.1 billion in size with $165 million in bank capital and would take at least ten years to become profitable. "Model Two: Divest" would assume custody of the bank's daily cash management and payments. As a result, this model entails in-house servicing and treasury management capabilities, so the bank would require $3.1 billion in size with $460 million in bank capital to achieve financial sustainability. Due to the size and infrastructure needs, Model Two projects thirty-one years to break even operationally. Lastly, "Model Three: Combo" is a hybrid of the earlier two models. The municipal bank would accept deposits, perform the City's cash management and commercial banking, and affordable housing and small business lending. Model Three would not directly offer retail deposit banking. However, Model Three would grant the City authority to divest from commercial banking partners and undertake reinvestment lending on their own. Model Three must be $10.4 billion in size to achieve financial sustainability, capitalized with $1.6 billion. This model would require a whopping fifty-six years to break even).

88.Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

For California, a fully capitalized state-owned bank would pose supervisory and regulatory challenges. A California public bank would be categorized as systemically important. As such, it would be required to comply with the Dodd-Frank requirements and incur immense costs to do so.[89] A public bank would be expensive and difficult to replicate and regulate at a state or municipal level due to its size and scope.[90] Moreover, California taxpayers and businesses will ultimately bear the cost burden in the form of higher taxes, fees, and greater regulatory hurdles.

iii. Violates and erodes public trust in finance.

The California State Constitution recognizes the value of limiting the state's government and monetary spheres. As it appears, creating a public bank and its corresponding municipal banks would potentially violate the California Constitution.[91,92]

Moreover, as the sole provider of public goods and services, the state and local government retains the exclusive right to taxes or take private property. Unlike a private economic transaction, where the value and exchange of the benefits are linked to the perceived value of the goods and services, and marketplace competition abounds, the citizen does not receive a direct connection between what it pays the government in exchange for what they receive. In other words, the government—the sole and singular provider of public goods and services—lacks the financial incentive to align the perceived value of the goods and services it remits with the amount of taxes collected from its citizens. Suppose that the gap between the value of taxes collected and the perceived value of public goods and services delivered widens and deteriorates over time. In that case, an economic free-rider problem ensues, and public trust erodes.[93]

Procedurally, under AB310, the appropriations process appeared to bypass and conflict with Section 12(a).[94] First, the process bypassed the legislative appropriations process because the fiscal committees approved the budget as a whole and not as a line item.[95] Second, further exacerbating the absence of public input, a municipal bank would obtain community input through surveys and participating lender feedback at a local level. This engagement is troubling because the public does not have

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89.*Gross Domestic Product by State, Fourth Quarter and Annual 2019,* US DEPT. OF COMMERCE, BUREAU OF ECONOMIC ANALYSIS. (2019).

90.The BND has not spurred questions about federal oversight because its smaller size and limited impact to the US economy comparatively.

91.*See* CAL. CONST. art. XVI, §§ 6, 12 (noting that Section12 prohibits the state, any political corporation, or subdivision the authority to grant or lend its credit in aid of or to any person or for a city's payment liabilities or any individual, association, municipal, or other corporation. Chartered cities are not exempted from this prohibition. AB310 creates a public bank tasked with lending credit to individuals, businesses, associations, and businesses, either directly or via municipal banks).

92.JOEL B. SLEMROD, TRUST IN PUBLIC FINANCE, NATIONAL BUREAU OF ECONOMIC RESEARCH (2002).

93.*Id.* (norting that Free-rider dilemma is an economic term to describe an inefficiency dynamic where those who directly benefit from public goods or resources fail to pay or pay an insufficient amount. This is typically an example of a market failure).

94.CAL. CONST. art. IV, § 12

95.*Id.* (noting that the Executive Director must prepare a five-year budget subject to the approval of the Board and then send it to the legislative fiscal committees).

an effective or meaningful channel to express its voice by voting on financing plans, upon which it will be taxed to support. Sure, AB857 claims to follow the Browns Act and Public Records Act. However, enforcement of both Acts remains an ongoing challenge.

The absence of said forums deprives citizens of the requisite arenas to influence and voice their feedback meaningfully- to debate and discuss tradeoffs and priorities. This form of civic engagement is vital in a representative democracy. As a result, government officials from both parties will be single-handedly responsible for creating a chaotic, wasteful, and unconstitutional process. These inefficient processes are undemocratic and, over time, will erode public trust.

C. Key Risks: Political, Financial, and Regulatory Trifecta

i. Political Risk

In the absence of a financial incentive, a government must rely on political and social incentives to foster trust in its institutions. The government enables this through a unique set of fiduciary duties public officials owe to those they serve.[96] When the government fails to uphold its fundamental duty of care, it will erode its citizens' trust in its authority and institutions.

A poignant example of the corrupting influence of politics in American banking history occurred during the era before the Free Banking Act (F.B.A.) of 1838. Before the passage of this historic act, the commonwealth ideal held that a state owed a duty to its citizens to promote economic growth through all available means, such as with the chartering of corporations, including bank chartering.[97,98] By reserving the right of incorporation to a state legislature, the policy goal was to protect the public from corporate fraud and malfeasance. Ironically, the converse became a reality. The state legislature and its chartering system became synonymous with corruption, politically affiliated bribery, and other illegal legislative, economic rent.[99] As such, the legislature failed in the impartiality and duty to preserve the public's trust in government, among other failures.

This era lacked federal control and regulation, but one in which the state's legislature levied a heavy hand. In response, the 1838 New York Free Banking Act was enacted, and other states followed. In addition, the State Legislature permitted a bank charter applicant to establish a bank so long as the charter complied with the

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96.Hana Callaghan, *Public Officials as Fiduciaries: The values behind government ethic laws.* SANTA CLARA U. https://www.scu.edu/government-ethics/resources/public-officials-as-fiduciaries/, (last visited Dec. 23, 2020).

97.*See* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*: 1776–1787 (1969) (explaining that he Commonwealth Ideal is a philosophical ideal espoused by the Founders, steeped in western classical thought, which defined the ideal character of a "republican federation" as one governed by popular sovereignty, resistance to corruption, civic virtue, and sentiment towards the common civic good).

98.Howard Bodenhorn, *Bank Chartering and Political Corruption in Antebellum New York. Free Banking as Reform,* U. OF CHI. PRESS (2006).

99. *Id.*

state's legal conditions.[100] As a result, the legislature was no longer the sole grantor of bank charters, thereby democratizing access.

However, the pendulum swung in the opposite extreme direction during 1837-1863, otherwise known as Wildcat Banking Era.[101] Although, for the most part, this period was predominately characterized by unrestrained and unregulated banking activities, some banks even distributed worthless banknotes located in remote, inaccessible regions to discourage redemption.[102] Then, in 1863, Congress passed the National Currency Act, and national banks were established based on a federal charter. This act created the dual banking structure of state and federally chartered banks.

Congress subsequently passed the National Banking Act of 1864. The act created the Office of the Comptroller of the Currency (O.C.C.) and mandated stricter standards and requirements for federally chartered banks. Most importantly, the Comptroller of the Currency Office was created to issue and regulate bank charters. This act helped the country operate with a uniform and stable currency while ensuring federal regulatory oversight of nationally chartered banks to ensure their soundness and system.[103] This newfound authority separated the state legislatures from the federally bank charter system. It began laying the foundations of an independent financial system to protect the integrity of both systems and the public.

Modern history is replete with examples of public corruption, fiscal mismanagement, fraud, and financial self-dealing at the municipality, county, and state levels. When financial intermediaries lacked structural independence from the political branches of government, bad behavior invited fiscal exploitation and moral hazard. This risk inevitably resulted in costly outcomes for taxpayers and eroded public confidence in our governments.[104] Most importantly, these examples demonstrate that even now, many state and municipal governments neither possess the requisite governance structure to ensure they function as financial fiduciaries of the public's finances.

The most widely known example of city fiscal mismanagement occurred in 1994 when Orange County squandered $1.7 billion of taxpayers' money. In 1995, Orange County filed for Chapter 9 Bankruptcy under the United States Code and became recognized as the first and largest municipal insolvency at that time.[105] For

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100.*Id.*

101.Encyclopedia Britannica, *Wildcat Banking Era*, ENCYCLOPEDIA BRITANNICA https://www.britannica.com/topic/wildcat-bank (Last visited on Dec. 23, 2020)

102.*Id.*

103.Office of the Comptroller of the Currency.

104.*Fiscal exploitation* in this context refers to an act where the state, an institution distinguished by sole claim to a "monopoly on the legitimate use of violence", as described by political philosopher Max Weber, uses its legitimate institutions to achieve its ends (such as delivering public goods or securing services) by threatening or coercing the inhabitants within its jurisdiction. *Moral Hazard* is an economic term which describes a situation where an entity is unrestrained and incentivized to assume a greater level of risk without bearing the full cost of the exposure. Overtime this cost- bearing party is at a detriment and trust erodes. The most notable example is the 2008 Great Financial Crisis and the bailout of large corporations and systemically important banks.

105.NATIONAL ASSOCIATION OF COUNTIES, A LOOK AT THE HISTORY OF MUNICIPAL BANKRUPTCY (2011).

over two decades, Orange County sought to repay its $1 billion bonds obligations. It has taken even longer to rebuild public trust in the local government.[106, 107]

In Northern California, Milpitas City Manager Tom Williams was accused of misusing public money to pay personal legal fees in 2017.[108] In the neighboring City of Santa Clara, the T4 C Council, a quasi-public parent nonprofit for The Community Child Care Council of Santa Clara County, shut its doors. Its failure stemmed from low enrollment due to widespread dysfunction and funding mismanagement. Not surprisingly, the organization also was the largest taxpayer-funded nonprofit in the South Bay, funded directly by the City Council and other local public agencies.[109]

Financial mismanagement is nothing new. However, in some cases, these activities veered into criminal and organized public entity rackets. For example, in 2010, eight current and former officials of the City of Bell were arrested for large-scale municipal corruption. Bell's chief administrative officer, Robert Hunecke-Rizzo, was accused of illegally earning a salary nearing $800,000 and self-dealing city money to himself and other city council members.[110] Additionally, the City effectuated a $4.8 million land purchase without the required documentation and an explicit appropriation for the land use. Years prior, the City mismanaged $50 million in bond funds approved by voters in 2003. According to the report, the City issued the funds and did not outline plans to use funds.[111]

The most recent and disturbing examples took place in Los Angeles, wrestling with the homelessness crisis.[112] In early 2020, the Los Angeles County Board of Supervisors settled with the Fair Political Practices Commission for $1.35 million over the county's illegal appropriation of close to $1 million municipal funds to promote Measure H. Measure H was a 2017 ballot initiative aimed to increase the local sales tax by 25 basis points to fund homeless service initiatives.[113]

In 2019, Los Angeles City Councilman Jose Huizar was arrested on federal racketeering charges involving a "pay-to-play" scheme at City Hall.[114] According to prosecutors, Huizar and his accomplices faced other charges connected to fraud,

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106.Teri Sforza, *Here's How Orange County Went Broke 25 Years Ago,* L.A. TIMES (2019).

107.Shari Friedenrich & Keith Williams, *Public Bank Bill Ignores Reality of Local Government Finance*, O.C. REGISTER (2019).

108.Jennifer Wadsworth, *Milpitas Places City Manager Tom Williams on Paid Leave after Allegations of Misuse of Funds*, SAN JOSE INSIDE (2017).

109.(San Jose Inside, 2016)

110.(Southern California Public Radio, 2014)

111.John Rogers & Robert Jablon, *Audit: City Mismanaged Over $50 Million in Funds*, SAN DIEGO TRIBUNE (2010).

112.David Zahniser, *LA's Budget Crisis Worsens as Deficit Projections Climb to $600 Million*, L.A. TIMES (2020).

113.City Watch LA, *Election Corruption Demands Real Consequences*, CITY WATCH (2020).

114.Los Angeles Times, *FBI Corruption Probe of L.A. City Hall Focuses on Downtown Development Boom*, L.A. TIMES, Jan. 14, 2019. (noting that according to a statement by U.S. Department of Justice(D.O.J.) officials, Huizar and other city hall officials orchestrated and conducted "a criminal enterprise" and leveraged political positions to solicit and accept hefty bribes and other financial benefits to line the pockets of himself and his coterie of close associates).

extortion, and money laundering.[115],[116] It is worth noting that the City of Los Angeles is one of the two cities recently granted authority under AB857, the companion bill to repurposed AB310, to set up a municipal bank.[117]

Today, California maintains a legislative supermajority and a political landscape increasingly monopolized by a single political party. Additionally, local city councils are increasingly governed by a single majority party, controlling access to capital. As a result, these public bank initiatives will be driven less by the merit of the deals and programs and increasingly on the political landscape. The result is riskier banking activities fostered by increasingly reckless politically motivated policies and dampening business innovation.

It bears repeating that Puerto Rico's G.D.B. failed because of mismanagement, political corruption, inefficiencies, and lack of meritocracy. Today, California and its key majority cities have yet to demonstrate the highest fiscal oversight and accountability standards. Therefore, public fiduciaries entrusted to oversee and manage a municipal bank on behalf of the community must demonstrate the requisite professional fitness before assuming their duties and responsibilities.

ii. Financial Risks

Banks have two inherent risks to actively control and mitigate: (1) adverse selection and (2) moral hazard.[118] As a distributor of capital, a bank operates as an intermediary. However, a bank inherently attracts borrowers with a greater propensity to demonstrate moral hazard. Therefore, a bank has every strong incentive to control the activities of its borrowers and employees to mitigate moral hazard risks.[119]

Prudent credit practices evolve from a firm foundation of disciplined credit-underwriting criteria and a policy framework. The 2008 Financial Crisis stemmed from grossly lax credit-underwriting rules and injected a material systemic risk. And yet, a measure of a healthy, sustainable economy is how efficiently it allocates capital to all participants. As designed, AB310 accomplished neither and would introduce critical, material financial risks into the public and private finance sectors.

Under AB310, business credit applicants may receive financing without a personal guarantee, credit score, tax identification number, or even collateral for

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115.*Id.*

116.*See* Los Angeles Times, *Ex-L.A. Councilman Englander charged with obstruction in probe alleging lavish spending and escorts*, L.A. TIMES

(2020) (noting that the ex-LA City councilmember Mitchel Englander was arrested for obstructing justice and receiving kickbacks in connection with and involvement in other potential crimes including: bribery, kickbacks, extortion, and money laundering involving more than a dozen people, which included Huizar and other city officials and business figures).

