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REGULATION OF FOOTBALL AGENTS IN EUROPE: A COMPARATIVE LAW AND ECONOMICS ANALYSIS

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I. INTRODUCTION

Sports, and especially football, are extremely prominent in the EU. An important role in the football world is played by football agents or intermediaries.[1] Football in general, but more particularly football agency, constitutes a sector of increasing economic value. In England, for example, roughly £980 million has been paid by the 92 professional English football clubs to football agents[2] since the 2008/2009 football season, and this does not include the huge sums estimated to be paid by the players themselves to the agents.[3] According to the Global Transfer Report, between 2011 and 2016, $1.396 million was spent by clubs to pay intermediaries' commission for their roles in international transfers.[4] And in recent years the amounts have only multiplied, with $1.59 billion being paid as commission to club agents from January 2013 to 2019.[5] One of the reasons for the upsurge in remuneration paid to football agents is obviously that transfer fees themselves have increased.[6] The total number of official sports agents registered in the EU was estimated at approximately 3,600 in 2009.[7] The actual number may be substantially larger, however, since this only represents the officially registered sports agents. Moreover, after the introduction of the *Fédération Internationale de Football Association* (FIFA) Regulations on Working with Intermediaries (RWI) of 2015, which,

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1. These professionals were initially referred to as football agents, but in the latest FIFA Regulations on Working with Intermediaries (2015) they are referred to as football intermediaries. The use of the latter term is criticized inter alia by Gregory Ioannidis, *Football Intermediaries and Self-Regulation: The Need for Greater Transparency Through Disciplinary Law, Sanctioning and Qualifying Criteria*, 19 INT'L SPORTS L.J. 154 (2019).

2. Giambattista Rossi, Agents and Intermediaries, in Routledge Handbook of Football and Business Management 138 (2019).

3. *Id*.

4. *Id*.

5. *See* Ioannidis, *supra* note 1, at 158–159.

6. The sums invested in the transfer market for the top 5 football leagues in Europe have increased from €1.5 billion in 2010 to €3.8 billion in 2015 after the introduction of the 2015 FIFA Regulations the sum further increased to €5.9 billion in 2017. RICHARD PARRISH ET AL., PROMOTING AND SUPPORTING GOOD GOVERNANCE IN THE EUROPEAN FOOTBALL AGENTS INDUSTRY 5 (2018, available at: https://www.edgehill.ac.uk/law/files/2019/10/National-Associations-Report.pdf.

7. KEA EUROPEAN AFFAIRS ET AL., STUDY ON SPORTS AGENTS IN THE EUROPEAN UNION 36–38 (2009), available at https://ec.europa.eu/assets/eac/sport/library/studies/study-sports-agents-in-eu.pdf.

as we will see, amounted to a deregulation of the profession, the number has increased even more.[8] In fact, in recent European football history, there have been two decisive moments that explain the rise in the number of football agents. A first important step occurred with the *Bosman* ruling of the European Court of Justice in 1993.[9] That judgment enabled players in the EU to transfer to another club without a fee at the end of their contracts, while at the same time prohibiting the quota restrictions on foreign players that previously applied to clubs, thereby facilitating the freedom of players to move between clubs. The *Bosman* ruling had the effect of raising the number of football agents, as it was a profession with easy access (in the sense that the requirements to enter the profession were minimal) and a potentially high remuneration to be gained from being involved in the increasing number of player transfers that would take place.[10] Then, after initially setting up a licensing system, FIFA deregulated agents in 2015, which again provided an impulse to make the profession very attractive.[11]

Football agents can perform a variety of different roles and functions and their roles have also evolved over time. Whereas originally agents were mostly scouting and intermediating for clubs (resolving potential conflicts between clubs and players),[12] from the early 1960s to the mid-1990s, they acted increasingly as representatives of football players, in a time where clubs could (pre-*Bosman*) still tie a player to the club.[13] Especially after the Bosman ruling, agents increasingly started playing a role in the transfer market, although still today they perform many other functions as well, inter alia by providing general (marketing, legal) advice to players.[14] As the number of agents increased and their role, especially in the transfer market, expanded as well, this was met with increasing criticism concerning various aspects of their intervention. On the one hand, there were stories of abuse of players by agents (e.g., not providing players with accurate information to improve their situation, but rather maximizing their own monetary gains; charging excessive commission and fees, etc.). Yet there were also concerns that the role being played by agents may affect the quality of the professional game itself (by preventing players from moving to the club where they would fit best, and instead selecting transfers that could achieve the greatest

8. Ioannidis, *supra* note 1, at 158.

9. Case C-415/93, *Union Royale Belge des Sociétés de Football Association asbl v. Jean-Marc Bosman*, ECR I-04921 (1995).

10. Ioannidis, *supra* note 1, at 158.

11. *Id.* at 159–160.

12. Rossi, *supra* note 2, at 131.

13. Rossi, *supra* note 2, at 132–133.

14. Ioannidis, *supra* note 1, at 155 (summarizing the many functions that sports agents could perform).

financial returns for the agents themselves). Other concerns included a fear that the intervention of football agents could give rise to societal problems (such as inter alia facilitating money laundering and even facilitating organized crime). Some Premier League managers even referred to football agents as "parasites, vermin of the worst kind" and "mafiosos."[15] According to those interviewed managers, football agents only have their own interests at heart and not their clients' and generally damage the image of the sport, creating a reputational risk for the different stakeholders involved.[16]

These concerns surrounding the role of football agents explain why there has been an increasing demand for regulation of their activities – this regulation of football agents, particularly in Europe, is the central focus of this Article. The reason for this focus is that the nature of the regulation in question, as well as the legal sources on which it is based, exhibit several features that merit further research into this domain. The starting point is the regulations laid down at an international level, not emerging from an international treaty, but from what is in fact a private organization — namely FIFA. Next, there is the domestic level at which the FIFA Regulations have to be implemented, where there are a variety of different models. In some countries in the EU, there exists formal legislation (partially to implement private regulations issued by FIFA), which is often in place in addition to private regulations of the national football associations. In other EU Member States, private regulations are promulgated by the national football associations at the domestic level. Furthermore, in between the FIFA and the Member State level is the regional EU level, which plays a limited role for the simple reason that the formal EU competence in the domain of sports (including football) is limited.[17] In fact, EU involvement with the regulation of football agents mostly derives from the perspective of the internal market (guaranteeing the free flow of persons and services) and from competition policy.[18] That implies that EU Member States actually have a conditional autonomy to regulate sports agents, as long as they respect basic principles of EU law, as well as (obviously) EU legislation.[19] That includes inter alia respecting the so-called Services Directive,[20] which does have relevance for

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15. *Id.*

16. *Id.*

17. Serhat Yilmaz, The EU & Players' Agents: A Theoretical Analysis of the EU's Intervention into the Regulation of Players' Agents in Europe 23–28 (Dec. 2015) (Ph.D. thesis, University of Westminster), available at: https://westminsterresearch.westminster.ac.uk/download/40cb50c8edf0f116070e4f186 835ab5d7fbd5d2889ee7f462 10c76b6228ab754/2951335/Yilmaz_Serhat_thesis.pdf.

18. *Id.* at 196.

19. *Id.* at 197.

20. Directive 2006/123 of the European Parliament and of the Council of 12 December 2006 on services in the internal market, *OJ* L376, 27.12.2006.

the regulation of the services provided by sports agents.

The regulation of football agents is of high economic importance (simply looking at the amounts of commission paid to them), and there is also a societal interest in regulating football agents (given the potential negative effects for the sport, risks of money laundering, etc.). Additionally, the topic is of significant interest from a comparative law perspective, given the differences in regulation between the various European countries. Also, the multi-governance aspect of the regulation is of interest, as there is private regulation at the international (FIFA) level as well as domestic regulation in the specific European countries, which (if they belong to the EU) still have to take into account the requirements of EU law.[21] Moreover, the regulation of sports agents exhibits interesting features of legal pluralism, as private and formal regulation co-exist at different levels of governance (between FIFA and formal legislation in Member States), and sometimes even within one EU Member State (where regulations of the national football association can co-exist with public rules). In order to keep the analysis within reasonable limits, we will not devote a great deal of attention to EU law, since, as we already indicated, EU law is of less relevance in this domain.[22] But we will provide a critical analysis of the regulation of sports agents in the EU, focusing both on the international (FIFA) level as well as on regulation in a few selected European countries. An overview of regulation of football agents at a general level within EU Member States has already been provided in earlier studies.[23] By focusing instead on a selection of jurisdictions we can acquire a better insight into the detailed working of the regulations. In order to provide a critical analysis of the regulations, we will employ a law and economics framework, as the economic approach to regulation has examined extensively the need for regulatory interventions with respect to professional services, but also to the type of instruments that would be appropriate to regulate such services.[24]

The structure of this contribution is as follows. First, we provide a theoretical framework concerning the need to regulate football agents and

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21. Many of the domestic regulations we will discuss, including those in England, were promulgated before Brexit. After Brexit, however, England is obviously no longer bound to the requirements of EU law. However, as it is still a European country (and a member of UEFA), it remains interesting to retain England in the analysis. At the same time, that explains why we refer to European countries or jurisdictions rather than to EU Member States, since post-Brexit the United Kingdom can no longer be qualified as such.

22. For a detailed account of the EU intervention in the regulation of players' agents in Europe, see Yilmaz, *supra* note 17.

23. *See* Parrish et al., *supra* note 6.

24. *See* Anthony Ogus & Qin Zhang, *Licensing Regimes: East and West*, 25 INT'L REV. L. & ECON. 124–142 (2005) ; Niels Philipsen, *The Law and Economics of Professional Regulation: What Does the Theory Teach China, in* ECONOMIC ANALYSIS OF LAW IN CHINA 112-150 (Thomas Eger, Michael Faure, & Naigen Zhang eds., 2007).

the appropriate instruments. Second, we present the evolution of the regulation at the international level of FIFA. This is followed by our examination of the regulatory framework in a few selected European jurisdictions. Lastly, Section V provides a critical comparative analysis, and Section VI concludes.

II. A THEORETICAL FRAMEWORK FOR THE REGULATION OF FOOTBALL AGENTS AND THEIR RESPECTIVE INSTRUMENTS

As was just mentioned in the introduction, we will use the economic approach to law to first discuss whether there is a need for regulating the services provided by sports agents. Then, we will address the different types of regulation, distinguishing between entry regulation and conduct regulation. Finally, we will briefly address the relevant literature, which focuses on potential relative advantages of private versus public regulation.

A. The Need for Regulation

The economic theory of regulation has advanced a number of reasons to regulate professional services in this space. Some of those arguments can also explain why a need to regulate the football agent may emerge.[25] The economic justifications for regulation usually depart from the concept of market failures. Even though the relationship between a player and an agent (or between a club and an intermediary for that matter) is in principle a contractual one where parties could maximize their own interests by negotiating an optimal contract for a variety of reasons, that ideal picture of the market may not always emerge. The failures of the market mechanism are then advanced as an argument for intervening and, in other words, not leaving it entirely to the parties themselves to determine with whom they wish to contract and to what terms they are subject. Regulation theory distinguishes four types of market failures, three of which could apply to the case of football agents.[26]

i. Information Asymmetries

The most likely candidate in terms of economic justifications for regulatory intervention is connected to the main reason why agents are needed by players in the first place, namely the existence of information asymmetries in player transfer and employment dealings. Players usually do not have substantial knowledge related to the transfer market. The same is the case for the specific conditions of employment. Certainly, if one

25. *See generally* Philipsen, *supra* note 24, at 112–150.

26. *See generally* HENRY M. BUTLER, CHRISTOPHER R. DRAHOZAL & JOANNA SHEPHARD, ECONOMIC ANALYSIS FOR LAWYERS 17–33 (3d ed., 2014).

compares the knowledge level of players with the clubs, it is clear that the informational advantage lies with the clubs. As a result, the players are undoubtedly in a disadvantageous position. One way for the players to remedy this information asymmetry is to retain an agent.[27] Compared to players, agents may have superior knowledge. They may be better at negotiating contractual conditions with clubs. Moreover, agents could have better information (at least than players) of the average salaries offered to players in the market. However, players do not only have insufficient information in their relationship toward the club. The same may obviously also apply in their relationship with the agent. In other words, the relationship between the player and the agent may also suffer from asymmetric information. This information asymmetry is not unique to the relationship between players and either clubs or agents. In the literature, it has been indicated that in many situations where professionals (like lawyers, accountants or architects) advise clients, there may be information asymmetry.[28] The main reason for this information asymmetry arises from the fact that judging the quality of the services to be provided by a professional may be extremely difficult for a client.[29] One reason is that a client can often be considered as a so-called "one-shotter," rather than a "repeat-player."[30] For most people, the use of the services of a professional (for example, an architect or a notary) happens only occasionally and for some even just once in a lifetime. As a result, most people do not have the opportunity to learn from repeated interactions. That is the principal reason why the information asymmetry in the professional relationship persists. The services offered by a professional are also referred to as "experience goods." This is a concept developed by Nelson, by which he referred to the fact that the quality of that particular good can only be assessed after the service has been delivered.[31] The fact that the relationship between the player and an agent can be characterized by information asymmetry has specific consequences.[32]

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27. *See* William Bull & Michael Faure, *Agents in the Sporting Field: A Law and Economics Perspective*, 22 INT'L SPORTS L.J. 17 (2021).

28. Philipsen, *supra* note 24, at 114.

29. *See* Benito Arruñada, *Managing Competition in Professional Services and the Burden of Inertia*, in EUROPEAN COMPETITION LAW ANNUAL 2004: THE RELATIONSHIP BETWEEN COMPETITION LAW AND (LIBERAL) PROFESSIONS 52 (Claus-Dieter Ehlemann & Isabela Atanasiu eds., 2006).

30. This distinction goes back on the seminal paper by Mark Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC. REV. 95 (1974).

31. *See* Philip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311 (1970); *see also* Philipsen, *supra* note 24, at 114.

32. *See* Bull & Faure, *supra* note 27.

A first problem that may arise is referred to as "adverse selection." Adverse selection was first pointed to by Akerlof, who referred to this in his famous paper "The Market for Lemons".[33] Akerlof showed that in case of information asymmetry a provider of high quality services may not be able to signal to a consumer the high quality of the particular services (or goods). As a result, a customer cannot reward a provider of services of a higher quality with a higher price. This follows from information asymmetry. Clients may not be able to recognize high quality services and would therefore not be willing to pay a higher price for those. By consequence, only low-quality services (and products) appear on the market, as a result of which the "market for lemons" emerges. This problem may especially appear in the case of professional services, as clients may not be able to recognize high quality services and service providers may have incentives to overstate the quality of their services. This is a problem that equally may emerge in the market for sports agents. This information asymmetry can therefore lead to adverse selection - players may not be able to distinguish good from bad quality services, resulting in the market mainly offering lower quality services over time.[34] Therefore, by virtue of adverse selection, a danger arises that a player could conclude a contract with an agent who may not be able to provide the high quality services on which the player counts. This problem is especially conceivable since the player (often being a so-called "one-shotter," rather than a "repeat-player") may not be able to distinguish good from bad services. The literature indicates that information asymmetry in the market for sports agents could lead to a widespread market failure because, in that particular market, "the potentially good quality sports agent does not have the incentive to be a good quality sports agent," with the possible consequence that "[t]he quality will decrease to the point, where all the sports agents have the same low-quality services."[35] The major problem with adverse selection (referred to as the lemon market) is that, by the end of the competitive process, low quality services (or products) could drive out high quality services. The result would be that only professionals offering low quality services would remain in the market. When players are not able to distinguish good from bad quality services, this results in players not rewarding good quality agents (offering high quality services) with a higher reward. It is for that reason that the literature has argued that market failure related to adverse selection is an important reason for regulation. The goal of the regulation would then be to remedy the lemon market (which leads to

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33. George A. Akerlof, *The Market for Lemons: Quality, Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

34. *See* Mark Smienk, *Regulation in the Market of Sports Agents: Or No Regulation at All?*, 3-4 INT'L SPORTS L.J. 70, 87 (2009).

35. *Id*.

only low quality, low-price services being provided). Minimum quality regulation could potentially result in better quality services being offered at a reasonable price.[36]

A second issue that can arise as a result of information asymmetry is moral hazard.[37] Whereas adverse selection rather causes a problem before the conclusion of a contract, moral hazard is an issue that arises *after* the contract has been concluded. It has especially been developed within the context of insurance. A risk-averse individual may demand coverage from an insurance company, but the fact that risk is removed from the insured (as a result of insurance coverage) may lead to a change of behavior that actually results in an increase in the probability of the risk materializing.[38] It is therefore related to the basic economic insight that when an individual is itself no longer exposed to risk, there will be no incentives to take precautionary efforts. The basic reason why moral hazard emerges (and that immediately shows the connection to the role of agents) is that there is a conflict of interest between a principal (the player) and the agent. In this particular relationship, the conflict of interest relates to the fact that the agent is supposed to promote the interests of the player (for which the contract is concluded), but at the same time, the agent also has their own interests to pursue. The bottom line is that the player will have an interest in the agent performing high quality services at a reasonable price, whereas the agent may try to extract the maximum amount of compensation for his services while performing a minimum effort. The fact that there is information asymmetry between the player and the agent may precisely facilitate this moral hazard, i.e., the agent not fully performing in furtherance of the player's interests. The moral hazard may not only lead to a situation whereby the agent would not fully act in the interest of the player (by engaging his best efforts); it could, for example, also lead to a situation whereby the agent would try to lure the player into concluding a contract with a club with which the agent has particular connections, even though that may not be optimal for the player. The problem arises when the agent starts pursuing his own interest, the consequences of which are not felt by the agent, but by the player (for example, a deal being concluded which is not in the interest of the player). In other words: "[t]he sports agent can earn money by making a good deal, but cannot lose any money (no risk involved). The risk of the failure of a contract is born [sic] by the athlete (principal). It could lead to more risk taking by the sports agent."[39]

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36. *See* Philipsen, *supra* note 24, at 114.

37. *Id.*

38. The phenomenon has been described in detail in relation to insurance by Steven Shavell, *Moral Hazard and Insurance*, Q.J. ECON. 541-562 (1970).

39. Smienk, *supra* note at 34, at 86; *see also* Bull & Faure, *supra* note 27, § 3.2.

The question as to whether there actually is a serious information asymmetry between the player on the one hand, and the agent on the other hand, is of course an empirical issue and may depend on particular facts and circumstances. Some players may be more knowledgeable (or could be repeat players in the transfer market), as a result of which information asymmetry should not necessarily be a major issue. In that case, they should be able to control the behavior of the agent and to monitor whether the agent is indeed acting in the interest of the player. One should therefore avoid general statements.[40] In this particular case, however, and particularly in situations where the players engage the agent first, the players may suffer from a lack of information. On the other hand, the agents are professionals specialized in this transfer market and thus have an information advantage. The danger of an information asymmetry is therefore profound. Moreover, the literature also indicates that there is a substantial danger of information asymmetry in the principal-agent relationship between the player and the agent. Ioannidis, for example, indicates that, in some cases, a contract between an agent and a player resulted in no benefit for the player, as common law principles of contract and employment law were ignored in the provision of advice by the agent.[41] It will be recalled that, as was mentioned in the introduction, several club managers argue that the agents would appear to have only their own interests in mind, rather than the interests of their clients.[42] Given those rumors, there indeed seems to be a serious problem of asymmetric information, which may justify regulating the profession of football agent.

ii. Negative Externalities

Information asymmetry is not the only market failure that could justify regulation. Another argument often advanced in economic theory in favor of regulatory intervention is the risk of a so-called negative external effect, also referred to as externalities.[43] An externality is generally the problem that a particular actor may engage in socially beneficial activities, whereby the activity could cause side effects that are not felt by the actor itself, but by third parties. To the extent that those negative effects for third parties impose costs rather than benefits on them, they are considered negative externalities. The question arises whether this risk of negative externalities could equally arise in situations where sports agents provide low-quality services. Theoretically, this could certainly be possible. One could imagine a scenario

40. *See* Philipsen, *supra* note 24, at 115.

41. Ioannidis, *supra* note 1, at 155.

42. *See id.*

43. *See generally* ANTHONY I. OGUS, REGULATION: LEGAL FORM AND ECONOMIC THEORY 18–19 (1994).

where the sports agent performs so poorly that a transfer occurs which not only has negative consequences for the player itself, but for the sport as a whole. Suppose that a wealth-maximizing transfer of a star player to a top club could take place but does not occur because of malpractice by the agent. In that case, it could be argued that it is not only the player that suffers, but also supporters of the clubs involved and potentially everyone who enjoys the sport. Even though this may theoretically be a possibility, it sounds indeed rather farfetched and theoretical. In the given example, one could imagine other remedies to make sure that the wealth-maximizing transfer would still take place. Moreover, if it did not take place, it is obviously not a given it would be due to poor performance on the part of the sports agent. Even if the sports agent were to (hypothetically) underperform, in such a high-profile case, others may intervene to make sure that a wealth-maximizing bargain still occurs between the player and the club that values the player most.[44] A problem may only arise if that bargaining would be impossible, for example, in the case of prohibitive transaction costs or high information costs. Only if one could show that there would indeed be a serious danger of the type of negative external effects described above, would there be an argument in favor of regulation. The regulation would in that particular case aim at improving the quality of services to be performed by the agent, in order to avoid negative external effects.[45]

Again, there are some rather alarming voices in the literature regarding how the behavior of football agents would negatively affect third parties as well. Sports agents who attempt to induce players to breach their existing representation agreements are of particular concern, as are those who engage in tax evasion and other questionable practices, which have the potential to harm the reputations of other parties.[46] That being so, there could indeed be strong arguments in favor of regulating the profession of football agents, also from this perspective.

iii. Restrictions on Competition

Another market failure that could potentially justify a regulatory intervention relates to restrictions of competition. Again, the question arises whether that is of any relevance for the area of sports agents. In theory, sports agents may conclude a (price) cartel, which could obviously constitute a serious restriction of competition. However, there is to the best of our knowledge no empirical evidence that those types of cartels have been concluded between sports agents. Moreover, even if there were evidence of

44. It is an application of the famous theorem developed by Ronald Coase, *The Problem of Social Cost*, J.L. & ECON. 1 (1960).

45. *See* Philipsen, *supra* note 24, at 115.

46. *See* Ioannidis, *supra* note 1, at 155.

those types of restrictions of competition, that should not necessarily be an argument in favor of a regulation of the professional services provided by a sports agent. The usual answer to restrictions of competition would be provided via competition law and policy.[47] This does not mean that there would not be any hindrance to competition on the market for football agents. Economic research in fact indicates that there is a large degree of concentration on the market, meaning that only a relatively limited number of sports agents always appear in most (important) transactions. Research has indicated that 50% of the entire representation market in the five major leagues in Europe is managed by 83 individual agents or agencies.[48] There ar only few agents that de facto play a significant role and attempts to enhance competition in the representation market have thus far failed.[49] But, again, this would be an argument in favor of competition law, rather than an argument in favor of professional regulation. There is, however, a reverse question that arises in some cases, which is whether professional regulation prescribing specific rules, for example, with respect to remuneration (like the recommendation in the FIFA 2015 RWI to cap fees at 3%), would be violating competition law.[50]

iv. Summary of Market Failures in Favor of Regulation

Information asymmetries, negative externalities, and restrictions of competition constitute the market failures that are considered to be the classic arguments in favor of regulation. This assumes, however, that a regulatory solution to remedy those problems would be drafted in the public interest. Another theoretical approach to regulation starts from a different assumption. In the so-called public choice theory, it has been assumed that special interest groups seek advantages ("rents") by demanding regulation in their interest from wealth-maximizing politicians.[51] This is also known as the economic theory of regulation.[52] The politicians would, on this view, draft regulation on a quid pro quo basis that benefits the interest groups in exchange for political support leading to their re-election. Olson has explained that special interest groups will be particularly successful if the

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47. Philipsen, *supra* note 24, at 115–16.

48. RAFFAELE POLI ET AL., FOOTBALL AGENTS IN THE BIGGEST FIVE EUROPEAN FOOTBALL MARKETS 76, CIES Football Observatory (Feb. 2012), available at https://football-observatory.com/IMG/pdf/report_agents_2012-2.pdf.

49. *Id.* at 77.

50. Yilmaz, *supra* note 17, at 52.

51. *See generally* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962).

52. *See* Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Richard Posner, *Theories of Economic Regulation*, BELL J. ECON. 335 (1974); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. 3 (1971).

information costs for the public at large (to find out that the regulation is the result of lobbying by interest groups) are high, whereas the transaction costs (for the group to get organized) are low.[53] One important instrument in this economic theory of regulation is that interest groups will try to use regulation as a barrier to market entry for competitors, a point stressed especially by Nobel Prize Winner George Stigler.[54] Both the public interest and private interest perspectives are useful in being able to provide an explanation for the regulatory landscape. The public interest theory can be used to explain that particular market failures (for example, information asymmetries or negative external effects) could be a valid reason for a regulatory intervention. At the same time, the private interest theory of regulation may point at the danger that the regulation that is introduced does not necessarily serve the public interest but may serve the private interests of specific lobby groups. This perspective is also useful to analyze the regulation of sports agents. Indeed, we did argue that there may be strong reasons (particularly the information asymmetry between the player and the agent) to regulate the profession of sports agents. However, private interest theory may point at the fact that the contents of the regulation go beyond what is necessary to remedy the market failure (for example, by imposing overly stringent requirements in order to create barriers to market entry). Often, the problem is indeed that there may as such be a public interest reason for regulation (finding its foundation in a market failure), but the content of the regulation also serves the interests of a specific lobby group.

Equally argued in the relevant literature concerning football agents, is the view that regulation is necessary. For example, Yilmaz equally discusses both economic and other arguments to justify regulation of sports in the EU.[55] In that respect he refers inter alia to the work of Sunstein, arguing that there are also substantive non-economic arguments for regulation.[56] In that respect he also cites the socio-cultural functions performed by sports, having the potential to deliver collective goals that enhance the general welfare of society.[57] Additionally, the aforementioned 2009 KEA Report advances several reasons for regulating sports agents' activities, distinguishing between, on the one hand, the aim of providing sports agents' activities with a legal basis and, on the other hand, the aim of protecting the image and reputation of the sport.[58] Even though the argument of protecting the

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53. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1971).

54. Stigler, *supra* note 53.

55. *See* Yilmaz, *supra* note 17, at 59–73.

56. *See id.* (citing CASS SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCIEVING THE REGULATORY STATE (1990)).

57. Yilmaz, *supra* note 17, at 62.

58. *See* KEA ET AL., *supra* note 7, at 66–68.

reputation and image of the sport is formulated differently, it aligns with the economic argument of preventing negative externalities. In sum, there are strong arguments to regulate the profession of sports agents, both from an economic perspective and from others.

B. Licensing, Certification, Conduct Regulation

Even when there may be well-founded (economic) justifications for regulating the activities of football agents, the question of what type of regulation would be required still needs to be answered. The most far-reaching regulatory intervention is to require the football agent to obtain a license in order to be allowed access to the profession; a less far-reaching intervention is certification, which merely protects the title of football agents. In addition to rules regulating access to the profession of football intermediary, the conduct of the profession can also be regulated.

i. Licensing

One possible instrument to be used in order to regulate the quality of services provided by a professional is licensing. Requiring a license from a professional could be an instrument to demand particular professional qualifications. Thus, licensing could fit into the public interest framework, as it could increase the quality of the services provided by a professional. From that perspective, licensing has been advanced as a solution to particular market failures such as adverse selection, moral hazard, and negative externalities.[59] However, licensing may equally create specific problems. The quality requirements that have to be met in order to obtain a license could lead to a price increase for the professional services. That price increase always entails a danger that clients will escape the licensed activity in order to look for cheaper alternatives or even resort to non-licensed activities on the black market.[60] There is empirical evidence showing that licensing does lead to higher prices but also to higher profits for the licensed professionals.[61] This confirms the hypothesis that licensing is often serving the interests of the regulated profession. Concerning football agents, the question arises as to what extent requiring a license from an agent would lead to higher quality of the services to be performed. In fact, it is doubtful that only requiring a license could remedy the mentioned problems of adverse selection related to information asymmetry. The problem is indeed that empirical evidence equally seems to indicate that licensing as such does not

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59. Niels Philipsen, *Professional Licencing and Self-Regulation in Europe and China: A Law and Economics Perspective, in* COMPETITION POLICY AND REGULATION 207 (Michael Faure & Xinzhu Zhang eds., 2011).

60. *Id.*

61. Philipsen, *supra* note 24, at 121.

affect the quality of the professional services performed.[62] One could argue that in the case of sports agents requiring a license, this could remove the "crooks" from the market (as they would not be able to meet the standards required for a license). One can, however, question whether merely requiring a license for a sports agent would necessarily lead to a higher quality of their services. This is exactly what FIFA did with the Players' Agents Regulations 1991, which created a system of compulsory licensing. Whether that would be an appropriate remedy as such to cure a market failure is therefore doubtful.