117.12 U.S.C § 371 (2021) (noting that federal law prevents a bank from self-dealing with itself or related parties. While it may be unclear if the prohibition extends to the state governments, it is undeniable that at the very least, a strong and clear conflict of interest concerns arise for a public bank under 12 U.S.C § 371).

118."Adverse selection" refers to a dynamic of asymmetric information which creates a situation where the lacking party is materially disadvantaged and makes a poor decision. To mitigate this impact, the disadvantaged party may charge a premium for the risk.

119.Jonathan Macy & Geoffrey Miller, *Corporate Governance and Commercial Banking: A Comparative Examination of Germany, Japan, and the United States*, 48 STAN. L. REV. 73 (1995).

security.[120] Moreover, the proposed public bank aimed to extend below-market credit rates on select loans and financial products.[121] These loose underwriting requirements introduce material credit risks and invite poor fiscal management. Coupled with the State bank's plan to seek an account with the Federal Reserve, this bill increases the systemic risk to the greater financial sector, given California's size and scope as the world's sixth-largest economy.[122]

Additionally, under California law, all commercial banks must obtain FDIC insurance.[123] In particular, AB310 mandates that the state and local governments deposit their funds into a "state or national bank, savings association or federal association, federal or state credit union, or federally insured industrial loan company."[124] Under AB310 and AB857, a public bank would be organized as a nonprofit public benefit corporation. While it would not be classified as a commercial bank, it would nonetheless function as one. Also, under AB310, the bank "may but shall not be required to obtain FDIC insurance." [125] The FDIC is unlikely to insure a public bank. So, its silence is meaningful cause a state bank may run into insolvency as systemically important as a California public bank.[126,127]

What about state insurance or reserve fund protections for public banks in the event of insolvency or credit crunches? The State reserve fund is buoyed by state, local, and city taxes and a credit facility through the Federal Reserve Bank.[128] Not

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120.A.B. 310, 2019-2020 Sess, §25, at §63089.85(a)(c)(2) (Cal. 2020).

121.A.B. 310, 2019-2020 Sess, §2 (Cal. 2020).

122.A.B. 310, 2021 Leg., 2021-22 Sess. (Cal. 2021) (illustrating that when you consider a scenario where a sponsor has not paid their liabilities or is in default. In that case, the State Controller may withhold payment or seek legally available means for payment from the State, federal government, or agencies until the default is cured).

123.A.B. 310, 2021 Leg., Sess. (Cal. 2021) (§ 53648).

124.*Id.*

125.A.B. 310, 2021 Leg., Sess. (Cal. 2021) (Section 20, § 63025.10(3)(g)).

126.The "Prudent Investor Rule" is a legal principle which stipulates that all fiduciaries must act as in the best interest of those they are entrusted to represent. They must act with "reasonable skill, care, and caution." Uniform Prudent Investor Act (1994); *See also* California Probate Code §§ 16045-16054 (1996) (noting that trustees of public money must follow the prudent investor rule under California law. As fiduciaries of public funds, they must preserve the principal; secondarily, they must have sufficient resources to meet liquidity needs, and lastly, achieve a reasonable rate of return. Public servants and bank officers are entrusted to act as fiduciaries, as they are responsible for safely and prudently managing the custody and disposition of entrusted financial assets. The fiduciary typically operates under a conservative investment framework. In the case of public bank officers, should market conditions change or debt obligations mount exorbitantly, officers may be compelled to assume more investment risk to generate sufficient returns to meet their outstanding obligations and preserve capital. This excess risk-taking and absence of caution can place fiduciaries in precarious ethical, legal, and financial situations).

127.*See* Molly Cohen, et al., Municipal Bank Feasibility Task Force Report, San Francisco Office of the Treasurer & Tax Collector (2019) (illustrating for example, the 2018 San Francisco Office of the Treasurer's Report noted that Los Angeles alone has up to forty financial institutions providing statements in compliance with the City's Responsible Banking ordinance These banking institutions offer financial services to the City, including LAWA, the Harbor, and D.W.P., related to general banking, investments, and bonds. We might consider the possibility of Los Angeles city financial resources being consolidated into a newly formed single bank. In that case, this consolidation could increase the City's risk exposure, and the municipal bank's failure would be devastating. Multiply a single public bank default risk by a factor of 10 (per allowance in AB310), the risk exposure would be monumental and such failures would pose a significant, catastrophic systemic risk for the State, the country, and the financial system as a whole).

128.A.B. 310, 2021 Leg. Sess. (Cal 2021), at Sec.20 § 63025(c)(1)(g)

only are the state's reserves insufficient to cover its outstanding liabilities or reserve deficits, but the absence of substantial state fund reserve protections may also likely introduce material solvency risks to the broader financial and municipal markets.

iii. Regulatory

As we have explored above, a bank requires significant infrastructure capital investments and ongoing maintenance to comply with and operate within a regulatory framework. Continuous improvement in the Anti-Money Laundering-Combatting Financing of Terrorism (AML-CFT) compliance pervades the global financial system.[129][130,131] In the absence of appropriate risk identification, monitoring, and reporting controls, public banks are uniquely susceptible to nefarious actors. The failure to promptly protect and respond to money laundering and illicit financing risks undermines the public bank and overall financial sector soundness.[132]

The failure to identify bank customers and beneficial owners increases the risk of money-laundering/financial transaction fraud (ML/FTF), particularly when said persons operate from locales characterized by higher bribery and government corruption levels.[133] As previously designed, AB310 extends credit and banking services to "Target Borrowers" who may be most vulnerable to exploitation or engaged in suspect activity.[134] The International Finance Corporation (IFC)—a World Bank Group member—strongly recommends against allowing anonymous accounts, fictitious names, and shell entities, which AB310 permits in the above-referenced section. Additionally, the failure to identify "high-risk business" presents a similar related risk. High-risk businesses are most prone to money laundering, illegal trafficking, and terrorism financing.[135,136,137]

129.International Finance Corp., Anti-Money-Laundering & Countering Financing of Terrorism Risk Management in Emerging Market Banks (2019).

130.*See How FNS Figths SNAP Fraud, Waste, and Abuse, Dept. oƨ Agriculture* (Mar. 29, 2013), https://www.fns.usda.gov/snap/fraud (illustrating one example of financial fraud and trafficking to which states are susceptible is SNAP benefits. Fraudsters and accomplices buy, sell, and steal E.B.T. cards (or associated numbers) in exchange for cash or other items of value).

131.7 C.F.R. § 217.2

132.International Finance Corp., *supra* note 129.

133.*Id.*

134.A.B. 310, 2021 Leg., 2021-22 Sess. (Cal. 2021) (Section 63025.(c)(d) (e)(f).)

135.*See* Electronic Code of Federal Regulations, 31 C.F.R. Ch. 10 § 1020.100-1020.670 (noting that businesses considered "high-risk" by regulatory agencies include, but are not limited to, gas stations, A.T.M. operators, money lending/pay-day operators, agriculture, casinos, and any other high cash transaction volume business. In addition to lending, tradelines, letters of credit, payment transfers such as (E.B.T.) are all vulnerable to money laundering risks).

136.A.B. 310, 2021 Leg., 2021-22 Sess. (Cal. 2021) , Sec.20. §63025.10 (d((h)(3).

137.*See* John Chiang, BANKING ACCESS STRATEGIES FOR CANNABIS-RELATED BUSINESSES (2017) (noting that under A.M.L. laws, including the Bank Secrecy Act and PATRIOT Act, it is illegal for banks to handle money from illicit activities, including federal drug law violations. Federal law prohibits banks from handling money attributed to illegal activities, including federally prohibited controlled substances. Today, Cannabis is a Schedule I drug under the Controlled Substances Act. Under federal law, banks are prohibited from serving the cannabis industry. State Treasurer's Cannabis Banking Work Group).

The cannabis sector is one example of a high-risk business a local or state public bank would be attracted to serve.[138] The cannabis industry, which includes growing, manufacturing, and distribution businesses, may serve as a cover for other illicit activity such as money laundering and trafficking crimes. For example, in Maine, an Auburn Man laundered money by running an illegal drug trafficking organization, growing, distributing, and selling large quantities of marijuana to participants outside of the Maine Medical Marijuana Program.[139] In September 2020, the DEA-led Operation APEX targeted two businesses in California and Florida running a transnational criminal enterprise trafficking in illegal wildlife goods, marijuana, and money laundering, spanning at least a decade.[140]

These prohibited businesses offer avenues for violent crime and criminal activity. The businesses' cash-intensive nature is simply the byproduct.[141,142143] Once these funds circulate through the system —absent of adequate bank controls, detection, and mitigation systems — illicit funds become "clean" and an avenue for illegal, criminal financing is thus created.[144,145,146]

In sum, these high-risk businesses create significant money laundering/BSA/KYC risks, which could seriously harm and undermine the financial industry. While AB310 did not explicitly prohibit the extension of credit or banking to cannabis businesses, the bill permitted "target borrowers" to receive capital from the public bank without providing federal tax identification.[147] In addition, the proposed legislation did not restrict credit access to non-documented applicants. These

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138.*See Id.* (noting that fervent cannabis banking advocates argue that these businesses are cash intensive. Thus, their company and employees are targeted for violent crimes and need protection through the banking sector/services. This thesis is dangerous).

139.*Auburn Man Charged with Illegal Firearm Possession and Marijuana Trafficking*, U.S. DEP'T. OF JUST. (2018) https://www.justice.gov/usao-me/pr/auburn-man-charged-illegal-firearm-possession-and-marijuana-trafficking.

140.*International money laundering, drug trafficking and illegal wildlife trade operation dismantled*, U.S. DEP'T. OF JUST. (2020) https://www.justice.gov/usao-sdga/pr/international-money-laundering-drug-trafficking-and-illegal-wildlife-trade-operation.

141."Placement" represents one of the three stages for illicit laundering of funds. At the "placement" stage, the criminal alleviates himself of the illegal funds by introducing the illicit funds or "dirty" cash or other assets, which are derived from illegal activities, into a legitimate financial system.

142.INTERNATIONAL FINANCE CORP., *supra* note 129.

143."Layering" represents the second stage of money laundering. In this stage, the criminal—through a series of complex transactions— coverts the illicit funds through a series of transactions to obfuscate the audit trail or source of ownership. At times, the placement and layering stages can occur simultaneously. The third and final stage of money laundering, known as "integration".

144.CHIANG, *supra* note 137.

145.Fourth Corner Credit Union v. Fed. Reserve Bank of Kansas City*,* 154 F. Supp. 3d 1185 (2016).

146.*See* DAVIS POLK & WARDWELL LLP. BANK REGULATORY CONSIDERATIONS RELATED TO ESTABLISHING A PUBLIC (2017) (highlighting that on November 7, 2017, California State Treasurer John Chiang commissioned a Cannabis Banking Work Group. The Group was tasked with understanding the nascent industry's complexity and published a working paper addressing the cannabis industry's concerns. The report explored major issues concerning the cannabis industry, including federal law restrictions. The memo concluded that a change in federal law was necessary for a public bank to serve the cannabis industry).

147.A.B. 310, 2019-2020 Sess, §20, at §63025.10 (d)(h)(3). (Cal. 2020). A.B. 310, 2019-2020 Sess, §19, at §63025.1(c)(d)(e)(f) (Cal. 2020).

allowances increase the rate of criminality and illicit financing, including drug-related offenses, which violate federal law.[148]

Cybersecurity is the third regulatory risk. Hostile state actors and cybercriminals target individuals, the government, and businesses with malware and cybercrimes.[149,150,151] Over time, banks have adopted, enhanced, and integrated their cyber capabilities and protections to monitor, detect, mitigate, neutralize, and report cyberattacks and malware. Mitigating this critical regulatory risk requires: (1) a massive investment in technology infrastructure; (2) coordination with federal law enforcement; (3) and trained software and information security personnel. Public banks, serving as a repository of sensitive identifying information and critical data on their local and state governments, may be particularly susceptible to cybercriminals and foreign hostile state actors. All of which have crucial implications for national security.[152]

D. RECOMMENDATIONS & ALTERNATIVES

Irrespective of the shortfalls discussed regarding public banks, there are other feasible alternatives to public banking that are equitable and viable. For example, many public bank lending and development initiatives aim to duplicate existing quasi-public agencies' roles and responsibilities, albeit more inefficient and costly.[153] One viable alternative includes evaluating, improving, and expanding existing private commercial lender and public funding programs. These activities also involve generating greater marketing awareness for these current initiatives.[154] Such a partnership would reduce inefficiency, cost and enhance public-private ventures' responsiveness and program innovation.[155]

The San Francisco Feasibility study recommends creating non-bank lending programs through community reinvestment initiatives and expanding socially

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148.*Global banks defy U.S. crackdowns by serving oligarchs, criminals, and terrorists,* INT'L CONSORT. OF INVEST. JOURNALISTS (2020) https://www.icij.org/investigations/fincen-files/global-banks-defy-u-s-crackdowns-by-serving-oligarchs-criminals-and-terrorists/.

149.U.S. DEPARTMENT OF JUSTICE, REPORT OF THE ATTORNEY GENERAL'S CYBER DIGITAL TASK FORCE (2020).

150.*See CISA ISSUES EMERGENCY DIRECTIVE TO MITIGATE THE COMPROMISE OF SOLARWINDS ORION NETWORK MANAGEMENT PRODUCTS, CYBERSECURITY & INFRA. SEC. AGCY.* (2020) https://www.cisa.gov/news/2020/12/13/cisa-issues-emergency-directive-mitigage-compromise-solarwinds-orion-network (noting that on December 13, 2020, the Cybersecurity Infrastructure Security Agency issued emergency directive announcing a cybersecurity breach of private and public entities, including but not limited to Homeland Security, State, and Defense Departments).

151.*See* Ryan McNeil & Jack Stubbs, *SolarWinds hackers broke into U.S. cable firm and Arizona county, web records show, REUTERS* (2020) https://www.reuters.com/article/us-usa-cyber/solarwinds-hackers-broke-into-u-s-cable-firm-and-arizona-county-web-records-show-idUSKBN28S2B9 (noting that On December 18, 2020, foreign state actors and cybercriminals targeted and breached the cyber infrastructure of state and local governments like Pima County, Arizona).

152.FINANCIAL CRIMES ENFORCEMENT NETWORK, ADVISORY ON RANSOMWARE AND THE USE OF THE FINANCIAL SYSTEM TO FACILITATE RANSOM PAYMENTS (2020).

153.ELMATAD, *supra* note 17.

154.*Id.*

155.*Id.*

responsible indicators during the City's R.F.P. process.[156] Lastly, the study advocates increasing public awareness and outreach of existing small business lending programs and fostering partnerships between existing financial institutions and CDFI/MDFI through joint program campaigns and outreach marketing.[157]

On the regulatory front, the Federal Reserve Board and the Office of the Comptroller of the Currency (O.C.C.) have begun reforming the existing Community Reinvestment Act (C.R.A.) framework in 2020.[158] The C.R.A. guidelines have not been updated since 1995.[159] This initiative is meaningful and a concerted, prudent attempt to realign C.R.A. indicators to reflect current socioeconomic inequities, assess and measure C.R.A program impact effectiveness, align bank C.R.A. efforts to C.R.A. framework priorities, and remedy decades of "banking deserts."[160,161]

Lastly, the rise of fin-tech companies in California, such as Chime (S.F.) and Dave (L.A.), as well as peer-to-peer lending platforms, provide unique opportunities for private companies currently lending to and accepting deposits/payments from unbanked and under-banked communities to partner with local and state officials to support community economic development initiatives. Many of these companies use existing technology platforms to deliver mobile banking and payment services at zero to low cost. But, most importantly, these platforms already partner with regional banks, credit unions, and national banks to deliver efficiencies and low-cost services to underserved markets and communities while participating within a regulatory and infrastructure compliance. Thus, the current environment is ripe for creating a private-public task force composed of various financial industry stakeholders to explore solutions and opportunities to collaborate on solving our most pressing capital resource allocation questions and possibilities.

CONCLUSION

In today's environment, the need to allocate capital to all citizens and participants benefits our community and economic development. Our ability to do this effectively and prudently is paramount to our socioeconomic sustainability and to ensure an equitable, just, and fully participative society. Many elected officials, policymakers, and citizens understand and appreciate this as a necessary, worthy goal. Our differences center on the variances in our policy prescriptions and approaches to solving the problem. California plays a critical role in the United States, not only as one of the largest states in the Union but also as one of the most dynamic economies in the world. California is often looked to as the vanguard for innovation and a pioneering spirit.

156.COHEN, *supra* note 85.

157.*Id.*

158.AMERICAN BANKERS ASSOCIATION JOURNAL, FED ISSUES ITS OWN CRA MODERNIZATION PROPOSAL (2020).

159.Bryan P. Brooks, *BankThink: Don't stand in the way of CRA reform*, AMERICAN BANKERS (2020) https://www.americanbanker.com/opinion/dont-stand-in-the-way-of-cra-reform.

160.*Id.*

161."Banking Desert" is a term of art to designate a community area under-represented by banking services. These areas are typically rural and low income.

The research shows that the trend in most developing countries continues towards divestment from the public, government-owned banks. The creation of public, state-owned banks in California goes against these contemporary trends. This paper highlights the critical risks and issues surrounding public banks. California's public bank initiatives are ill-suited to address California's economic development concerns. Now is the time for public officials to serve as vanguards of innovation in responsible banking and equitable economic development by leading their states and citizens forward, not backward.

EBBS AND FLOWS IN ANTITRUST ENFORCEMENT, AND THE RESURGENCE OF PUBLIC FAVOR

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I. INTRODUCTION

Since its founding, America has been enamored with the idea of freedom. None quite so overtly advertised as economic freedom, written as a guaranteed right to economic liberty for Americans to have "free use of [their] faculties and free choice of the objects on which to employ them."[2] This may have been the result of America's quest for independence as a response to British restrictions on trade and taxes. Since then, American values of freedom and liberty in the United States irreparably intertwine with daily life and are a most passionate pursuit of many in the country. The focus of this article is the rise of a new villain of economic liberty, those firms arising from digital means, swiftly and with unprecedented economic power—the "Big Tech Monopoly." Antitrust enforcement has slowed to all-time lows, and has yet to adapt to many of the practices that may be anticompetitive or unfair that give rise to these tech monopolies. Meanwhile, there are an increasing number of technology companies who are, or are considered close to, monopolies within their respective markets. For better or worse, market competition, consumer affected choice, and government intervention have not prevented the rise of big tech monopolies.

The current state of American antitrust appears stagnant, with fewer attempts at enforcement despite record economic growth over recent years. America, like much of the world is experiencing an economic shift from physical firms with physical products, to more digital firms combining physical technology and digital software and products. This has become even more pronounced since the recent lockdown orders have required individuals spend even more time at their homes and online. The result of the economic shift to digital products has resulted in different and novel situations that antitrust law has yet to encounter or adapt to. This note will explore the changing nature of antitrust law; the socio-economic stressors that resulted in the Sherman Act; later changes that encourage an adaptive policy of antitrust enforcement; and the recent public and government interest in antitrust enforcement. This note makes no arguments for or against specific changes, and instead focuses on the previous adaptability of antitrust law, the challenges to antitrust enforcement, and the public interest in again adapting antitrust law to better manage these new big tech monopolies. As a final argument, the judiciary and legislative branches should take notice of the public interest in regulating these tech giants, and seek knowledge about preventing the harms these modern monopolies can present to markets and consumers.

Part I will briefly introduce a history of American antitrust law and the operation to foster competition and effectively maximize society's total wealth. Part II discusses theories driving change and preventing it within the field of antitrust law. Part III discusses the monopoly and its effects on a market. Part IV examines the history of the first major antitrust legislation, the Sherman Act. It then explores the

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2.Anna Katherine Miller, *Don't Cry Over Spilt Milk: Hettinga v. United States (quoting* James Madison*, Property*, 51 HOUS. L. REV. 681, 681-3 (1792), reprinted in 1 *The Founder's Constitution* 598, 598 (*Philip B Kurland & Ralph Lerner eds.,* 1987)).

stressors that brought about the Sherman Act and notes parallels to modern economic and socio-political stressors. Part V is a number driven discussion showing what is seen as the recent decline of enforcement in antitrust law. Part VI notes some modern big tech and digital monopolies and their arguably anticompetitive behaviors. Here, the discussion brings together the issues of regulating digital firms with weakening antitrust enforcement and problems with current antitrust ideology that prevent adaptation to new behaviors which toe the line with anticompetitive and unfair practices. It briefly touches on why tech companies, unlike others, are well suited for efficiency monopolies making them particularly difficult for enforcement. Part VII makes an argument for why the stressors present today including wealth disparity, social, and political pressures match those of the pre-Sherman Act era, and may be pointing to necessary changes in American antitrust. Part VIII and IX conclude with final comments about the reasons and interests pushing for change in antitrust law and why the judicial and legislative branches should seek the adaptability necessary to protect the market and consumers from big tech monopolies.

II. AN EXCEPTIONALLY BRIEF EXCERPT ON AMERICAN ANTITRUST HISTORY

a. American Roots in British Common Law

American antitrust, much like the rest of American law, has staunch roots in British common law. It bears noting that antitrust at common law has been subject to many changes over the centuries which moved back and forth between different economic principles and ideologies, each popular during their time. One such example comes from the term "forestalling," which was an all-inclusive term for unlawful attempts to increase prices. In England, forestalling was considered illegal consistently until in 1772 a bill repealed the various statutes protecting against it.[3] Forestalling itself was mostly consigned to trade conducted with foodstuffs, where businesspeople would buy goods before the market opened; in wholesale or retail, and then sell individually.[4] The courts at the time reasoned overturning the common law precedents behind forestalling based on the development of laissez-faire economic theory—or the theory of competitive markets free from government intervention.[5] The argument goes that in a perfect market, with little restrictions to access, and numerous buyers and sellers, the competition between buyers and sellers will inherently prevent any one seller from abusing market power, because such an exercise would result in buyers fleeing to other sellers. This theory would retain its prominence in much of the western nations and become a cornerstone of American market ideals.

Following the trend of the British, America accepted and adopted laissez-faire economics as its hallmark of economic freedom. However, just like the British, the role of American antitrust continued its ever-changing common law approach. It adjusted with each generation of society, expanding or contracting, with whatever was declared unfair practices. This has led to three basic elements required for an

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3.Andrew I. Gavil, *An Antitrust Anthology* at 9 (citing Martin J. Sklar, *The Corporate Reconstruction of American Capitalism* 93-105 (1988)).

4. *Id.*

5. *Id.*

antitrust lawsuit: "anticompetitive conduct, an actual or likely increase in market power compared to the but-for world as a result of the creation or maintenance of market power, and a causal connection between them.[6]" Each of these has been an area of issue for enforcement as it pertains to big tech monopolies, for reasons discussed later in this note.

By the 1890's twenty-one territories and states under the banner of the United States of America had incorporated some form of provisions against restraints of trade in their constitutions or statutes.[7] American courts applied a reasonable and unreasonable standard to restraints of trade. Complaints of this standard arose from a lack of clarity and consistency, with many believing the United States courts were coming to different conclusions, or refusing to apply the test of reasonableness altogether.[8] Those critics believed the line between reasonable and unreasonable restraints of trade seemed to be based wholly on a judge's opinion, with great discretion, to determine the intent or effect of the restraint rather than the fact of the restraint, the form of the restraint, or the extent of the restraint.[9] But, it was that same great discretion, given to judges by the capricious utilization of the reasonableness standard, which resulted in several cases that attracted public attention and impressed upon Americans the issues arising from a lack of consistent enforcement and a growing problem of concentration and consolidation in the American markets.[10]

These decisions also provided the context and defining terms that would shape American antitrust law. An invalid restraint was established as "those contracts agreements, or combinations that were unreasonable and therefore void, unenforceable, and enjoinable at the bar; those that were reasonable remained valid and enforceable."[11] The monopoly was the sole possession on the part of a person or group of persons of a market or trade that derived from government grant.[12] These common law precedents persisted from their British roots and served as the foundation of understanding for forming the Sherman Act, the first major work of American antitrust law. The flexibility of the Sherman Act, as we will discuss below, was necessary in order to protect consumers and businesses based on the wide breadth of understanding of what a monopoly and invalid restraint could include. That flexibility was means for antitrust to provide protection from ever-changing and hard to define anticompetitive behavior, in cut-throat markets.

b. Antitrust Common Law Shuffle

Much of antitrust history involves changing enforcement and anticompetitive practices as the people, or rulers, so declare. In western countries, the British and later American antitrust common law has been involved in a deadly dance between economic priorities. Particularly, the intervention and enforcement of antitrust law,

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6.A. Douglas Melamed, *Antitrust Law and its Critics*, 83 ANTITRUST L.J. 269, 271 (2020).

7.*Id.* at 14.

8.*Id.* at 15.

9.*Id.* at 15.

10.*Id.* at 15.

11.*See* Martin J. Sklar, *The Corporate Reconstruction of American Capitalism* 93-105 (1988).

12. *Id.*

required to prohibit and prevent anticompetitive practices, is diametrically in opposition to the minimalist governmental intervention approach that laissez-faire economic theory seeks. Ironically, competition may be the best manner in which the two theories may be reconciled—by allowing the systems to fight it out with lawyers arguing for and against legislation and judicial decisions, antitrust is allowed to adapt and hopefully prevent perceived anticompetitive practices. Under the current application of laissez-faire theory of economics, antitrust theory is pushed between having a per se doctrine of illegality, arguably too strict and eliminating business and growth incentives, and having a "Rule of Reason" doctrine, allowing judicial discretion for unpredictable future anticompetitive behaviors.[13] Each has benefits and detriments it can serve to society, based on fundamental differences in economic and legal views. These views, also inherited from British common law, have thrived in some form and fashion, and developed their own life in America.

III. DECLINES AND RESURGENCES: CHANGING COURSE IN THE ECONOMIC RIVER

There are many different schools of thought in antitrust law. For the sake of this article, we will generally assume the terms Chicago and Harvard School of thought, which appear to encompass the majority of differing economic and antitrust schools of thought. For America, competing theories of antitrust are largely based on a fundamental difference in understanding economics.[14] Followers of the Chicago school of thought, tend to follow the evolutionary vision in which the individual is motivated by self-interest or household interest, rather than the interest of society as a whole.[15] The main theory of the Chicago school rests on the notion that a rule of per se legality is better because courts are unlikely to weigh the anticompetitive and procompetitive effects better than manufacturers with optimal incentives.[16] Essentially operating under the belief that competition between business is sufficient to deter monopolies and unwanted or unfair behavior. Even going so far as to claim competitive markets are self-resolving and do not require government interference barring egregious offenders whose conduct overcomes the rebuttable presumption of per se legality.

In contrast, followers of several other schools including the New Brandeis school, herein referred to as the Harvard school of thought, trend towards the intentional vision.[17] The intentional vision belief follows that individuals are "not innately limited, self-interested beings; they have great intellectual capacity and will act naturally to benefit others."[18] The Harvard school of thought generally focuses on per se illegality and judicial discretion to allow courts to determine unfair practices not

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13.Nolan Ezra Clark, *Antitrust Comes Full Circle: The Return to the Cartelization Standard*, 38 VAND. L. REV. 1125, 1182 (1985).

14.Andrew I. Gavil, *An Antitrust Anthology* at 390 (citing William H. Page*, Ideological Conflict and the Origins of Antitrust Policy*, 66 TUL. L. REV. 1 (1991)).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

enumerated in statutes. This gives great discretion to the courts as opposed to competitive businesses in attempt to prevent unenumerated and unanticipated anticompetitive behavior. Essentially promoting a reasonableness standard for business practices.

Ultimately, the Chicago school believes per se illegality or court discretion will be too expansive, stifling and discouraging innovation and economic efficiency; while the Harvard school believes the discouraging effect is not overly burdensome, and the necessity for court discretion is more important. Both these theories address different aspects of the role antitrust should play in enforcement, depending on which theory is ascribed to. Both of these ideologies have competed for dominance in Western culture for hundreds of years, with each taking a larger or smaller role as society's idea of anticompetitive behavior changes. This history is important precedent as America may again be facing change, and those changes will be based on past ideology of economics, and will likely determine the fate of antitrust legislation and judicial rulings for the next era of enforcement.