In this respect, it should also be recalled that, according to private interest theory, there are various interest groups that can benefit from licensing. This is certainly the case for the incumbent professionals who worked in the profession before licensing requirements were implemented, as they are usually "grandfathered," meaning that they do not have to comply with the new and stringent licensing requirements. However, politicians and the bureaucrats involved in the licensing mechanism could also benefit from the administrative requirements related to licensing insofar as it increases their power.[63] Moore therefore argues in an article titled "The Purpose of Licensing" that this purpose really is the creation of barriers to market entry.[64] Licensing protects incumbents and makes market entry for newcomers more difficult.[65] Some concerns include whether licensing creates barriers to market entry which are too high, as well as proportionality concerns. If there is indeed, as argued above, a market failure in the relationship between the football agent and the player (which could constitute a public interest argument for regulation), the question arises as to whether regulation should necessarily take the form of licensing.

ii. Certification

Another way of regulating professional services is certification. Certification does not necessarily require a license; it rather refers to the protection of a title. Only professionals who are certified can use a particular title. Licensing is often criticized by economists on the grounds that it creates barriers to market entry and therefore restricts competition. From an economic perspective, certification is less problematic. Certification does not necessarily reduce the number of players on the market (as does licensing). The main difference is that licensing controls the entry into the profession (thus limiting the number of professionals and creating serious

62. *Id*.

63. *See* Anthony Ogus & Qing Zhang, *Licencing Regimes East and West*, 25 INT'L REV. L. & ECON. 138, 141 (2005).

64. *See* Thomas G. Moore, *The Purpose of Licencing*, 4 J.L. & ECON. 93 (1961).

65. *See id.*

entry barriers), whereas certification only requires a professional to have particular qualifications in order to be certified without limiting entry into the profession.[66]

From an economic perspective, certification is therefore often preferred to licensing, on the condition that certification can remedy a particular market failure.[67] This could apply to the case of football agents as well. A certificate could in theory convey information that the certified professional has a particular level of training and capacity. In that sense, it could send a signal of trust to the potential clients and remedy the information asymmetry issue. At the same time, certification would have fewer restrictions on competition.

iii. Conduct Regulation

The earlier two measures discussed (licensing and certification) are referred to as entry regulation. These instruments control the entry into the profession (albeit, as just mentioned, licensing more strongly than certification). In addition, it is possible that regulation relates to the conduct of the profession. This is referred to as quality regulation or conduct regulation. These rules prescribe the conduct that is expected of a particular professional. In theory, conduct regulation would be less restrictive of competition than entry regulation (such as licensing) as it does not limit the entry to the profession. But clearly, in the case that conduct regulation would impose very stringent conditions upon the professional, it could be restrictive of competition as well. From an economic perspective, the question arises as to whether the quality regulation is of such a nature that it is needed to remedy a specific market failure (like information asymmetry) and whether it is proportional.[68] Quality regulation could take many different forms. One very far-reaching instrument is the regulation of the prices of the professional services. Price and fee-regulation constitute a severe restriction of competition. Economists are often critical of price regulation for the reason that it may be disproportionate compared to the market failure it is supposed to cure.[69]

C. Private or Public Regulation

One important element in regulation theory, and relevant not only from a theoretical but also a practical perspective, is whether the rules should be made by the government or by private entities. Self-regulation is usually considered as regulation by the regulated community itself. In the relevant

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66. *See* Carl Shapiro, *Investment, Moral Hazard and Occupational Licencing*, 53 REV. ECON. STUDIES 843 (1986).

67. Philipsen, *supra* note 60, at 205–06.

68. *See* Philipsen, *supra* note 24, at 118.

69. *Id.* at 118–19.

law and economics literature, several arguments have been presented in favor of self-regulation. One argument is that the regulated community often has the best information and could therefore be better able to regulate the quality of the services to be provided. The regulated community itself is often better able than the government to assess the risks involved with services and the appropriate regulatory response.[70] That argument could easily be applicable in the case of regulation of sports agents as well. After all, it may be very difficult for public authorities to acquire accurate information needed to set optimal regulations for the quality of the services to be provided by sports agents. Another argument in favor of self-regulation is that it might be less costly. Since the regulated community can obtain the information at lower costs, enforcement may also be easier, as spontaneous compliance could follow.[71] However, there are also substantial dangers involved with self-regulation. These are more particularly related to the above-mentioned private interest theory. The point is indeed that the regulated community could, via self-regulation, serve its own interests, rather than the public interests. One of the problems that may equally arise is that the regulated profession may not always have adequate incentives to effectively enforce stringent standards upon its own members. There is also evidence that in many cases self-regulatory organizations do not effectively monitor or enforce professional standards.[72]

After having sketched the theoretical starting points with respect to the regulation of football agents, we will now first address the actual regulations imposed upon sports agents at the international level by FIFA (III) and then in selected European Member States (IV).

III. REGULATION BY FIFA

It is worthwhile to start by sketching how the position of the football agent has been regulated at the international level through private regulation by FIFA. Although FIFA has regulated the profession de facto since the 1990s, there have been several important developments in the contents of this regulation since, including a deregulation in 2015; a development that is seriously criticized in the literature.

A. FIFA and Its Regulations

FIFA oversees international competition among the members of national football associations and, as such, it derives its regulatory powers from these

70. *See generally* James C. Miller, *The FTC and Voluntary Standards: Maximizing the Net Benefits of Self-Regulation*, 4 CATO J. 897 (1985).

71. *See* Philipsen, *supra* note 60, at 210.

72. *See* Roger Van den Bergh & Michael Faure, *Self-Regulation of the Professions in Belgium*, 11 INT'L REV. L. & ECON. 165 (1991).

same associations, which agree to grant this body the authority to set ground rules for all to follow and to adjudicate in disputes between members. Accordingly, football clubs and, in turn, the players who join them are required to consent to be subject to the regulations promulgated by these governing bodies, and to abide by them. Hence, they also submit themselves to the disciplinary and sanctioning powers of their national association and FIFA; and if they refuse or fail to do so, they are liable to be excluded from exercising their profession.

Unlike players, football agents do not fall directly under FIFA's regulatory powers, since neither this body nor its member associations have a pre-existing contractual relationship, whether direct or indirect, with football agents. Any regulations adopted by such bodies in respect of agents are applicable to – or, more precisely, enforceable against — them only to the extent that the agent submits to the FIFA or the national regulatory regime in the first place. It is possible, of course, for FIFA to enforce regulations against the football players and clubs who use agents that do not comply with them, but nevertheless FIFA does not exercise any direct authority over football agents. This is also the case for football associations at the national level. The regulations of national football associations have been of relevance to football agents because, as is stated in FIFA's Regulations on Working with Intermediaries of 2015, national associations retain the right to go beyond the minimum standards/requirements when implementing and enforcing the FIFA regulations, as they are contractually bound to do.[73] Conversely, continental confederations, such as the Union of European Football Associations (UEFA) in Europe, are not members of FIFA, though membership of a confederation constitutes a prerequisite for membership of FIFA. Their primary role is to represent their national member associations, as well as to organize and administer club (as well as international) competitions, including the regulation of those particular competitions — but their regulatory authority does not extend to the sport in general.

The first attempt by FIFA to regulate the football agents' profession dates back to the early 1990s, when it promulgated the FIFA Players' Agents Regulations 1991, which introduced a compulsory FIFA agents' license for the purposes of obtaining access to the profession. Any person who wished to act as a representative of a footballer or football club would in principle have to be in possession of this license in order to be entitled to legitimately carry out that activity (with a few exceptions for qualified lawyers and players' relatives). Initially, applicants had to undertake an interview process that would test their knowledge and ability to carry out this type of business. Later, after revisions to the regulations in 1994 and 1995,

73. *See* Art. 1(3) of the current FIFA Regulations on Working with Intermediaries 2015.

applicants were required to pass a qualifying exam assessing their technical competences (in terms of their knowledge of the sport as well as relevant rules and regulations).[74] The licensee also needed to satisfy particular ethical conditions and to provide financial guarantees.[75] As noted by Yilmaz, the European Commission objected to these FIFA Regulations on the ground that they would limit access to the profession,[76] and it went as far as to state that the ban on using unlicensed agents and the exclusion of legal persons from player representation may violate competition law.[77] In response, FIFA eliminated a number of these restrictions in its 2001 Players' Agents Regulations. When subsequently confronted with a dispute surrounding the legality of these regulations that had been initiated by the French agent Laurent Piau, the erstwhile European Court of First Instance declared in a judgment of 2006 that the FIFA Regulations did not infringe EU competition rules and also affirmed FIFA's entitlement to lay down qualitative restrictions on agents,[78] which had met approval in the literature.[79]

The 1991 regulations established that the license was conferred centrally by FIFA itself. This was changed in 2001, when the revised regulations required players' agents to obtain the license directly from the respective member associations, which for their part were under the obligation to implement and enforce the FIFA Regulations.[80] The aim of the 1991 regulations was to allow FIFA to extend its reach to football agents, insofar as license-holders would be subject to the private standards on which the granting of the license was conditional, and particularly ethical rules governing the relationship with their clients and the exercise of their activities. Infringements of these standards by licensed agents could be sanctioned, for instance, by the imposition of a fine on the agent, if not the withdrawal of their license altogether.[81] In addition, clubs and players could be subject to a number of sanctions if they engaged unlicensed agents to assist them in their dealings.[82] However, the new regulations fell short of their aim, since a large majority of international football transfers continued to be conducted by unlicensed agents,[83] who, being unlicensed, were not

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74. *See* GIAMBATTISTA ROSSI ET AL., SPORTS AGENTS AND LABOUR MARKETS: EVIDENCE FROM WORLD FOOTBALL 15 (2016).

75. Rossi, *supra* note 2, at 134.

76. Yilmaz, *supra* note 17, at 34.

77. Ioannidis, *supra* note 1, at 157.

78. Case T-193/02, *Laurent Piau v. Commission of the European Communities* (2005), ECR II-209 and Order of the Court of 23 February 2006, ECR 2006, I-37.

79. *See* Ioannidis, *supra* note 1, at 157; Yilmaz, *supra* note 17, at 34–36.

80. FIFA Players' Agents Regulations 1991, Art. 1.

81. FIFA Players' Agents Regulations 1991, Art. 15.

82. *See* Rossi et al., *supra* note 74, at 116.

83. By FIFA's own estimates, almost twenty years after the introduction of its

subject to the standards imposed by FIFA themselves.

B. The Regulations on Working with Intermediaries (RWI)

Once FIFA became aware of the fact that roughly ¾ of all international transfers continued to take place through unlicensed agents, it undertook a series of consultations concerning further revisions to the original regulations.[84] A reform of 2008 was followed by the reform of FIFA's Regulations in 2015, which eliminated the compulsory license and replaced it with a set of minimum standards required of agents. This version of the regulations, renamed the FIFA Regulations on Working with Intermediaries, has remained in force until January 9, 2023, when it was replaced by the new FIFA Football Agent Regulations. It marked a notable departure from the previous system, as it partially deregulated the profession of football intermediaries (as football agents would henceforth be known). Applicants no longer needed to undertake an examination but were instead merely required to register with a competent national member association.[85] This can be done by simply depositing with that association the representation contract that the intermediary concludes with a player and/or club, provided the association is 'satisfied that the intermediary involved has an impeccable reputation'.[86] The 2015 RWI therefore marked an ideological shift. The licensing requirement regulating professional access for particular people was replaced with a requirement to register the activity being carried out (that is to say, the transfer and the football agent's involvement therein).[87] This replacement of licensing by a mandatory registration of agents' involvement in individual transactions is considered as a form of deregulation in the literature.[88]

Once registered, the football intermediaries are again bound to abide by the standards in the FIFA Regulations governing the conduct of the occupation (not to mention the general FIFA Code of Ethics, which prescribes a range of rules of conduct).[89] Under the 2015 regulations, these

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licensing system, around 70% of international football transfers were still being conducted by unlicensed agents. Rossi, *supra* note 2, at 135. Having said that, others have pointed out that FIFA's figures (based on its Transfer Matching System, or TMS) also show that the percentage is closer to 50% if one were to consider only those transfers involving payment of a transfer fee. Nick De Marco & Daniel Lowen, *Football Intermediaries, Regulation and Legal Disputes*, in FOOTBALL AND THE LAW 213 (Nick De Marco ed., 2018).

84. *See* Rossi et al., *supra* note 74, at 121.

85. *See* FIFA Regulations on Working with Intermediaries 2015, particularly arts. 2(3) and 3.

86. FIFA Regulations on Working with Intermediaries 2015, Art. 4.

87. Rossi, *supra* note 2, at 136.

88. Ioannidis, *supra* note 1, at 159–60.

89. Article 2(1) of the FIFA Code of Ethics of 2020 (specifying that it covers

include the duty to disclose earnings[90] and actual or potential conflicts of interest (and in such circumstances the duty to obtain the written consent of the parties before initiating negotiations),[91] which can be sanctioned by national member associations.[92]

The RWI also set a benchmark for the level of remuneration of intermediaries, '[w]hile taking into account the relevant national regulations . . . and as a recommendation', namely 3% of the player's basic gross income in the case of an employment contract, or 3% of the transfer fee in the case of a transfer agreement.[93] The 3% fee is merely a recommendation, yet the literature already warns that it could be seen as price fixing and therefore proscribed under competition law.[94] If the 3% rule were not a recommendation but rather mandatory, it would certainly violate competition law.[95]

In sum, by lowering the basic entry requirements for persons to legitimately act as intermediaries (again, in the eyes of FIFA), the FIFA Regulations of 2015 reflected an attempt to bring more football agents within FIFA's – and hence FIFA's member associations' – private regulatory authority over the conduct of the occupation. As one commentator puts it, FIFA's "decision to streamline its intermediaries came in light of the challenges it faced in attempting to regulate actors over whom the governing body had no control."[96]

C. The Critics

These changes incorporated in the RWI 2015 have been the object of substantial criticism. It has, for example, been contended that the 2015 Regulations were ineffective in the sense that they have not achieved their goals.[97] The fact that the licensing requirement was abolished also gave rise to a wide range of approaches.[98] The danger of the deregulation by FIFA is that many unqualified individuals could since enter the transfer market acting as sports agents.[99] Since access to the transfer market was made significantly

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intermediaries among others).

90. FIFA Regulations on Working with Intermediaries 2015, Art. 6(1).

91. FIFA Regulations on Working with Intermediaries 2015, Art. 8(2).

92. FIFA Regulations on Working with Intermediaries 2015, Art. 9.

93. FIFA Regulations on Working with Intermediaries 2015, Art. 7(3).

94. *See* Yilmaz, *supra* note 17, at 52.

95. Ioannidis, *supra* note 1, at 160.

96. Lisa Masteralexis, *Regulating Player Agents*, in RESEARCH HANDBOOK OF EMPLOYMENT RELATIONS IN SPORTS 99, 120 (Michael Barry et al. eds., 2016).

97. *See* MAESCHALCK ET AL., SPORTRECHT 243 (2015).

98. *See* Rossi, *supra* note 2, at 136.

99. Yilmaz, *supra* note 17, at 52.

easier (by removing most barriers), problems could arise, especially where there is a lack of imposition of sanctions, for example, if an unregistered agent were to lure a player into breaching their contract of representation with another agent.[100] There was now a danger that individuals who have no knowledge of football law (or employment/contract law), have not taken an exam, and do not have financial security (like insurance), would act as intermediaries.[101] The RWI 2015 has also been blamed for leading to a rise in agents' fees, to a lowering of standards and to a lack of uniformity, which could give rise to imbalances in the working conditions of intermediaries in different countries.[102] According to some stakeholders, the deregulation by FIFA, abandoning its license requirement for intermediaries and leaving enforcement to national associations, had the potential to give rise to something of a "wild west" in which less stringent registration requirements are frequently exploited by agents to dupe players and especially young footballers, particularly in countries characterized by large-scale corruption.[103] The fear has also been expressed that this deregulation would lead to a greater number of players signing contracts with agents who do not possess the requisite skills and qualifications, and, as a result, the potential for the youngest players being exploited.[104] The report produced by KEA and ECORYS for the European Commission in 2018 argues that "[t]he changes introduced in 2015 are in any case correlated with a sharp increase in fees for intermediaries stemming from international transfers: from USD 238 million in 2014, intermediaries' commissions reached USD 446 million in 2017, which represents an 87% increase over four years."[105] There was equal criticism of the recommended financial cap on remuneration, on the basis that this would reduce the motivations for agents to attain the most preferable terms for the players.[106]

D. Recent Developments

This primer of the 2015 RWI demonstrates that these regulations have invited significant criticism, especially from those agents who were licensed

100. Ioannidis, *supra* note 1, at 156, 159–160.

101. Ioannidis, *supra* note 1, at 161.

102. This was the result of a study by KEA EUROPEAN AFFAIRS & ECORYS, AN UPDATE ON CHANGE DRIVERS AND ECONOMIC AND LEGAL IMPLICATIONS OF TRANSFERS OF PLAYERS: FINAL REPORT TO THE DG EDUCATION, YOUTH, CULTURE AND SPORTS OF THE EUROPEAN COMMISSION (2018), available at https://ec.europa.eu/sport/sites/sport/files/report-transfer-of-players-2018-en.pdf; *see also* De Marco & Lowen, *supra* note 83, at 215.

103. *See* KEA & ECORYS, *supra* note 101, at 46.

104. *Id*.

105. *Id*.

106. KEA & ECORYS, *supra* note 101, at 46–47.

under the previous system. The result of this widespread criticism is that FIFA has not reformed these regulations again with the adoption of the new FIFA Football Agent Regulations ("FFAR"), and this latest reform marks a return to the previous licensing requirement. In any event, it should be remembered that the regulations implemented by FIFA national member associations are also applicable to those persons, whether natural or legal, who are registered with those associations. This entails that these registered persons will also be bound by any additional requirements that the national association may have promulgated, which may go beyond the minimum standards provided in FIFA's Regulations. Football agents may therefore also have to comply with domestic private regulation. Moreover, mandatory laws and national legislative norms apply to the national member associations and their implementing regulations.[107] Hence, with this in mind, we will now shift the focus to the domestic level in order to see how the FIFA Regulations have been implemented in a few selected European jurisdictions.

Before jumping into the regulation at domestic level, though, we should reiterate that the regulations, both in regard to transfers and intermediaries, have again been the subject of reform at the level of FIFA. In the fall of 2018, the FIFA Football Stakeholders Committee approved a reform package concerning the transfer system. The Committee endorsed principles that resulted, among other things, in the establishment of a "clearing house" entity, which would regulate and process player transfers. This in turn would deter fraudulent business dealings and contracting procedures, and ultimately safeguard the stability of the sport. The clearing house entity would be able to streamline and centralize payments relating to player transfers (including agents' commissions and eventually transfer fees). The Committee additionally proffered more stringent rules to govern agents with a renewed licensing and registration regime through a transfer matching system, as well as the introduction of restrictions on agent compensation and representation.[108] These proposals have recently led to the adoption of new formal rules in the form of the FFAR of 2023.

IV. REGULATION IN SELECTED EUROPEAN COUNTRIES

In various earlier studies attention has been paid to the regulation of sports agents at the domestic level. In one study, regulatory provisions in a few European jurisdictions were addressed;[109] in others, the regulation in all

107. FIFA Regulations on Working with Intermediaries 2015, Art. 1(2).

108. FIFA, *FIFA Council Makes Key Decisions for the Future of Football Development*, (Oct. 26, 2018), https://www.fifa.com/who-we-are/news/fifa-council-makes-key-decisions-for-the-future-of-football-development.

109. *See* KEA et al., *supra* note 7, at 157–165.

European Member States was sketched at a general level, more particularly regarding the implementation of the RWI.[110] We will focus on the regulation of transfer agents in four European countries, namely Belgium, England, France and Italy. Originally, all were EU Member States, but since Brexit that is no longer the case for England as a constituent part of the UK. Whereas England, France and Italy represent the larger leagues, Belgium is undoubtedly smaller and precisely for that reason, also intriguing to study. Belgium merits attention as there has been a lot of debate on the regulation of sports agents in that jurisdiction in light of the implementation of the RWI. England and France are interesting as they to some extent have opposite regimes: whereas England largely relies on private regulation via the Football Association (FA), in France the position of football agent is formally regulated in the *Code du sport*. The Italian system is again closer to the English as the intermediary is regulated in the Regulations of the Football Association, at least predominantly, while being grounded in public law. We will discuss the regulations in these four selected European countries, as they nicely illustrate the diversity of regulatory approaches to implementing the RWI 2015 that currently exists. One should, however, be slightly careful in referring to the "implementation" of the FIFA Regulations at the domestic level. As far as private regulation is concerned (for example, in England and Italy), the goal of the regulations adopted by the national football associations is undoubtedly to implement the FIFA Regulations. But in France, for example, where the intermediary profession is mainly governed through public regulation in the *Code du sport*, it certainly cannot be said that that Code constitutes an implementation of the private regulations of FIFA. In Belgium the situation is slightly mixed, insofar as the public regulations concerning transfer agents in that country do refer to the FIFA Regulations. This regulatory diversity will also allow a comparison with the theoretical framework presented in Section II.

For each of the above-mentioned jurisdictions a few general features will be sketched, after which we will discuss specific issues, such as the regulatory basis (statute or private regulation), the costs of registration, the specific reputational requirements, the regulation of fees and of conflict of interests.

A. Belgium

The various reports summarizing the regulation of football intermediaries in Europe mention that there are seven countries that have mandatory legislation specifically aimed at football agents, but do not include Belgium in that list.[111] This is probably due to the fact that, whereas there is no

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110. *See* Parrish et al., *supra* note 6.

111. Parrish et al., *supra* note 6, at 184–97 (mentioning Bulgaria, Croatia, France,

national law at the federal level in Belgium regulating sports agents, there are regional decrees from the Brussels, Flanders and Walloon regions, as the regulatory competences in this domain have been largely allocated to the regional level.[112] The Belgian regulation belongs to the legislation related to labor intermediation. In that respect, a specific chapter dealing with sports agents was included in a Decree of 10 December 2010.[113] Separate regulations exist for the Brussels, Flemish and Walloon regions. The various regulations did require a license for sports agents, the importance of which was shown in a Decision of the Court of Appeals of Brussels of 5 May 2015.[114] A Dutch company had acted as agent for the player Boussoufa and filed the lawsuit against Anderlecht for intermediation. Anderlecht promised by contract to pay a commission to the agent of 7% of the gross wages that the club would pay to the player during the time of the labor agreement, as well as a commission in case of a transfer. As the player was indeed transferred, the agent demanded its commission. Anderlecht, however, claimed that the contract violated public order and would therefore be null and void. Anderlecht based itself on an executive order of the Brussels Region of 15 April 2004, holding that an agent needed a license to intermediate in labor contracts. The agent did not have such a license.

The court held that the Brussels Regulation aims at the protection of public interests, more particularly the protection of employees and the limitation of abuses. Given the fact that the regulation is of public order, parties cannot deviate from it by contract. The court, moreover, took the view that the agent could not call on the European Services Directive 2006/123 (to argue that the Brussels Regulation should not be applied), as the Services Directive did not exist when the contract between the parties was drafted. The agents' claim was therefore rejected.

The regulation of sports agents in the Flemish Region has a long history. A sports agent needed a registration from the Flemish Government on the basis of a Decree of 13 April 1999. The registration requirement was later abrogated as a result of the European Services Directive, which promotes the free exercise of professional services between Member States. A requirement to register as it was contained in the Decree of 13 April 1999 was considered as a restriction on the free movement of services, which could only be justified on the basis of public order, public safety, public health or environmental protection. The necessity of such a measure could not be demonstrated sufficiently with respect to service providers located in

Greece, Hungary, Italy, and Lithuania).

112. Maeschalck, Vermeersch & De Sadeleer, *supra* note 97, at 231–36.

113. Most recently amended by a Decree of 29 March 2019 and a Decision of the Flemish Executive of 7 June 2019.

114. Maeschalck, Vermeersch & De Sadeleer, *supra* note 97, at 233.

another EU Member State. The requirement to register could have been retained for service providers located in the Flemish Region, but that would have led to the perverse result that the registration requirement would only apply to service providers active in the Flemish Region and not to those located abroad. As a result, the registration requirement was totally abolished.

As a result of the most recent changes in 2019, there is a duty to register for sports agents and an obligation to provide a financial guarantee of €25,000. The Explanatory Memorandum discusses in detail the compatibility of the requirement to register and to provide a guarantee with the European Services Directive. It argues that these measures are necessary in order to guarantee a control on the activity of sports agents. The registration is not an authorization. In other words, the administrative agency does not verify whether the sports agent meets the regulatory conditions. There is only ex post control. It is therefore argued that this regulation complies with the proportionality requirement of the European Services Directive.

The Flemish Decree concerning private labor intermediation is applicable to every service of private labor intermediation, provided both by legal entities as well as by individuals. There are a large number of conditions with which the agent has to comply, related inter alia to criteria concerning professional expertise. For a sports agent it is also required that there are no debts, fines or interest to be paid to the social security agencies.

The old Flemish regulation provided for a maximum remuneration of 7% of the total gross income of the player. That maximum was, however, removed in the Decree of 10 December 2010, as it was considered a violation of the European Services Directive, and there was resistance against it from stakeholders. The current Decree provides that a commission fee can be charged, on the condition that the fee is specifically arranged in a written contract between the agent and the player, that the player explicitly agrees to the commission and that both parties possess an original copy of the contract.[115] The amendment of 2019 introduced a prohibition on charging a commission for services of private labor intermediation for a sports player who is a minor.

In addition to these formal regulations with a statutory basis, intermediaries in Belgium are also regulated by the (private) regulations of the Royal Belgian Football Association (RBFA). Intermediaries are subject to a mandatory registration, with an annual registration fee of €500. Registration will automatically be rejected if the criminal record shows a confirmed conviction for a felony or a financial crime (such as match fixing)

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115. Maeschalck, Vermeersch & De Sadeleer, *supra* note 97, at 239.

in the five years preceding the application, or a conviction for a crime with regard to a minor, or if there is a final decision issued by FIFA or by another association that prevents the intermediary from registering due to issues related to corruption or match fixing.[116]

There is a regulation of conflicts of interest providing that the intermediary cannot act, either directly or indirectly, for both the player and the club. An intermediary also cannot be involved in a transaction for both the selling club as well as the new club of the player.

As far as remuneration is concerned, the regulations provide that the remuneration paid to an intermediary by a player shall be calculated on the basis of the player's gross income for the duration of his/her employment contract.[117] The previous version of the Belgian regulations recommended, in light of the FIFA RWI, to cap the remuneration at 3%, but that condition has been removed from the latest version of the regulations. According to a national expert, the abolition of the exam for sports agents has led to an exponential increase in the number of intermediaries. The respondent fears that if there is no appropriate control and enforcement, abuses may take place.[118] The average gross income per intermediary per year amounts to €65,000 and the recommendation of a 3% cap would appear to be systematically disregarded by the sector.[119]

A study holds that the Belgian situation is complex since each region (Flanders, Brussels and the Walloon Region) has its own registration system and the conditions of interregional equivalents could be a source of uncertainty.[120] The same study holds that the Flemish Decree corresponds with Article 16 of the European Services Directive (by requiring registration only if it concerns a continuous activity). The Walloon and Brussels Regulations, however, also require complete authorization, even in the case of an occasional service provision, which may be at odds with Article 16 of the Services Directive.[121]

B. England

In England, the national member association — the Football Association (FA) — gave effect to the RWI through the FA Regulations on Working with Intermediaries, effective April 1, 2015. These abolished the FA agents' license that had existed previously and took over the RWI's minimum registration requirement for access to the intermediary profession, requiring

116. Parrish et al., *supra* note 6, at 13–19.
117. *Id.*
118. *Id.* at 18.
119. *Id.* at 18-19.
120. KEA et al., *supra* note 7, at 161.
121. *See id.* at 163.

agents to enter into a representation contract with the player or club 'prior to that Intermediary carrying out any Intermediary Activity on his or its behalf',[122] and to lodge that contract with the FA 'within 10 days of being executed and in any event no later than at the time of the registration of a Transaction by the Association',[123] after which the FA will apply a test of good character in order to assess the impeccable reputation of the agent. This test lists a series of disqualifying conditions, including any unspent conviction for a violent, financial or dishonest crime, any suspension or bad from involvement in the administration of or participation in a sport for at least six months, and any suspension or disqualification by a professional body. These conditions are ongoing, meaning registered intermediaries must confirm that they continue to meet the criteria every time that they carry out intermediary activity in relation to a transaction, and notify the FA of any change in circumstances relating to them within ten days thereof. However, the FA regulations also include a set of further conditions for the representation contract itself and duties to which intermediaries agree by registering, which are based on a body of rules that had already been cultivated and refined by the FA within its former Football Agents Regulations of 2009.[124] The intermediary will be charged £500 (plus VAT) for the first registration period of one year and £250 (plus VAT) for every annual renewal.[125] With respect to the contract itself, an agreement with a player is limited to a maximum duration of two years,[126] and a minor cannot be party to such a contract without their parent's or guardian's written consent.[127] Furthermore, with respect to duties, the FA regulations include additional, comprehensive provisions concerning conflicts of interest and duties of disclosure. With regard to the former, intermediaries are, for instance, prohibited from having an interest, such as a business or proprietary interest, in a club or in any player transfer compensation and from offering any benefits or favors in return for preferential treatment from a club or player.[128] Also, an intermediary may only act on behalf of one party to a transaction unless additional requirements regarding consent and disclosure for dual or multiple representation are met.[129] As for the latter, intermediaries must disclose inter alia any remunerated contractual or other arrangement that they may have with any player, club, club official or

122. FA Regulations on Working with Intermediaries 2015, Rule B1.
123. FA Regulations on Working with Intermediaries 2015, Rule B3.
124. *See* De Marco & Lowen, *supra* note 83, at 217.
125. Parrish et al., *supra* note 6, at 46.
126. FA Regulations on Working with Intermediaries 2015, Rule B10.
127. FA Regulations on Working with Intermediaries 2015, Rule B9.
128. *See* FA Regulations on Working with Intermediaries 2015, Rule E4-7.
129. FA Regulations on Working with Intermediaries 2015, Rule E1.

manager, not to mention any actual or potential conflict of interest they might have in relation to a transaction.[130] Beyond the FIFA benchmark for remuneration of 3%, the regulations also include other provisions regulating the means and recording of payments, which must be processed through the FA's clearing house.[131] Additionally, in England the perception is that the non-binding 3% cap is not followed in practice but has instead "been largely ignored by the market and a commission rate of 5% (and in some cases higher) remains prevalent."[132] Some national experts are, however, opposed to a stricter cap, on the basis that it would drive all the payments out of the system and therefore out of the FA's control.[133] All of these regulations are enforceable by the FA, with any breach of the private standards contained therein deemed to constitute misconduct under the FA's Rules, to be 'dealt with in accordance with the Rules of The Association and . . . determined by a Regulatory Commission of the Association.'[134] The FA may sanction agents by fines, suspensions, or even permanent bans, in accordance with the procedures set out in the FA's Regulations for Football Association Disciplinary Action.[135]

Accordingly, it is primarily the FA that regulates access to and the performance of the intermediary profession in England, which, in line with FIFA's RWI, set forth relatively low entry requirements, although with stricter conduct regulation. Beyond these regulations, certain national legal requirements also regulate the activities of intermediaries, in particular the common law of agency, which prescribes general private law duties of care, openness and good faith. Indeed, the requirement for an intermediary to act in accordance with general fiduciary duties is also recognized in the FA regulations themselves.[136] This reinforces the obligation of the intermediary to always act in the best interests of the player or club for whom they act, and therefore to disclose any realistic possibility of a conflict of interest that, if kept secret, would constitute a breach of their duty of good faith towards their client. As much was reaffirmed by the Court of Appeal in 2009 in the case of *Imageview Management Ltd v.* Jack,[137] which involved an agency company that had negotiated a contract for a client footballer with a UK club (in fact a Scottish club, Dundee United), while at the same time making a "side deal" with that club to obtain the footballer's work permit in return for

130. *See* FA Regulations on Working with Intermediaries 2015, Rule E8-10.
131. *See* FA Regulations on Working with Intermediaries 2015, Rule C.
132. De Marco & Lowen, *supra* note 83, at 222.
133. Parrish et al., *supra* note 6, at 49.
134. FA Regulations on Working with Intermediaries 2015, Rule F1.
135. *See* Parrish et al., *supra* note 6, at 49.
136. See FA Regulations on Working with Intermediaries 2015, Rule A7.
137. [2009] EWCA Civ 63.

a fee. The Court held that, by failing to disclose this side deal and resulting payment to the footballer, the agent had breached their common law fiduciary duty by reason of a real conflict of interest. To quote from the judgment of Lord Justice Jacob, "[T]he law imposes on agents high standards. Footballers' agents are not exempt from these. An agent's own personal interests come entirely second to the interest of his client. If you undertake to act for a man you must act 100%, body and soul, for him. You must act as if you were him. You must not allow your own interest to get in the way without telling him."[138] In addition, on top of such common law duties, there are the rules laid down in some legislative instruments, such as the Fraud Act 2006, the Bribery Act 2010, and the Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2010. However, the overall regulatory approach in England takes a minimum requirements stance, focusing more on professional conduct, particularly transparency, than on accessibility. Public standards for the profession are largely nonexistent.

C. France

The applicable regulatory framework in France stands in stark contrast to that in England, primarily because the sports intermediaries' profession in France is governed in the main by statutory law laid down in the *Code du sport*. This special codified law, which is long-established, contains various articles applicable to sports agents under national law. It is true that the French national football association, the *Fédération française de football* (FFF), has also formulated specific rules regulating football agents (the *FFF Règlement des agents sportifs*), but for the most part these regulations reproduce the state law regulating sports agency set out in the *Code du sport*, while also adding certain particulars at the technical level. In fact, being mandatory public laws, the collection of provisions applicable to sporting intermediaries in the *Code du sport* takes precedence over any private regulations.[139] This explains why the RWI were not actually been implemented in the French jurisdiction, and instead the FFF has notified FIFA of the RWI's inapplicability in France.[140]

The relevant articles of the *Code du sport* lay down strict requirements and standards on sports agency, including notably the mandatory requirement "that the agent (i) hold an official licence to operate a business as a sports agent (the conditions for obtaining which are very strictly detailed); (ii) comply with certain good practice rules; (iii) submit to the

138. Imageview Management Ltd v. Jack [2009] EWCA Civ 63, at 6.

139. Indeed, as much is acknowledged in the FIFA Regulations on Working with Intermediaries 2015, Art. 1(2).

140. See Parrish et al., *supra* note 6, at 58.

disciplinary procedures of the sports association."[141] In this sense, the pertinent national legislation in France (which applies not only to football but to all sports) clearly goes further than the base standards provided by the RWI, insofar as it obliges intermediaries to obtain a license from the FFF Sports Agents Commission, thereby coupling standards of professional conduct with a relatively stringent precondition for access to the profession. In order to be so licensed, the applicant must pass a written examination, which is composed of both a general and a specific part, testing awareness and understanding of relevant legal and sporting rules, including specifically in the footballing domain.[142] The FFF Sports Agents Commission also determines, on an annual basis, the registration fees payable by applicants for the license, which at the time of writing amounts to €1,000.[143] There are strict "conditions of integrity that prohibit access to the profession, for instance, to persons responsible for acts giving rise to a criminal conviction that are contrary to the honor, probity or rules of morality."[144] The same is true for "persons affected by personal bankruptcy or a ban on management . . . ."[145] Additionally, the legislation also prescribes several rigorous transparency and reporting obligations and conflict of interest-related requirements that licensed agents must comply with, some of which are significantly more restrictive than those provided by the RWI.[146] The former includes professional and accounting reporting obligations,[147] as well as obligations of contractual transparency, particularly in the form of the duty to transmit the agency contract to the federation.[148] The latter includes, for example, an outright prohibition of the so-called *double mandat* (i.e., dual representation), meaning a sports agent may only act on behalf of a contracting player or club, but not both simultaneously.[149] While comparable in essence to the interdiction that is contained in Article 1161 of the *Code civil*, the corresponding provision of the *Code du sport* goes further

141. Parrish et al., *supra* note 6, at 57.

142. *Code du sport*, Art. L.222-7 and *FFF Règlement des agents sportifs*, Art. 3.4. See also GRÉGORY SINGER, *Ethique et transfert du sportif*, in L'ÉTHIQUE EN MATIÈRE SPORTIVE 36 (Delphine Gardes & Lionel Miniato eds., 2016).

143. *FFF Règlement des agents sportifs*, Art. 3.3.

144. Parrish et al., *supra* note 6, at 62. *Cf. FFF Règlement des agents sportifs*, Art. 3.1(6).

145. Parrish et al., *supra* note 6, at 62.

146. *See* Frédéric Buy, *Les Intermédiaires Sportifs*, *in* L'INTERMEDIATION PROFESSIONNELLE: DE LA DECOUVERTE D'UNE MYRIADE DE DROIT SPECIAUX (PATENTS) A LA RECHERCHE D'UN AUTHENTIQUE DROIT COMMUN (LATENT) 44 ff. (Moussa Thioye ed., 2016).

147. *Code du sport*, Art. R.222-31.

148. *Code du sport*, Art. R.222-32.

149. *Code du sport*, Art. L.222-17.

in this respect insofar as it offers no escape, since any agreement between the parties to the contrary is deemed null and void.[150] If licensed agents do not comply, they risk disciplinary fines as well as temporary suspension or permanent revocation of their license. Meanwhile, unlicensed agents who carry on the occupation of sports agency regardless can be held criminally liable, with punishment including not just a hefty fine of at least €30,000, but even two year's imprisonment and this may be accompanied by a temporary or permanent ban on exercising the profession.[151]

French law caps the remuneration of sports agents at "10% of the amount of the contract signed by the parties it has brought together."[152] A legislative change of 2012[153] allowed delegated sports associations (including the FFF) to set a cap which is less than 10%.[154] But questions are being asked with respect to the legitimacy of the state's regulation of the price of this service.[155] One national expert contended that "[t]he remuneration of a service such as sports intermediaries must be freely determined by the laws of supply and demand," and therefore not by a price cap.[156]

Thus, the French regulations with regard to sports agents stand in stark contrast to those of England because they are derived predominantly from rules of public origin, and because those rules focus on high standards for access to the profession as much as professional conduct.

D. Italy

By means of a 'Budget Law' of 2017, adopted after a protracted campaign by Italian football agents, the Italian Parliament enacted a new regulatory framework for sports agents, including football agents, which entered into force on January 1, 2018.[157] This Act requires all sports intermediaries in Italy to be registered with the National Olympic Committee (the *Comitato Olimpico Nazionale Italiano*, or CONI), who need to do so in order to be allowed to register, in turn, with the relevant national sporting federations, including the football association (the *Federazione Italiana Giuoco Calcio*, or FIGC). For this purpose, applicants must pass a habilitation exam designed to determine their suitability (unless they already passed the exam that existed before the 2015 deregulation by FIFA).[158] Only CONI-

150. Buy, *supra* note 148, at 42.
151. *Code du sport*, Art. L.222-20 and L.222-21.
152. Parrish et al., *supra* note 6, at 64.
153. *Loi n. 2012-158 du 1er février 2012.*
154. *Code du sport*, Art. L.222-17.
155. Parrish et al., *supra* note 6, at 64–65.
156. Parrish et al., *supra* note 6, at 70.
157. *Legge 27 dicembre 2017 n. 205*.
158. *Legge 27 dicembre 2017 n. 205*, Art. 1,373.

registered intermediaries, or intermediaries exempt from the new regime on the basis of other legally recognized professional competences (such as lawyers), are allowed to conduct sports agency activities, meaning that professional sportspeople and companies affiliated to a professional sporting federation, including the FIGC, are prohibited from making use of non-registered (and non-exempted) agents – and therefore that any contracts entered into by such parties with non-registered agents shall be deemed null and void.[159] In order to be eligible to take the qualifying examination and eventually be registered by CONI, applicants must hold Italian citizenship or that of another EU member state, as well as a secondary school diploma or equivalent as a minimum and be free from criminal conviction for five years.[160] While the Budget Law of 2017 lays down the legal framework for recognized professional sports agents, however, it left the promulgation of the specific substantive and procedural requirements for registration, via prime ministerial decree, to CONI itself.[161] Hence the particular conditions for registration in the CONI register have been laid down by CONI in its Sports Agents Regulation, first adopted in 2018.[162]

Similarly, the specific obligations of the registered football intermediary are not defined in formal legislation, but rather in regulations of the FIGC.[163] "The parties involved in the transaction must sign the relevant representation agreement and the intermediary must be registered prior to entering into the transaction process."[164] In order to register, the football intermediary must pass both the general CONI habilitation test, which assesses their knowledge of fundamental principles of civil and administrative law, followed by a special test supervised by the FIGC (i.e., the respective national sports federation under which the intermediary wishes to operate), which focuses on FIGC statutes, codes and regulations, including the FIGC's Sports Agents Regulation.[165] An annual registration fee of €500 applies,[166] as well as €150 for each individual representation contract.[167] The intermediary must also

159. *Id.*

160. *Id.*; *see also* De Marco & Lowen, *supra* note 83, at 215.

161. *Id*.

162. *Regolamento degli Agenti Sportivi, approvato con deliberazione del Consiglio Nazionale n. 1596 del 10 luglio 2018*.

163. *Regolamento Agenti Sportivi FIGC, approvato con delibera del Consiglio Federale n. 125A del 4 dicembre 2020.*

164. Parrish et al, *supra* note 6, at 89.

165. *Regolamento Agenti Sportivi FIGC, approvato con delibera del Consiglio Federale n. 125A del 4 dicembre 2020*, Art. 11; *see also* Parrish et al, *supra* note 6, at 88.

166. *Regolamento Agenti Sportivi FIGC, approvato con delibera del Consiglio Federale n. 125A del 4 dicembre 2020*, Art. 5(3)(a) and 6(3)(a).

167. See further Parrish et al., *supra* note 6, at 88.

declare that he has no conflict of interest and that he consents to be bound by the statutes of FIFA and of the football association.[168] There do not seem to be detailed requirements concerning the "impeccable reputation" other than that the intermediary must make a declaration (filed along with the registration) wherein he affirms to have full legal capacity and no previous criminal record for match fixing, no previous criminal convictions and no life-time ban.[169]

Remuneration of intermediaries can take the form of a single amount or a certain proportion of the amount of the transaction.[170] The FIGC recommends the FIFA limit on the sum paid of no more than three percent of the fee for the transfer.[171] Along with general principles of honesty, diligence, transparency and the like,[172] there are further detailed rules to avoid conflicts of interest.[173] In particular, football intermediaries are prohibited from holding an interest, be it direct or indirect, in the future transfer of a player, or in any economic advantage in relation to such a transfer.[174] The intermediary can, however, represent both the club and the player in a transaction if this is clear from the representation contract and parties have previously given their explicit consent in writing to that extent.[175] Some individuals (members of the football association, managers, players or technical staff members) are prohibited from registering as intermediaries.[176]

In terms of the sanctions for breaches of the FIGC regulations, the applicable regime provides for a number of different possible sanctions, depending on the gravity, duration and eventual recurrences of the violation.

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168. *Regolamento Agenti Sportivi FIGC, approvato con delibera del Consiglio Federale n. 125A del 4 dicembre 2020*, Art. 5(6).

169. *Regolamento Agenti Sportivi FIGC, approvato con delibera del Consiglio Federale n. 125A del 4 dicembre 2020*, Art 5(1); *see also* Parrish et al, *supra* note 6, at 88.

12; *see also* Parrish et al., *supra* note 6, at 89.

170. Parrish et al., *supra* note 6, at 90.

171. *Id.*

172. *Regolamento Agenti Sportivi FIGC, approvato con delibera del Consiglio Federale n. 125A del 4 dicembre 2020*, Art. 15(2).

173. *See Regolamento Agenti Sportivi FIGC, approvato con delibera del Consiglio Federale n. 125A del 4 dicembre 2020*, Art. 16. Rules on incompatibility and conflicts of interest are also provided in the CONI regulations, *Regolamento degli Agenti Sportivi, approvato con deliberazione del Consiglio Nazionale n. 1596 del 10 luglio 2018*, Art. 18.

174. *Regolamento Agenti Sportivi FIGC, approvato con delibera del Consiglio Federale n. 125A del 4 dicembre 2020*, Art. 16(6).

175. *Regolamento Agenti Sportivi FIGC, approvato con delibera del Consiglio Federale n. 125A del 4 dicembre 2020*, Art. 21(5).

176. *Regolamento Agenti Sportivi FIGC, approvato con delibera del Consiglio Federale n. 125A del 4 dicembre 2020*, Art. 16(3).

These range from a fine, through suspension for up to three years, to striking off from the register, and may also be imposed in combination.[177]

Thus, while not reverting to a formal licensing system of the kind abolished by FIFA with the adoption of its RWI 2015, the Italian legislator has reintroduced the requirement of a habilitation exam for the purpose of registration, after initially deregulating in line with the RWI 2015. According to one national expert, the deregulation of FIFA (and subsequently of the FIGC) led to a perceived reduction in the standard of football agency being provided in Italy, since the possibility of registering as an intermediary without any prior test to assess applicants' knowledge and suitability opened up the profession to individuals lacking competence and knowledge. And it was inter alia for this reason that the Italian government stepped in to reintroduce a qualifying examination to be passed in order to become a sports intermediary.[178]

V. COMPARATIVE ANALYSIS

We already indicated in the introduction that there have been earlier comparative studies concerning the regulation of football agents. For example, in a 2018 study, Parrish et al. have compared the national regulations and also concluded that there is a wide variety between the EU Member States in the applicable legal rules.[179] A second KEA/ECORYS study (from 2018) equally addressed the implementation of the 2015 FIFA Regulations. They concluded that only six EU Member States have formal legislation governing football agents.[180] The Parrish et al. study mentions seven Member States[181] and if one were to (as we argue one should) add Belgium, there would be a total number of eight. Equally though, there are differences, for example, in the definition of and registration costs for football intermediaries, as well as significant differences in the regulation of payments to football intermediaries. It is striking that, notwithstanding the 3% recommendation in the FIFA 2015 RWI, many EU Member States have

177. *Regolamento Agenti Sportivi FIGC, approvato con delibera del Consiglio Federale n. 125A del 4 dicembre 2020*, Art. 20(3); *see also* Parrish, et al., *supra* note 6, at 92.

178. Parrish et al., *supra* note 6, at 92.

179. *See* Parrish et al., *supra* note 6, at 184–97.

180. KEA/ECORYS, *supra* note 101, at 40–44.

181. Parrish et al., *supra* note 6, at 184 (mentioning 7 Member States: Bulgaria, Croatia, France, Greece, Hungary, Italy and Lithuania). We have doubts as to whether Italy really has a statutory system, as most of the applicable rules are contained in the regulations of the football association. But we would surely add Belgium. Therefore, depending upon one's interpretation, there are 6-8 Member States with a formal framework.

no financial cap at all.[182]

We have used the Parrish et al. studies to describe the regulation of sports agents in the countries in the previous section; yet, for the four countries we selected, we have attempted at the same time to provide a more detailed analysis, which will also allow us to test the regulations in the jurisdictions we analyzed against the theoretical framework provided in Section II. For now, it is important to recall that the different studies all come to the same conclusion, namely that since the deregulation by FIFA with the RWI 2015, the contents of the regulations reveal a huge diversity between the European countries.[183] We will now briefly compare the four countries we discussed in the previous section with respect to a few key features (A); then we test the legal arrangements in the different jurisdictions of our sample against the theoretical framework (B) and we briefly ask the question to what extent the diversity we found may give rise to an intervention at the European level (C).

A. Comparison of Key Features

As far as the four countries discussed in the previous section are concerned, the differences could be sketched in the following table.[184]

182. Richard Parrish et al., *Promoting and supporting good governance in the European football agents industry. Final report*, October 2019, co-funded by the Erasmus program of the European Union, available at: https://www.edgehill.ac.uk/law/files/2019/10/Final-Report.pdf, last consulted on 26 January 2021, at 48.

183. It is equally the conclusion reached by Rossi, *supra* note 2, at 136.

184. Note that Parrish et al. equally provide a comparative table listing differences in key features (Parrish et al., *supra* note 6, at 184–97). We have, however, preferred to design our own table based on the analysis in the previous section.

Table 1: Comparison of four European jurisdictions on Key Features

	Belgium/ Flanders	**England**	**France**	**Italy**
Type of regulation	Statutory basis in Decrees of Regions + FA regulations	Only FA regulations	*Code du sport* (not RWI)	Statutory basis, but FA Regulations
License or registration	Registration	Registration	License	Registration
Costs of registration	€500 annual registration fee	£500 (+ VAT) initial registration fee and £250 (+ VAT) for every annual renewal	€1,000 initial registration fee	€500 annual registration fee and €150 for each individual representation contract
Reputational requirements	No criminal record No FIFA decision prohibiting registration	Test of good character	Written exam + no criminal record	Self-declaration of no criminal record + no life-time ban
Regulation of remuneration	Was max. 7%, now free	Recommended cap of 3% + payment made via FA clearing house	10% cap	Recommended 3% cap of FIFA
Conflicts of interest	Not work for club and player Not for selling and buying club	Prohibition of interests in the club + disclosure duty of dual representation	Strict prohibition of dual representation	Declare no conflict + particular parties cannot work as intermediary + dual representation allowed with prior written consent

In fact, this table confirms what we also found in the other studies providing a comparative analysis, which is that there is a wide variety between the different jurisdictions, as also evident in the four jurisdictions examined in this Article. Already starting from the type of regulation, it is striking that two jurisdictions (Belgium and France) have a statutory basis (in regional decrees in Belgium; in the *Code du sport* in France). And even as between these jurisdictions there is a striking difference, since France explicitly states not to have implemented the RWI, whereas such a statement

is not made in the regional decrees in Belgium, the contents of which have by contrast been adapted after the amendment of the FIFA Regulations in 2015. England and Italy do not have specific statutory bases for the regulation of football agents, but rather rely on disciplinary rules (regulations) of the football associations. Belgium, England and Italy all have a registration system (following the FIFA 2015 RWI), but France kept to the requirement of a license. Remarkably, the only system we found where a license is required (France) does not charge particular costs, whereas the systems based on registration do have costs attached to it, at least a one-time cost for the registration itself. In the case of Italy, there is an additional cost for each representation contract that is registered. Furthermore, the way in which reputational requirements are described reflects significant differences. Obviously, all systems rely to a larger or smaller extent on the basic requirement of not having a criminal record or a FIFA decision prohibiting registration. But in England, for example, this is rather vaguely described as a test of good character, whereas in France the agent will be subject to a written exam in addition to the absence of a criminal record.

Differences also apply as far as the remuneration is concerned. Only England and Italy follow the FIFA recommended 3%, to which England then adds the requirement of a payment via a football association clearing house. In France a 10% cap applies, whereas in Belgium (at least in the Flemish Region) the previous cap of 7% has been abrogated and the agent is now free to determine its remuneration. Finally, as far as conflicts of interest are concerned, one can again notice remarkable differences. In France, for example, there are clear statutory prohibitions laid down in the *Code du sport*. In Belgium (Flanders) there is again a prohibition on engaging in particular relationships which could constitute a conflict of interest (like working both for the club and the player or both for the selling and buying club). But this dual representation is seen less as a problem in Italy, on the condition that there is disclosure and even explicit prior consent of the parties in writing.

Let us now examine how some of the different features of the regulation of football agents we discovered compare in the light of the theoretical framework we presented in Section II.

B. Analysis

We will now pick up the various elements identified of importance in Section II and discuss those in the light of the regulation of football agents presented in the previous section.

i. The Need for Regulation

Section II (A) started by observing that there may be strong arguments in

favor of regulation of sports agents. The strongest argument is probably the fact that there may well be information asymmetries, especially between a player and an agent, which could constitute a market failure. There is a danger of abuse by experienced agents with superior information vis-à-vis potentially weaker (especially young) players. Moreover, there is equally a risk of so-called negative external effects; in other words, negative effects for third parties not involved in the initial contractual relationship between an agent and the player. The point is indeed that malpractice by a sports agent could well lead to a large social loss, for example, if players were not allocated to the club that would maximize their talents and preferences. That could, more particularly, occur in the case that the sports agent has incentives to serve their private interests (for example, because of prior engagements with particular clubs) rather than serving the interests of the player or even the public interest. Moreover, abuses by football agents could be damaging for the sport of football in general and therefore negatively affect stakeholders other than the agents involved. It is thus apparent that there is a need for regulation and, as we could identify, all countries on which we specifically focused do indeed have some type of regulation, although the nature of that regulation may differ. As we have indicated in the previous section, there are many jurisdictions where the legislator has initiated rules with respect to the activities of football agents. The nature of those rules is, however, largely diverging. In some cases, it is the entry into the profession which is regulated (either through licensing or certification), whereas in other cases legislators did not initiate specific rules aiming at the sports agents. In that case, the jurisdictions rather rely on the application of general rules, such as employment law and/or contract law. The four jurisdictions on which we specifically focused all had specific regulations concerning access to the profession.

ii. License or Certification?

We indicated in II (B) that a traditional instrument for regulating access to the profession is licensing. Even though licensing may be an adequate instrument to regulate services provided by professionals, there has also been criticism related to licensing in general, being that it may serve the private interests of the licensed profession and would raise prices and profits of the professionals.[185] In particular, there are doubts surrounding the effectiveness and proportionality of licensing. The question arises as to whether merely requiring people to obtain a license would as such guarantee a particular quality and resolve the information asymmetry and negative externality problems that the regulation was intended to address in the first place.

185. Philipsen, *supra* note 24, at 121.

Empirical evidence shows that, as mentioned earlier, licensing or business practice restrictions do not have any influence on the quality of the services performed by the professional.[186] Given the way in which the licensing requirements are drafted, it could be argued that they could at best have the effect of excluding the real crooks from the market. However, as we already indicated above, one can seriously doubt whether the requirement to have a compulsory license (introduced by FIFA in 1991) will lead to a higher level in the quality of the services performed by the agent.

These general problems mentioned in the law and economics literature may also arise in practice. It can certainly be argued in the case of football agents that strict licensing requirements do create barriers to enter the market. This is more particularly the case with the compulsory licensing initiated by FIFA, but especially for the legislation in France. The problem is, moreover, that one can wonder whether the stringent regime of licensing is able to remedy the market failure, more particularly the information asymmetry. After all, the main public interest justification for licensing would consist in the information asymmetry between the player and the sports agent. As (compulsory) licensing would not necessarily remedy that problem, it is doubtful that there is any public interest justification at all for this stringent licensing requirement. One could argue that this licensing can probably be explained from the private interest theory of regulation. It seems to be an instrument that very well protects the interests of the incumbent sports agents (the so-called grandfathers) by making new entry into the profession more difficult.

We already indicated in the theory section that economists advocated a different instrument to regulate entry into the market, namely certification. Certification would have the advantage that it does cure the information asymmetry. If a sports agent were to be certified, it would signal particular information to customers (in this particular case players) with respect to the human capital investments made by the agent. It signals, for example, a certain level of training, but also the required educational level. Certification has the advantage of curing an information asymmetry without having the negative effects of restricting competition, like licensing.[187] Recall, that the FIFA Regulations of 2015 were changed to the extent that the compulsory licensing (introduced in the FIFA Regulations in 1991) was eliminated. The FIFA Regulations 2015 henceforth only required a minimum registration. To some extent, this modification in 2015 could be considered as a transition from the earlier licensing instrument (in the 1991 Regulations) towards certification (in 2015). The minimum requirement for football agents was

186. *Id.*

187. *See* Carl Shapiro, *Investment, Moral Hazard and Occupational Licencing*, 53 REV. ECON. STUDIES 843 (1986).

then to merely be registered with a competent national member association. As a result, the barriers to enter the market for football agents were substantially lower than with licensing. In that sense, the modifications brought in the FIFA Regulations in 2015 are more in line with the economic theory. However, we will show below that to an important extent this modification did also serve the FIFA interests. Moreover, there are now serious questions raised by many stakeholders as to whether the way in which the deregulation took place ultimately still provides for an adequate remedy against information asymmetries and negative externalities. It seems that the move to certification without sufficient quality control on the agents applying for the certification flung open the doors to the profession without adequate controls on the required capacity, knowledge and expertise.

The problem today is probably not the reliance on a certification as such, but that the certification, as we could see from the description of the selected European jurisdictions, largely relies on self-reporting with no ex ante verification. In other words, anyone could feasibly expect to meet all the (reputational) requirements in the declaration and to be of good character. In a certification system of this kind there is no verification of the declaration of the candidate as such, which opens the door to individuals being registered as agents who may not actually meet the reputational requirements.

iii. Conduct Regulation

In the jurisdictions we examined, we could equally notice that there is not only entry regulation, but also regulation concerning the quality of the services performed by football agents, in other words conduct regulation. This conduct regulation relates to various aspects of the services of the football agent. Often it concerns the contents of the contract of representation between the agent and the player; the goal of the conduct regulation is often aimed at avoiding conflicts of interests. Specific rules can often be found concerning the case where the players are minors and concerning the fee to be paid to the agent. As far as the remuneration is concerned, the FIFA RWI 2015 recommends a 3% cap on the fee of the agent. Many of the regulations in the domestic jurisdictions we examined also contain rules regulating the fee of the sports agent which go beyond the standard introduced by FIFA. Other regulations, including the FIFA RWI 2015 themselves, contain a duty of the sports agent to disclose their earnings. In England, the rules provide a duty to disclose potential conflicts of interests, whereas the rules of conduct in France relate to transparency requirements and contain reporting obligations. Most of those specific rules can be explained as serving the public interest. They could more particularly be considered as a cure for the market failure related to information asymmetry and adverse selection. In this particular domain, it is especially conflicts of interests with the agent that may constitute a serious issue. For

players, it is often difficult to detect that there may be a conflict of interest with the sports agent (for example, because he would have previous engagements with a club); such a conflict of interest could seriously endanger the interests of the player. These conduct rules, especially those aiming at preventing a conflict of interest, can undoubtedly be justified from a public interest perspective. The question, however, arises to whether in addition to those conduct rules, it is still necessary to control the entry into the profession as well (as is currently the case). In fact, in most jurisdictions there are not only (justified) conduct regulations, but entry regulations too. Such a combination could potentially not be proportional.[188] Take the case of France; in addition to the conduct rules, France equally has heavy conditions as far as the entry into the profession is concerned. It could be doubted whether those entry requirements have any added value compared to the existing conduct regulation. It is not likely that entry requirements lead to an increased quality of the services provided by the agent. As we already mentioned, from an economic perspective, fee regulation is always problematic. Patently, a regulation of fees seriously restricts competition, as it is often on the basis of differing fees that sports agents would compete.[189] A specific problem with the regulation of fees is also that it neglects the fact that there is a large variety between different transfer agreements. The very fact that there is no homogeneity between transfer agreements between the player and the agent may explain the existence of different fee agreements that could well differ from the 3% rule recommended by FIFA.