There is much debate about whether the Harvard School of thought is still prevalent, or whether the Chicago school of thought has "won." Some court case decisions by the Supreme Court indicate they use parts of both approaches.[19] But most important to antitrust law and to this article, is that the Chicago school's belief of hands off government intervention has resulted in all-time lows for government and private antitrust enforcement.[20] This supports a conclusion that although the theories of the Chicago school may not be wholly consuming the courts logic and analysis, they play a substantial role in narrowing legal doctrine to impact the cases and scope of antitrust enforcement.

IV. MONOPOLIES AND ECONOMIC LIBERTY

A monopoly can have a host of effects on markets ranging from positive to negative. The products a monopolist produces would be less than those produced under competitive conditions, resulting in a misallocation of resources and diminished satisfaction of society's wants and total wealth.[21] Thus, monopoly pricing reduces the total wealth in a society. This inefficiency and subsequent unfair practices are exactly what antitrust enforcement seeks to prevent. However, a monopoly can also promote positive effects on businesses within a market.[22] In fact, business desires to become a monopoly have been supported as an important part of the market system. As noted above, firms are generally allowed to become monopolies through

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19.Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent Supreme Court Decisions*, 3 COMPETITION POL'Y & INT. 2 (2007).

20.*Thurman Arnold Project at Yale*, ANTITRUST DIVISION ENFORCEMENT DATA, https://som.yale.edu/faculty-research-centers/centers-initiatives/thurman-arnold-project-at-yale/antitrust-enforcement-data-0. (last visited Nov. 11, 2020).

21.Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871, 878 (1999). For detailed examples and definitions, see E. Mansfield, *Microeconomics: Theory and Applications*, 15 (4th ed. 1982); G. Stigler, *The Theory of Price*,78-81 (1996).

22.*Id.* at 883.

efficiency when by their own efforts they compete energetically, to lower costs and prices, and improve product quality.

Under a laissez-faire system, society seeks to have minimal intervention, and thereby allow competition to ferret out the most productive use and effective management of resources for consumer welfare. Judge Bork, himself a staunch supporter of the Chicago school theory, defined consumer welfare as the "maximization of wealth or consumer want satisfaction."[23] However, almost all society requires some level of rule or regulation. The Sherman and Clayton Acts allow private and government cases to be brought against behaviors that are anticompetitive to discourage them with fines, broken mergers, and other reasonable measures. It is imperative that the U.S. not only has but utilizes antitrust laws, and if necessary, modifies them when they no longer suit the purposes of regulation. The free market, much like an ecosystem, can require a delicate balance, and if not cared for properly, may be detrimental to those living within it.[24] A prime example is the monopoly who takes market share in an industry, and uses its market power to engage in anticompetitive behaviors. These behaviors could range from discouraging introduction of new competition, suffocating new market interests, and purchasing competitors in efforts to maintain their market share and power. Some evidence suggests that the existence of monopolies might prohibit overall research and innovation, and may lead to unintended and undesirable economic consequences.[25]

The Sherman Act seeks to ensure protections of both the market and consumers, though there are many disagreeing opinions on the levels of protections and values placed on economic and noneconomic factors.[26] The modern majority theory of the Chicago school has interpreted antitrust protections to mean the promotion of economic efficiency and the providing of the greatest benefits for consumer welfare. Regardless of interpretation, consumer welfare seeks to get to the root issues of anticompetitive behavior. Namely, the ability of consumers to have and use their economic liberty and identity in choosing products and services of their choice. Antitrust laws operate to ensure there is a "set [of] fair rules of the game," that everyone must abide by, and which "prevents economic competition from devolving into potentially lethal free-for-alls."[27] This gives Americans the economic liberty to freely choose their products from among businesses. However, the Twentieth-century antitrust frameworks and modes of analysis appear to be complacent, unable to keep pace with the innovative business models within high tech industries where traditional understandings of monetary costs and consumer harms cannot be accounted for.[28]

23.Robert Bork, *Legislative Intent and the Policy of The Sherman Act*, 9 J.L. & ECON. 7, 7 (1966).

24.Thomas J. Horton, *The Coming Extinction of Homo Economicus and the Eclipse of the Chicago School of Antitrust: Applying Evolutionary Biology to Structural and Behavioral Antitrust Analyses*, 42 LOY. U CHI. L.J. 469, 519-20.

25.Lande, *supra* note 21, at 884. *See also* R. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975).

26.*Id.* at 875. Compare e.g. Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979), with Schwartz, *"Justice" and other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1051, 1076 (1979) (disagreeing about the use of noneconomic values in considerations of efficiency in antitrust).

27.Horton, *supra* note 24, at 509 (referencing material from Robert H. Frank and Philip J. Cook, *The Winner-Take-All Society: Why the Few at the Top Get So Much More Than the Rest of Us* (1996)).

28.Josh Obear, *Move Last and Take Things: Facebook and Predatory Copying*, 2018 COLUM. BUS. L. REV. 994, 1059.

V. THE MERCURIAL HISTORY OF AMERICAN ANTITRUST

a. The Gilded Age

The period of time between the 1860's and 1900's is known as the "Gilded Age," and that period of time was subject to extreme wealth disparity. "The richest 9 per cent (sic) of families in 1890 owned 71 per cent (sic) of personally held wealth in the United States. . . .[29]" Prior to the Sherman Act, the United States faced an increasing gap in wealth between the richest and poorest members of its society.[30] This was due in large part to a small number of companies who controlled a majority of market power in particular industries and could quickly expand into others.[31] Wealth disparity as an economic stressor was particularly relevant prior to the Sherman act, when people began to associate the economic disparity with potential for social disruption abuse of political power.[32] Public opinion of fairness in the underpinnings of the economy, a vital belief in the functioning of a free market, led to a belief in widespread unfair business practices. By 1888, most major American political parties denounced monopolies, trusts, and combinations in an appeal to the growing public concern for the clusters of economic power in trusts like Standard Oil.[33] While the courts of the time were certainly not helpless, they were unable to provide the more expansive measures public outcry sought in curbing the influence of the trusts. A situation that seems relevant today, and will be discussed further below, as federal and state courts struggle to successfully adapt antitrust regulations to the plethora of hyper competitive behaviors tech companies employ.

The economic power which trusts exercised was particularly relevant to the people and Congress of the 1880's and 1890's because, as an end in itself, that power posed economic and social disruptions to society.[34] One essential fear was that with the rise of trusts, who wielded power to raise prices and restrict output, governmental decision-making would be transferred from traditional political power centers, the conglomeration of individuals gathering around shared ideals, the greatly enriched

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29.Robert E. Gallman, *Trends in the Size Distribution of Wealth in the Nineteenth Century: Some Speculations*, NBER, http://www.nber.org/chapters/c4339, [http://www.piketty.pse.ens.fr/files/Gallman1969.pdf]. (last visited Nov. 21, 2020).

30.Lande, *supra* note 21, at 902.

31.15 U.S.C. §§ 12 to 27; see Standard Oil Co v. United States, 221 U.S. 1, 50 (1911): [T]he main cause which led to the legislation was the thought that it was required by the economic condition of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally); Benjamin J. Larson, *Antitrust for All: A Primer for the Non-Antitrust Practitioner*, 43 OCT. COLO. LAW. 19, 3-4.

32.*See* Lee Soltow, *Six papers on the Size Distribution of Wealth and Income*, http://www.nber.org/books/solt69-1, (1969). (last visited on Nov. 24, 2020).

33.*See* T. McKee, *The National Conventions and Platforms of All Political Parties 1789 To 1795* (6th ed. 1906); E. Kinter, *The Legislative History of the Federal Antitrust Laws and Related Statutes*, at 54 (1978).

34. *Id.*

industrialists.[35] Thus, forcing discretionary power into the hands of a few rich men.[36] It was this transfer of power that likely generated the public's hostility towards the trusts and resulted in pressure on Congress to pass antitrust legislation.[37] In fact, the legislative history of the time demonstrates an intent to condemn monopolies in part because of the increased cost of goods to consumers, as well as a desire to curb the social and political power of large business. [38] It seems reasonable that the proponents of the Sherman Act viewed the concentration of extreme wealth during the 1800's as a near equivalent to a concentration of power. And this was treated as a serious problem, for it posed a possible infringement to what the United States stands for as a society of opportunity for everyone.

Currently there is much disagreement among legal and economic scholars as to the goals of antitrust enforcement and methods of achieving those goals. The prevailing modern view is that Congress intended antitrust laws as a means of checks and balances with the goal of increasing economic efficiency.[39] This view is considered to be in line with the evolutionary theory of the Chicago school of thought and generally regarded as "designed to promote competition and, therefore, economic efficiency,"[40] and emphasizing minimal market interference to allow for the best efficiency for allocation of resources. Still others contend there were a variety of social, moral, and political concerns that brought about the passing of the Sherman Act. [41] Recently, the Harvard school among several others have continued their challenges to the more dominant Chicago theory expressing a belief that enforcement is encompassing less than Congress intended, even while some courts and economists acknowledge the numerical and economic accuracy of Chicago models. [42]

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35. *Id.*

36.*Id.*; *see also* W. Letwin, *Law and Economic Policy in America*, Ch. 6 (1965) (discussing the speedy change in which the public attitude moved when trusts were believed to overrun everything; "Trusts, it was said, threatened liberty, because they corrupted civil servants and bribed legislators; they enjoyed privileges such as protection by tariffs; they drove out competitors by lowering prices, victimized consumers by raising prices, defrauded investors by watering down stocks, put laborers out of work by closing down plants, and somehow or other abused everyone.")

37.*Id.* (arguing the Sherman Act was likely not enacted solely to increase economic efficiency, but also provided to transfer power and wealth to state and labor unions in order to curb the social and political power of the trusts.) *See generally* Noll, *Antitrust Exemptions: An Economic Overview in NCRALP Report*, NAT'L COMM. FOR THE REV. OF ANTITRUST LAWS AND PROCEDURES, 1 REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 158, 168-70 (1979).

38.Lande, *supra* note, 21 at 902.

39.*See* Lande, *supra* note 21; *see also* Reiter v. Sonotone Corp., 442 U.S. 330 (1979) (The Court has stated on that the antitrust laws have a variety of goals. The Court has never made clear which goals were meant to prevail under what circumstances).

40.W. Kip Viscusi, Joseph E. Harrington, Jr. & John M. Vernon, *Economic of Regulation and Antitrust* 70 (4th ed. 2005).

41.Lande, *supra* note 21, at 873.

42.For summaries of arguments regarding a large number of possible antitrust goals, see John J. Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182 (1977).

b. The Sherman Act and its Historical Antitrust Cases

The language used in the Sherman Act was "broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce.[43]" Stated simply, the Sherman Act declared:

"[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . .[44]"

It is this language, along with the legislative history and the surrounding history of nineteenth century America, which is the frame for which most economists and law students view the conversation of antitrust law.[45] Although it is not perfectly clear why Congress initially passed the Sherman Act, the goals of the language itself lend flexibility to the judicial branch. This allows enumerated anticompetitive behaviors to be declared illegal, while giving courts wide discretion on creating a judicial path to move forward when presented with behavior that is not covered under existing definitions and understandings of anticompetitive behaviors. This discretionary power does not align with the Chicago theory models whose goals are for minimal government intervention. Instead, the Chicago theory has focused on reducing the flexibility of judicial discretion in favor of explicit rules and the allowing of competition within markets to prevent monopolies and promote efficiency.

In a seminal antitrust case, John D. Rockefeller's Standard Oil Trust, presents itself for enumerated violations.[46] Standard Oil was a conglomerate that had a wide majority over the United States' oil industry from top to bottom. This conglomerate, prior to its 1911 break-up, was controversial because it was well regarded as beneficial for consumers. Standard Oil significantly lowered prices and increased public access to products across the United States. So, what part of the antitrust laws did they violate? Rockefeller formed an alliance between the railroad industry and the oil refiners, using cooperation with one another to decrease prices, and ultimately threaten competitors to sell out to Standard Oil.[47] This led to Standard Oil owning approximately 90% of the U.S. oil refining business by 1880, with some 100,000 workers under their employ.[48] When Standard Oil's continued behaviors to control the oil market violated their original Ohio charter—and in attempts to evade litigation and corner the market—Standard Oil was secretly re-formed as a trust in New York where they continued selling stoves and lamps at below cost to drive competitors out of business and increase demand for kerosene.[49]

43.*Standard Oil Co*., 221 U.S. 1 (1911).

44.15 U.S.C. § 1.

45.Lande, *supra* note 21, at 888.

46.Larson, *supra* note 33, at 5.

47.Constitutional Rights Foundation, https://www.crf-usa.org/bill-of-rights-in-action/bria-16-2-b-rockefeller-and-the-standard-oil-monopoly.html. (last visited Nov. 22, 2020).

48. *Id.*

49. *Id.*

Moving forward in time, a second case presents itself in Alcoa Aluminum.[50] Alcoa, had been under antitrust scrutiny for several decades.[51] They arguably attained their monopoly by legitimate business acumen and efficiency, and yet in 1945, Judge Hand overruled the District Court and found Alcoa guilty of monopolization.[52] Alcoa was "guilty" of attempting monopolization through combining with other companies. In *Alcoa*, the corporation "simulated demand and opened new uses for the metal, but not without making sure that it could supply what it had evoked."[53] Essentially, providing themselves with the opportunity to control the demand and supply for their products, and the potential danger of throttling competition and indirectly harming the markets. Although Alcoa did not have a perfect supply and demand curve manipulating the market, and indeed used business acumen to guess the demand for products, their intent to control the supply of production was the danger deemed worthy of antitrust enforcement. After the Sherman Act, the trusts, and other attempted combinations, were found "guilty" based on aggressive anticompetitive behaviors which attempted the monopolization of a market, even where the behaviors were not specifically enumerated in the act itself. Regardless of the outcomes for the future, Standard Oil Trust, Alcoa Aluminum, and many industrial giants of the era, were targeted for antitrust violations and broken up as seminal cases of the Sherman Act and subsequent antitrust regulations.[54] The Court's application of regulation in both cases shows a willingness to expand the definitions of unfair practices to prevent monopolization. Presently, antitrust enforcement revolves around the Chicago school's theory that less is more, and Courts have been less flexible in restricting novel conduct.