Conduct regulation is potentially restrictive insofar as it is also not always clear to which extent it is actually effective in curing market failures in this domain. An important element creating this doubt is that some of the conduct regulation does not emerge from public regulation (with an adequate sanctioning system), but from disciplinary rules (private regulation) whereby the sanctioning powers are considerably weaker.

iv. Public or Private Regulation?

A third aspect we discussed in the theoretical framework is that the need to have regulation does not necessarily imply that it should be public regulation issued by the government. In the domain of sports, and more particularly football, both the access to the profession and the conduct of the activity could be regulated by professional associations.

The world of the regulation of sports agents is indeed a peculiar one, as the primary organization promulgating the rules in this domain, namely FIFA, is in fact a private organization. FIFA apparently also had its own

188. Bull & Faure, *supra* note 27, section 4.5.
189. *Id.*

incentives to regulate the domain of transfer agents. FIFA apparently noticed that many transfers occurred through agents that were not licensed (even though the 1991 FIFA Rules required compulsory licensing). As a result, many transfers evaded the application of the FIFA rules altogether. It is for that reason that FIFA decided in 2015 to reform its system by no longer requiring licensing and moving to a registration (certification) system. This effectively means that entry into the profession was made easier, having the advantage for FIFA that its rules would apply to a larger number of transactions. This 2015 change is in fact slightly ambiguous. On the one hand, the transfer from licensing to registration could be justified on public interest grounds as less interventionist; at the same time, the 2015 change clearly served the (private) interests of FIFA by creating a means to ensure that a larger number of transfers would come within its scope.[190]

In domestic regulation we noticed a variety of different models. One could roughly argue that England and Italy largely rely on private standards, while Belgium and France make a stronger use of public regulation. The approach followed in England (where private standards apply) is that mere minimum requirements are imposed. Strikingly, those do not relate to the entry into the profession, but rather focus on the quality of the services of the transfer agent and on the necessary transparency of the transfers. To a large extent, as we indicated, this approach corresponds to the public interest justification for regulation. This is a striking difference with France. France combines very strict and detailed licensing rules controlling the entry into the profession with conduct regulation. An explanation for this difference could be that the profession of intermediaries in France might have been more successful in creating barriers to market entry. The French profession apparently convinced the French legislator to impose strict requirements for licensing in addition to conduct rules included in public regulation (more particularly the *Code du sport*). Obviously further research would be needed to examine whether it was indeed effective lobbying by the profession that explains this far-reaching regulation in France. But at first blush it seems to be in line with the private interest explanation of regulation. As explained above, that theory holds that a profession that has low transaction costs and can lobby effectively will strive to protect itself through entry regulation. France goes very far in this respect, as exercising the profession of sports agent on the French territory without a license can even give rise to criminal liability. These very stringent rules in France can hardly be explained by the public interest theory (as a remedy for a market failure), but rather seem to be the result of an effective lobbying by the interest group concerned. Of course, a further study of the precise role of the profession in the creation of

190. *Id.*

the French legislation could shed more light on this. However, using the economic theoretical framework, it seems that the approach followed in England (with private standards aiming at conduct regulation) is more in line with public interest theory than the French approach (of using strict public regulation, both of entry into the profession and conduct regulation).

v. Summary

What are the main lessons of the economic approach applied to the regulation of football agents? The starting point is that some type of regulation is evidently necessary from a public interest perspective, as there could be serious information asymmetries and negative externalities if football agents were not subject to any control at all. Yet, even though there is a case for regulation, the private interest theory signals that there is always a danger that regulation may be abused by interest groups so as to create barriers to market entry and thus improve their market position. Private interest theory equally indicates that there could be a disproportionate regulation, worse than the market failure it is supposed to correct. Private regulation may have important advantages (of better information and flexibility) compared to public regulation, but at the same time it may have as a major weakness that its enforcement capacity is limited. That was clearly shown in the case of FIFA. As a private regulator it launched a system of licensing but did not have the capacity to enforce this rule upon its members, as a result of which clubs continued to a large extent to use unlicensed agents. That led FIFA to deregulate (from a licensing to a certification system), which was then followed in the examined European jurisdictions (with the exception of France), possibly opening the floodgates for a large number of (potentially) unqualified football agents and increased remuneration. To some extent conduct regulation may remedy those drawbacks, but again enforcement is often in the hands of the football associations (in this model of private regulation) and therefore potentially weak.

It is not the transfer from a licensing to a certification system that is necessarily the problem. It will be recalled that, from an economic perspective, certification has the advantage that it is less restrictive of competition and licensing creates much higher barriers to market entry. The question therefore arises whether it is possible to balance the need to have a system to control access to the profession (banning unqualified agents) on the one hand with the need to reduce ineffective and disproportional barriers to market entry on the other. A certification model is in theory able to reach that goal, but it requires an ex ante verification of whether the candidate meets the conditions for registration. The question is whether that is sufficiently monitored at present. If it were possible to guarantee that the strict conditions for registration are met (without the need to have an

excessively restrictive system like an exam), the most unscrupulous candidates could be banned from the market without overly restricting competition. The only query one could pose is whether football associations have the necessary independence, incentives, and sanctioning power to verify the registration or whether that should be a task for a government agency (without necessarily going back to the overly restrictive licensing system). A strong argument in favor of such government regulation is that there is apparently a real danger of negative externalities emerging for players, third parties and the sport in general as a result of unscrupulous behavior by particular football agents. These are some of the challenges for the future regulation of the profession.

C. A Formidable Task for Europe?

Although we do not have the scope to discuss a potential intervention at the EU level in this domain in a great level of detail, it is inevitable that a large divergence between the regulation of football agents in different European jurisdictions gives rise to the question of whether there should be an EU intervention in this domain.[191] Obviously, that question would only concern the EU Member States (and therefore not England) but remains relevant given that large differences in regulatory intensity were found to exist also as between the EU Member States.

There is no doubt that European law played an important role in the development of the football market in Europe. The liberation of the transfer market facilitated by the *Bosman* ruling of the Court of Justice led to a spectacular development of the transfer market, but also to an increasing prevalence of football agents.[192] The possibilities for the EU to intervene in the regulation of football agents are, however, rather limited. Traditionally the regulation of football agents could be scrutinized under EU law, either from the perspective of the internal market, or from competition law: excessively stringent domestic regulation might jeopardize free movement of services and therefore the internal market,[193] and the issue of whether the imposition of a mandatory license would violate competition law has also been raised.[194] Since 2006, domestic regulation with respect to football agents is equally scrutinized under the effectiveness and proportionality requirements incorporated in the Services Directive, as the discussion of the

191. We already stressed many times the wide variety in regulatory regimes, not only in the four jurisdictions we scrutinized, but also in the EU in general. *See* KEA et al., *supra* note 7, at 4.

192. Ioannidis, *supra* note 1, at 158.

193. KEA et al., *supra* note 7, at 157.

194. Which was denied in the *Piao* ruling of the Court of Justice. *See* KEA et al., *supra* note 7, at 5; Yilmaz, *supra* note 17, at 34–36.

Flemish regulation made clear.[195]

The issue is that the EU only has a limited competence as far as sports is concerned. This is generally the case with respect to employment law, but also specifically for sports law. The competence for the EU in the area of sports law was in fact only introduced in the Lisbon Treaty in 2009. Its scope is still very limited; the EU only has competence "to contribute to the promotion of European sporting issues."[196] Concerning employment law, the EU does have specific competences, more particularly to "take measures to ensure coordination of the employment policies of the Member States in particular by defining guidelines for these policies."[197] Until now, the EU has not used that competence to define any specific coordination measures concerning the policies of the Member States related to football agents. There was strong lobbying in the lead-up to the current formulation in Article 165(1) of the Treaty on the Functioning of the European Union (TFEU).[198] The result is that there is a so-called conditional autonomy of the Member States; they remain sovereign to legislate in the domain of sports law on the condition that they respect general principles of EU law (inter alia with respect to the internal market and competition policy).[199] Hence the introduction of the very limited wording in Article 165(1) of the TFEU in 2009 is expected to be merely of trivial influence, as it completely excludes the possibility of the EU undertaking, for example, a harmonization of the regulation of football agents, or any issue related to sports for that matter.[200] The interesting point, however, is that a number of resolutions calling for much further-reaching action at the EU level have been adopted by the European Parliament.[201]

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195. See on the relevance of the Services Directive further KEA et al., *supra* note 7, at 140.

196. Treaty on the Functioning of the European Union, Art. 165(1).

197. Treaty on the Functioning of the European Union, Art. 5(2).

198. Yilmaz, *supra* note 17, at 198.

199. *Id.* at 179.

200. *Id.* at 199–200.

201. The Parrish et al. final report (*supra* note 177, at 14) mentions inter alia a European Parliament Resolution on the future of professional football (2007) which calls inter alia for the regulation of players' agents "if necessary by presenting a proposal for a Directive concerning players' agents, which could include: strict standards and examination criteria before anyone could operate as a football players' agent: transparency in agents' transactions; minimum harmonized standards for agents' contracts; an efficient monitoring and disciplinary system by the European governing bodies; the introduction of an 'agents' licensing system' and agents' register; and ending 'dual representation' and payment of agents by the player" (OJ C27 E/232 of 31.01.2008). Many similar resolutions have followed. For example, on 17 June 2010 (on players' agents in sports, OJ C236 E/99 of 12.08.2011) calling for an EU initiative concerning the activities of players' agents that should aim inter alia at strict standards and examination criteria, transparency in transactions, minimum harmonized standards

Even though these resolutions are not binding, they constitute an important signal that at least some stakeholders within the European Union call for measures to be taken in this area. Some have observed that even though Article 165 of the TFEU provides only a very limited legal base, there might still be other possible bases for the EU to legislate, for example, on the basis of Article 114 of the TFEU on the approximation of laws relevant to the functioning of the internal market.[202] There is, in other words, a high likelihood that further action with respect to the regulation of football agents will be on the political agenda again at some point. That obviously merits further research not only into the question of what the precise legal base for such action would be, but also what the precise economic justification for that harmonization could be. That is undoubtedly a compelling point for further research.

VI. CONCLUDING REMARKS

Sports law in general, but especially the regulation of sports agents, is a fascinating research domain that extends into other areas and aspects of law to a significant extent. As we tried to develop throughout this article, it touches upon fundamental questions of regulation theory, law and economics, comparative law and competences of the European Union. Let us look at the relevance of this domain for each of these four research areas.

The domain of the regulation of football agents is intriguing first of all from the perspective of regulation theory, as one can observe that, within the scope of the EU, similar objectives are achieved in certain jurisdictions via formal legislation, whereas in others they are left to private regulation by the football associations. Moreover, in some cases hybrid forms of regulation apply, combining public and private regulation. This legal pluralism raises important questions in practice. It is generally agreed that after the introduction of the FIFA 2015 RWI, which amounted to a large deregulation, there is a serious problem. Some claim substantial abuses by agents, including luring players into breaching contracts, conflicts of interests, and even criminal activities like money laundering. Notwithstanding this now often negative image of football agents, we stressed that agents can also play an important facilitating role, potentially reducing information asymmetries between players and clubs and thus constructively supporting the transfer system. Regulation theory therefore does provide a justification for regulating the activities of football agents, but it is less clear what the specific regulatory instruments to effectively serve the public interest should be.

for agents' contracts, an efficient monitoring and disciplinary system, the ending of 'dual representation' and a gradual remuneration conditional on the fulfillment of the contract.

202. This was discussed in the EU White Paper on Sports (COM(2007) 391 final). See the discussion in Parrish et al., *supra* note 6, at 15.

That is where the second area, the economic approach to law, steps in, as it allows for critical assessment of whether the regulation aims to pursue public interest goals or whether there is a danger that it erects artificial barriers to market entry, thereby restricting competition. Law and economics also point at the difficult trade-off to be made between the necessity to regulate in order to remedy market failures (information asymmetries and negative externalities) and the risk that the regulation itself may create undesirable barriers to market entry.

As far as comparative law is concerned, we noticed a remarkable case of multi-level governance, including at the international level with private regulation by FIFA, and large differences in regulatory intensity between the European jurisdictions. In addition, as already mentioned, there is often hybrid regulation, combining public and private regulation and thus legal pluralism.

Finally, we showed that the role of the European Union in this domain is currently remarkable in its absence, in the sense that most regulations emerge either from the international (FIFA) level or from the domestic EU Member State level. Yet, one can notice increasing attempts by the European Commission (and the European Parliament) to become active in the field, with some even envisaging the possibility of a Directive, perhaps even striving for harmonization of the regulation of football agents. Many studies have been carried out, some at the request of the European Commission, and these studies have also put forward several proposals for reforms. Some propose detailed qualification criteria, requiring agents to acquire knowledge of football law, to take an exam, and obtain a license and insurance.[203] A 2018 KEA study recommended inter alia the establishment of "a centralized and harmonized mandatory licensing system, following the example applicable to agents in US basketball."[204] And others have also suggested reforms, either for action at the EU level or for a reform of the FIFA 2015 RWI.[205] In fact, FIFA has since adopted such a reform, in the form of the FFAR 2023.

Our aim was to contribute to that debate and towards those reform initiatives by adding the perspective of comparative law and economics. Obviously, as we have indicated, much more research has to be and can be done. In the words of the specialist scholar Masteralexis, "FIFA's decision to deregulate agents and to push the regulations back is an area ripe for future research . . . . It will certainly be worthwhile research to determine if this decision by FIFA opens the door for corruption, enables a more local form of control over football agents, or leads to a different, more national or

203. Ioannidis, *supra* note 1, at 161.
204. KEA/ECORYS, *supra* note 101, at 58.
205. *See, e.g.*, Parrish et al., *supra* note 180, at 56–70.

international body to regulate the group."[206] We argued that the economic approach can help to strike the delicate balance between the need to achieve adequate regulation of sports agents in order to correct market failures and the danger that overly restrictive regulation may create barriers to market entry and unnecessarily limit competition. This is one of the major challenges that a future (European) regulation of football agents may face.

206. Masteralexis, *supra* note 95, at 120.

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THE FOUNDATION OF THE THEORY OF LAW AND BUSINESS

JAMES E. HOLLOWAY*

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I. INTRODUCTION

Government regulation, common law, and their applications and impact on American jurisprudence and business can no longer remain open questions. American legal and business education has given urgency to interpretations of using common law and government regulation. These interpretations include the making of lawful business decisions, plans, and operations recognizing the normative value of these lawful decisions, plans, and operations, and understanding the impact of law on business and its disciplines. The urgency of these questions is made most significant by the analytical and predictive skills, explanatory and applied knowledge, and methodological and analytical processes of modern legal and graduate business education that includes single and joint degrees such as JD/MBA, JD/MS, and JD/Ph.D., held by some lawyers and managers.[1] Other lawyers

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1. *See, e.g.*, *Law & Business Curriculum*, VANDERBILT LAW SCHOOL, https://law.vanderbilt.edu/academics/academic-programs/law-business-program/law-business-curriculum.php (last visited Mar. 25, 2020) ("[O]ffer[ing] students interested in a career in corporate law a solid foundation in how businesses work . . . ."); *Business Law Curriculum*, BERKELEY LAW SCHOOL,

and managers do not possess joint law and business degrees but studied analytical tools and methods, explanatory and fact-sensitive principles, methodological order and sensitivity of law and business in one or more advanced undergraduate and graduate courses, such as the law school's quantitative business analysis and business school's government regulation of business.[2] In fact, who among us can say legal and business professionals do not knowingly or unknowingly integrate legal and business knowledge, analytics, or methodologies to recognize, address and manage legal and regulatory issues, concerns and risks arising in business decision-making, planning, and operations?[3]

The theory of law and business needs a jurisprudential foundation ensuring and enhancing fact sensitivity, analytical scrutiny, and methodological order in making lawful and examining unlawful decisions, plans and practices, recognizing unethical and other normative breaches of lawful decisions, and assessing the impact of law on business and its organizations and disciplines. This Article consists of eight parts explaining the explanatory, analytical, and methodological nature of the jurisprudential foundation and its ability to enable and support the theory of law and business in ascertaining and understanding legality, illegality, normative values, and the impact of law on business. Part II extends the introduction to explain the long-held response on, substance of earlier research on, and

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https://www.law.berkeley.edu/research/business/curriculum/ (last visited Mar. 25, 2020) ("[P]repar[ing] students for work in a range of disciplines, including business counseling, finance, litigation, entrepreneurship, academic research, government service and policy advocacy."). Primarily, lawyers or attorneys-at-law who may also be managers or implanted in decision-making, planning, and operations give legal advice on the legality or illegality of transactions, circumstances, relationships, and other happenings. Many managers and executives cannot fully determine or ascertain legality or illegality but must emphatically know and understand legal advice on the legality of business ideas, happenings, findings, information, and conclusions. Most precisely, managers must know and understand legality or illegality at each stage of the processes of business decision-making and planning and on each practice or matter of conducting business operations. Simply, managers who cannot determine or ascertain legality must understand and use legal advice that is accompanied by relevant legal analytics, such as finding the legal issue or analyzing relevant facts, to aid in using legal advice. *See infra* note 2 and accompanying text.

2. *See, e.g.*, George Siedel, *Law and the Business School Curriculum*, BIZED AACSB INT'L (Mar. 15, 2017), https://bized.aacsb.edu/articles/2017/03/law-and-business-school-curriculum (explaining why common law and government regulation are essential courses in the curricula of colleges and schools of business); Howell E. Jackson, *Analytical Methods for Lawyers*, 53 J. LEGAL EDUC. 321, 321–22 (2003) (recognizing that law students need insight into qualitative and quantitative methods used by managers and executives to make business decisions).

3. *See* Michael J. Rizzo, *Navigating the Intersection of Law and Business*, 19 ELT 34, 35 (2007) (discussing the role of corporate counsels who practice corporate law at the intersection of law and business).

broad nature of the theory of law and business needing to rest on an active and stable jurisprudential foundation. Part III discusses the nature of the theory of law and business by explaining a taxonomy categorizing the impact of law on business of the integration of law and business combining legal and business knowledge, analytics, or methodologies. Part IV explains the need for a legal foundation consisting of jurisprudential or jural elements enabling integration of law and business by relying on common knowledge-, analytical-, and methodological-based properties to combine legal and business knowledge, analytics, or methodologies. Part V explains how the nature and role of jurisprudential elements of the foundation ensure and increase fact sensitivity, analytical scrutiny, and methodological order in ascertaining legality of business decision-making, planning, and operations.

The latter parts of the Article focus on the ability of the jurisprudential elements to enhance business knowledge, analytics, and methodology and support the use of a managerial analysis with law to ascertain and understand legality and illegality of business decision-making, planning, and operations. Part VI focuses on the effects of the legal foundation on business knowledge, analytics, and methodology. It explains that the jurisprudential elements complement and enhance uses of business knowledge, analytics, and methodology in making lawful and effective decisions, strategies, and practices to justify planned and unplanned business needs and advance legitimate and forward-looking business goals and objectives. Part VII focuses on the ability of the foundation to enable the integration of law and business by combining legal and business knowledge, legal and business analytics, and legal and business methodologies. It explains that the jurisprudential elements support a managerial analysis with law to form and create specific legal-managerial tools, methods and information in making the most effective and lawful end result at each stage of business decision-making and planning and each matter of business operations. Lastly, Part VIII concludes that the legal foundation consists of jural elements enabling the integration of law and business by combining amenable legal and business knowledge, analysis, and methods, examining the normative value of business decision-making, planning, and operations and lastly, assessing the impact of a legal rule or statutory provision on business and its disciplines and organizations.

II. LONG RESPONSE, EARLIER RESEARCH, AND BROAD NATURE OF THE FOUNDATION

The need for a jurisprudential or legal foundation is to enable the theory of law and business to explain and predict what could happen or had happened in making and implementing business decisions, plans, and

practices. These explanations and predictions are needed and useful to manage business organizations and their advantages and threats, using innovation and creativity to expand business markets and find advantages, as well as to relate business principles, analytics, and methods to address legal and regulatory issues, concerns, and risks.

A. A Long Response to the Question on the Need for School of Thought

The theory of law and business is a school of thought explaining and predicting uses of the integration of law and business to make unique explanatory, analytical and methodological combinations of legal and business principles, legal and business analyses, and legal and business decision-making methodologies in applications and uses of common law and regulation to make decisions, strategies, and plans.[4] Practically, the theory of law and business is executed as a managerial analysis[5] with law applying common law and government regulation accompanied by legal analytics in making business decisions, creating strategies, and assessing the impact of law on business and its disciplines and organizations. A managerial analysis

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4. *See generally* James E. Holloway et al., *Law and Business as a School of Thought: A Pedagogy to Teach the Theory and Practice of the School*, 18 U.C. DAVIS BUS. L.J. 215 (2018) (detailing an integrated framework for the theory of law and business).

5. *See generally* ROBERT E. SCHELLENBERGER, MANAGERIAL ANALYSIS 8 (1969) (defining "[m]anagerial analysis . . . [as] the systematic investigation, compilation, manipulation, and presentation of information to a decision-maker in order to aid the decision-making process."). The late Robert E. Schellenberger, Ph.D., occupied an office across the hall from my office in the College of Business at East Carolina University, Greenville, North Carolina. Robert's academic area was operations research, and he explained that business decision-making was a methodology. He also listened to my thoughts on integrating legal and business analyses and decision-making methodologies. My interest in integrating law and business began with teaching prospective managers to know and understand the use of common law and regulation in business decision-making and the impact of law on business and its disciplines and organizations. *See* James E. Holloway, *The Nature of Teaching Legal Methodology as Managerial Analysis for Business Decision-Making*, 12 PROCEEDINGS OF THE MID-ATLANTIC ACADEMY OF LEGAL STUDIES IN BUSINESS 17 (Spr. 2001); James E. Holloway, *Management Education and Teaching Rational Judgment, Teaching Legal Methodology in the Middle Stages of Management Education*, 26 PROCEEDINGS OF THE MID-ATLANTIC ACADEMY OF LEGAL STUDIES IN BUSINESS 17 (Spr. 2000). However, Robert thought pedagogy was not the place to begin researching and writing on the integration of law and business. He also thought that research and writing should set forth a theory, explain how to use the theory, and then demonstrate how to teach the theory. Using Robert's advice and guidance, I redirected my research and writing and eventually published a primer, concept, practicality, and pedagogy. *See infra* notes 6, 11 and accompanying text. Only recently did I see the need to place the school of thought on a jurisprudential foundation of jural and jurisprudential concepts and relations to add stability, continuity, and consistency to the theory of law and business and its application by a managerial analysis with law.

with law creates legal-business — or, preferably referred to as, legal-managerial[6] — tools, methods, and information to aid in using common law and government regulation by combining legal and business knowledge, analytics, or methodologies to make lawful business recognize breaches of normative values,[7] make lawful business decisions, plans and practices[8] and describe the impact of law on business and its disciplines and organizations.[9] Consequently, my solution for the need of a theory of law and business has

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6. *See* James E. Holloway, *A Primer on The Theory, Practice and Pedagogy Underpinning a School of Thought of Law and Business*, 38 U. MICH. J.L. REFORM 587, 602–03 (2005) [hereinafter Holloway, *Primer*] (using finance theory and analysis to demonstrate the use of managerial analysis with law). In the theory of law and business, legal-managerial includes all of the diverse disciplines and areas of business and is not limited solely to management. Simply, the choice of legal-managerial is derived from the needs for and uses of business decision-making, planning and operations to make decisions, plans and practices within all business functions and areas, such as finance, marketing, real estate and management. Thus, a managerial analysis with law applies legal rules in the stages of business decision-making and planning and matters of operations involving the use of legal rules and principles in business and its disciplines and organizations. *See* Helena Haapio, *Introduction to Proactive Law: A Business Lawyer's View*, *in* 49 SCANDANAVIAN STUDIES IN LAW: A PROACTIVE APPROACH 21, 21 (Peter Wahlgren ed. 2010) ("Proactive law is based on a strong belief that legal knowledge is at its best when applied before things go wrong. In addition to avoiding disputes and litigation, proactive law seeks to promote and strengthen ways to use the law to create value, do what is right, and build a solid foundation for business. . . .").

7. *See* Otto Spijkers, *What's Running the World: Global Values, International Law, and the United Nations*, 4 INTERDISC. J. HUM. RTS. L. 67, 68 (2010) (quoting MILTON ROKEOCH, THE NATURE OF HUMAN VALUES 5 (1973)) ("A *value* is an enduring belief that a specific mode of conduct or end-state of existence is personally or socially preferable to an opposite or converse mode of conduct or end-state of existence."); Robin Derry et al., *Nature's Place in Legal and Ethical Reasoning: An Interactive Commentary on William Frederick's Values, Nature and Culture in the American Corporation*, 36 AM. BUS. L.J. 633, 636 (1999) (stating that "[v]alues are standards or criteria for guiding behavior and conduct.""). One commentator has recognized a lack of normative values in a business curriculum relying heavily on theory of law and economics. *See* Reginald Shareef, *Want Better Business Theories? Maybe Karl Popper Has the Answer*, 6 ACAD. OF MGMT. LEARNING & EDUC. 272, 272 (2007) (arguing that some MBA students are led to believe business decision-making, planning and operations are value-free); *see also infra* Part III.B and accompanying notes (introducing the need to find normative values of lawful decisions, plans and practices and recognizing unlawful decisions, plans and practices lack both legal and normative values).

8. *See infra* Part III.B and C and accompanying notes (explaining the nature of the theory of law and business and its use of a managerial analysis with law to form and create legal-managerial tools, methods and information to determine the legality of each stage of decision-making and planning and each matter of business operations).

9. *See infra* Part III.A and accompanying notes (explaining how a theory of law and business uses a legal-business taxonomy to describe and explain the impact of common law and regulation on business and its disciplines and organizations by categorizing and explaining losses of managerial discretion or latitude, restrictions on discipline knowledge and analytics, and regulatory effects of continuous lines of harmful business decisions, strategies and practices).

always been positive for 38 years; the foundation of the theory of law in this article is not written on the proverbial clean slate.[10]

B. Earlier Research on the Theory of Law and Business

Earlier articles on this subject usually state and define concepts, practicality, and pedagogy that were originally introduced as a primer on a theory of law and business.[11] The integrated knowledge, analytical and methodological nature of the theory of law and business needs a jurisprudential foundation enabling the integration of law and business by underpinning the concept and giving support to the practicality and pedagogy. Foremost, the concept must possess an explanatory, analytical and methodological nature capable of explaining and evaluating legality and recognizing normative validity or usability of business situations,

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10. James E. Holloway et al., *Law and Business as a School of Thought: A Pedagogy to Teach the Theory and Practice of the School*, 18 U.C. DAVIS BUS. L.J. 215 (2018) [hereinafter Holloway et al., *Pedagogy*]; James E. Holloway, *A Concept-Sensitive Managerial Analysis With Law: Applying a Business Concept to a Legal Rule to Identify the Domain of Business Situations*, 6 WM. & MARY BUS. L. REV. 137 (2015) [hereinafter Holloway, *Concept*]; James E. Holloway, A *Primer on The Theory, Practice and Pedagogy Underpinning a School of Thought of Law and Business*, 38 U. MICH. J.L. REFORM 587 (2005); James E. Holloway, *The Practical Entry and Utility of a Legal-Managerial Framework Without the Economic Analysis of Law*, 24 CAMPBELL L. REV. 131 (2002); James E. Holloway, *The Nature of Teaching Legal Methodology as Managerial Analysis for Business Decision-Making*, 12 PROC. OF THE MID-ATLANTIC ACAD. OF LEGAL STUD. IN BUS. 17 (2001); James E. Holloway, *Management Education and Teaching Rational Judgment with the Law: Teaching Legal Methodology in the Latter Stages of Management Education,* 2 ATL. L.J. 96 (1999).

American and European colleagues have proffered law and strategy or a proactive law approach to ascertain and explain how common law and regulation can be more beneficial and useful to gain lawful competitive advantages and other business benefits and opportunities. *See, e.g.,* David Orozco, *Strategic Legal Bullying*, 13 N.Y.U.J.L. & BUS. 137 (2016); GEORGE J. SIEDEL & HELENA HAAPIO, PROACTIVE LAW FOR MANAGERS: A HIDDEN SOURCE OF COMPETITIVE ADVANTAGE (2011); Robert C. Bird, *Law, Strategy, and Competitive Advantage,* 44 CONN. L. REV. 61 (2011); George J. Siedel & Helena Haapio, *Using Proactive Law for Competitive Advantage,* 47 AM. BUS. L.J. 641 (2010); Constance E. Bagley, *What's Law Got to Do with It? Integrating Law and Strategy,* 47 AM. BUS. L.J. 587 (2010); David Silverstein & Daniel C. Hohler, *A Rule-of-Law Metric for Quantifying and Assessing the Changing Legal Environment of Business,* 47 AM. BUS. L.J. 795 (2010); Larry A. DiMatteo, *Strategic Contracting: Contract Law as a Source of Competitive Advantage,* 47 AM. BUS. L.J. 727 (2010); PROACTIVE LAW IN A BUSINESS ENVIRONMENT 13–31 (Gerlinde Berger-Walliser & Kim Østergaard eds., 2012); Constance E. Bagley, *Winning Legally: The Value of Legal Astuteness,* 33 ACAD. MGMT. REV. 378 (2008); Robert C. Bird, *Pathways of Legal Strategy,* 14 STAN. J.L. BUS. & FIN. 1 (2008); GEORGE J. SIEDEL, USING THE LAW FOR COMPETITIVE ADVANTAGE (2002); Helena Haapio & Annika Varjonen, *Quality Improvement Through Proactive Contracting: Contracts Are Too Important to be Left to Lawyers!*, ANN. QUALITY CONG. PROC., 243 (1998).

11. Holloway, *Primer*, *supra* note 6, at 587.

information, findings and conclusions in stages of the processes of business decision-making and planning and on matters of conducting continuing or ongoing business operations.[12] Next, the practicality lies in the application of a managerial analysis with law to ascertain legality and recognize the normative validity or usability of business situations, findings, information and conclusions to make a lawful end result[13] at each stage of recursive business decision-making and planning, as well as on each matter of conducting ongoing business operations.[14] Lastly, the pedagogy is teaching students and training professionals the nature of the conceptual framework and use of a managerial analysis with law to determine and understand legality and recognize normative validity or usability of an end result at the

12. *See* Holloway, *Concept*, *supra* note 10. The managerial analysis with law includes infinite combinations of legal and business knowledge, legal and business analyses, and judicial and business decision methods for use in business decision-making, planning and operations. These legal-managerial combinations add fact sensitivity, methodological order and analytical scrutiny to market situations, organizational opportunities. employment practices and business competition affecting or driving market, organizational, social, and other needs, objectives and goals of business and its organizations. Foremost, legal and business knowledge includes infinite combinations of legal rules and business principles to create an analytical method and information to evaluate situations and factual patterns. Next, legal and business analyses include finite single or joint uses of legal and business analytical tools and methods, such as means-ends analysis, factual analysis, and problem recognition, to make and analyze situations, findings and information and make and test findings and conclusions. Finally, judicial and business decision-making methodologies include finite combinations of judicial decision methods (parts) and business decision methods (stages), such as recognizing a legal issue in identifying feasible alternatives, to find, make or create lawful end results, such as one or more feasible alternatives. *See infra* Part III and accompanying notes (introducing the use of a managerial analysis with law supported by the jurisprudential foundation of a theory of law and business).

13. In the theory of law and business, the completion of each stage of decision-making and planning and each matter of operation is an end result, such as identifying feasible alternatives and implementation of the decision. An end result of a stage or matter may be made or created by using analytical tools and methods and rational thinking and judgment. *See* Herbert A. Simon, *Making Management Decisions: The Role of Intuition and Emotion*, 1 ACAD. OF MGMT. EXEC. 57, 63 (1987) (finding the use of rational judgment and intuition as well as logic and rationality in business decision-making). Analytical tools and methods recognize and evaluate the situation and need and find and analyze facts, information, data, findings and conclusions in making decisions, plans and practices. Rationally, once an end result is completed and found lawful without breach of a normative value, a manager or executive can use this end result to move to the next stage in making the next end result of completing decision-making and planning and another matter of continuing business operations. *See* S. Trevis Certo et al., *Managers and Their Not-So Rational Decisions*, 51 BUS. HORIZONS. 113, 114 (2008) (identifying a formal decision-making process that is rational with several steps or informal process with a few steps).

14. James E. Holloway, *The Practical Entry and Utility of a Legal-Managerial Framework without the Economic Analysis of Law*, 24 CAMPBELL L. REV. 131 (2002).

completion of a stage of business decision-making and in conducting ongoing business operations.[15] Notwithstanding those ideas and thoughts, the concept, practicality and pedagogy of the theory of law and business must rest on a jurisprudential foundation enabling the integration of law and business and rendering business principles, analytical tools and decision-making more effective to make creative, innovative and thoughtful decisions.

On solidifying earlier research to integrate law and business, the foundation identifies jural concepts and relations of legal interests, text and rationality to be most consistent with innovation and creativity in business and its disciplines and organizations.[16] These concepts and relations underpin legal rules to protect rights and enforce obligations and further the use of legal analysis and reasoning to recognize and address legal and regulatory issues and risks of business and its organizations. These concepts and relations complement the fundamental nature of legitimate business principles, analytical tools and rational thinking, which are researched, hypothesized and used solely to manage markets, organizations, transactions, activities and environments in advancing business needs and objectives. through making decisions and conducting day-to-day practices and activities. Consequently, the jurisprudential foundation supports ascertaining legal and regulatory issues, normative value concerns, and legal and regulatory impact of managing markets, organizations, transactions, activities, relationships and environments by using business principles, analytics and methodologies to make decisions, plans and matters solely to further business needs and objectives that must comply with law and should

15. *See* Holloway et al., *Pedagogy*, *supra* note 11. Schools and colleges of business teach students in the context of using marketing, financial and other principles and analytical tools and methods to find and solve problems, find and choose among courses of action, and recognize and perform day-to-day practices and procedures. *See, e.g.*, ASSOCIATION TO ADVANCE COLLEGIATE SCHOOLS OF BUSINESS (AACSB), *Eligibility Procedures and Accreditation Standards for Business Accreditation,* 35–36 (2013 & Updates 2016 & 2018) (establishing undergraduate and graduate learning and curriculum standards that require colleges of business to teach finance, marketing and other business and general knowledge, recognize problems and make creative solutions), https://www.aacsb.edu/-/media/aacsb/docs/accreditation/business/standards-and-tables/2018-business-standards-track-changes.ashx?la=en&hash=9C191B7B3A3A2E3E1DDC51A5C5275457092DADBB (last visited Mar. 7, 2020) [hereinafter AACSB-Eligibility Standards]. Consequently, the theory of law and business is executed by a managerial analysis with law using business decision-making to solve current and prospective problem situations, *see infra* note 54, planning to create courses of actions for the future, *see infra* note 55, and operational practices and matters to conduct day-to-day activities, *see infra* note 56.

16. *See generally* Holloway – Primer, *supra* note 6, at 606–17 (discussing how the "integration gives business decision makers access to usable legal information and an integrated analysis to seek more exact and timely legal information").

conform to normative values.

C. Nature and Corollary of Using the Theory of Law and Business

The jurisprudential foundation enables the theory of law and business to increase stability, continuity and predictability by integrating law and business in combining legal and business knowledge, analytics or methodologies. These combinations arise from making a lawful and examining an unlawful end result at the completion of each stage of recursive business decision-making and planning, and each matter of conducting ongoing business operations. The enabling abilities of the foundation are jurisprudential elements capable of supporting the integrated explanatory, analytical, and methodological nature of a theory of law and business. The explanatory, analytical, and methodological nature points out that an unlawful end result causes the implementation of an unlawful decision, strategy or practice. However, the implementation of a lawful decision, plan or practice may include a breach of a normative value, such as an ethical standard, and could cast dispersion on the character of the organization and its management.[17] Thus, the corollary of using the theory of law and business is making a lawful end result with normative value that will move to the next stage to lawfully continue or complete the recursive processes of business decision-making and planning, and complete the matter or practice in moving to another related and unrelated matter or practice of continuous business operations.

The jurisprudential elements must also be capable of supporting the explanatory, analytical and methodological nature of the theory of law and business to describe, assess and predict the impact of a common law rule or government statute on doing business, managing organizations and advancing disciplines. On one hand, the explanatory and analytical natures are essential in recognizing and explaining the impact of law on business, where business organizations and disciplines are affected by legal risks and uncertainties of government policy-making and ethical decision-making in demanding business markets and regulatory and policy environments, such as climate change.[18] On the other hand, the analytical and methodological

17. *See id.* at 606 (explaining the need for a theory of law and business that integrates or combines legal and business knowledge, analytics or methodologies in making and examining business decisions, plans and matters).

18. *See* Thomas A. Tsalis & Iaonnis E. Nikolaou, *Assessing the Effects of Climate Change Regulations on the Business Community: A System Dynamic Approach*, 26 BUS. STRATEGY & THE ENV'T 826, 827 (2017) (recognizing the need to consider a proactive approach to managing government regulation caused by climate change and concluding that making business decisions, plans and operations to avoid regulatory risks may cause financial losses and other consequences); *see also* Shareef, *supra* note 8, at 272 (arguing

natures are quintessential to understanding business relationships, transactions and happenings under regulation and common law where executives must recognize and address disruptive business, social, economic, technological and natural conditions, such as climate change and its effects.[19] These natures are needed to recognize and understand natural, economic and technological causes of public harm, business threats, and market opportunities. Thus, technological, natural and economic conditions may cause national governments to create new legal and regulatory risks and uncertainties[20] for executives who must manage the impact of climate change,[21] technology and other threats for business organizations and their stakeholders.[22]

III. THE NATURE OF THE THEORY OF LAW AND BUSINESS

The theory of law and business must rest on a legal foundation capable of enabling an integration of law and business and supporting a managerial analysis with law. The integration of law and business includes using common law and regulation in business decision-making, planning and operations, recognizing the normative value of lawful decisions, strategies and practices and assessing the impact of common law and regulation on business and its disciplines and organizations. The managerial analysis with

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that some MBA students are led to believe business decision-making, planning and operations are value-free).

19. *See* Jeremy J. Hess et al., *Public Health and Climate Change Adaptation at the Federal Level: One Agency's Response to Executive Order 13514*, AM. J. OF PUB. HEALTH. 22, 22 (2014) (finding that climate change includes several adverse effects on the natural environments, such as precipitation, storms and sea level); *see* Eric Biber et al., *Regulating Business Innovation as Policy Disruption: From the Model T to Airbnb*, 70 VAND. L. REV. 1561, 1563 (2017) (explaining how disruptive technologies and business models can affect government regulation and public policy).

20. *See* Tsalis & Nikolaou, *supra* note 22, at 827 (finding that corporations and other organizations may "regard climate change and its implications as potential threats or risks to their financial value."). A category of risk requiring business organizations to make new decisions and plans or change existing operations and plans is indirect risks that include litigation, reputational and regulatory risks. *Id.* New regulation increases regulatory risks that must be addressed with lawful, usable, innovative decisions, plans and operations. *Id.* Furthermore, litigation risks arise when managers and executives implement decisions, strategies and practices that raise legal issues requiring courts to determine legality or illegality. *Id*. at 828.

21. *See id.* (finding that business organizations must respond to climate change and may attempt to avoid legal and regulatory risks to remain competitive); *see* Biber et al., *supra* note 16, at 1563 (explaining how regulation and public policy are affected by disruptive technologies and business models).

22. *See* Holloway, *Primer*, *supra* note 6, at 592–93 (explaining the need for a theory of law and business that integrates or combines legal and business knowledge, analytics and methodologies in making and examining business decisions, plans and matters).

law assists in ascertaining the legality and normative validity of end results of each stage of business decision-making and planning and each practice or matter of conducting business operations.[23] The theory of law and business relies on knowledge-based properties of legal rules and business principles that state and explain happenings, analytical-based properties of legal and business analyses that analyze facts, findings and information, and legal and business methodological-based properties of judicial and business decision-making that uses logical and rational thinking in making conclusions.

A. Assessing and Categorizing the Impact of Law on Business

The theory of law and business must rest on a legal foundation enabling a legal-business taxonomy to state and describe the limits, losses and failures of business managers, organizations and disciplines operating under enforceable protections, restrictions and limitations of common law, legislative acts and administrative regulations.[24] The legal-business taxonomy uses managerial discretion theory to categorize the limits on the latitude of managers and organizations to exercise their rights and comply with their obligations and duties under common law and regulations.[25] Managerial discretion is a "continuous measure of the cumulative effects caused by legal rules on business powers and rights at any one time . . . ."[26] Next, the taxonomy uses managerial loss to classify unlawful business decisions, plans and matters, which violate common law and government regulation, causing a denial of or limit on use of a business principle, theory, analytics or method. A managerial loss is "[t]he elimination or decline of a business concept under a fact-sensitive managerial analysis of a legal rule . . . ."[27] Finally, the taxonomy uses a managerial failure to classify a line of unethical or conflictual decisions, strategies and practices, which are theory-less and lawless, triggering or causing an increasingly restrictive

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23. Holloway, *Concept*, *supra* note 11, at 144-45.

24. *See id.* at 161-63 (introducing a taxonomy to describe and categorize limits, losses and failures that must be recognized and addressed in assessing the impact of law on business and its disciplines and organizations).

25. *See id*. at 154-57, 161 (recognizing that managerial discretion theory explains and identifies the latitude of managers, executives and organizations of business disciplines); *see also* Craig Crossland & Donald C. Hambrick, *Differences in Managerial Discretion Across Countries: How Nation-Level Institutions Affect the Degree to Which CEOs Matter,* 32 STRATEGIC MGMT. J. 797, 803 (2011) (explaining managerial discretion theory and its application to the latitude of national organizations responding to the law, regulation and other limitations of national governments).

26. *See* Holloway, *Concept*, *supra* note 11, at 161.

27. Holloway, *Concept*, *supra* note 11, at 161; *see also* SCHELLENBERGER, *supra* note 6, at 8 (defining the use of a managerial analysis as the use of analytical tools to aid the process of decision-making).

judicial precedent or legislative mandate. A managerial failure occurs when "managers . . . continuously define or analyze the same or similar situations and make the same or similar [unethical or socially irresponsible] decisions."[28] Thus, the taxonomy classifies the limits of and kinds of theory-less and lawless decisions, plans and practices that do not comply with common law and regulation or that comply with common law and regulation but do not conform to public interests, ethical standards and organizations directives.

B. Enabling the Theory of Law and Business to Aid Managers

The jurisprudential foundation consists of legal interests, text and rationality to add predictability, continuity and consistency to the theory of law and business by broadly integrating law and business for more exact uses in business decision-making, planning and operations. The jurisprudential elements enable the theory of law and business to add text or fact sensitivity, legitimate public needs and rational thinking of legal rules, analysis and reasoning.[29] This sensitivity, combined with public needs, aid managers and executives in recognizing the impact of common law rules and government regulation on their business decisions, preferably that are given with legal advice accompanied by legal analytics. This legal advice accompanied by legal analytics provides managers, who do not possess sufficient legal skills, active legal findings and explanations.[30] Legal advice accompanied by legal analytics is more sensitive and responsive to significant differences in business when moving from one stage to another in decision-making and planning, and one matter to another in business operations.[31] In using legal advice, these elements aid in ascertaining and understanding lawful business and other needs, situations, and conclusions, and in recognizing and addressing compliance with normative values in making lawful decisions. The legal interests, text and rationality enables combining legal and business knowledge, analytics or decision-making methodologies in decisional stages and operational matters to analyze and explain business situations, information, and conclusions. In various stages and matters, these analyses

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28. *Id.*

29. *See* Holloway, *Primer*, *supra* note 6, at 587–89 (explaining the need for a theory of law and business that integrates or combines legal and business knowledge, analytics and methodologies in making and examining business decisions, plans and matters).

30. *See id.* at 628-29 (explaining the need for a theory of law and business that integrates or combines legal and business knowledge, analytics, and methodologies in making and examining business decisions, plans and matters).

31. *See* Holloway, *supra* note 7, at 608-09 (explaining the need for a theory of law and business that integrates or combines legal and business knowledge, analytics, and methodologies in making and examining business decisions, plans and matters).

and explanations take place precisely where business managers and executives need to know, understand, and use legal rules and advice accompanied by legal analytics and methods.[32]

The fact sensitivity, analytical scrutiny and methodological order of the theory of law and business increase the usefulness or utility of common law rules and statutory provisions at each stage of recursive processes of business decision-making and planning and on each matter of ongoing business operations.[33] Each stage or matter requires a lawful business completion or end result, such as the best alternative.[34] Legality is essential. Notwithstanding legality, if a lawful end result lacks normative value, such as an unethical lawful alternative, this end result cannot move to the next stage or continue to the next practice. Normative value is therefore necessary. However, the quintessential requirement is an effective business end result, such as sales promotion alternatives, which justifies the decision need and furthers the decision objective, for example, to increase product sales.[35] This effective business end result justifies a current organizational need that exists in a market or organizational situation, environment or activity causing decision-making, planning and operations. Thus, the theory of law and business explains and ascertains the legality and recognizes the normative validity of each stage of business decision-making and planning and each matter of business operations to make effective business end results.

C. Using the Foundation to Enable a Theory of Law and Business

The jurisprudential foundation enables the theory of law and business to give explanations and predictions on using common law and government regulation with legal analysis and reasoning in making and examining business decisions, plans and practices. The legal foundation underpins a theoretical framework that explains and predicts the legality and illegality of the various stages of business decision-making and planning, matters of conducting business operations and impacts of law on business and its

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32. *See* Nancy B. Rapoport & Joseph R. Tiano, Jr., *Legal Analytics, Social Science, and Legal Fees: Reimagining "Legal Spend" Decisions in an Evolving Industry*, 35 GA. ST. U. L. REV. 1269, 1291 (2019) ("The strength of what legal analytics can provide—predictability, accuracy, and consistency of service delivery—may, under many circumstances, matter more than the speed of delivery of those [legal] services.").

33. Holloway, *Concept*, *supra* note 11, at 157–59.

34. Holloway, *et al.*, *Pedagogy*, *supra* note 16, at 242–43 (listing decision making steps, including evaluating alternatives).

35. *Id.* at 245 (providing an example of an alternative — providing tools to workers — to achieve a business objective of maintaining a flexible workforce through independent contractor status).

disciplines and organizations.[36] The theoretical framework also uses managerial discretion theory in analyzing whether each lawful end result conforms to ethical and other normative values within each stage of business decision-making, planning and operations.[37] Next, the legal foundation supports a managerial analysis with law as an analytical framework combining and using legal and business principles, analytics and methodologies to make lawful and examine unlawful business decisions, plans and matters and assess the impact of law on business and its organizations.[38] These combinations create and form legal-managerial tools, methods and information to determine and understand the legality and usability of defined business situations and needs, as well as to ascertain the legality and validity of business and other information, findings and conclusions of stages of recursive decision-making and planning and ongoing business operations.[39] Thus, the jurisprudential foundation consists of legal interests, text and rationality to explain and ascertain the legality, illegality and normative value of end results of stages of business decision-making and planning and matters of business operations and assess the impact of common law and regulation on business and its disciplines and organizations.

IV. NEED FOR THE FOUNDATION OF THE THEORY OF LAW AND BUSINESS

The legal foundation enables an integration of law and business to fuse the qualities of legal interests, texts and rationalities into stages of business decision-making and matters of business operations to recognize and address questions of legality and illegality of end results - often relying on finances, sales, accounting, as well as other findings, information and conclusions. Law as a discipline is more than legality. The foundation underpins the use of legal rules, analysis and reasoning to address the legality and illegality of business decision-making, planning and operations. The legal foundation recognizes business is not driven by law but is driven by market conditions and business advantages, opportunities and needs that must be lawfully gained and used to conduct successful business operations. The purpose of beginning and completing decision-making, planning and operations is to

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36. *See supra* Parts III.A. and B. and accompanying notes (explaining how the legal foundation enables the theory of law and business to make lawful and examine unlawful and recognize the normative value of business decisions, plans and matters and assess the impact of law on business and its organizations and disciplines).

37. *See id*.

38. *See infra* Part IV.C (explaining how the legal foundation supports the use of a managerial analysis with law to make lawful and examine unlawful business decisions, plans and matters).

39. *See id*.

gain effective business benefits and advantages that further organizational goals and objectives in responding to or anticipating threats, opportunities and needs. These threats, opportunities and needs occur in or are treated as business situations, environments or day-to-day tasks and are informed by business, marketing, statistical and other findings, information and conclusions in making decisions, plans and practices.[40]

A. Ensuring Relations and Thinking of an Integration of Law and Business

Legal interests, texts and rationalities are jurisprudential elements enabling the theory of law and business to actually integrate law and business. This integration supports a managerial analysis with law to combine legal and business knowledge, analytics or methodologies in recognizing and addressing legal issues and regulatory concerns of common law and regulation.[41] Legal text, interests and rationality support and rely on a managerial analysis with law to combine and use common or shared legal and business knowledge-, analytical-, and methodological-based properties of the nature of legal and business principles, analytical tools and decision-making methods.[42] The foundation supports managerial analysis with law by making certain each end result is consistent with legitimate public and private interests, complies with the legal rules and conforms to requisite normative values.

The foundation supports a managerial analysis with law by ensuring knowledge- and analytical-based properties are used to make functional combinations of legal and business principles, analytics or methodologies. These properties have unique uses in stages of decision-making and matters of operations to make lawful and usable plans, as well as examine unlawful end results through legal interests, text, and rationality.[43] Foremost, common analytical-based properties are analytical scrutiny provided by business and legal analytical tools and methods to scrutinize, review and analyze facts, data and information and make findings and conclusions in making judicial decisions and business decisions, plans and matters. For example, common analytical-based properties include, among others, recognizing a business situation (problem) and finding a legal issue (problem) to find the need for a

40. *See* Holloway, *et al.*, *Pedagogy*, *supra* note 16, at 245 (noting the use of "statistics and other information, findings and conclusions" when entering the decision-making steps).

41. *See id.* at 248, 250.

42. *See id.* at 239–40 (explaining how managerial analysis treats business and legal knowledge and stating "[t]hese kinds of knowledge tell much about the nature and use of a legal rule, business concept and their shared factual and predictive natures").

43. *See id.* at 230 (discussing managerial analysis with law and business decision-making steps).

business decision and determine the presence of a legal issue, respectively. Next, methodological-based properties guide and control the informational and analytical qualities of business and judicial methods that are recursive stages and parts[44] of completing each stage of the processes of making business decisions and plans and conducting matters of ongoing business operations. For instance, the methodological-based properties ensure order to the entry of one or more judicial or legal methods, such as giving a rationale for a conclusion, or completing and reviewing an end result at a business decision stage, such as selecting one or more lawful feasible alternatives. Finally, knowledge-based properties are the fact-sensitive elements or statements of business principles and legal rules capable of explaining, identifying, and verifying comparable business situations and other factual patterns of decision-making, planning, and operations. For example, knowledge-based properties include the use of the status of an employer-employee relationship rule and organizational flexibility theory to identify and verify a flexible employment arrangement in creating a flexible workforce to build organizational flexibility.[45] Thus, the legal foundation enables the theory of law and business to use amenable knowledge-, analytical-, and knowledge-based properties of legal and business knowledge, analytics and methodologies to ascertain legality or illegality of end results at the end of each stage of business decision-making and planning and each matter of ongoing business operations.

1. Rational Purposes of Law Conforming to Normative Values

The foundation consists of legal text, interests and rationality to ensure use of legal rules, analytics and methodology in ascertaining and understanding lawful and usable recognized or defined situations and lawful and valid feasible alternatives and other end results. The theory of law and business posits that all lawful situations and end results may not conform to normative values that would make them usable and valid to make decisions, plans and practices.[46] Simply, lawful results may not always conform to ethical

44. *See* Richard B. Cappalli, *The Disappearance of Legal Method*, 70 TEMP. L. REV. 393, 398–399 (1997) (recognizing legal methodology learned by conducting an analysis of judicial decisions); Certo et al., *supra* note 13, at 114 (explaining the use of two kinds of decision-making processes that include a well-developed, uniquely human rational decision-making process with several steps and less developed decision-making process).

45. *See, e.g.*, *Employment Law Issues for Startups, Entrepreneurs, and Growing Businesses: Overview*, Practical Law Labor & Employment (West) (last visited July 11, 2022) (laying out the business principles and legal rules considered when starting a business).

46. *See* Spijkers, *supra* note 8, at 78 (“A *value* is an enduring belief that a specific mode of conduct or end-state of existence is personally or socially preferable to an

standards, public interests and organizational directives. Legal text and rationality underpin legal analytics and methods to recognize end results that do not conform to ethical standards, public interests and organizational directives.[47] Next, legal interests and rationality are sensitive to legitimate public and private needs and wants that are rational legislative and common law purposes furthering protection and enforcement of social norms, public welfare, and societal needs.[48] The foundation ensures methodological order in recognizing ethical, organizational and public standards that affect the usability of lawful situations, environments and factual patterns[49]. These standards affect the validity of lawful alternatives, matters, strategies and other end results as managers and executives move from one stage or matter to another stage or matter.[50] This usability and validity also demand analytical scrutiny of end results to weigh their potential conflicts with ethical standards, organizational directives and public interests that could cause an ethical dilemma, raise a public policy concern, or cause internal organizational conflict. This dilemma, concern, or conflict may cause lawful end results to be unusable and invalid at any stage of decision-making and planning, and on any matter or practice of business operations.[51] Thus, legal interests, text and rationality enable the theory of law and business to recognize ethical dilemmas, public policy concerns and organizational conflicts limiting the usability of business situations (end results) at the beginning stage and validity of other end results at other stages of business decision-making and planning and in matters of business operations.

2. Need to Add Predictability and Safeguard Innovation

The foundation ensures more precise uses of legal and business knowledge, analytics, and methodologies by enabling the integration of law

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opposite or converse mode of conduct or end-state of existence." (quoting MILTON ROKEACH, THE NATURE OF HUMAN VALUES 5 (1973))).

47. *See* John Stanton-Ife, *The Limits of Law*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY 1 (2022) ("Law of its nature has an internal morality of its own, so it is claimed, with its own built-in limits (Section 8).").

48. *Cf.* Karl T. Kurtz, *Legislatures and Citizens: Public Participation and Confidence in the Legislature*, NAT'L CONF. OF STATE LEGISLATURES (1997) (discussing why public participation is important to democracy and the importance of public engagement in the legislative process).

49. *See infra* Part VII.C and accompanying notes (explaining the methodological order performed by a managerial analysis with law to determine legality and examine illegality in business decisions, plans and practices).

50. *Cf.* Holloway, *Primer*, *supra* note 6, at 625 (discussing ethical and legal dilemmas arising from recognition of decision situations and best alternatives).

51. *See* Shareef, *supra* note 8, at 272 (arguing that some MBA students are led to believe business decision-making, planning and operations are value-free).

and business to form discrete matter- and stage-specific combinations of legal and business knowledge, analytics or methodologies. This precise use adds predictability, safeguards creativity, and recognizes amenability by forming and using discrete legal-managerial information, tools and methods to ascertain the legality and usability or validity of end results of business decision-making, planning and operations. This discrete information, in conjunction with the legal-managerial tools and methods, depends on common or shared knowledge- and analytical-based properties of amenable or agreeable legal and business knowledge, analytics and methodologies. These discrete matter- and stage-specific legal-managerial tools, methods and information are given support by jurisprudential elements underpinning legal rules, analytics, and rational thinking. For example, knowledge-based properties that include descriptive legal text and explanatory business principles are combined to form a unique legal-managerial method.[52] This combination of this text and principle forms legal-managerial methods and information to evaluate the legality and usability and examine illegality of decision situations at the beginning stage of business decision-making and planning and in factual matters of ongoing business operations. Thus, legal text is used with a business principle to give predictability to a legal-managerial method and information that only identifies and verifies lawful and usable situations or end results at the beginning stage of decision-making and planning and in factual patterns, such as an employment dispute, in conducting business operations.

Other discrete legal-managerial tools and methods are supported by legal interests and rationality to recognize and address legal issues and regulatory concerns limiting decisions, strategies and practices of innovative and creative business models and disruptive technologies.[53] These tools and methods may need to recognize and address the conflict between an innovative business decision and a public interest of a common law rule or legislative act at one or more stages of decision-making and planning and matters of business operations. For instance, the use of independent contractors as drivers in the ridesharing business model creates conflict

52. *See infra* Part VII.A and accompanying notes (forming legal-managerial tools and information for use in the decisional situation or first stage of business decision-making and planning and factual matters of business operations).

53. *See, e.g.*, Andre Andoyan, Comment, *Independent Contractor or Employee: I'm Uber Confused! Why California Should Create an Exception for Uber Drivers and the "On-Demand Economy*," 47 GOLDEN GATE U. L. REV. 153, 154–55 (2017) (discussing legal concerns in under the rideshare business model and the classification of Uber drivers as independent contractors rather than employees); Biber et al., *supra* note 23, at 1563 (explaining the impact of regulation and public policy on disruptive technologies and innovative business models that affect our lives and change business operations).

between an innovative model and common law on whether these drivers can be employees under the common law principle applied to determine the employment status of contract workers.[54] Next, the foundation enables an integration of amenable legal and business principles, legal and business analytics, and judicial and business decision-making methodologies. For example, the texts of amenable legal rules and business principles share a similar textual nature of describing situations and other facts and explaining situations which exist at an intersection of law and business.[55] Thus, the foundation safeguards innovativeness and supports use of amenable properties in forming discrete tools and methods to recognize, analyze and use situations, information, findings and conclusions in making lawful and usable or valid decisions, plans and matters.

B. Increasing the Usefulness of Law and Regulation in Business

The theory of law and business rests on a legal foundation squarely within law and its institutions and academic discipline and directly complements business and its organizations and academic disciplines. Legal interests, text and rationality are jurisprudential elements that include purposes, substance and process of legal knowledge, analytics and methodology, respectively. These elements are relied on by courts, legislatures and administrative agencies to enact, interpret and promulgate, respectively, legal rules and principles.[56] These elements are also amenable to much business knowledge, analytics and methodology. Foremost, legal interests include legitimate business needs or private interests that are protected by common law and regulation. Next, the legal text of common law rules and regulatory provisions[57] can match the explanatory statements of business principles and theories[58] where both law and business principles may share similar factual

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54. *See* Biber et al., *supra* note 23, at 1563 (recognizing that business innovation created legal issues, such as: "Should service providers [e.g., drivers] be considered employees of the firm [e.g., Uber, Lyft] managing the platform? Who bears liability for harm caused during service provision?").

55. *See* Rizzo, *supra* note 3, at 35 (discussing the role of the corporate counsel who now needs to understand law and business in practicing corporate law at the dangerous intersection of law and business).