As the phrase goes, "history is prone to repeat itself." The market in 2020 is beginning to show similar stressors that economists, legal scholars, and academics find in the time leading up to the enactment of the Sherman Act. Wealth disparity, moral and social implications, and concerns over political power are trending toward strikingly similarities with the Gilded Age. This note proposes that these stressors, if they continue to be present may cause a second wave of government and public interest in the regulation of companies like Facebook and Google, whose conduct for the purposes of antitrust enforcement is novel and presents difficult challenges to regulation. This note suggests, that Congress is likely the most appropriate branch to begin the changes necessary to bring back flexibility to antitrust and allow it to adapt to the changing world of big tech monopolies. But, if and when the public again calls on antitrust litigation to prevent of "unfair" transfers of wealth from consumers to firms with market power, courts will have the first opportunity to interpret the Sherman Act and apply to the modern giants in technology.[55] In either case, both branches of government should be prepared to take on the history of antitrust and move to

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50.Our History, ALCOA, https://www.alcoa.com/blobal/en/who-we-are/history/default.asp (last visited November 5, 2020) [https://perma.cc/m5lH-QdG9] (started in "a garage," like many digital companies and tech companies of modern times, "Working with his sister Julia in a shed attached to the family home in Oberlin, Ohio, chemistry student Charles Martin Hall discovers a way to produce aluminum through electrolysis that drastically reduces its cost.").

51.*See* United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) (discussing the totality and breadth of Alcoa's monopoly power).

52.*Id.* at 448.

53.*Aluminum Co. of Am*., 148 F.2d at 430.

54.Larson, *supra* note 33, at 6

55.*Supra* note 51, at 430.*; see also* Lande, *supra* note 21, at 873.

make it flexible again—for the ability of the people to decide which behavioral harms are unfair practices is a necessary part of successful antitrust enforcement, and for a healthy free market system.

c. How Antitrust Operates Within the Free Market Framework

The Sherman Act passed by Congress sought to protect consumers "from practices that deprive them of the benefits of competition and transfer their wealth to firms with market power."[56] The Sherman Act discouraged anticompetitive behavior by two different means, each written into law. Section one of the Sherman Act prohibits concerted activity to restrain trade.[57] Section two of the Sherman Act prohibits monopolization of markets, whether by concerted or unilateral activity.[58] The two sections of the Sherman act are minimally written, amounting to one sentence each and therefore can be construed to prohibit a wide variety of everyday business activities.[59] The result, is that the United States Supreme Court has been left to narrow and shape the antitrust laws as seen fit and deemed necessary as business practice changes over time.[60]

In doing so, the argument goes that Congress implicitly declared "consumers' surplus" was the rightful entitlement of consumers, in other words, that consumers had the right to purchase competitively priced goods.[61] Antitrust litigation and notably, the Court's decision in Standard Oil Co. v. United States, [62] led to the belief that additional antitrust legislation was necessary.[63] The subsequent Federal Trade Commission (FTC) and Clayton Acts, refined specific offenses from the broad language of the Sherman Act in response to a congressional desire to prohibit "new" unfair and harmful practices.[64] The practices were new only because previous generations and technology did not allow for such behaviors to be considered unfair. This adaptive response by Congress allowed for enforcement of enumerated anticompetitive behaviors when the courts declined to extend the wide discretion from the Sherman Act to include the new unfair practices. Without such adaptation, antitrust law would remain unable to properly regulate, discourage and prohibit behaviors that current or future generations believe violate the spirit of antitrust statutes, even while the behaviors conform to the letter of the statutes.

56.Horton, *supra* note 24, at 504 (citing John B. Kirkwood and Robert H. Lande, *The Chicago School's Foundation is Flawed: Antitrust Protects Consumers, Not Efficiency, in How the Chicago School Overshot the Mark* at 97).

57.Larson, *supra* note 33, at 10.

58.*Id.* at 11.

59. *Id.*

60. *Id.*

61.Lande, *supra* note 21, at 875.

62.*Standard Oil Co.,* 221 U.S. 1 (1911).

63.*See generally* Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C.L. REV. 227 (1980).

64.Federal Trade Comm'n v. Gratz, 253 U.S. 421, 434 (1920) (Justice Brandeis' dissenting opinion states "The Clayton Act . . . was framed largely with a view to making more effective the remedies given by the Sherman Law. The Federal Trade Commission Act . . . created an administrative tribunal, largely with a view to regulating competition.")

Congress passing additional regulations for antitrust enforcement enabled consumers to purchase at competitive prices, and encourage greater efficiencies and benefits resulting from substantial competition in the free market. In doing so, Congress primarily curbed companies' abilities to monopolize their industry in a variety of ways; although, always leaving open an exception for the "efficient monopolist" as a means of encouraging business to remain efficient.[65] The efficient monopolist, in theory, was a business who succeeded in establishing a monopoly purely through superior skill and intelligence.[66] This was considered fair competition, and free markets used the efficient monopolist theory as a means to promote business interests and competition in the markets. The nature of this practice followed that natural economic growth would prevent anticompetitive monopolization, while simultaneously allowing a company to grow into a natural monopoly through efficiency and fair practices. Even in Chicago theory few companies could achieve such a monopoly because natural competition so strongly prevents them from doing so.

Antitrust regulations face a variety of challenges when seeking enforcement depending on the school of thought and goals which government attaches to antitrust enforcement. As an example of what is necessary for antitrust litigation, consider a restraint of trade, which is briefly defined as a limitation on competition in a market.[67] The Supreme Court has read a narrow understanding to the Sherman Act, prohibiting only unreasonable restraints of trade.[68] Certain categories of "*per se* offenses" are deemed unreasonable simply because of the nature of the restraint, without regard to the defendants' intent or the restraint's actual impact on competition.[69] Any restraints that are not per se offenses, are judged under the rule of reason standard, under which the fact finder assesses the pro-competitive effects of the conduct in question, and weighs that against its anticompetitive effects.[70] An important part of this analysis requires the courts examine whether a defendant possesses "market power" in the "relevant market" where the anticompetitive conduct is alleged.[71] The relevant market can typically be broken down into the product and geographic market, and analyzed to determine the breadth of the market in which the anticompetitive activity takes place.[72] "A relevant product market consists of 'products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered.'"[73] The relevant market in particular poses problems for antitrust enforcement of digital firms, whose products, by their very nature, are often made and grow into a majority of the market until a competitor can copy it successfully.

One example of the relevant market and the issues that can arise in defining it, is that of the lemonade and dairy producer.[74] If the defendant lemonade producer possesses great market power in their relevant market, they may attempt to increase

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65.Lande, *supra* note 21, at 911.

66.Senator Kenna's Discussion of Passing Sherman Act. 21 CONG. REC. 3151 (1890).

67. *Id.*

68.Larson, *supra* note 33, at 24.

69.*Id.* at 25.

70.*Id.* at 26

71.*Id.* at 30-31.

72.*Id.* at 19-32.

73.Green Country Food Market, Inc. v. Bottling Group, LLC, 371 F.3d 1275, 1281 (10th Cir. 2004).

74.Larson, *supra* note 33, at 19.

prices, thereby squeezing consumers wealth.[75] However, the relevant market of lemonade includes a wide variety of substitutes of drinks such as iced tea, soda, and other drinks which would allow consumers to turn to substitutes even though the defendant producer has maintained a monopoly. Thus, monopoly power is not exercised to the harm of the consumer.[76] However, for a milk producer, the market is more narrowly construed as the natural result of their being less products available that are active substitutes.[77] Milk substitutes being constrained to a variety of animals, and more recently nuts and vegetables, still limits the relevant market, leaving fewer alternatives than a lemonade producer within the same geographic region. Geographic markets also pose problems for antitrust enforcement because the digital spaces in which many of the markets reside allow them access to any customer who can also access the internet, leaving opportunity to greatly affect markets quickly.

The geographic market is generally the actual and physical geographic location in which consumers can find the product and alternative products in the event a defendant producer increases prices.[78] In keeping with the lemonade examples, the geographic market of a lemonade stand is not merely limited to the neighborhood block simply because there may be other suppliers within a nearby area, like a grocery store. The geographic market of the lemonade stand would be more like the small locality or town in which it is located, the limit being where consumers would be unwilling to travel to gain access to the product.[79] But on the internet, the market is not so easily defined. Antitrust enforcement faces uphill challenges where the geographic markets can move quickly and be readily accessed from within a vast majority of states and countries within minutes of product publishing.

Defining per se offenses and unreasonable behaviors, as well as the relevant market for digital firms and big tech monopolies are significant problems for the courts. Digital products themselves, as well as the connectivity between those products and markets lends itself to the concentration of market power. All of which is done without drawing antitrust enforcement, as the scale of benefits has tended to outweigh the detriments for consumers by providing a maximization of consumer welfare.

VI. MODERN ANTITRUST ENFORCEMENT AND THE MAXIMIZATION OF CONSUMER WELFARE

Today, courts and legislators alike still rely on the 1950's Chicago school theory that has predominated much of antitrust enforcement: the maximization of consumer welfare. The theory goes that antitrust laws should be interpreted as having only one goal, the promotion of maximizing consumer welfare by invalidating business arrangements that reduce economic efficiency.[80] The court has largely avoided

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75. *Id.*

76. *Id.*

77. *Id.* at 20. This example does not consider the ever-growing variety of nut and other vegetable milks are rapidly available and could increase the breadth of viable alternatives and the relevant market.

78. *Id.*

79. Larson, *supra* note 33, at 20-21.

80. Clark, *supra* note 13, at 1127.

complete adoption of the economic efficiency standard, and maintained the more flexible reasonableness standard though efficiency arguable directs the Court's recent antitrust decisions.[8182] The courts are by and large skirting the issues that are being presented by novel technological growth which drives the tech monopolies of today. The consumer welfare standard is now the primary benchmark for determining if anticompetitive behavior rises to the benchmark for necessary enforcement. The hands-off approach of the Chicago school is apparent in all three areas of antitrust activity: challenging anticompetitive conduct, seeking to block proposed mergers and acquisitions, and promoting competition advocacy.[83] Despite digital firms' unusual circumstances for fast growth and extremely competitive behaviors, digital markets and firms are avoiding antitrust enforcement and receiving unique treatment under U.S. antitrust laws.[84]

Antitrust litigation has grown increasingly complex as economic theory and actual practice has changed over the years. The legislative amendments and additional passages of the FTC Act,[85] the Clayton Act,[86] and the Robinson-Patman Act,[87] have each intended to further prohibit those things which Congress agreed are prohibited, and left agencies and commissions to work out the areas in which flexibility may be required for behaviors not enumerated. However, enforcement has strangely remained stagnant and in some cases disappeared altogether despite several periods of rapid economic growth. Under federal law, the Department of Justice and the Federal Trade Commission can each bring antitrust lawsuits, and private actors may also bring such lawsuits on behalf of businesses and the government.[88] Yet, since the 1970's antitrust lawsuits have steadily declined in enforcement.

81.Clark, s*upra* note 13, at 1133 (citing Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) and Robert Bork, the *Antitrust Paradox* 66 (1978) (the Court has cited with approval Robert Bork's contention that the Sherman Act is a 'consumer welfare proscription.)).

82.Clark, s*upra* note 13, at 1133 (citing Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36, at 53 (1977) (rejecting the 'view that the Sherman Act as intended to prohibit restrictions on the autonomy of independent businessmen.')).

83.John M. Newman, *Antitrust in Digital Markets*, 72 VAND. L. REV. 1497, 1548-50 (hereinafter "*Antitrust*").

84.*See e.g.*, Nitasha Tiku, *How to Curb Silicon Valley Power—Even with Weak Antitrust Laws*, WIRED (Jan. 5, 2018 7:00 AM), https://www.wired.com/story/how-to-curb-silicon-valley-power-even-with-weak-antitrust-laws/, [https://perma.cc/B5FW-C8SZ] ("[Tech giants] were allowed to grow unfettered in part because of a nearly-40-year-old interpretation of US antitrust law that views anticompetitive behavior primarily through the prism of the effect on consumers.").

85.*E.g.* 51 CONG. REC. 12,030 (1914) (Senator Newlands, sponsor of the FTC Act: "[T]he Judiciary Committee can, if it chooses, leave out all legislation with reference to specific practices which are today regarded as unfair competition, or they can put them in, according to their pleasure."); *Id.* at 14,259 (Senator Clapp: "[T]hose things that may be made plain, upon which we are generally agreed, should be prohibited. We should prohibit them, and then leave the Commission with that territory to work in which we are unable to cover by specific cases.")

86.Lande, *supra* note 21, at 933 (The general intention of passing the act was a desire to encourage competition, similar to the goals for enacting the Sherman and FTC Acts).

87.15 U.S.C. §§ 18, 21 (1950) (prohibited certain forms of non-cost justified price discrimination between businesses that purchase the same goods to the effect of substantial lessening competition or with the intention to create a monopoly).

88.15 U.S.C. § 41 (The Federal Trade Commission Act established the "FTC" in 1914, nearly a quarter century after the Sherman Act).

For example, section two cases of the Sherman Act, a landmark section, have essentially stopped being brought by the Department of Justice.[89] From 1970 to approximately 1978, the Department of Justice brought five or more section two cases each year.[90] Since 2010, there has not been a single year in which more than five section two cases were brought.[91] While the Department of Justice's Antitrust Division continues to bring cases, this data reflects an overall decrease in the claims the Department of Justice pursues. This decrease in antitrust enforcement is not merely limited to section two of the Sherman Act, which requires conduct violating both section one and two. The Antitrust Division also reports a decline of civil nonmerger actions brought by the U.S. Department of Justice.[92] "Since 2000, the Antitrust Division brought five or more cases only once, as compared to five or more cases in six of ten years during the 1990s."[93] This reduction in enforcement falls in line with the Chicago school of thought that competitive behaviors will regulate themselves and do not require government intervention. The resulting effect is that enforcement is not taking place despite broadly written language of the Sherman Act, and subsequent congressional attempts to add specific enumerated unfair practices. Regardless of which theory of antitrust and economics you favor, it appears antitrust enforcement has become minimized in favor of competitive market forces. For modern antitrust enforcement it appears to become a decision about whether rigorous enforcement is even necessary at all instead of whether the benefits of rigorous enforcement outweigh the detriments to the market.