56. *See* Mark Greenberg, *Legal Interpretation*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2021), https://plato.stanford.edu/entries/legal-interpretation/#toc.

57. Legal knowledge is legal rules, principles and doctrines of common law, legislative acts and administrative regulations to govern specific relationships, acts, transactions and other happenings. In addition, judicial precedents are also legal knowledge. *See* Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 969–70 (3d Cir. 1979) (defining a legal precedent as a legal rule that describes a specific set of facts); Cappalli, *supra* note 45, at 399 (recognizing that a precedent has the quality of law).

58. *See* Jason Earl Thomas, *Scholarly Views on Theory: Its Nature, Practical*

patterns. Finally, the legal rationality of much of legal analytics[59] and judicial methodology share common analytical and methodological properties with business analytics[60] and decision-making methodology.[61] These properties include recognizing and analyzing situations and using these findings to continue or complete decision-making, planning, and operations. Thus, the jurisprudential elements of the foundation permit the use of common and shared properties of legal and business knowledge,[62] analytics,[63] and methodologies[64] in the application of legal rules and use of legal advice, which is accompanied by legal analytics, by business managers, executives and policymakers.[65]

1. Needing to Respond to Regulation and Regulatory Risks

Both lawyers and managers must recognize and respond to regulatory and

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Application, and Relation to World View in Business Research, 12 INT'L. J. BUS. & MGMT. 231, 232 (2017) (defining theory as "a description of a phenomenon and the interactions of its variables that are used to attempt to explain or predict.""); John G. Wacker, *A Definition Of Theory: Research Guidelines For Different Theory-Building Research Methods in Operations Management,* 16 J. OPERATIONS MGMT. 361, 363 (1998) (using operations research to define theory that includes a domain, variables, definitions, and predictions); *see also* AACSB-Eligibility Standards, *supra* note 16, at 35 (stating that general business knowledge includes legal, political, and regulatory knowledge and traditional business knowledge, such as finance, marketing, and accounting).

59. *See* Rapoport & Tiano, *supra* note 39, at 1283 (defining a legal analytics discipline that uses technology in the practice of law to benefit both lawyers and clients).

60. Zhaohao Sun et al., Business Analytics-Based Enterprise Information Systems, 57 J. COMPUT. INFO. SYS. 1, 7 (2016) (recognizing business analytics and its study cover various subject areas, such as management and finance).

61. Holloway et al., *Pedagogy*, *supra* note 16, at 230–32 (discussing the use of managerial analysis with law to create unique legal-managerial information and analytics that can be taught by professors in colleges and schools of business).

62. *See* AACSB-Eligibility Standards, *supra* note 16, at 34–36 (listing the areas of knowledge that should be taught in colleges of business to undergraduate and graduate students). The AACSB was established a century ago to establish curriculum, faculty and other standards for schools and colleges of business. The AACSB promotes and uses business education to improve our global society. *Id*. at 1. AACSB Eligibility Standard 9 sets forth "[c]urriculum content [that] is appropriate to general expectations for the degree program type and learning goals . . . ." *Id*. at 34. AACSB Eligibility Standard 9 lists the knowledge areas, skills areas and technological agility that should exist in graduate and undergraduate curricula of colleges of business. *Id.*

63. *See* Cappalli, *supra* note 45, at 398 (recognizing legal analysis and reasoning as legal methodology to analyze law and facts and is learned by analyzing judicial decisions).

64. *See id.*; *see also* Rizzo, *supra* note 3, at 34–35 (recognizing that lawyers eventually learn business knowledge and methods by education and experience).

65. *See* Rizzo, *supra* note 3, at 35 (recognizing that lawyers can learn by education and gain by experience business knowledge and methods).

legal risks and issues occurring at any stage of the process of business decision-making,[66] planning[67] and conducting business operations.[68] In recognizing legal issues, the theory of law and business expands the use of legal rules, analytics and methodology by using a managerial analysis with

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66. *See* Certo et al., *supra* note 13, at 114 (explaining the use of two kinds of decision-making processes: (1) a well-developed, uniquely human rational decision-making process with several steps and (2) a less developed decision-making process); William F. O'Dell, *Effective Business Decision Making*, *in* SMALL BUSINESS REPORTS 68, 70–71 (1992) (setting forth a rational decision-making processes with several steps); Earnest R. Archer, *How to Make a Business Decision: An Analysis of Theory and Practice*, 69 MGMT. REV. 54, 54–55 (1980) (discussing management research that established managers need a rational and systematic decision-making process consisting of several stages).

67. UNIV. MINN. LIBR. PUBL'G, PRINCIPLES OF MANAGEMENT, § 1.5, (2010), https://open.lib.umn.edu/principlesmanagement/chapter/1-5-planning-organizing-leading-and-controlling-2/ [hereinafter PRINCIPLES OF MANAGEMENT] (explaining the need for and use of various kinds of planning in business organizations). "Planning is the function of management that involves setting objectives and determining a course of action for achieving those objectives. Planning requires that managers be aware of environmental conditions facing their organization and forecast future conditions. It also requires that managers be good decision makers." *Id.* There are three types of business plans that create tactical, operational and strategic courses of action. First, "[s]trategic planning involves analyzing competitive opportunities and threats, as well as the strengths and weaknesses of the organization, and then determining how to position the organization to compete effectively in their environment. Strategic planning has a long-time frame . . . ." *Id*. Second, "[t]actical planning is intermediate-range (one to three years) planning that is designed to develop relatively concrete and specific means to implement the strategic plan. . . ." *Id*. Third, "[o]perational planning generally assumes the existence of organization-wide or subunit goals and objectives and specifies ways to achieve them. Operational planning is short-range (less than a year) planning that is designed to develop specific action steps that support the strategic and tactical plans"." *Id.* For case law applications, see, for example, Earley v. Champion Int'l Corp., 907 F.2d 1077, 1082 (11th Cir. 1990) ("Evaluations of the age of the work force as part of a restructuring and reduction-in-force plan are indicative of thorough business planning and are not direct evidence of discriminatory intent."); United States v. Phila. Nat'l Bank, 374 U.S. 321, 362 (1963) (citing Crown Zellerbach Corp. v. F.T.C., 296 F.2d 800, 826-27 (9th Cir. 1961) ("And unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded.").

68. *See* *Business Operations*, CORPORATE FINANCE INSTITUTE, https://corporatefinanceinstitute.com/resources/knowledge/strategy/business-operations/ (last visited Sept. 15, 2020) (explaining specific actions that may be taken by business managers and specialists to carry out day-to-day financial, managerial, marketing and other functions). The end result of a practice or matter, such as hiring an employee, of business operations is evidence that business actions, transactions, and happenings do not always require a multi-stage process to address a problem, issue or concern. *See* Certo et al., *supra* note 13, at 114. The Corporate Finance Institute defines business operations as "activities that businesses engage in on a daily basis to increase the value of the enterprise and earn a profit. . . . Employees help accomplish the business' goals by performing certain functions such as marketing, accounting, manufacturing, etc." CORPORATE FINANCE INSTITUTE, *supra* note 69.

law to form discrete legal-managerial information, tools and methods.[69] The managerial analysis with law is needed by managers and executives to ascertain and examine the legality and usability of the recognition of the decision situation stage and thereafter, the legality and validity of finding alternatives, implementation of the decision and other stages of decision-making,[70] and planning and ongoing matters of banking, retail and other business operations.

The jurisprudential elements of the foundation give greater insight into the impact of common law and regulation on business and its disciplines and organizations. Greater insight is needed to manage the new legal and regulatory risks of more disruptive climate change and its effects on technological, political and social environments. One could easily believe that unrelenting climate change occurring alongside a devastating pandemic, fierce global economic competition and more damaging natural disasters are evidence that business organizations need more methodological order, fact sensitivity and analytical scrutiny to respond to novel legal issues and regulatory risks.[71] Business organizations that may have relied on a retrenchment strategy to delay compliance with civil rights, employee retirement or another policy[72] can now use the same strategy to oppose *nature and government*, though lawsuits and lobbying will not slow the devastation of climate change and its bad weather and rising seas.

2. Gaining Greater Insight into Recognizing Business Needs

Managing in a highly regulatory and global environment may eventually

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69. *But see* Rizzo, *supra* note 3, at 34 (stating that "[i]n business, a potentially dangerous intersection is the crossing of legal and business interests. New legislation and court opinions may make even familiar intersections difficult to navigate . . . .").

70. *See* Certo, et al., *supra* note 13, at 114 (explaining that more formal business decision-making includes a well-developed process with several stages).

71. *See* Tsalis & Nikolaou, *supra* note 22, at 827-28 (referring to "the proactive reactions of businesses in response to future climate change regulations . . . . This approach recognizes [t]he main goal of this corporate behavior is to avoid new regulatory risks, which have direct consequences on operation and production costs and thus on corporate competitiveness."); *see also* James E. Holloway & D. Tevis Noelting, *Takings Clause and Integrated Sustainability Policy and Regulation: The Proportionality of the Burdens of Exercising Property Rights and Paying Just Compensation,* 29 VILL. ENV'T. L.J. 1, 13–19 (2018) (discussing that property rights will be affected by global and national climate change policies to respond to development and environmental sustainability concerns).

72. *See, e.g.,* Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a), 2000e-3 (2022) (regulating discriminatory employment practices based on race, color, sex, national origin and religion in making employment decisions, plans and operations); Employee Retirement Income Security Act of 1974, 29 U.S.C.A. § 1003(a) (2022) (regulating employee benefit plans that are established and maintained by an employer and employee organization(s) engaged in interstate commerce).

be the business norm that requires different theoretical and analytical frameworks to manage organizations and their needs and objectives under new legal and regulatory issues and liabilities. New theoretical and analytical frameworks may require new and different business knowledge, analytics and methods and their most effective uses and applications by managers and executives to sustain domestic and global business growth of business organizations. Legal and regulatory risks will be created by federal and state policymakers responding to actual and potential harm to environmental and natural resources, such as forest fires and flooding, by expanding environmental, natural resources, land use and other regulation restricting economic and property rights.[73] The theory of law and business responds to greater policy, regulatory and legal risks and environmental, land use and other restrictions by offering a practical approach, namely a managerial analysis with law, to ascertain legality and normative value and avoid illegality in decision-making, planning and operations.

The theory of law and business is executed by a managerial analysis with law to aid managers and executives and perhaps lawyers, who want to know more about business analytical tools, in determining and understanding legality and recognizing normative values of end results, such as a decision, strategy or practice. The managerial analysis with law allows business financial, marketing and other managers, executives and specialists to pursue innovative, creative and forward-looking lawful end results.[74] These end results at each stage or matter are not bound by business precedents and permit more inclusive knowledge, analytics, and rational thinking under judicial precedents, common law rules and statutory provisions in stages of the process of decision-making,[75] and planning[76] and in matters of

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73. *See* Holloway & Noelting, *supra* note 79, at 12–19 (explaining the need for an integrated business development and environmental policies that require federal and state policymakers to weigh the need for more restrictions on private property rights).

74. *See* Holloway, *Concept*, *supra* note 11, at 164.

75. *See* Archer, *supra* note 67, at 55–61 (explaining each stage of a nine-stage decision-making process that is interactive and recursive through monitoring the decision environment to implementing and monitoring the decision). The steps in a rational decision-making process are as follows: (1) identify the problem, (2) establish decision criteria, (3) weigh decision criteria, (4) generate alternatives, (5) evaluate the alternatives, (6) chose the best alternative, (7) implement the decision and (8) evaluate the decision. UNIV. OF MINN., MANAGEMENT, *supra* note 68, § 11.3 (using Figure 11.8 to list the steps in rational business decision-making).

76. UNIV. OF MINN., MANAGEMENT, *supra* note 68, § 1.5 (showing how different kinds of planning involves multiple steps or stages in conducting business operations). First, "[t]he process begins with environmental scanning which simply means that planners must be aware of the critical contingencies facing their organization in terms of economic conditions, their competitors, and their customers." *Id.* Second, "[p]lanners must then attempt to forecast future conditions. These forecasts form the basis for

conducting business operations[77] in facing new and different regulatory environments. In addition, the managerial analysis with law offers colleges of business[78] and perhaps schools of law[79] a pedagogy for students needing to study and learn more sensitive and responsive legal-managerial information, tools and methods to recognize and address the legal and regulatory risks and issues and normative value[80] of global economic, environmental, social and business concerns confronting business organizations.[81] Thus, the foundation supports a managerial analysis with law by ensuring broad use of law and regulation through fact sensitivity,

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planning." *Id*. Third, "[p]lanners must establish objectives, which are statements of what needs to be achieved and when." *Id*. Fourth, "[p]lanners must then identify alternative courses of action for achieving objectives." *Id*. Fifth, "[a]fter evaluating the various alternatives, planners must make decisions about the best courses of action for achieving objectives." *Id*. Sixth, "[t]hey must then formulate necessary steps and ensure effective implementation of plans." *Id*. Seventh "planners must constantly evaluate the success of their plans and take corrective action when necessary." *Id*.

77. *See* Corporate Financial Institute, *supra* note 76 (defining various kinds of business operations as engaging in day-to-day activities of marketing, management, information systems and other functions to manage retail, service, and other industries).

78. *See* AACSB-Eligibility Standards, *supra* note 16, at 10 (recognizing that colleges and schools of business should teach business law, legal environment and government regulation courses to students needing to use legal advice and information in their business professions and work); Siedel, *supra* note 2 ("[E]ight questions and answers designed to demonstrate why law is such an integral part of business and how it is incorporated into business school programs . . . .").

79. *See* Jackson, *supra* note 2, at 321–22 (recognizing law school should teach and qualitative and quantitative analytical skills in preparing law students to practice corporate law). Another approach is "[t]he transactional perspective [that] demands that lawyers, and students as they learn this approach to practice, be well versed in "not only the legal aspects of a contract concept, but also its business purpose." Celeste M. Hammond, *Borrowing from the B Schools: The Legal Case Study as Course Materials for Transaction Oriented Elective Courses: A Response to the Challenges of the MacCrate Report and the Carnegie Foundation for Advancement of Teaching Report on Legal Education*, 11 TRANSACTIONS: TENN. J. BUS. L. 9, 10 (2009) (citing Tina L. Stark, *Thinking Like a Deal Lawyer*, 54 J. LEGAL EDUC. 223, 226 (2004) (identifying a skill of transactional lawyers as "translating the business deal into contract concepts")).

80. *See* Tsalis & Nikolaou, *supra* note 22, at 827 (recognizing that a proactive approach to manage and rather than avoid regulatory risks and their impact on operations, costs and competitiveness); *see also* Holloway, *Concept*, *supra* note 13, at 151 (explaining the formation of legal-managerial tools, methods and information to make lawful end results at stages of the processes of business decision-making and planning); *supra* note 9 and accompanying text (listing American and European business law professors and their research urging the use of a proactive approach or law and strategy approach to recognize and manage legal and regulatory issues, risks and concerns by creating competitive advantages and other business opportunities and benefits for business organizations).

81. *See* Holloway, et al., *Pedagogy*, *supra* note 11, at 245–54 (explaining how a managerial analysis with law can be taught by professors in colleges and schools of business).

greater control over decision-making, planning and operations through methodological order and fuller analysis of situations, through analytical scrutiny of end results of the stages of business decision-making and planning and practices or matters of conducting business operations.

C. Using Legal Rules Accompanied by Legal Analytics and Methods

The elements of the legal foundation take on special need, textual and rational qualities in enabling the theory of law and business and supporting the managerial analysis with law. These qualities of legal text, interests and rationality are inherent in uses and applications of legal rules and statutory provisions accompanied by legal analytics. Legal advice or rules accompanied by legal analytics occurs when lawyers explain the nature of legal findings and conclusions and legal analytical tools and methods applied to determine legality or illegality of these findings and conclusions by recognizing and addressing legal issues and regulatory concerns. These qualities of legal interests, text and rationality play unique analytical, textual or rational thinking roles in recognizing common law and regulatory issues and concerns that are raised by business situations, findings and conclusions. These issues and concerns must be recognized and addressed to make lawful end results in completing stages of business decision-making and planning and completing matters of business operations. In recognizing these issues and concerns, the jurisprudential elements support the managerial analysis with law to combine business and legal principles that are accompanied by business and legal analytics and methods to make lawful end results, ascertain normative values of lawful end results, examine unlawful end results and assess the impact of law on business organizations.

1. Using the Foundation to Support Legal Rules and Business Principles

The foundation supports a managerial analysis with law by using legal interests, text and rationality to support making lawful and examining unlawful business decisions, plans and matters. Legal interests, text and rationality support a managerial analysis with law by ensuring the purposes of and statements of common law rules and statutory provisions are fully used or applied in creating and forming legal-managerial information, tools and methods in stages of business decision-making and planning and within matters of business operations. These purposes and statements are the substance of legal rules and business principles that can be used for explanatory statements, to further legitimate needs, or to rely on normative values. These jurisprudential elements support the managerial analysis with law to determine, in part, the legality of business situations and factual

patterns that are identified by detailed sets of facts of a legal rule and specific explanations of a business principle.[82]

Under both legal rules and business principles, the jurisprudential elements support a managerial analysis with law to identify and verify the legality of the manager's recognized situation and other similar situations in beginning business decision-making and planning and weighing factual patterns of business operations. Managers and executives recognize or define the pertinent situation or need and the use of factual patterns in matters of business operations. In applying business principles to legal rules, the managerial analysis with law identifies similar situations in determining the legality of a defined situation or need that will be used in the beginning stage of decision-making and planning. Managers can compare one or more lawful situations of a managerial analysis with law to their recognized or defined situation or need. The comparison of a defined situation with other lawful situations allows these managers to consider other effective situations similar to the defined situation to begin this process of decision-making and planning. Managers and executives should consider or weigh other situations or factual matters that are both lawful and more effective in furthering the same decision or organizational need and objective, such as a business competition creating a need for a flexible workforce. Moreover, the consideration of a more effective situation includes considering private and public needs, rational thinking and legal text to ensure innovation, creativity and consistency. Thus, the jurisprudential foundation supports a managerial analysis with law to aid in verifying and using a lawful situation to begin decision-making, or recognizing a lawful business environment to begin the planning process, or using a lawful pattern to continue business operations.[83]

The jurisprudential elements play substantial roles in recognizing and addressing normative values by increasing methodological order and analytical scrutiny of lawful end results. This order and sensitivity are most significant in recognizing dilemma and conflict of normative values in making and using gray-area end results at all stages of business decision-making and planning and matters of business operations. These elements support the managerial analysis with law to create a legal-managerial method

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82. *See infra* Part VII and accompanying notes (explaining how each jurisprudential element supports the use of each level of a managerial analysis with law that consists of analytical tools, methods and information).

83. *See infra* Part VII.A and accompanying notes (explaining how specific jurisprudential elements affect the use of a managerial evaluation that applies a business principle to a legal rule to determine the legality of business situations at the beginning stage of decision-making and planning and factual matters of ongoing business operations).

which recognizes and tests legitimate business interests and decision needs of lawful situations and other end results. These elements fuse or ensure more order and scrutiny through a managerial analysis with law to recognize the dilemma and conflict of normative value of lawful end results. This order and scrutiny are provided by a legal-managerial method and information to timely evaluate and weigh lawful end results that can be undermined by an ethical dilemma, organizational breach or public policy conflict. The jurisprudential elements are qualities of public needs, rational thinking and legal mandates on harmful conduct. These dilemmas, conflicts and breaches are not covered by enforceable mandates, but their societal impact on social norms, business trust and public needs can still limit or diminish the normative value of lawful situations and other end results which may be harmful to society.[84]

Jurisprudential elements and their qualities support the managerial analysis with law to use another business theory or principle, managerial discretion theory, to recognize and analyze the latitude of managers and organizations to use lawful end results to move to the next stage in completing decision-making and planning and to the next matter of continuing business operations.[85] Managerial discretion theory depends on methodological sensitivity and analytical scrutiny to determine whether a lawful situation or other end result would not be usable and valid, respectively, or simply impermissible as lacking normative value within the latitude of managers and organizations under ethics, public policy and organizational policies. Ascertaining usability or validity is a necessary measure or test of normative value by determining whether each end result knowingly conforms to or breaches an ethical standard and organizational directive, or furthers or undermines a public interest in moving to the next stage of decision-making and planning and next matter of ongoing business operations. Thus, a managerial analysis with law relies on legal interests, texts and rationalities to form and create a legal-managerial method which uses managerial discretion theory to recognize usable or valid lawful end results conforming to normative values within business organizations.[86]

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84. *See infra* Part VI.A and accompanying notes (explaining how public and private interests, which are needs and wants, are protected by common law rules and statutory provisions).

85. *See* Crossland & Hambrick, *supra* note 30, at 803 (explaining managerial discretion theory and the latitude of business organizations under regulation and common law imposing restrictions on business decision-making, planning and operations).

86. *See infra* Part VI.B and accompanying notes (explaining how specific jurisprudential elements affect the use of a managerial evaluation that uses managerial discretion theory to determine the usability and validity of lawful end results, such as recognition of the business situation and finding feasible alternatives).

2. Using the Foundation to Support Legal-Managerial Analytics

The foundation supports a managerial analysis with law to use legal interests, text and rationality of legal rules and advice accompanied by legal analytics and methods to form and create discrete legal-managerial tools and methods. Legal interests, texts and rationalities possess unique analytical, textual and need qualities that support a managerial analysis with law to aid in recognizing and addressing common law and regulatory issues and concerns.[87] The managerial analysis with law uses these qualities to form legal-managerial tools and methods to address legal and regulatory issues and concerns. Such issues and concerns are raised by marketing, finance and other information, findings and conclusions needed and used in completing other stages of business decision-making and planning and nonfactual matters of business operations. One discrete legal-managerial tool uses a combination of judicial factual analysis and business feasible alternatives to recognize and analyze factual issues under a legal rule, such as fraud or wrongful discharge, governing one or more feasible alternatives. This factual analysis-feasible alternative tool ascertains the legality of feasible alternatives by analyzing business information or findings to determine whether an alternative is lawfully feasible to advance the objective and capable of moving to or being included in the next stage, which is the selection of the decision or best alternative. Business managers always need and must use lawful findings, information and conclusions to make lawful end results, such as feasible alternatives, at the end of a stage and matter. Legal-managerial tools and methods use legal interests, text and rational thinking to make lawful end results that must also address the situation and its decision need and objective, conform to normative values, and move to and advance the next stage in making another end result.[88]

Legal interests, text and rationality support the managerial analysis with law to aid managers and executives in determining the legality of each practice or matter by using legal-managerial tools and methods in moving to

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87. *See* Binyamin Appelbaum & Jim Tankersley, *The Trump Effect: Business, Anticipating Less Regulation, Loosens Purse Strings*, N.Y. TIMES (Jan. 1, 2018), https://www.nytimes.com/2018/01/01/us/politics/trump-businesses-regulation-economic-growth.html (stating that "[t]he evidence is weak that regulation actually reduces economic activity or that deregulation stimulates it. But business executives are largely convinced that the cost of complying with rules diverts money that could be invested elsewhere."). *But see* Tsalis & Nikolaou, *supra* note 21, at 827 (recognizing that "[t]he outcomes of such strategies show that corporate regulatory compliance is connected with an additional cost and loss of competitiveness").

88. *See infra* Part VII.C and accompanying notes (explaining how specific jurisprudential elements affect the use of legal-managerial tools and methods to determine the legality of business and other findings, conclusions and information and end results of stages of decision-making and planning).

the next matter of ongoing business operations. A managerial analysis with law is supported by legal interests, texts and rationalities to make legal-managerial methods and tools that are used in making lawful business practices or matters to continue effective ongoing business operations, such as retail sales and banking. For example, a legal-managerial tool is created by applying the recognition of a legal issue in making a workforce practice. This tool is an *issue recognition-workforce matter* used to recognize any legal issues and regulatory concerns under a known legal rule, namely determination of the status of workers in employment relationships, in ascertaining the legality of this workforce practice. The legal-managerial tool is applied to a newly designed workforce practice which imposes more forceful workforce standards on contract workers, for example, prohibiting flexible work schedules by drivers of personally owned vehicles in ride-sharing arrangements.[89] Thus, the managerial analysis with law is supported by legal interests, text and rationality to make lawful and examine unlawful matters or practices of ongoing business operations of organizations, such as banks and retail stores.[90]

V. NATURE OF LEGAL INTERESTS, TEXT, AND RATIONALITY

The theory of law and business rests on a foundation of legal interests, text, and rationality that are jurisprudential elements exhibited by legal rules and their application using legal analysis and reasoning in judicial decision-making as well as supporting legislative decision-making. Nevertheless, legal interests, text and rationality share some common properties with business interests and rational thinking to advance organizational goals and objectives. The foundation enables the theory of law and business to make legal-managerial tools and methods to recognize public and business needs, use fact-sensitive statements and explanations, and make logical and rational end results in decision-making, planning and operations.

A. Understanding Interests as Needs of Public and Private Sectors

Legal interests are a jurisprudential element that consists of legitimate personal, organizational, economic and public needs and wants that may be recognized and protected under common law and regulation. Often, harmful or injurious human behavior and business development can create

89. Andoyan, *supra* note 54, at 171–73 (discussing the use of drivers of their own vehicles as independent contractors by Uber under California law and regulation).

90. *See infra* Part VII.C and accompanying notes (explaining how specific jurisprudential elements affect the use of legal-managerial tools and methods to determine the legality of business and other findings, conclusions and information and end results of matters of business operations).

environmental, social or political tension between public interests and private interests, such as between environmental protection and real estate development. This tension may rise to the level of a public policy conflict regarding the earth's existence, the world's people and nation's economy.[91] Of the foundation, legal interests recognize and weigh legitimate public and private needs and wants of business, persons, and society. Legal interests show why legal rules prohibit particular harmful and injurious behavior, conduct and acts to protect the public, markets and organizations.[92] Moreover, public and private interests are recognized, protected and advanced by legal rules and principles granting rights, imposing obligations and establishing other legal relations, such as privileges and immunities.[93] These interests enable the theory of law and business to show how common law and regulation protect rights and enforce duties[94] to further public purposes and needs by regulating harmful and injurious conduct and behavior.[95] Thus, legal interests are protected by legal rules and principles that impose obligations on managers and organizations to prevent or restrict unlawful business decisions, plans and matters.

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91. Holloway & Noelting, *supra* note 51, at 5–11 (discussing impact of climate change on environmental, land use and other policies subject to the limitations of the Takings Clause).

92. The theory of law and business is not meant to replace, diminish or undermine an economic analysis of the law. Scholarly articles and books have been written regarding an economic analysis of the law. *See, e.g.,* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 1 (9th ed. 2014) (explaining the application of economic theory to statutory and common law principles to create efficiencies in markets and transactions). The theory of law and business states how well-educated business managers, executives and policymakers knowingly or unknowingly use legal rules accompanied by legal analysis and reasoning, as provided legal education or lawyers, in making business decisions and plans, conducting business operations and assessing the impact of law on business and its disciplines and organizations. *See* Holloway, *Concept*, *supra* note 11, at 152. The theory of law and business sets forth a theoretical framework and analytical framework based solely on the dominant knowledge, analytics and methodology of the business curriculum in schools and colleges of business. *Id.*

93. *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 711–12 (1917) (discussing the use of jural concepts, such as rights and privileges, to describe legal relations and disputes).

94. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090 (1972) (recognizing that states must decide the public and private interests to protect with legal rules).

95. *See id.* at 1090–91 (explaining that legal rules and principles protect public and private interests by making and applying property, liability, and inalienability rules).

1. Legal Interests of Legal Rules to Further Public and Business Needs

Legal interests can both protect and limit business needs and wants, such as laying off employees, which may conflict with public needs, namely employee welfare. Legal rules are legal knowledge that includes common law rules,[96] statutory provisions,[97] and administrative regulations.[98] These rules, provisions and regulations establish legal duties, rights, privileges and other jural relations to recognize and protect important public and private needs.[99] Jural relations include, among others, legal rights, duties, immunities privileges,[100] and legal rights are set forth under liability, property and inalienability rules.[101] Common law rules and government regulation can restrict business matters, decisions and plans by limiting organizational and managerial control and decisional uses of findings, information and conclusions.[102] Legal rights are not opposites but correlatives of legal duties and obligations that mandate business matters, decisions and plans to comply with or conform to common law norms and regulatory standards in completing transactions, establishing relationships

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96. *See* RESTATEMENT (SECOND) OF CONTRACTS INTRO. (AM. L. INST. 1981); *see also* Allegheny Gen. Hosp. v. N.L.R.B., 608 F.2d 965, 969–70 (recognizing a legal rule as a precedent setting forth a specific set of facts describing specific acts, transactions, behavior and other happenings).

97. *See, e.g.*, 29 U.S.C. §§ 1001 *et seq.* (2020) (regulating the administration of employee benefit plans of the private sector).

98. *See, e.g.*, 29 C.F.R. §§ 2509 *et seq.* (2020) (detailing federal labor regulations promulgated to implement the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et. seq.* (2020), by the United States Department of Labor).

99. *See* Calabresi & Melamed, *supra* note 95, at 1090-91; *see also* Hohfeld, *supra* note 94, at 710 (explaining a set of eight jural conceptions that are composed of opposites and correlatives to identify and explain legal relations and demonstrate judicial reasoning in solving legal issues). *But see* Jules L. Coleman & Jody Krause, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1340 (1986) (arguing that "[t]he tension between the two frameworks [Coasem Theorem and Calabresi-Melamed framework] appears to require that we give up one or another plausible claim: either that a right is a domain of protected control, or that liability rules protect rights. Both claims are plausible, but apparently incompatible . . . .").