Yet, "time and tide wait for no man."[94] As the economy experienced a rapid period of growth, so too did technology. Technology corporations grew at a pace unprecedented and became an increasingly large part of society. Cell phones, computers, and internet access are now widespread. Work, social activities, exercise, and more can all operate on or through digital technology. These digital firms were left mostly untouched by the hands-off antitrust approach advocated by the Chicago school of thought as they grew in size, scope, and stature. But recently, professionals and regulators from both schools of thought are beginning to re-examine big technology firm behaviors. These behaviors, arguably anticompetitive and discussed later in the note, appear to be achieving near monopoly status for big tech through efficiency and technology alone. What happens when the product can be modified? Or when using technology to seek out near perfect levels of efficiency? How should antitrust law treat such firms when efficient monopolists are encouraged? The answer thus far has been little, if any enforcement.

For some scholars, the Sherman Act doctrine has been considered confused for decades, changing from its originally broad focus on prohibiting monopolization and combinations and its grant of great discretion to courts in declaring anticompetitive behavior.[95] Congress has enacted amendments and Acts which moved from the

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89.Thurman Arnold Project, *supra* note 20.

90.U.S. Department of Justice, Antitrust Division Workload Statistics FY, 1970 - 2016.

91. *Id.*

92. *Id.*

93.Thurman Arnold Project, *supra* note 20.

94.Credited to Geoffrey Chaucer, The Grammarist, https://grammarist.com/proverb/time-waits-for-no-man/ (last visited Nov. 22, 2020).

95.*See generally* H. Packer, *The State of Research in Antitrust Law* (1963).

more general goals to specific and articulable instances of prohibited conduct, and the courts have interpreted this narrowly and broadly in differing circumstances. While some big tech behaviors may or may not be within the scope of the original standards of the Sherman Act, there have been few attempts to determine if there are violations. While over-regulation is not ever the goal, it has been argued that any return to the rule of reason standard,[96] where the courts are again declaring business practices as unreasonable even with little or no relation to the focus of the Sherman Act, is too harmful to consider.[97] Even if this is true given the recent lack of enforcement implementing the flexibility that a rule of reason offers may be necessary to prevent the monopoly harms to consumers and markets. Particularly for digital monopolies, where the lack of enforcement and technological advances allowed the formation of an efficient monopoly in record time, and with few if any natural competitors in sight for market self-correction.

VII. ONLINE AND DIGITAL MONOPOLIES; THE MODERN INDUSTRIAL REVOLUTION

In early antitrust litigation brought under the Sherman Act, the Department of Justice enforced antitrust laws with minimal guidance and wide latitude.[98] Cases were backed by political motives as much as by concrete economic arguments.[99] Over time the Sherman Act was developed by the legislative and judicial branches, altering some of the assumptions of the body of law, and shifting the targets and values that antitrust law seeks to promote.[100] This adaptation would slow the opportunity for change as technology companies began to expand ever faster.

a. Modern Giants of Industry and Competitive Behaviors

Previously we discussed Alcoa Aluminum, whose break up was a large focus of early American antitrust law. Alcoa attempted to take control of their supply lines through behaviors that restricted the ability of competitors to seriously compete. With this, Alcoa exercised attempted control the demand for their products. Much like Alcoa, modern day big tech monopolies continue to engage in hyper competitive guesswork to determine where a demand will emerge and how to supply that demand.[101] But wholly separate from physical firms whose copying was slower, dominant technology and digital firms have the unique benefit and ability to literally clone, or

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96.Standard Oil v. United States, 221 U.S. 1 (1911) (referring to the "standard of reason" and the "rule of reason."). Clark, *supra* note 13, at 1131, (Rule of reason can be interpreted as an analysis that agreements are illegal if they unreasonably restrain or suppress competition).

97.Clark, *supra* note 13, at 1125-26.

98.*Id.* at 1010.

99.*Id.*; *see* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 2 (2003).

100.*Id.* at 1011.

101.*See generally* Timothy Wu, *Blind Spot: The Attention Economy and the Law*, 82 ANTITRUST L.J. 771 (2018).

mimic, start-up features.[102] Facebook, has reached some level of notoriety for its own methods of "copycatting," although some argue such behavior is not anticompetitive.

Facebook's copying methods has received much media attention. The ability to craft new features and applications to stimulate and guide growth towards Facebook's success has been a vital part of company growth.[103] Copycatting new companies poses significant harms to market entry for new businesses. Specifically, copycatting behavior leads to decreased investment in startups and decreased innovation.[104] Although some argue that copycatting is a positive sign, "that their business is on to something," not all investors are, nor should they be, so optimistically inclined.[105] For example, Snapchat, the multimedia messaging app created in 2011, gained massive popularity among teenage users in 2013. Noticing that, Facebook attempted to buy it and ride its wave of popularity.[106] After the negotiation attempt failed, Facebook turned to copying the features into their own application ecosystem.[107] While such copying behaviors is certain to create competition between businesses, it also allows a dominant firm to exercise its market power to suppress new firms who might otherwise compete successfully for market share with a new product. It also gives the dominant firm leverage in negotiating, for any failure to purchase the product can be met with attempts to copy and mimic the product, thus hindering new firms. The dominant firm, by mimicking or appropriating popular features, is side stepping the costs associated with the actual innovation itself. Such behavior can result in harms similar to other notable anticompetitive behaviors, but as yet not harms widely recognized by antitrust enforcement. Facebook's copycatting seems similar to Alcoa's attempt to corner the need for their products, where each company can exercise its dominant position to buy up and control access to a new product, exercising leverage to ensure the new firms cannot compete as successfully. These harms would not be limited to startups, but to competitive innovation. The homogeneity of such innovation deprives the market of the unique and innovative products, opportunity, and wealth that those new companies would otherwise bring. In the dominant firm's case, and especially for a technology giant like Facebook, it also decreases incentive to innovate by insulating them from competition. Why

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102.*Id.*

103.Obear, *supra* note 28, at 1047-1048 (Discussing in note 236 "If Facebook uses copycatting as a strategy to preserve its monopoly, it can then continue to extract a monopoly rent either by increasing the advertising on its platform (extracting the rent directly from consumers by subjecting them to more ads in exchange for less content), or by charging higher prices to advertisers who find it necessary to use Facebook or else lose out to competitors who do use social media advertising. In a more competitive marketplace, those advertisers could take their business to a different social media platform that offered lower advertising rates.).

104.Id. at 1044-46; *see also* Brian Feldman, *Is Facebook a Monopoly? Just Ask Snapchat*, NEW YORK MAG. (Apr. 14, 2017), http://nymag.com/selectall/2017/04/is-facebook-a-monopoly-just-ask-snapchat.html, [https://perma.cc/Z6JP-HWUG]. (last visited Nov. 24, 2020).

105.Elizabeth Dwoskin, *Facebook's Willingness to Copy Rivals' Apps Seen As Hurting Innovation*, WASH. POST (Aug. 10, 2017), https://www.washingtonpost.com/business/economy/facebooks-willingness-to-copy-rivals-apps-seen-as-hurting-innovation/2017/08/10/ea7188ea-7df6-11e7-a669-b400c5c7e1cc_story.html [https://perma.cc/7JN4-XN4E]. (last visited Nov. 24, 2020).

106.*See* Olivia Solon, *As tech Companies Get Richer, Is It 'Game Over' for Startups?*, GUARDIAN (Oct. 20, 2017), https://www.theguardian.com/technology/2017/oct/20/tech-startups-facebook-amazon-google-apple, [https://perma.cc/4YB5-8ZGX]. (last visited Nov. 24, 2020).

107.*Id.*

should Facebook spend its money to innovate when they can copy and improve on the products that gather populous attentions?

Although Antitrust law does not punish companies for using analytics to foresee demand, the court should carefully consider whether behaviors like Facebook's competitor copying is sufficiently ripe for antitrust litigation. In such a case, Facebook can use its position as a majority of market power within their industry, to leverage purchasing power, data analytics, and even consumer demand to "buy-out" or copy a smaller competitor's ideas or business. By doing so, it can not only continue its monopoly, but discourage innovation from smaller firms who are otherwise unable to compete with a market power so ingrained and well-funded that it can operate at losses, or create its own similar product at little to no risk to its primary product.

Google is another example of a big tech monopoly with a rapid rise and which has remained mostly untouched over the years of internet expansion. In particular, Google is considered a prime example for upstream abuse of market power. In 2017, the European Commission fined Google €2.42 billion for "abusing its dominant position in searches.[108]" The Commission specifically pointed to how Google's search engine "provides search results to consumers who pay for the service with their data," and claimed this was used to Google's advantage when they attempted to enter a new market for shopping services.[109] By providing free services, Google could collect fees from advertisers, and then tailor ads using personal data from the customers to provide the best advertising experience. Recently, the manipulation of such personal data is becoming a large talking point, as the public now perceives privacy invasion as far more serious a problem than previously anticipated. For now, these behaviors are not considered anticompetitive under America's current analysis of antitrust.

Recently, the Department of Justice has brought actions against Google alleging anticompetitive behaviors in violation of Section two of the Sherman Act. The subject of the complaint raises the claim of acquiring or maintaining monopoly through improper means.[110] The suit focuses on Google's contracts with hardware and browser making companies. One Google subsidiary, the search engine Chrome, operates as a free to use application. The Department of Justice alleges that part of Google's "anticompetitive conduct," is the inclusion of its products on many devices as the *de facto* search engine for major distributors like Apple and Samsung.[111] Interestingly, the filing uses Google's market share as its primary factor indicative of monopoly power, stating that between Google's exclusionary agreements and owned-and-operated properties, roughly 80 percent of the general search query market within the United States is owned by Google.[112] The filing indicates the Department's belief this conduct is further indicative of monopoly problems because the entry barrier to creating a rival or competitive product to Google's would be a multi-billion

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108.Anthony Russo, *"A Special Responsibility": European Search Equality and The American Response*, 43 SETON HALL LEGIS. J. 381, 384 (2019).

109.*Id.* at 400-404.

110.Department of Justice, Press Release, https://www.justice.gov/opa/press-release/file/1328941/download.

111.*Id.* at 4.

112.*Id.* at 4.

dollar entry fee.[113] Thus, a competitor like DuckDuckGo will be less likely to offer a legitimate alternative to Google unless it can also offer additional products like a mobile operating system or email client. This is indicative of a wider problem in antitrust enforcement, that digital markets often involve products that require "years of time, considerable expertise, and hundreds of millions of dollars . . . to launch and maintain.[114] Both the Department of Justice filing and Google agree that the scale of Google is to its benefit, denying rivals the opportunity to compete effectively.[115] For reference, the Department of Justice claims that from 2009 to 2019, Google increased its estimated position as the dominant search engine to 77 percent on computers, almost 90 percent across mobile devices, and almost 90 percent of all general search engine queries in the United States.[116] In this way, Google may indeed appear to have a monopoly, albeit one that on its face seems to have been built through internal improvements and without anticompetitive behaviors or cartelization or mergers. It is thus more difficult to categorize or declare a monopoly, even more because Google maintains that it has achieved this level of market power by efficiency and product alone, leaving it squarely legal, as an efficient monopolist.

The filing acknowledges the primary source of monetization for Google's products are the selling of consumer personal information for advertising, and indicates this could be harmful to consumers, but fails to identify a direct and immediate harm.[117] Instead the complaint argues Google's monopoly prevents consumers from getting an even better free service because a competitive market would result in a greater benefit for consumer welfare, and touches on the overcollection and misuse of customers' personal information.[118] However, the same filing also includes the large benefit to consumer welfare that Google provides users, indicating Google serves as a "one-stop shop" for consumer convenience, providing all the answers they may want for ease of access.[119] These claims, while sounding impressive ultimately leave a lackluster vacuum instead of an "ah-ha!" moment, and it remains to be seen whether this lawsuit will be litigated in the courts, amended, or dropped.

b. Regulating Tech Companies in the Midst of a Technological Revolution

Antitrust enforcement faces significant challenges as applied to big tech giants because direct proof of "possession of monopoly power," as required under *Grinnell*, is rarely readily shown.[120] Digital firms tend to create their own ecosystem

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113.*Id.* at 5.

114.*See* John M. Newman, *The Myth of Free*, 86 GEO. WASH. L. REV. 513, 545 (2018) (hereinafter "*Myth*").

115.Department of Justice Press Release, *supra* note 109, at 5.

116.*Id.* at 30.

117.*Id.* at 10.

118.Mitch Stoltz, *Antitrust Suit Against Google is a Watershed Moment*, https://www.eff.org/deeplinks/2020/10/antitrust-suit-against-google-watershed-moment-0, DEEPLINKS BLOG, (last visited Nov. 23, 2020).

119.Department of Justice Press Release, *supra* note 109, at 28.

120.Obear, *supra* note 28 at 1005-1006. *See* U.S. v. Microsoft Corp., 253 F.3d 34, 51 (The Microsoft court defined "entry barriers" as factors "that prevent new rivals from timely responding to an increase

of products that are self-sustaining and self-improving. These ecosystems greatly benefit from adding products outside the original product, but don't require outside mergers or acquisitions of competitors that would normally be proof of anticompetitive behavior. Instead, big tech relies just as much on product modifications and technological advancements as they might with acquisitions to remain dominant in their respective market. The case for stronger regulation of big tech firms comes at a time when perceived harms are seen as unfair practices and the public's sense of fairness grows increasingly frustrated by the economic, social, and political power big tech monopolies appear to have. There are more difficulties than just the finding direct proof of possession of monopoly power and much like the gilded era the public and government will need to reconsider the fairness of big tech business practices particularly if antitrust regulation is to act as an arbiter of fairness in American markets.

i. Issues with Efficiency

Internal efficiency, approved by the lassiez-faire market systems as incentive for businesses to develop into a natural monopoly, has led many firms to develop their own ecosystem of products that all work together to create an internal market. Take, for example retail chains like Walmart who find themselves as a seller of almost all daily needs. Digital firms seem to do this better than others. A digital firm can control a dominant share of their competitor's market, simply by creating its own market ecosystem of multiple portals among which the users can easily switch, and which creates a new barrier preventing a user from switching to a competitor's platform.[121] This also allows digital firms to take advantage of their market power and engage in anticompetitive behaviors otherwise unavailable to any competitor. For example, Amazon displays a willingness to lose or forgo profits, and even incur losses in order to offer customers a value as a one-stop-shop type of service, providing one-click access to anything consumers may need.[122] This is "a vital service 'in an era of too many choices,'" and encourages users to come back through convenience and eliminates the ability of a competitor with a lesser ability to provide similar one-stop-shop services to successfully compete.[123] Any competitor who cannot provide similar side by side services is less likely to keep customers. In this case, bigger

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in price above the competitive level."). *Microsoft*, 253 F.3d at 50 ([T]here is no consensus among commentators on the question of whether, and to what extent, current monopolization doctrine should be amended to account for competition in technologically dynamic markets characterized by network effects . . . . Indeed, there is some suggestion that the economic consequences of network effects and technological dynamism act to offset one another, thereby making it difficult to formulate categorical antitrust rules absent a particularized analysis of a given market.").

121.Newman, *Antitrust*, *supra* note 83, at 1508.

122.*See, e.g.,* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 746 (2017) ("Amazon has established dominance as an online platform thanks to two elements of its business strategy: a willingness to sustain losses and invest aggressively at the expense of profits, and integration across multiple business lines.").

123.Geoffrey A. Fowler, *Why You Cannot Quit Amazon Prime—Even if Maybe You Should*, WASH. POST (Jan. 31, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/01/31/why-you-cannot-quit-amazon-prime-even-if-maybe-you-should/ [https://perma.cc/4TQZ-HLBF]. (last visited Nov. 24, 2020).

is better, and consumers recognize the benefits of searching once for a service as opposed to using multiple services.

ii. Defining Digital Markets

Issues of market definition also benefit technology giants, whose very product is often unique and thus gets a de facto dominant share of the relevant market as it grows until a competitor can copy it, or until they grow sufficiently quick to rival other digital firms. The issue then becomes whether antitrust enforcement can show additional anticompetitive behavior sufficient to warrant a rule of reason approach as opposed to per se legality. One way of showing monopoly power is to prove that a firm possesses a dominant share of the relevant market and that such a market is protected by significant entry barriers.[124] This is problematic in regulation of digital firms. The Chicago school, which dominates modern antitrust enforcement policies, finds government intervention in the markets and antitrust enforcement as an inefficient use of resources to prevent a firm's near impossible hold on the majority market share. In digital markets, the competition is incredibly fierce, and copying methods often result in competitors mimicking each other. As Facebook copycat policy shows, such competitive behavior can reach the threshold of anticompetitive harms, and enforcement has yet to pursue such claims.

Additionally, antitrust enforcement agencies generally argue for a narrow definition for product markets, leaving the market undefined and making antitrust enforcement more difficult to pursue when mergers and acquisitions do happen.[125] This gives digital firms free reign to continue expanding their ecosystem of products into "new" markets. Google is free to enter the market of mapping with "Google Maps," and still purchase "Waze," a competing mapping company, essentially allowing them to grow their product into a majority market on android and windows products while simultaneously owning and operating a secondary application within the same market.[126]

Alphabet's Google also gives a second great example. Google's primary product is a search engine, and their acquisitions regularly link its services with information and products such as news, email, and more to entice consumers to remain within their ecosystem market. Google's purchase of YouTube, and similar products, continually offers consumers additional reasons to stay within Google's artificial market.[127] YouTube is a video streaming service, that has little to do with search engine, or other Google products, and is therefore considered a distinct market. However, Google's acquisition of a product like YouTube provides them many opportunities to keep consumers within their ecosystem of products, ensuring greater profits while simultaneously eliminating the ability of competitors to draw away consumers

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124.*Id.* at 1006.

125.*Id.*

126.Jennifer Elias, *Google's acquisitions are in the spotlight 15 years after it went public*, CNBC, https://www.cnbc.com/2019/08/19/googles-best-and-worst-acquisitions-are-in-the-spotlight-15-years-later.html, (Aug 19, 2019 9:31 A.M.).

127.Newman, *Antitrust*, *supra* note 83, at 1508-10 (citing Adam Candeub, *Behavioral Economics, Internet Search, and Antitrust* 9 I/S: J.L. & POL'Y FOR INFO. SOC'Y 407, 410 (2014).

without providing sufficiently similar ecosystems. This is an issue for current antitrust theory because the standard definition of market would indicate that because Google's primary service and YouTube did not compete for users, they are distinct markets.[128] As distinct markets, they would be less likely to draw an antitrust enforcement challenges, despite the advantages Google gains to its market power by entering *new* product markets. This utilization of dissimilar markets to create an ecosystem gives frightening amounts of opportunity and growth for digital firms. Digital firms continually acquire distinctly new products, then add to their existing product or ecosystem and combine them into a seamless service.

These examples are not limited to a few digital firms, but are a recurring theme among most. Despite almost two decades after the district court held Microsoft had a monopoly, Microsoft continues to enjoy a majority share of desktop operating systems with only two direct competitors, each of whom have significantly less market share. In 2018, Facebook, Instagram, and Messenger were three of the largest social networking applications in the United States—and all are owned by Facebook, Inc.[129] Alphabet's Google Maps has a majority of users in the market for online mapping services, yet despite few competitors there was no challenge to Google's purchase of Waze.[130] Antitrust agencies have a difficult standard to meet for digital and technology companies, whose products and services elude the current and traditional concept of a distinct market.

iii. Free Products in Digital Firms

Another difficulty in the regulation of big tech, is that unlike traditional firms which sell products to consumers, many big tech companies offer their services to customers for "free."[131] Instead of charging consumers, many "social media" companies, such as Facebook, Twitter, TikTok, and Instagram now follow a free model in which they monetize their product by selling ad space.[132] In effect, the company makes its money on the amount of user time they can maximize. The term "attention broker" has been ascribed to such tech companies, who utilize a myriad of methods to attract and resell customer attention to advertisers.[133] As an attention broker, Facebook operates to attract large numbers of users with free content, then sells advertising space alongside the free content.[134] By providing data on the usage of their ad space to Facebook's real customers—the advertisement companies—Facebook can provide a massive amount of data to show what works and doesn't for advertisers, thereby increasing both the time users give, and the money advertisers are willing to spend on Facebook ads.[135] All of these free services create issues in antitrust

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128.*See* John M. Newman, *Antitrust in Zero-Price Markets: Applications*, 94 WASH. U. L. REV. 49 (2016) (hereinafter "*Applications*"); U.S. v. Grinnel Corp., 384 U.S. 563, 574 (1996).

129.Newman, *Antitrust*, *supra* note 83, at 1521.

130.*Id.* at 1512.

131.*Id.* at 1510-13.

132.*Id.*

133.Obear, *supra* note 28, at 1007 (citing Wu, *supra* note 42).

134.*Id.* at 1029-33.

135.*Id.* at 1030-33

enforcement. For example, if consumer welfare, the "maximization of wealth or consumer want satisfaction, [136]" is part of the way in which antitrust identifies issues of anticompetitive behavior, then social media giant's "free" pricing will rarely draw enforcement from agencies. Free products provide immense benefits to consumers and are therefore desirable even in spite of competition concerns. It is difficult to point out the direct harms to a market if the consumer isn't harmed, and the competition employs similar methods. Consumers are receiving a product that they overwhelmingly want, at a price that is literally free from monetary cost to them. However, nothing in life is free and the cost of these digital products is moved from the currency expended by an individual, to the time an individual spends on such applications or products. The results are unanticipated harms largely unknown to historical antitrust regulation and enforcement. Until recently, the idea that a person's time and attention can be a cost of unfair business practices is a relatively foreign thought.

iv. Scarcity of Human Attention

One such unanticipated harm comes from detriment to human attention. In part, it is argued that some features of digital markets naturally lend themselves to concentration, specifically because of the result of human attention.[137] The argument goes that humans will naturally be drawn to the use of one product that does everything they need, rather than a series of products that each do a piece of what is needed. The issue of attention is particularly novel for antitrust because the use of, and scarcity of, humans as a resource has not been relevant in antitrust law since the end of physical slavery.

In the past, human attention was relatively abundant and did not pose issues for decision-making.[138] The fact that information is now so abundant has created evidence of a taxation on the attention of humans.[139] Not only is modern society bombarded by information, the companies who sell human attention as their product are making their applications with the intent to be addictive—drawing as much attention as possible—in order to maximize advertising revenue. Humans possess limited cognitive capacity.[140] This means that mental processes can be overloaded by distractions and can reduce cognitive capacity over time.[141] For perhaps the first time, information is swamping the ability for human processing capacity and as distractions increase, science shows decision-making does not inherently get better.[142]

136.Lande, s*upra* note 18, at 889.

137.*See e.g.,* John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149 (2015) (hereinafter "*Foundations*").

138.Herbert A. Simon, *Designing Organizations for an Information-Rich World, in Computers, Communications, and the Public Interest*, 40-41 (M. Greenberger ed., 1971).

139.Newman, *Antitrust*, *supra* note 83, at 1504-06.

140.Simon, *supra* note 126.

141.*See e.g.*, Daniel T. Gilbert & J. Gregory Hixon, *The Trouble of Thinking: Activation and Application of Stereotypic Beliefs,* 60 J. PERSONALITY & SOC. PSYCHOL. 509, 509 (1991); Roy F. Baumeister et al., *The Strength Model of Self-Control,* 16 CURRENT DIRECTIONS PSYCHOL. SCI. 351, 351 (2007).

142.*See e.g.*, David L. Faigman et al., *Modern Scientific Evidence: The Law and Science of Expert Testimony*, 17-39 (2018).

These are issues that antitrust law was not designed to handle, and yet seems perfectly situated to solve. But that decision has been delayed and punted by courts and regulators who are only recently realizing antitrust is not yet able to handle such problems. The legislative and judicial branches are well suited to adapting to big tech monopolies, but antitrust regulation is best for the job. So long as it continues to adapt to the changing definitions of unfair practices, it can provide protection from behaviors which may now be considered unfair and anticompetitive. Ultimately, the presence of any combination of the above factors results in positive feedback loops that reaffirm a company's success, while simultaneously limiting the number of viable competitors. With digital markets continuing their rapid growth and becoming the focal point of American lives, antitrust law appears primed for adapting to the new challenges barring a lack of enforcement under laissez-faire theory.

v. Different Treatment for Digital Mergers

Mergers which were previously a visible sign of the combinations and trusts ripe for busting, are treated differently for digital firms. Another example is in Alphabet's acquisition of Android, and subsequent expansion into the mobile operating system market. Alphabet expanded into a market with which it shared no previous competition, and was not subjected to scrutiny over any combined market power. The price was estimated at $50 million, and some consider this a primary reason the transaction drew little, if any, antitrust concern.[143] But, Alphabet's offering the product freely to smartphone manufactures provided a new avenue to building out Google's proprietary product ecosystem.[144] Android is now the primary mobile operating system for many smartphones, and Google is able to use its dominant market position and connections to mobile operating system providers to provide immense benefits to its own products. The ability to acquire a secondary market and offer that product for free as a means of growing and benefiting the primary product appears uniquely suited to growing big tech monopolies. Google's search service is now the default on a substantial majority of android devices.[145]

The benefits of expansions into new markets without fear of significant antitrust enforcement encourage digital firms to expand their ecosystem of products, garnering customer and consumer attentions, and letting digital firms rely even more heavily on a strategy of acquisitions after the success of an initial product.[146] "Google, Facebook, and Amazon alone have acquired dozens of head-to-head rivals and ecosystem building targets without drawing any serious opposition from [government] agencies.[147]" In the actions taken by government agencies to block mergers and

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143.Newman, *Antitrust*, *supra* note 83, at 1510.

144.*Id.* at 1511.

145.*See* Benjamin Edelman, *Does Google Leverage Market Power Through Tying and Bundling?*, 11 J. COMP. L. & ECON. 365, 389-90 (2015) ("Google Android is the dominant mobile OS available for installation on third-party hardware.").

146.*Id.* at 1511.

147.Newman, *Antitrust*, *supra* note 83, at 1551; *see e.g.* Russell Brandom, *The Monopoly-Busting Case Against Google*, *Amazon, Uber, and Facebook, Verge* (Sept. 5, 2018 4:18 AM), https://www.theverge.com/2018/9/5/17805162/monoppoly-antitrust-regulation-google-amazon-uber-facebook,

acquisitions, most if not all have identifiable prices.[148] But as discussed above, digital firms can and will take great losses or offer their products for free and rely on income solely from primary products and advertising. This problem is cause for growing concern, especially where free pricing results in unusually absent regulatory and enforcement behavior, and where the prevalence of zero-price business strategies within digital markets is pervasive.[149]

So, when the product is free, it is of little concern to antitrust. Where the acquisition "does not directly compete with the dominant firm's core business, modern antitrust law has little to say."[150] And again, when the harms are not economic, but involve privacy, data, and human attention, antitrust—again—has little to say. These issues, and more, are coming to the forefront of public attention as the behaviors of digital firms continue to toe the line between competitive and unfair. Particularly the public has noticed the issues of privacy and attention. As human attention becomes scarcer, big tech competition ramps up to take a bigger piece of the pie. When the competition ramps up, the consumer welfare "wins," by Chicago school of thought, with little if any downside for consumers—aside from shiny new harms like scarcity of attention, and collection of private data. The established firm thus has the ability, and great incentive, to continue growing their ecosystem to encourage users to remain within the digital products they can offer. This also benefits the dominant firm by decreasing the viability of competition as the purchase and creation of a digital ecosystem creates near insurmountable entry barriers for competitors. The result is continued dominance and the monopolization of a wide breadth of markets where dominant firms can expand freely into *new* markets without fear of antitrust enforcement.

c. Why Regulation Matters

Antitrust has played a large and important role throughout history, none the lesser in America. It ushered protections and enforcement when industrialists radically changed the economic landscape of the late 1800s, and continued to be a pillar of the regulatory government functions well into the 1970s. The changes from common law to the Sherman Act, and later Clayton Act allowed antitrust law to fulfill its role of promoting competition in markets. The more minimal role in recent years has been a brief interlude, allowing the market to self-correct barring the most egregious of violations. But the stressors affecting public opinion of corporations has begun to shift again, in similar ways to those which prompted the Sherman Act.