100. Calabresi & Melamed, *supra* note 95, at 1090–91. *But see* Max McCann, *The True Cost of Economic Rights Jurisprudence*, 6 J. JURIS. 149, 150 (2010) (arguing that "due to an inextricable link between the two [kinds of rights], the very attempt to distinguish and adjudicate the two spheres separately has had pronounced, unintended consequences on individual rights . . . .").

101. Calabresi & Melamed, *supra* note 95, at 1092 (identifying the kinds of rules that can be used to protect entitlements that were given to address conflicting interests).

102. *Id*. at 1091–92 (recognizing the use of liability, property and inalienability rules to limit the actions of persons and organizations exercising economic rights).

and taking part in business practices.[103] Thus, rights, duties and other relations are established by liability, property and inalienability rules to protect the public, organizations and persons.

B. Understanding of the Nature of the Text of Legal Rules

Legal text is a jurisprudential element that includes fact-sensitive legal rules and principles protecting and furthering specific public needs and purposes. The legal rules consist of fact-sensitive statements that are words and phrases describing situations, factual patterns and other sets of facts occurring in business, personal and organizational relationships, transactions and happenings, such as employee-employer relationships. Legal texts state the substance of common law rules, judicial precedents, legislative provisions and administrative regulations. These statements of common law rules,[104] statutory provisions,[105] and administrative regulations[106] are fact-sensitive words and phrases describing happenings and other factual patterns, such as employer-employee relationships.[107] These descriptive statements of legal rules and principles recognize and protect underlying public and private interests[108] by establishing rights, duties, privileges and other legal relations.[109] These statements are text of liability rules, property

103. *See id.* at 1092 (stating that the state must decide how to protect legal interests or entitlements by creating rules and imposing duties or obligations).

104. *See, e.g.,* Restatement (Second) of Contracts (1981), https://luatcanhtranhvabaovenguoitieudung.wordpress.com/2011/06/08/the-us-restatement-second-of-contracts-of-1981/ (retrieved on Mar. 25, 2020); *Allegheny Gen. Hosp*., 608 F.2d at 969–70 (recognizing that a legal rule is a precedent that sets forth a set of facts identifying unlawful conduct or behavior).

105. *See, e.g.,* 29 U.S.C. §§ 1001. *et. seq.* (regulating the administration of employee benefits plan of the private sector).

106. *See, e.g.,* 29 C.F.R. §§ 2500 *et. seq.* (2020) (federal labor regulations promulgated by the United States Department of Labor to implement the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et. seq.* (2020)).

107. Calabresi & Melamed, *supra* note 95, at 1092 (finding that states protect legal interests or entitlements by creating rules and imposing duties or obligations).

108. *Id.* at 1090 (recognizing conflicting interests can cause government to grant entitlements to protect legal rights).

109. *See* Hohfeld, *supra* note 94, at 711 (listing jural conceptions and relations that include jural correlatives and opposites and finding that duties are correlatives and not opposites of rights). Courts interpret common law rules and legislative acts to decide whether these rules and acts apply to facts, transactions, and relationships. *See* Int'l Union, UAW v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983), *cert denied.*, 104 S. Ct. 1002 (1984), *abrogated by*, M&G Polymers USA, LLC v. Tackett, 135 S. Ct. 926 (2015). In *Tackett*, the Court rejected the Sixth Circuit's interpretation of the postretirement provisions of the collective bargaining agreement and instructed the Sixth Circuit to apply traditional common law rules governing the interpretation of contracts. The Court concluded that *Yard-Man* was inconsistent with common law principles of interpreting contracts and stated that "[w]e interpret collective-bargaining agreements, including

rules and inalienability rules protecting and obligating persons and organizations.[110]

1. Legal Text as Legal Rules to State Claims and Defenses

The textual statements of rules include substantive claims and defenses imposing limits on and creating benefits for persons, corporations and other business organizations. These statements permit business organizations and their managers to exercise discretion in their authority over employment, other relationships, and other happenings. For example, the text or statement of the employment-at-will doctrine protects the managerial discretion of employers[111] by permitting them to unilaterally discharge employees for no reason or cause, except when a federal or state regulation or state common law prohibits discharging employees without cause.[112] The employment-at-will doctrine permits managers to freely allocate or reallocate labor, financial or other resources by using business decision-making, planning and

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those establishing ERISA plans, according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy." *Tackett*, 574 U.S. at 435 (*citing* Textile Workers v. Lincoln Mills of Ala*.,* 353 U.S. 448, 456–457 (1957).

The United States Constitution is subject to competing theories of interpreting the text of constitutional clauses and principles, such as the Takings Clause and just compensation. *See* Wyatt G. Sassman**,** *Applying Originalism*, 63 UCLA L. REV. DISCOURSE 154, 157–58 **(**2015) ("An essay reviewing the inaugural Justice Antonin Scalia Lecture, titled "Interpreting the Unwritten Constitution," presented at Harvard Law School by Judge Frank H. Easterbrook on Nov. 14, 2014."). Professor Sassman explains competing theories of interpreting constitutional text by stating that "[o]riginalists believe that judges must interpret the Constitution to mean what the Framers believed it to mean at the time of drafting, rather than any more modern interpretation." *Id*. at 157. "In contrast, the legal thinkers on the other side think of the Constitution (and laws, to a lesser extent) as a living document. The idea is that the Framers could not have considered the challenges we face today." *Id*. at 157–58.

110. *See* Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 681 (1994) (explaining the development of the employment-at-will doctrine).

111. *See id.*; *see also* Crossland & Hambrick, *supra* note 30, at 803 (analyzing and hypothesizing the impact of law and other institutions and conditions on managerial discretion of national organizations).

Crossland and Hambrick set forth "Hypothesis 7: The greater the level of employer flexibility in a country, the greater the discretion available to CEOs of firms headquartered in that country." *Id*. at 803. Crossland and Hambrick found that executives can create flexibility by altering the composition and deployment of their workforces when they are not limited by government policies and private contracts. *Id*.; *see also* Holloway, *Concept*, *supra* note 13, at 164–68 (conducting a managerial analysis with law by applying organizational flexibility theory to factors or criteria for determining employee status to identify and verify a domain of workforce or employment situations to begin decision-making in establishing a flexible workforce).

112. *See* Moriss, *supra* note 111, at 681.

operations to make lawful decisions, strategies and practices.[113] Another example of a prohibition is the text of Title VII of the Civil Rights Act of 1964[114] that prohibits the use of race, color, religion, national origin and sex in employment practices and decisions to hire, promote, compensate and discharge employees.[115] Fact-sensitive statements of employment, labor, workplace safety and other statutory provisions prohibit employers and their organizations from making harmful or injurious employment and labor decisions, as well as other potentially problematic strategies and practices, such as discriminatory employment practices.[116] Thus, fact-sensitive statements of legal knowledge, which include common law rules and government statutes and regulations, describe sets of facts granting and protecting legal rights by imposing and enforcing duties of persons and organizations.

C. Understanding Rationality of Legal Analytics and Methods

Legal rationality is a jurisprudential element using logic and rationality of judicial and legislative decision-making methodologies. This element underpins the rational thinking and judgment of managers and executives in making decisions, strategies and practices to advance tactical, operational and strategic goals and objectives of business organizations. On one hand, legislative decision-making relies on rational thinking to enact statutes advancing legitimate public objectives and justifying public needs and demonstrates basic rationality between statutes and their public needs and objectives.[117] On the other hand, judicial decision-making uses legal analysis and reasoning to apply legal rules to the facts of disputes to solve legal issues in making judicial decisions that are based on factual and public policy grounds and possess decision rationales demonstrating legal rationality and logic.[118] A legal or judicial decision must also be consistent

113. *Id*.

114. *See* 42 U.S.C. §§ 2000e *et. seq*. (prohibiting employment discrimination based on race, color, national origin and religion in hiring, training and other employment practices of employers engaged in interstate commerce).

115. *See id. at* § 2000e 2(a)(1), (2).

116. *See id.* (prohibiting employment discrimination based on race, color, national origin, sex, and religion).

117. *See* Russell W. Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A. L. REV. 449, 451–52 (1988) (explaining a means-ends analysis that tests whether a government statute is rational by justifying a public need and furthering a legitimate public objective).

118. *See* Thomas R. Haggad, *A Selective Bibliography On The Use Of Logic In Law*, 20 JURIMETICS J. 102, 102–04 (1979) (including a bibliography of articles on the logic of judicial decision-making); Lee Loevinger, *An Introduction To Legal Logic*, 27 IND. L.J. 471, 472–75 (1952) (examining the logic of judicial decision-making and explaining thoughts and

with the purposes of the legal rules, and the legislative decision or statute must relate to and justify its public need and objective. Thus, legal rationality and logic are inherent in legal analytics and methodology making judicial decisions to decide disputes under legal rules and their purposes and enacting legislation establishing and responding to employee, environmental and other public needs by setting and furthering public objectives.

Allegedly irrational and illogical decisions of administrative regulations and legislative acts may be challenged under constitutional provisions for lacking a sufficient connection between the legislation and its public need and objective. Federal statutes require a degree of rationality by furthering a desired public objective and justifying a given public need, especially when these statutes are challenged under a constitutional provision, such as the Equal Protection Clause.[119] This degree of rationality is the level of connection between a federal statute and its need and objective, and this requisite level of the connection or relationship may vary from a deferential test or loose connection favoring government, or a test permitting little or no deference, or requiring a direct connection.[120] When little or no deference is given to government policymakers, federal and state legislative acts must demonstrate a very close connection with either a compelling state interest or an important public objective under the Equal Protection Clause.[121] Legal rationality and logic impose rational or logical thinking on the use of judicial and legislative powers to make government decisions governing persons and organizations. As a requirement of or limit on government decision-making, legal rationality can expand the rational thinking of business decision-making, planning and operations by ensuring end results further the decision objective and justify the need for the decision in the recognized business situation or other stages and matters.

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comments of legal scholars, such as Justice Wendell O. Holmes and Roscoe Pound, and stating that "Holmes did not mean to minimize the importance of rational thinking in the law, but, quite on the contrary, to urge a more conscious and rational recognition of the grounds of judicial decision").

119. U.S. CONST. amend. XIV, § 1.

120. *See id.* (recognizing that the Due Process Clause and Equal Protection Clause require at least a minimum amount of rationality under a rational basis test connecting a legislative act to its public objective and need).

121. *See id.* Government needs only show a legitimate interest under a rational basis test to use socioeconomic classifications but must show a compelling state interest under a strict scrutiny test for classifications based on suspect traits, and an important governmental objective under an intermediate scrutiny test for classifications based on sex under the Equal Protection Clause. *See generally* Brendan T. Beery & Daniel R. Ray, *Five Different Species of Legal Tests-and What They All Have in Common*, 37 QUINNIPIAC L. REV. 501, 504–19 (2019) (explaining the use of legal factors, factors, means-ends tests, balancing tests and categorical tests to justify government regulatory classifications and mandates).

1. Legal Rationality of Legal Analytics and Methods for Thinking

Rationality exists in the use of legal analytics and methodology to weigh public needs and objectives,[122] draft legislation,[123] promulgate administrative regulations,[124] and make judicial precedents.[125] Legal rationality and logic require a minimum kind and level of reasoning to hold weight in judicial and legislative decision-making. This kind and level of reasoning are legal rationalities that are tested by a means-ends test and analyzed to ensure a minimum connection between a justifiable public need and legitimate public objective and a legislative decision.[126] A means-ends analysis operates to determine whether each legislative act furthers its stated public objective and justifies its recognized public need. Legal rationality includes using legitimate legislative findings to establish a public need and objective to begin and continue public decision-making and administrative operations.[127] Additionally, legal rationality requires regulation to further a public need and objective that can loosely or directly connect to a specific legislative act depending on its nature or character, such as classifying persons or regulating rights. Thus, the foundation of the theory of law and business can use legal rationality and its analytical nature to aid in validating business decision-making, planning and operations by ensuring decisions, plans and matters further a relevant organizational or decision objective and justify an organizational or decision need.

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122. *See* 29 U.S.C. § 1001(a) ("Congress finds that . . . the continued well-being and security of millions of employees and their dependents are directly affected by these plans . . . .").

123. *See id.* at §§ 1001 *et. seq.* (enacting ERISA to further retirement security); 42 U.S.C. §§ 2000e *et. seq*. (enacting Title VII to promote equal opportunity and fairness in employment).

124. *See* 29 C.F.R. §§ 2509 *et. seq.* (federal labor regulations implementing ERISA and its retirement security policy); 26 C.F.R §§ 1.401 *et. seq.* (federal tax regulations implementing ERISA and employee benefit taxation policy to further retirement security).

125. *See* Int'l Union, UAW v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1002 (1984) (holding that retirees were entitled to continuing benefits despite the expiration of the collective bargaining agreement), *abrogated by*, M&G Polymers USA, LLC v. Tackett, 135 S. Ct. 926 (2015) (reversing and remanding *Tackett* to Sixth Circuit with instructions to apply traditional rules of contract interpretation that were not applied in *Yard-Man.*).

126. *See* Beery & Ray, *supra* note 122, at 504–19 (explaining the use of legal factors, means-ends test, balancing test and categorical test to justify government regulatory classifications and mandates).

127. *See* 29 U.S.C. § 1001(a) (listing findings that were used by Congress to set forth the need to justify enacting ERISA to protect employee benefit plans).

VI. FOUNDATION TO EFFECT USE OF BUSINESS KNOWLEDGE, ANALYTICS AND METHODOLOGIES

The jurisprudential elements can enhance business knowledge and expand analytics and methodology independently of a managerial analysis with law. These elements individually enhance uses of business knowledge and expand applications of business analytics and decision-making methodology of business disciplines. First, the enhanced use of business knowledge works by using legal interests, text and rationality to support the knowledge-based properties that include an explanatory nature, a normative value, and business needs and objectives.[128] Second, the expanded utility of business analytics and methodology is using legal interests, texts and rationalities to support analytical- and methodological-based properties, such as recognizing problems, analyzing situations, finding normative value and exercising rational thinking.[129] However, a managerial analysis with law is dependent on common knowledge-, analytical- and methodological-based properties of law and business to make functional combinations of legal and business knowledge, analytics or methodologies.

A. Expanding the Use of Legal and Business Knowledge

The foundation of the theory of law and business uses legal text and interests to expand or enhance the operative nature of business principles and theories (knowledge) that explain and identify happenings in business relationships, transactions and other events. The theory of law and business uses legal and business knowledge to identify and verify lawful, unlawful and gray-area situations and needs existing under similar happenings and facts of a legal rule and business principle. On one hand, the operative nature of business knowledge consists of business theories and principles explaining how managers and executives can exert influence, find opportunities and gain advantages over markets, situations, and competitors, which include relationships, transactions and other circumstances.[130] On the other hand, the operative nature of legal knowledge is legal text and interests that are set forth in legal rules and precedents[131] and their purposes to

128. Loevinger, *supra* note 119, at 475.

129. *See id.*

130. *See* Crossland & Hambrick, *supra* note 30, at 803–04 (setting forth hypotheses stating the impact of the national legal system can limit the use of managerial discretion theory in understanding and explaining business processes and operations of national organizations). Crossland and Hambrick state that: "Hypothesis 6: Countries with a common-law legal origin (compared to those with a civil-law origin) will provide greater discretion to CEOs of firms headquartered there." *Id.* at 803.

131. *See* Allegheny Gen. Hosp., v. N.L.R.B., 608 F.2d 965, 969–70 (3d Cir. 1979) (giving a definition of precedent or legal rule).

mandate and control only harmful or injurious conduct and behavior of managers and organizations.[132] These statements and purposes of legal rules govern and describe situations, relationships, transactions and other sets of facts that are not available or useful to organizations and managers to advance legitimate organizational goals and objectives.[133] Thus, the legal text of legal rules and regulation complement the operative nature of business theories and principles[134] that can explain business happenings, situations and needs in making decisions, plans and matters.

1. Adding Legal Interests to Enhance Business Knowledge

Legal interests enhance business knowledge by supporting the use of business theories and principles to explain lawful happenings in business decision-making, planning and operations. Business knowledge includes business text and interests that explain lawful happenings, situations and needs of organizations, relationships and markets. The private interests justify the use of business situations and needs, such as using technological innovation to start new business operations,[135] by placing these situations and needs within protected business interests, such as the use of a new business model.[136] These situations protected by lawful interests can be distinguished from unlawful and extremely risky gray-area situations that are recognized but not used by managers to initiate or begin decision-making and planning. Thus, legal interests enhance business principles and theories to aid in verifying whether a domain of lawful situations is within the stated public or personal purposes or interests of common law rules and government statutes.

Public and private interests support creativity and innovation by allowing

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132. *Id*.

133. *See id.*

134. *See* AACSB-Eligibility Standards, *supra* note 16, at 35 (listing the areas of knowledge that should be taught in colleges of business); Thomas, *supra* note 59, at 232 (defining business theory as "a description of a phenomenon and the interactions of its variables that are used to attempt to explain or predict."); Wacker, *supra* note 59, at 364 (defining business theory under the field of operations research).

135. *See* Dena Hale et al., *Gifted Innovation: An Examination Using Different Business Theories,* 17 J. BUS. INQUIRY 4, 18 (2017) (identifying business technology acceptance model and diffusion of innovation theories requiring business plans, decisions and actions to adopt technology); Crossland & Hambrick, *supra* note 30, at 798 (using managerial discretion theory as a business principle or theory to make hypotheses that demonstrate how government policy and regulation can affect the latitude and discretion of managers in making and implementing decisions, strategies and practices).

136. *See, e.g.*, Andoyan, *supra* note 54, at 155–56 (explaining that ride sharing companies are new business models confronted by common law and state regulation defining employer-employer relationships that could severely restrict development of the ride sharing industry).

managers and executives to put forth ideas, models and technologies to minimize restrictions on or pursue legislative protection by tariffs, taxes and other regulation to begin and continue decision-making and planning and conduct and expand ongoing business operations. Legal interests aid in ascertaining whether creative and innovative situations and matters, which can be explained by business principles, are within a legitimate private need or interest (not necessarily codified) and do not conflict with an important public interest or need of common law or government regulation. Moreover, legal interests of common law and government regulation point firmly to organizations and managers needing to be sensitive and responsive to public interests when business transactions, relations and happenings affect national social welfare and other policies, such as retirement security.[137] Business sensitivity and responsiveness to public interests point out any lawful and unlawful decisions, practices and strategies frequently causing injury or harm to an important public interest that is protected or not protected by a legal rule.[138]

In responding to harmful decisions, legislatures will regulate more, or courts may need to consider existing interpretations of common law rules and legislative provisions to protect public interests, such as labor relations and retirement security.[139] Legislatures, courts and agencies will respond or react to an injurious and harmful line of decisions, such as misclassifying employees as independent contract workers, by imposing restrictions on managers and executives making business decisions, strategies and practices harming or undermining important public interests. Common law and regulation protect public interests but often leave enough private interests to allow, if not demanded, business innovation and creativity to compete in domestic and global markets, assuming employers know and understand

137. *See* 29 U.S.C. § 1001(a) (2018) (listing findings that were used by Congress to set forth the need to justify enacting ERISA to protect employee benefit plans).

138. *See infra* Part III.A and accompanying note (defining a managerial failure as "managers [who] . . . continuously define or analyze the same or similar situations and make the same or similar [unethical or socially irresponsible] decisions").

139. *See, e.g.*, 29 U.S.C. § 1001(a) (2018).

their rights under common law[140] and duties under government regulation.[141] Thus, legal interests enhance business principles and theories by adding sensitivity in responding to public interests and broadly using unrestricted private interests in business decision-making and planning and matters of business operations.

2. Adding Legal Text to Expand Business Knowledge

Legal text enhances business knowledge by identifying and verifying a situation or factual matter that is within a set of facts of a legal rule and factual happenings of a business principle. The application of a business principle to a legal rule identifies similar situations that may include a more effective or useful situation(s) to verify the legality of the recognized situation and complete the first stage of decision-making, planning, and continuing operations. This recognized or actual situation is recognized by the manager to begin or initiate decision-making and planning or evaluate a factual matter of business operations. Moreover, common law and regulation can enhance business knowledge to reveal how an innovative business model may be consistent with a legal rule and its purpose. For example, Uber and other ride-sharing services allow independent contractors to use their personally owned vehicles to provide ride-sharing services on drivers' work schedules.[142] The ride-sharing model supports the use of independent contractors to operate their personally owned vehicles. This model allows these contractors and ride-sharing services more flexibility in managing employment relationships of the domestic ride-sharing industry.[143] Broadly

140. *Compare* Hohfeld, *supra* note 94, at 746 (explaining the enormity of legal rights, powers and other legal relations conferred on persons and organizations owing property can be restricted greatly by the lack of innovation and creativity), *with* Pullitzer v. Livingston, 89 Me. 359, 363 (1896) ("[W]ith all the rights, privileges, and powers incident to ownership . . . . . . "). Hohfeld describes this enormity by stating that "Suppose, for example, that A is fee-simple owner of Blackacre. His '"legal interest'" or '"property'" relating to the tangible object that we call land consists of a complex aggregate of rights (or claims), privileges, powers, and immunities." Hohfeld, *supra* note 94, at 746; *see also infra* Part VI.A.2 and accompanying notes (explaining how legal rules and principles can enhance business principles and theories to protect innovative and creative business models, such as Lyft and Uber ride sharing services).

141. *See* 42 U.S.C. §§ 1001 *et. seq.* (regulating administration of employee benefits to protect retirement security); 42 U.S.C. §§ 2000e *et. seq*. (regulating employment practices, decisions and strategies to promote equal opportunity and fairness in employment).

142. Andoyan, *supra* note 54, at 155 ("Uber provides rides to those who are seeking them and connects them with a driver. This characteristic places it into the 'On-Demand Economy.'").

143. *Id.* at 156 ("[I]f Uber drivers were found to be employees, the cost to Uber would increase and pressure Uber to limit the drivers' ability to set their own schedules. It is a poor outcome for both parties.").

construing employer-employee relations limits the flexibility of the ride-sharing industry by not allowing vehicle operators to choose their employment status.[144] When the legal text or rule states a set of facts or happenings that are broader than the happenings of any business principle, the business model is totally unlawful, notwithstanding any business innovation. Thus, enhancing business knowledge often uses legal text to broadly analyze business situations, findings and information to find and understand regulatory risks, regulatory restrictions and common law limits facing business innovation and creativity, such as new business models.

3. Hypothesis on Legal Interests and Text to Enhance Business Knowledge

One could easily hypothesize that a managerial analysis with law supported by legal interests and text can apply a business principle to a legal rule to create a domain of lawful, unlawful and gray-area business situations. This application of business principles to legal rules occurs at the beginning of business decision-making and planning and addressing factual matters of ongoing business operations. As an example, a managerial analysis with law supported by legal text and interests would enable a manager to apply a business principle to a legal rule to identify a domain of employment situations that would allow a manager to identify lawful, unlawful and risky gray area[145] situations. This can in turn verify whether a manager's

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144. *Id*. at 158–61 (explaining the application of California's right-to-control test in *S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations*, 769 P.2d 399 (Cal. 1989), and *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981 (9th Cir. 2014), to determine the employment status of workers in ride sharing industry of California and holding that drivers were presumptive employees of Uber); Douglas O'Connor v. Uber Technologies, Inc., 82 F. Supp. 3d 1133, 1141–45 (N.D. Cal. 2015), *rev'd*, 904 F.3d 1087 (9th Cir. 2018) (deciding issue of enforceability of the arbitration agreement, designation of arbitrability and class certification under the arbitration agreement). However, on November 3, 2020, a majority of California residents voted to approved California's Proposition 22 that permits Uber and Lyft to treat drivers and other workers as independent contractors, though an earlier California judicial decision and labor law had declared these drivers as employees. Kate Conger, *Uber and Lyft Drivers in California Will Remain Contractors,* N.Y. TIMES (Nov. 4, 2020), https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html ("Californians rejected the principles outlined in a 2018 State Supreme Court ruling and enshrined in a 2019 state law that said workers who performed tasks within a company's regular business . . . must be treated as employees. Under Prop. 22, gig workers are exempted from these rules and can continue to work independently.")."

145. *See generally* Int'l Union v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983), *cert denied.*, 104 S. Ct. 1002 (1984), *abrogated by*, M&G Polymers USA, LLC v. Tackett, 135 S. Ct. 926 (2015) (involving the termination of postretirement welfare benefits under ambiguous terms of an employee benefit plan). In the early 1980s, the termination of post-retirement benefits under reservation clauses of employee benefit plans raised a legal issue regarding the legality of post retirement plan terminations under ambiguous

recognized situation or factual matter or practice is lawful and the most effective situation to begin decision-making and planning and most productive matter to continue ongoing business operations.

B. Increasing the Usefulness of Legal and Business Analytics

The foundation of the theory of law and business uses legal text and rationality to expand or enhance the utility or usefulness of business analytics by supporting a broader analysis of qualitative and quantitative findings, information and conclusions. Legal text and rationality are integral parts of legal rules and reasoning and can enhance business analytical tools and methods by minimizing uses of marketing and other findings, information and conclusions presenting legal and regulatory concerns, showing a lack of normative value and demonstrating a detrimental impact on business organizations. First, legal analytics is the use of legal analysis to recognize and analyze findings, information and conclusions and then find and analyze corresponding legal rules or preferably request and understand legal advice to find legal and regulatory issues. Second, the utility of business analytics consists of financial, operations and other analytical tools and methods providing analysis of factual patterns, data and information and making findings and conclusions to make end results, such as feasible alternatives, hiring practices and marketing strategies. The theory of law and business uses legal text and rationality to increase or expand utility of business analytics in making lawful end results at the end of stages of decision-making and planning and completing end results of matters of business operations.

1. Adding Legal Text to Enhance Business Analytics

Legal text accompanied by legal analytics complements financial, accounting and other business analyses to aid in analyzing business situations, findings, data and information to begin, continue and complete lawful decision-making, planning and operations. In finding legal issues and making legal applications, legal analytics are used to determine whether business information, findings and conclusions[146] may be subject to a legal

terms and conditions. *See* Raymond A. Franklin, *Vesting Retirement Benefits: Revisiting Yard-Man and Its Unacknowledged Presumption*, 25 J. CIV. RTS. & ECON. DEV. 803, 805 (2011) ("Most of the courts that have looked at the issue have based their decisions on their agreement or disagreement with the 1983 Sixth Circuit decision *International Union, UAW v. Yard-Man, Inc.* . . . [H]olding that retirees were entitled to continuing benefits despite the expiration of the collective agreement.") In 2015, the United States Supreme Court remanded *Tackett* to the Sixth Circuit instructing it to apply contract principles to the interpretation of the collective bargaining agreement rather than rely on *Yard-Man*. 574 U.S. at 937.

146. *See* AACSB-Eligibility Standards, *supra* note 16, at 36 (establishing undergraduate and graduate learning and curriculum standards that require colleges of

rule. Specifically, legal analytics complement business analytics to conduct factual analysis, recognize issues and make legal conclusions in determining whether business information, findings and conclusions are needed to make end results in stages of decision-making and planning and matters of business operations are lawful.[147] Some acquired information, findings and conclusions may be unlawful on their face, such as false information or competitor's trade secrets. Other findings and information that could raise gray-area concerns will require more business analysis or scrutiny upon entry and use in recursive decision-making and planning and ongoing business operations. Once business analytical tools are used to determine the relevancy or usefulness of these findings, information and conclusions on entering a stage or matter, the manager may consider the need for legal analytics accompanying legal rules or advice to determine if a legal issue is raised by these findings, information or conclusions in this stage or matter. This need for and entry of legal text enhances the utility of business analytics in ascertaining the legality and validity of business and other information, findings and conclusions to make effective end results, such as one or more feasible alternatives to establish a flexible and adaptable workforce.

2. Adding Legal Rationality to Enhance Business Analytics

Legal rationality exists with legal analytics and reasoning accompanying legal rules to enhance business analytics by increasing rational business thinking in making decisions, plans and matters. Legal analytics and methods increase rationality in the use of business analytical tools and methods to find and use information, findings and conclusions to make lawful, rational end results of stages of decision-making and planning and matters or practices of operations.[148] In addition, legal rationality enhances business analytics and methods to ensure managers and organizations exercise sufficient rational thinking to relate the end result of each stage or matter to the decision objective and need.[149] Rational end results include the

business to teach students to recognize problems and make creative solutions).

147. *See id.* (establishing standards that require colleges to teach students to think creative, integrate knowledge across as well as understanding disciplines from multiple perspectives).

148. *See* Peter Dewitz, *Legal Education: A Problem of Learning from Text*, 23 N.Y.U. REV. L. & SOC. CHANGE 225, 228 (1997) (identifying the nature of legal analysis and reasoning that are used to make the rationale in judicial decisions). Legal text includes "[l]egal cases [that] have a unique structure, typically including a summary of previous proceedings, issues or disputes, a rationale of the reasoning, decisions and the rule. Experts use their knowledge of this structure to guide their comprehension as they locate the facts, then the decisions, and finally the rationale behind the legal reasoning." *Id.*

149. Jack Woerner, *Steps in the Rational Decision-Making Model*, STUDY.COM (Feb. 2, 2022), https://study.com/academy/lesson/the-rational-decision-making-model-steps-

selection of lawful feasible alternatives and making employment practices that comply with legal rules, justify the need for the decision, and advance the decision objective. Thus, legal rationality enhances business analytics and methods by using rational thinking to completing the end result to the decision need and objective.