Recently forty leading economists said that acquisitions by tech platforms create "risks of anticompetitive effects" and should be prohibited and potentially broken apart.[151] Backing this, the public has begun to clamor about issues with privacy,

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[http://perma.cc/W3SA-B69L] (describing some of the ways in which majority tech monopolies are successful in acquisition and which may be prime for antitrust scrutiny in the future.).

148.*Id.*

149.Newman, *Foundations*, *supra* note 136, at 151.

150.*Id.*

151.*Breaking up Large Tech Companies*, IGM FORUM, University of Chicago Booth School of Business (Mar. 26, 2019), www.igmchicago.org/surveys/breaking-up-large-tech-companies. (last visited Nov. 24, 2020).

data, and addictive attention gathering platforms exploited by some of the biggest digital companies. The Department of Justice along with 11 state attorney generals filed suit against Google, and there is the possibility for more lawsuits against big tech monopolies in the future from both federal and state agencies. Data and privacy Americans hold dear are used and sold through technology Americans use daily. This includes personal information, photos, videos, locations, and other records held by social media companies. Many digital companies hold vast quantities of data for individuals and society as a whole, and are beholden to no one person; perhaps only to governments and antitrust enforcement. When antitrust enforcement is limited by ideology or restrained by the language of enforcement, it fails to promote competition and the free market. The field of antitrust must follow with society and adapt to recognize competitive behaviors that fall into unfair practices, or risk disuse and serious harm to the market and individual economic liberty. Whereas before, consumers would face direct and indirect economic injury by the powers of monopolies, now we see consumers facing even more indirect and subtle injuries through harms to the gathering of their personal information without informed consent, or without reasonable alternatives; the manipulation of information and products based on powerful predictive artificial algorithms; the throttling of competition by immense entry barriers for competitors who cannot afford to spend billions to create similar platforms; and the social, economic, and political power of companies who hold great sway over the information, attention, and people living in the United States.

It is imperative that antitrust remain a vital part of the modern era and change, grow, and shrink, as necessary. The origin of antitrust in British common law should lend hope that change is not only possible but still probable. The subsequent antitrust acts passed by Congress show agreement that adaptive change is necessary for proper enforcement in changing times. Though slow, continued enforcement of antitrust law will continue to allow each generation to determine what new behaviors are unfair, and adapt law to new technology and new ideology before substantial harm comes to markets or consumers.

VIII. ANOTHER CHANGE IN AMERICAN ANTITRUST HISTORY

Public interest in more enforcement appears due to the rise of big tech firms expanding rapidly in scale and scope, posing threats to data and privacy.[152] Since 2005, there have been an estimated 9,044 data breaches involving the loss of customer information among various digital and even physical firms.[153] This is a substantial threat as more people utilize digital records to store sensitive information online. There are also economic studies that suggest markets around the world are seeing a concentration of market power, concerning government and private consolidation of power.[154] There are also examples of potentially novel concerns like

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152.*Id.*

153.Daniel Funke, *By the numbers: How common are data breaches and what can you do about them?*, POLITIFACT, https://www.politifact.com/article/2019/sep/23/numbers-how-common-are-data-breaches-and-what-can-/, (last visited Nov. 23, 2020).

154.*Id.*; *E.g.* Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L. J. INDUS. ORG. 714 (2018); David Autor et. al., *Concentrating on the Fall of the Labor Share*, 107 AM. ECON. REV. (PAPERS & PROCEEDINGS) 180 (2017).

manipulation of search results; algorithm based collusion; markets without prices; markets with data as currency; and as a means of increasing product quality.[155] While this list is by no means exhaustive, it presents just some of the many issues markets face by digital monopolies, and each of these, and likely more, are affecting government and citizens alike in their call for regulation of big tech.

Rising populism decries free markets and increasing inequality within developed countries bears great similarity to the public outcry against wealth disparity of the Gilded Age.[156] A rich American in 2019 would need a net worth of $2.1 billion to be considered for the Forbes 400 list of richest Americans.[157] That net worth is over 12 times the 1982 average even after adjusting for inflation.[158] Moreover, the wealth disparity happening today appears even more pronounced. In 2018, "America's top .000004 percent is comprised of the five wealthiest households: the Jeff Bezos, Bill Gates, Warren Buffett, Mark Zuckerberg, and Larry Page households," combining for $470 billion.[159] Even after adjusting for inflation from 1918, Rockefeller, as America's top .000004 percent household at the time, only had a wealth equivalent of $340 billion.[160] In fact, the second .000004 percent of 1918 households were worth $225 million,[161] inflated to the modern equivalent of $63.7 billion; while the second .000004 percent of 2018 Americans combined for a wealth of $250 billion.[162] Modern wealth disparity in America is more than four times the modern day equivalent of the wealth disparity for the second .000004 percent households in 1918.[163]

This note proposes that the technology of today is now supporting companies who can accomplish near perfect efficiency in the use of their products, and exploiting those products to create an ecosystem that both promotes their product and hinders competition. Antitrust laws are unresponsive to these hyper competitive behaviors, despite the accumulation of economic, social, and political power. Although the efficient monopolist theory encourages such behavior, technology keeps growing at the fastest rate in history. Big tech monopolies can rely purely on technology instead of human intellect or hard work or innovation to create and affect their industry.

155.Newman, *Myth*, *supra* note 113 at 1501. *See generally*, Jennifer Daskal, *The Un-Territoriality of Data*, 125 YALE L.J. 326, 329-31 (2015); James D. Ratliff and Daniel L. Rubinfeld, *Is There a Market for Organic Search engine Results and Can Their Manipulation Give Rise to Antitrust Liability?*, 10 J. COMPETITION L. & ECON. 517 (2014); Salil K. Mehra, *Antitrust and the Robo-Seller: Competition in the Time of Algorithms*, 100 MINN. L. REV. 1323 (2016); Magali Eben, *Market Definition and Free Online Services: The Prospect of Personal Data as Price*, 14 I/S: J.L. & POL'Y FOR INFO. SOC'Y 227 (2018); David S. Evans, *The Antitrust Economics of Free*, 7 COMPETITION POL'Y INT'L 71 (2011); Michal S. Gal & Daniel L. Rubenfeld, *The Hidden Costs of Free Goods: Implications for Antitrust Enforcement*, 80 ANTITRUST L.J. 521 (2016); Newman, *Applications*, *supra* note 133; Newman, *Foundations*, *supra* note 136.

156.Melamed, *supra* note 12, at 1.

157.Institute for Policy Studies, https://inequality.org/facts/wealth-inequality/. (last visited Nov. 21, 2020).

158.*Id.*

159.Bob Lord, Institute for Policy Studies, https://inequality.org/great-divide/america-2018-more-gilded-america-1918/. (last visited Nov. 21, 2020).

160.*Id.*

161.*Id.* (The wealth credited to Henry Frick's household).

162.*Id.*

163.*Id.*

It is entirely possible now to have a company's product and monetization of that work be entirely digital, or even free. Social media companies can monetize a product by using and selling the information about their "users." Artificial intelligences can be designed to improve themselves can gather more profit and attention from human consumers. Novel industries are created entirely around one product and can rapidly grab attention, thrusting a start-up into new industries, an ecosystem of markets, and putting the firm in a pseudo-monopoly position.

Though the absence of antitrust law is again receiving increasing press, public, and government scrutiny over the last few years. Perhaps for the first time since the 1912 presidential campaign where Woodrow Wilson brought renewed interest in antitrust regulation,[164] we are seeing the start of a serious conversation about antitrust law and its role of enforcement in the markets. President Donald Trump, whose Department of Justice brought the complaint discussed above, made the targeting of big tech monopolies a priority.[165] But, it is clear that both political parties are interested in pursuing change as the democratically led house also pursues hearings on big tech companies.[166] At the prompting of all this attention, scholars are beginning to publish books, articles, and reports on all manner of antitrust law, as a predicate to the perceived changes that seem to come down the pipeline.[167] Perhaps, finally, it is time for another change to antitrust history.

IX. CONCLUSION

Antitrust laws have historically changed with society's ideals, norms, and best practices. However, despite the slow modern changes, there have been no explicitly different rules for digital and technology-based markets that are emerging. Indeed, until recently there appeared to be widespread agreement that none was needed.[168] Much like the times leading up to the Sherman Act and the later Clayton Act, we are seeing a massive surge of public and government interest in protecting consumers from big tech and data monopolies and a whole plethora of potential harms previously considered competitive or outright unknown to antitrust

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164.*See* W. Patman, *Complete Guide to the Robinson-Patman Act* 7 (1968) (Woodrow Wilson made the passage of the Clayton Act an election promise of the Democratic Party. President Wilson stated in 1913, society was sufficiently familiar with monopoly and restraints of trade such that legislation could be passed to deal with issues such as price discrimination and other unfair trade practices).

165.James Clayton, *Big Tech: Between a rock and a hard place*, BBC NEWS, https://www.bbc.com/news/technology-54444633. (last visited Nov. 23, 2020).

166.*Id.*

167.E.g. Lina Khan and Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and its Discontents*, 11 HAR. L. R. 235 (2017); Eric A. Posner and E. Glen Weyl, *Radical Markets* (2018); Ranier Lenz, *Big Data: Ethics and Law* (2019); Jonathan B. Baker, *The Antitrust Paradigm: Restoring A Competitive Economy* (2019); Jonathan Tepper and Denise Hearn, *The Myth of Capitalism* (2019).

168.Newman, *Antitrust*, *supra* note 83, at 1499-1500 (citing United States. v. Microsoft Corp., 253 F.3d 34, 89-90 (One exception being Microsoft, where the D.C. Circuit Court decided "the markets at issue were novel enough to warrant rule-of-reason treatment for a tying agreement, instead of the long-standing quasi-per-se-illegality rule.")); see e.g., ANTITRUST MODERNIZATION COMM'N REPORT AND RECOMMENDATIONS 9 (2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf [https://perma.cc/4PL6-KDQC]; Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application* ¶1500 (2017).

enforcement. It seems a likely probability that if the judicial branches are unable to wholly adapt current antitrust laws to these rapidly changing monopolies, new legislation may be necessary. While the courts are most likely to have the first chance to interpret antitrust regulations for cases against big tech monopolies, they may not be the best suited for the job. In great part, the legislators are the best place to begin reforms to antitrust laws to make them competitive with digital markets. However, even restarting the conversation with a discussion of the "new" types of harms facing markets and consumers by these tech giants with market power, and a recognition of the ways in which these monopolies differ from past monopolies is a good way to jumpstart changes needed to protect the America's free market system from over-monopolization. The stressors which originally birthed the Sherman Act may well lead us into a new era of regulation as the public and government again seeks to transfer wealth and power.

The Chicago theory of American antitrust teach us that not all monopolies are bad, and certainly efficient monopolies serve as a neigh unattainable goal for many businesses who are successful. But, most economic theories recognize monopolies pose inherent threats to markets if not managed responsibly. The coming generations may decide the benefits of big tech companies outweigh the detriments, or that the behavior is competitive and not unfair. Yet, this is a decision that needs to be made, and without antitrust laws flexible enough to check those behaviors, it will not happen. Digital defendants in antitrust litigation have thus far received, a free pass in the form of de jure and de facto immunity and leniency.[169] If left unchecked, this overly laissez-faire approach will not allow the markets to self-correct monopolies with competition. Instead, it will allow digital firms to consolidate more power.

Antitrust law has developed many different ways of calculating harms and threats posed by various anticompetitive behaviors, and successfully adapted to prevent them.[170] "No escape" harm;" "split the rents;" and "digital product redesign," are but a few of many concepts for possible implementation to resolve monopoly issues in digital and technology-based firms.[171] But, it is not the specific adaptation that is important for the purposes of this note. Instead, regardless of the ways in which courts and legislators develop antitrust law, this note seeks to show the importance of an adaptive antitrust ideology. With the potential threats digital firms can cause, the conversation and application of new ideas should be encouraged for antitrust enforcement, even if only as a means of competitive regulation as a check on anticompetitive behaviors of large firms. Leave defining new unfair practices to the enumeration of the next generation of legislators and perhaps even wide discretion of the courts instead of relying on the past generation's understanding of anticompetitive behavior. Only the future knows what is to come, but if public interest sustains it, it's worth noting that "[d]igital markets warrant unique treatment.[172]"

Like most things in excess, monopolies may be dangerous to markets and consumers. Modern antitrust enforcement has largely been left alone; given little

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169.*See* Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369 (2019); Rory Van Loo, *The Missing Regulatory State: Monitoring Businesses in an Age of Surveillance*, 72 VAND. L. REV. 1563 (2019).

170.*E.g.* Newman, *Myth*, *supra* note 113.

171.*Id.* at 1523-31.

172.*Id.* at 1549.

importance as government and private actors find little reason to challenge the giants in industry for violations. This is fast becoming a field in which winning by efficiency is not only tolerated but actively supported because it benefits consumer welfare. Although consumer welfare is beneficial, and is the primary goal of antitrust law under the current Chicago school of thought, it simply cannot account for the types of harms caused by digital monopolies. In the modern era, where computers, artificial intelligence, and engineering take a large workload off human producers, society may be seeing the first of a series of monopolies built on technological efficiency who will never have a serious competitor. It is these industries, headed by household names like Google, Amazon, Facebook, Microsoft, and Apple, whose progress must be watched to ensure the total welfare of the market sustains no damage by exercise of massive market power, not just the consumer welfare. Such a standard leaves consumers the economic freedom of choice, as part of the economic liberty necessary to keep a free-market ecosystem self-sustaining. The failure to so regulate could result in a historic loss of freedom in a market known worldwide for its freedom of choice, entry, and exit. For the above reasons, the judiciary and legislative branches should take notice of the public interest in regulating these tech giants, and be wary and knowledgeable about the dangers these modern monopolies can present to the market and to the consumers. Legislators and judges should not be reluctant to block mergers, monopolies, and predatory behaviors between competitors where violations of antitrust laws are found, merely because current statutes do not enumerate the specific offense or because of a belief the competitive industry will resolve itself under laissez-faire self-correction.[173]

173.Horton, *supra* note 24 at 521.