3. Hypothesis on Legal Text and Rationality to Enhance Business Analytics

One could easily hypothesize that a managerial analysis with law supported by legal text and rationality of legal and business knowledge and analytics in stages of business decision-making and planning and matters of ongoing business operations form legal-managerial tools and methods. The creation and formation of these tools and methods analyze the legality of business and other information, findings and conclusions in making lawful and valid end results at each stage and matter. As an example, a managerial analysis with law combines finding the legal issues with selecting feasible alternatives to analyze and find legal issues raised by information and data to identify one or more lawful and valid feasible employment alternatives in making a human resources decision to expand the workforce.

C. Extending Usefulness of Business Methodologies

The foundation of the theory of law and business uses legal text and rationality to expand or enhance the utility of business decision-making and planning methodologies and operational methods or tools. Legal texts and rationalities expand the usefulness or utility of business methodologies by using legal rules to determine the legality of business findings and information in making lawful end results of stages of decision-making and planning methodologies and matters of conducting business operations.[150] On one hand, business decision-making and planning methodologies and operational methods consist of analytical tools and methods that can interact with legal text and rationality to expand or enhance rational thinking in completing each end result of a stage or matter.[151] On the other hand, judicial

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and-purpose-in-organizations.html.

150. *See* O'Dell, *supra* note 67, at 70–71 (recognition of the situation in an organization, market or other decision environment is finding the need or problem as the first step in business decision-making); Cappalli, *supra* note 45, at 399 (recognizing legal methods include, among others, finding the legal issue that leads the court to make a conclusion and rationale).

151. *See* Certo et al., *supra* note 13, at 114 (stating several commentators do not believe that decision-making is always rational). Certo and coauthors explained the theory of "bounded rationality, which suggests that managers make imperfect decisions due to a variety of factors including lack of information, inadequate time, and cognitive

decision-making methodology uses legal analytics and rational thinking in analyzing facts to find a specific legal issue and then applying a legal rule to these facts to make a legal conclusion with a rationale.[152] Consequently, amenable legal and business decision-making and planning methodologies include a common problem recognition method that covers recognizing problems (situations) and finding legal problems (issues), respectively, of transactions, relationships and other happenings. Other methods use facts, information and conclusions to make rational end results and include both making legal conclusions and selecting a business decision with an applicable rationale.[153] A business decision is implemented within organizations, industries and markets and then followed up to determine its effectiveness to solve or address the business situation or need. In contrast, a judicial decision is implemented within society, government and organizations and may become a precedent that can be used by lower courts. Perhaps, the follow-up is an eventual review of the judicial decision or a similar case by a higher court. Thus, the theory of law and business relies on amenable legal and business methodologies to permit legal text and rationality to enhance the utility of business decision-making, planning methodologies and operations.

1. Adding Legal Text to Enhance Business Methodology

Business methodology requires legal text to make legal conclusions and rationales under common law rules and regulation at each conclusion of these stages and matters. Legal text consists of legal rules accompanied by legal analytics and directly covers some situations or factual happenings. These happenings and other situations may often be explained by business principles, such as organizational flexibility theory,[154] accompanied by or

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limitations. . . . [Herbert] Simon labeled this process of making decisions that are suboptimal yet 'good enough' as *satisficing*." *Id*. (citing HERBERT A. SIMON, MODELS OF MAN: SOCIAL AND RATIONAL (1957)).

152. *See* Cappalli, *supra* note 45, at 398 (stating that legal methodology "does concern itself with the methodology employed, principally by courts, to create, elaborate, and apply that substance. Think of a mechanic and her tools in constructing a machine . . . . [T]he worker's tools and knowledge of their use are analogous to method. The tools can be used to construct or to dismantle, to add on, or to downsize.").

153. *See id.* at 399.

154. *See* Martin R. Fellenz, *Flexibility in Management Theory: Towards Clarification of an Elusive Concept*, J. STRATEGIC MGMT. EDUC. at 65, 78 (2008) (discussing the making a flexible organization using organizational flexibility theory); John G. Lynch, *Organization Flexibility*, HUMAN RESOURCE PLANNING, at 24–25 (Mar. 1, 1989) (discussing the use of flexible work arrangements in creating organizational flexibility); Crossland & Hambrick, *supra* note 21, at 803 (using managerial discretion theory to show the impact of using workers and employees to create organizational flexibility in some countries). Crossland and Hambrick state that "[t]he less employer flexibility in a

needing business analytics in making decisions, strategies and practices, such as controlling the employment status of workers to create a more flexible workforce. Legal text ensures the legality of a situation at an end result, or occurring at the beginning stage, and the legality of findings, information and conclusions of other end results at other stages of decision-making and planning and throughout all matters of operations. Business and planning methodologies and marketing, banking and various analytical methods are made more effective and useful by using legal text to precisely identify and address legal issues raised in using situations, information, findings and conclusions to make lawful business decisions, strategies and practices. Simply, unlawful situations, information, findings and conclusions cannot be used in business decision-making, planning and operations to make lawful decisions, strategies and practices if they lack normative values, such as not conforming to ethical standards. Thus, enhancing or expanding the utility of business decision-making and planning methodologies and operational methods, which are both qualitative and quantitative, is using legal text and its fact-sensitive nature to determine legality and recognize normative values.

2. Adding Legal Rationality to Enhance Business Knowledge

Legal rationality enhances business rational thinking in decision-making, planning and operations to further organizational goals and objectives by rationally relating each end result to the decision, plan or practice need and objective. Enhancing rational thinking upon each end result uses legal rationality as a legal-managerial or analytical method. In legal decision-making, this analytical method is used to relate or connect a legislative decision to its public need and objective.[155] The foundation enables stage- or matter-specific rationality by using a legal-managerial (analytical) method to objectively measure the relationship between each end result and its decision need and decision objective. Simply, each end result of a business decision, plan or matter must justify its lawful decision need and further its lawful decision objective where the theory of law and business assumes the

country, the less discretion available to CEOs. Facing significant legal restrictions, executives will have limited ability to furlough or reassign employees — even in periods of downturn or strategic restructuring." *Id*.

155. Galloway, *supra* note 118, at 449 (citing G. GUNTHER, CONSTITUTIONAL LAW 93 (1985)) ("[M]eans-end scrutiny [is] the most common form of analysis used by courts in enforcing constitutional limits on government action. . . . [J]udicial scrutiny of means-ends relationships . . . may well be the most frequently invoked technique in the judicial review of the validity of federal and state legislation."). The means-end test or method is not the only test of legal knowledge, analysis and reasoning to measure the legality of government decisions. *See* Beery & Ray, *supra* note 122, at 504–19 (explaining the use of legal factors, means-ends test, balancing test and categorical test).

decision need and objective are consistent with and advances a requisite organizational need and objective. The rational matter or stage-specific method measures the fit between the end result and decision purpose at each stage of a recursive process of decision-making and planning and each matter of ongoing operations.

As stated above, this legal-managerial method is similar to legal methods applied to measure the rationality of government decision-making conducted to enact legislative acts addressing actual public needs and advancing legitimate public objectives.[156] Legal rationality increases methodological order and analytical scrutiny of the relationship between a manager's end result and the decision or organization's needs and objectives. Moreover, rational judicial decision-making requires analytical scrutiny to avoid relying on feelings, emotions and intuition[157] and requires methodological order to make and justify legislative acts consistent with their public needs and objectives, and judicial decisions consistent with purposes of legal rules.[158] Federal and state constitutions require government policymakers to enact legislation that furthers legitimate public needs and objectives, though the connection between a legislative act and its need and objective may range from deferential to non-deferential.[159] In recursive decision-making and planning ongoing operations, an end result is sufficiently rational when it is justified by a definite decision need and can effectively advance a legitimate decision objective in moving to the next stage of business decision-making or the next matter of ongoing business operations.

Lawyers give legal advice on the legality of business situations, information and findings and conclusions.[160] Executives and managers need

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156. Galloway, *supra* note 118, at 449 ("When government action is subject to a constitutional limit, courts frequently evaluate the justification for that action. If a sufficient justification exists, the action may be permitted despite the applicability of the limit.").

157. Loevinger, *supra* note 119, at 472–75 (examining the logic and rational thinking of judicial decision-making and arguing that Justice Holmes did not mean that judicial decisions should be based on experience); Simon, *supra* note 134, at 63 (contrasting the use of judgment and intuition in rapid decision-making relying on education and experience and the use of logic and rationality in a well ordered process of decision-making where judgment and rational thinking can be used appropriately to make rational decisions).

158. Galloway, *supra* note 118, at 449 (recognizing that government regulation requires a legitimate need and objective).

159. *Id.* at 452 (quoting G. GUNTHER, CONSTITUTIONAL LAW 472 (1985)) ("The deferential rational basis test is so easily satisfied that it has been nicknamed the 'hands off' approach. The outcome of deferential rationality review is virtually a foregone conclusion. In nearly all cases, the government action is held constitutional.").

160. *See* Praveen Kosuri, *Beyond Gilson: The Art of Business Lawyering*, 19 LEWIS & CLARK L. REV. 463, 472–75 (2015) (citing George W. Dent, Jr., *Business Lawyers as*

specific legal rules and advice accompanied by analytical and rational explanations of the relevant legal rule and its application to determine the legality of situations, findings, information and conclusions to create and ensure rational end results.[161] Such explanations are not unthinkable and perhaps are more likely where managers and executives know enough legal analytical tools and methods, such as recognizing the legal issue, to understand and make basic uses and applications of a few relevant legal rules in stages of decision-making and planning and matters of business operations. Where managers have completed a legal studies course or earned a joint business and law degree, it is reasonable to assume that they can recognize a basic factual, or mixed legal issue by using basic legal analysis and methods. Therefore, some managers and lawyers, today, have proficient uses of some legal rules and statutory provisions and their accompanying legal analytics. In seeking or knowing when to request and receive legal advice accompanied by legal analytics, these proficient uses are more comparable with managers using basic statistical, financial and marketing principles and their related business analytical tools and methods in stages of processes of business decision-making and planning and matters of ongoing business operations.

Legal rules or advice accompanied by legal analytics includes legal rationality that is an essential quality of legal analysis and its analytical methods to measure whether a lawful end result is consistent with the decision or organizational need and objective.[162] These methods include measuring the rationalities of a decision, strategy or matter by determining whether the end result is consistent with the purpose of the stage or matter, such as identifying and evaluating feasible alternatives identifying one or more manufacturing operations to use digital technology to modernize a production line.[163] And if the end result of a stage or matter is not consistent with the decision need or objective, it cannot be used to move to the next stage or matter and should cause the rethinking of this stage or matter, termination of decision-making and planning, or discontinue this matter of

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Enterprise Architects, 64 BUS. L. 279, 296–99 (2009)) (recognizing business lawyers as problem solvers and should understand business as optional skills).

161. *See* Certo et al., *supra* note 13, at 114 (recognizing a rational decision-making process with several steps); Archer, *supra* note 67, at 54–55 (explaining a nine-step process of decision-making and noting an earlier five-step process of decision-making).

162. *See* Certo et al., *supra* note 13, at 114 ("[T]he most prominent assumption in this body of literature is that decision-makers are rational. Among scholars working in this arena, decision makers are understood to vary with respect to their beliefs, opinions, and preferences. . . . Despite the dominant stronghold of rationality in decision-making research, some scholars have questioned this assumption.").

163. *See id.*

ongoing business operations. Thus, legal rationality enhances rational thinking of business decision-making and planning methodologies and making matters of ongoing operations by measuring the fit or link between each end result and the decision need and objective.

3. Hypothesis on Legal Text and Rationality to Enhance Business Methodology

One could easily hypothesize that a managerial analysis with law supported by legal text and rationality continues business decision-making, planning and operations by forming legal-managerial tools and methods. These tools and methods use legal text to determine or understand the legality of information and findings and measure rational thinking by connecting each end result to the decision objective and need. Broadly, the relationship between an end result and organizational need and objective determines whether the end result justifies the need and furthers the objective for beginning and continuing decision-making and planning and continuing business operations. As an example, a managerial analysis with law uses a legal-managerial (means-ends) analysis to measure the connection between one or more feasible employment alternatives and the decision need and objective to identify lawful and valid feasible employment alternatives in making a workforce expansion decision.

VII. FOUNDATION TO SUPPORT MAKING LAWFUL AND EXAMINING UNLAWFUL END RESULTS

The foundation of the theory of law and business rests on the use of jurisprudential elements to integrate law and business using fundamental knowledge-, analytical- and methodological-based properties that are possessed by legal and business knowledge, analytics and methodologies. Conducting a managerial analysis with law consists of forming or creating and using legal-managerial information, tools and methods in stages of business decision-making and planning and matters of business operations to make lawful and examine unlawful end results, find the normative value of end results and explain the impact of law on business and its disciplines and organizations. At these stages and matters, the managerial analysis with law depends on legal interests, text and rationality to support making useful combinations of legal and business knowledge, analytics or methodologies to make legal-managerial tools, methods and information.[164] At each stage of decision-making and planning and on each matter of ongoing business operations, these tools, methods and information are used to make lawful end

164. *See* Certo et al., *supra* note 14, at 114.

results under common law and government regulation by providing and performing specific analytical and methodological uses and applications within each stage or matter. This information in conjunction with these tools and methods, add more fact sensitivity, methodological order and analytical scrutiny to recognizing and weighing legal, normative and business considerations to determine or understand the legality of end results and their usability and validity under ethics, public policy and organizational policy.

A. Foundation to Support Conducting a Managerial Evaluation

The foundation supports a managerial analysis with law by using legal text, interests and rationality to ascertain or understand whether business situations are lawful and usable to further a decision or organizational objective and justify the need for the decision. A managerial analysis with law includes a managerial evaluation that uses a uniquely different knowledge-based combination of legal and business principles by applying a business theory or principle to a legal rule to identify the domain of lawful, unlawful and gray-area or ambiguous or risky situations. This combination addresses whether managers recognize the most beneficial, lawful, and usable business situations that include business opportunities, problems and needs, such as making an employee layoff and developing a growth strategy. This legal-managerial combination is a managerial evaluation tool resting firmly on legal interests, rationality and text to add fact sensitivity, methodological order and analytical scrutiny to find benefits and constraints on defining or recognizing lawful business situations.

1. Using Legal Text to Support a Managerial Evaluation

Some business managers and executives may not give enough weight to enforceable legal rules or text that states a specific set of facts describing the circumstances, facts and other happenings that may also be explained by established marketing, finance and other business principles. These accepted principles do not necessarily violate any legal rules but explain happenings and circumstances creating marketing, financial and other opportunities and advantages. In using these explanations, managers can manipulate happenings to undermine business principles but not suffer a government penalty or sanction. They cannot perform personal acts, such as making a false statement or misrepresentation, which are within the set of facts of a legal rule; if they do so, they can lose business opportunities explained by business principles, incur a criminal or civil penalty and suffer public humiliation. Thus, business principles are lawful and useful in making decisions, strategies and practices, but the manager's behavior or conduct of making false statements is unlawful or extremely risky under one or more

accepted business principles.

An accepted sales principle could explain happenings and circumstances that can be used to create practices or matters of banking, retail and other business operations. A retail sales practice is designed and implemented to acquire new customers and increase product or service sales.[165] In determining the legality of a sales practice, a legal rule sets forth a specific set of facts that describes unlawful organizational or personal acts, which include relationships, transactions and other happenings.[166] The use of these acts would cause a legitimate product sales practice to be unlawful if this practice deceived customers or public[167] within the set of facts stated by legal rules. In beginning decision-making or ongoing retail operations, a managerial evaluation would have identified and applied the prevailing retail sales principle to fraud (or fraudulent misrepresentation) to identify and verify the legality of the situations and factual patterns that created the need to increase sales and revenues. These situations and patterns were made unlawful by personal conduct, such as making false representations, under a relevant legal rule governing unlawful conduct or act of the retail sales practice based on legitimate sales principles. A managerial evaluation that applies a sales principle to fraud (or fraudulent misrepresentation), a legal rule, would identify one or more matters or sales practices that are unlawful and risky gray-area practices or matters that are lawful, but unusable for a lack of normative value under fraud or fraudulent misrepresentation. The managerial evaluation includes fact sensitivity and analytical scrutiny to understand facts or factual patterns, legal rules and business principles and methodological order to control insertion and use of legal advice or rules with accompanying analytics in the beginning stage of decision-making and planning and matters of continuing business operations. This sensitivity, order and scrutiny are used to determine whether the situation is lawful under

165. Brian Murtha & Goutam Challagalla, *Sales Principles: The Case of Rules and Standards*, 28 AMERICAN MARKETING ASSOCIATION SUMMER EDUCATORS' CONFERENCE PROCEEDIngs, N35, N35-N36 (Aug. 4, 2017) ("This paper examines the implications of articulating a sales principle as more rule-like or standard-like."). *See generally* UNIV. OF MINN. LIBR. PUBL'G, PRINCIPLES OF MARKETING, §13.2 (2010), https://open.lib.umn.edu/principlesmarketing/chapter/13-2-customer-relationships-and-selling-strategies/ (retrieved on Dec. 18, 2021) (explaining the roles of salesperson, including account managers, and customer relationships, selling strategies and ethical issues) [hereinafter UNIV. OF MINN., MARKETING].

166. *See* Allegheny Gen. Hosp. v. NLRB, 608 F.2d at 969–70 (defining a precedent as describing a detailed set of facts).

167. See Petek Tosun, *Unethical Sales Practices in Retail Banking*, 38 INT'L J. OF BANK MKTG. 1305, 1308 (2020) ("Ethical sales practices are becoming increasingly essential since establishing long-term relationships with the target consumers and having loyal customers have positive outcomes on profitability and having a sustainable competitive advantage in banking.").

a legal rule and relevant business principle that together explains the legality of the situation or other similar situations and needs in beginning decision-making and planning and using factual patterns in matters of business operations.

Legal text supports a managerial evaluation to add fact sensitivity, methodological order and analytical scrutiny to identify and verify a domain of lawful, unlawful and gray area situations where only one or more lawful situations and factual patterns may be better than or equal to the recognized situation that was originally recognized by the manager. In considering lawful situations and practices, legal text is used with managerial discretion theory to enable a managerial evaluation to go much farther. The managerial evaluation adds methodological sensitivity and analytical scrutiny to recognize and perhaps address the normative values of lawful situations and factual matters. This sensitivity, order and scrutiny recognizes whether a lawful situation contributes significantly to a breach of an ethical standard, violation of an organizational policy, or undermines an important public interest. Lawful situations may breach an ethical standard or organizational policy or undermine a public interest and may not be usable to move to the next stage of decision-making and planning and matters of business operations. Thus, a lawful situation containing a breach may contribute substantially to a managerial failure[168] that may trigger regulatory reform and result in unwanted attention to a business organization or industry.[169]

2. Using Legal Interests to Support a Managerial Evaluation

Legal interests include public needs to protect consumers and organizations from deceptive or unfair retail, banking and other sales practices. These interests support a managerial evaluation by increasing fact sensitivity to unlawful business situations or factual matters affecting both organizational and public needs. In examining Wells Fargo banking operations, for instance, a managerial evaluation would determine how bank managers used fraudulent acts to create unlawful product sales practices under accepted sales principles of the marketing discipline. Such principles

168. *See supra* Part II.A and accompanying notes (explaining that continuously harmful decisions, plans and practices have legal consequences causing litigation, regulation and precedents restricting managerial discretion or latitude of managers and organizations).

169. OFF. OF ENTER. GOVERNANCE AND THE OMBUDSMAN, OFF. OF THE COMPTROLLER OF CURRENCY, LESSONS LEARNED REVIEW OF SUPERVISION OF SALES PRACTICES AT WELLS FARGO (Apr. 19, 2017), https://www.occ.gov/publications-and-resources/publications/banker-education/files/pub-wells-fargo-supervision-lessons-learned.pdf [hereinafter OFF. OF THE COMPTROLLER OF CURRENCY] (finding that Wells Fargo engaged in unsafe banking practices and improper sales practices).

explain and permit only lawful sales practices to advance bank objectives and justify bank needs, namely new products and account sales and more bank revenues, in managing banking operations.[170] These managers used retail banking sales practices, such as opening credit card accounts, but did not disclose to their customers the opening of these accounts.[171] The willful failure to disclose or intentional concealment of information raises a legal issue that is either a violation of a common law rule or statutory provision governing the conduct of bank managers who deceive their customers by not soliciting their approval or disclosing to them product sales and other transactions.[172] The applicable marketing sales principle explains legitimate happenings that can be used to make product sales in conducting retail bank operations to sell bank products and services.[173] This application of the marketing sales principle to fraud, a legal rule or provision, identifies the domain or grouping of all lawful, unlawful and gray-area sales practices or matters that can be used by bank managers to verify an actual factual pattern in operations, a business situation in decision-making, and a business environment in planning.

If the legal rule governs all situations or factual matters explained by a business principle, then the application of this principle to this legal rule cannot identify or verify any lawful situations or matters. Simply, the business theory or principle is lawfully null or empty to predict or explain lawful situations and needs and therefore, is a managerial loss or useless to the business and legal disciplines. Consequently, managers and executives cannot use these principles to aid in recognizing lawful situations and factual

170. *See* Chad Albrecht, Conan C Albrecht, Andrew N. Rocha & Victor Morales, *A Better Understanding of the Wells Fargo Fraud: Through the Lens of the Fraud Triangle*, COST MGMT. 35, 35–40; Joseph A. Smith, Jr. & Lee Reiners, *Wells Fargo Unauthorized Account Openings: A Case Study for Bank Board Directors*, THEFINREG BLOG (Apr. 26, 2017), https://sites.duke.edu/thefinregblog/2017/04/26/phony-accounts-scandal-a-case-study-for-bank-board-directors/; OFF. OF THE COMPTROLLER OF CURRENCY, *supra* note 170 (setting forth lessons learned from the marketing practices used by employees in retail banking operations of Wells Fargo).

171. *See* Smith & Reiners, *supra* note 171; Michael Wursthorn, *Wells Fargo to End Broker Bonuses Tied to Loan Sales,* WALL ST. J. (Dec. 15, 2016), https://www.wsj.com/articles/wells-fargo-to-end-broker-bonuses-tied-to-loan-sales-1481829657 ("The move comes as Wells Fargo continues to face public outrage after paying a $185 million fine related to retail-banking sales practices that contributed to the opening of as many as 2 million customer accounts with fictitious or unauthorized information.").

172. *See* Smith & Reiners, *supra* note 171 (explaining a case study of legal issues facing Wells Fargo regarding bank staff or employees providing products and services not authorized by bank customers).

173. *See id.*

matters.[174] A managerial evaluation demonstrates fact sensitivity, methodologically order and analytically scrutiny by allowing managers and their lawyers to identify and accept the most beneficial lawful situations and matters and reject unlawful and risky gray-area situations and matters that either violate or would eventually violate federal regulation or state common law and regulation.

3. Using Legal Rationality to Support a Managerial Evaluation

A managerial evaluation is supported by legal rationality accompanied by legal analytics to enhance rational thinking in identifying and verifying a domain of situations or factual matters and removing from this domain unlawful and highly risky gray-area situations or matters. The managerial evaluation creates a domain of unlawful and lawful situations to begin decision-making and planning and factual matters to continue business operations. Within decision-making, planning and operations, an unlawful situation, alternative or other end result could not rationally lead to a legitimate decision, advance a decision objective and justify a decision need. [175] Normally, effective lawful situations and matters which further organizational needs and objectives do not violate common law rules and legislative acts protecting financial markets, environmental qualities, employee welfare and other public interests.

The managerial evaluation is supported by legal rationality in using or applying banking, trade, communications and other legislative acts that set forth facts describing fraudulent and other unlawful situations and practices. Legal rationality complements rational business thinking to ensure business practices and other end results are rational under common law and regulation. In the Wells-Fargo incident, legal rationality would have minimized the illegality of using factual matters and practices that are not capable of complying with or create too much legal risks under common law and regulation, such as federal banking regulation.[176] Legal rationality would have enhanced the rational business thinking of executives and managers by connecting federal banking regulation to specific public needs that were undermined by fraudulent sales practices of managers and other

174. *See supra* Part II.A and accompanying notes (explaining that business theories and principles that would be rendered useless or totally restricted by common law and regulation are managerial losses to business disciplines of a useful business theory or principle).

175. *See id*.

176. *See* OFF. OF THE COMPTROLLER OF CURRENCY, *supra* note 170 (setting forth lessons learned from the marketing practices used by employees in retail banking operations of Wells Fargo).

employees.[177] Equally important, legal rationality would also demand rational thinking by managers needing to connect or relate their end results or banking practices to legitimate bank decision objectives and needs.[178] Simply, an unlawful sales practice, situation or other end result can never legitimately advance a decision objective or justify a decision need. Thus, the managerial evaluation uses legal rationality to connect managers' unlawful sales practices to legitimate legislative or public objectives and requires managers to carefully weigh legitimate organizational needs and objectives that can indicate limits on decisions, strategies and practices of managers and executives.

The managerial evaluation uses legal rationality to add methodological order to business organizations by identifying and verifying lawful situations capable of moving to the next stage or matter by furthering the decision objective and need. The domain of lawful business situations and factual matters is determined by using a business theory or principle, such as a sales principle and organizational flexibility theory.[179] These principles or theories explain or describe happenings that advance private or business interests, such as profitable operations, market growth and flexible workforce. In retail sales and other industries, private interests include profitable retail operations and market growth that may depend on sales practices and strategies to attract new customers and provide better services to old customers.[180] So, here the need exists for legal rationality supporting a managerial evaluation to connect a lawful situation to a specific organizational objective and need that was the cause for decision-making and planning and a change to operations. Lawful situations must further decision or organizational objectives and justify decision or organizational need. Thus, legal rationality supports a managerial evaluation by adding methodological order to enhance rational business thinking by aiding managers and executives in relating or connecting a business situation or factual matter to a known organizational objective and need of decision-making, planning and operations before moving to the next stage of decision-making and planning or next factual matter of business operations.

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177. *See id*. (explaining that "OCC processes . . . could have improved the timeliness and effectiveness of supervision of sales practices").

178. *See supra* Parts V.B & C & VI.B.2 and accompanying notes (explaining how legal rationality can enhance the usefulness of business knowledge, utility and methodology).

179. Murtha & Challagalla, *supra* note 165, at N35–N36 (recognizing sales principles and need to address their implementation as standards or rules); *see also* Fellenz, *supra* note 154 and accompanying text; Lynch, *supra* note 154 and accompanying text.

180. *See* UNIV. OF MINN., MARKETING, *supra* note 165, § 13.2 (explaining the use of customer relationship and selling strategies to acquire customers).

B. Foundation for Determining Usability of Lawful Situations

The foundation uses legal interests, text and rationality to enable the theory of law and business to find and analyze the nature and extent of the manager's latitude or discretion in recognizing and managing conformance under ethical standards, public interests and organizational directives. Such latitude or discretion is possessed by business policymakers, executives and managers and requires them to consider whether end results of lawful stages and matters conform to ethical standards, public interests and organizational directives. For a managerial analysis with law, the managerial evaluation measures or tests managerial latitude to determine or recognize the usability of business situations and validity of alternatives and other end results under ethical standards, public interests and organizational policies.

1. Using Legal Text to Understand Limits on Managerial Discretion

Managers and executives do not have unbridled latitude or discretion to use lawful situations that could undermine public policy, breach ethical standards and violate organizational policy. Managerial discretion theory is used to recognize the extent of the managerial latitude of business managers and executives to use lawful situations and other end results under common law and government regulation.[181] The legal text of common law rules and statutory provisions restrict or limit managerial latitude to initiate and continue business decision-making, planning and operations, such as employment practices unlawfully discharging employees.[182] Other limits include conflicts with norms and public interests, such as retirement security and equal employment opportunity, that could be undermined by a breach of an ethical standard, violation of an organizational policy or not conforming to a public interest,[183] such as using race and gender in recruiting professional

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181. David B. Wangrow, Donald J. Schepker & Vincent L. Barker III, *Managerial Discretion: An Empirical Review and Focus on Future Research Directions*, 14 J. MGMT. 99, 100 (2014) (citing Donald C. Hambrick & Sydney Finkelstein, *Managerial Discretion: A Bridge Between Polar Views of Organizational Outcomes*, 9 RESEARCH IN ORGANIZATIONAL BEHAVIOR: AN ANNUAL SERIES OF ANALYTICAL ESSAYS AND CRITICAL REVIEWS 369, 371 ("[S]eek[ing] to examine how research has advanced the concept of managerial discretion and explore both its antecedents and consequences . . . " and noting that " . . . managerial discretion comes from sources at three levels: the environment, the organization, and the individual.")); *see* Crossland & Hambrick, *supra* note 25, at 802–03 (analyzing the impact of civil and common law systems on managerial discretion exercised by managers and organizations and hypothesizing that "[t]he greater the ownership dispersion in a country, the greater the discretion available to CEOs of firms headquartered in that country" and that "[c]ountries with a common-law legal origin (compared to those with a civil-law origin) will provide greater discretion.").

182. *See* Crossland & Hambrick, *supra* note 25, at 803 (explicitly recognizing that common law and legislation of a common law system can limit managerial discretion).

183. *See* Calabresi & Melamed, *supra* note 94, at 1090 (explaining that conflicting

contract workers.[184] In recognizing limits imposed by legal rules, fact sensitivity and analytical scrutiny include using legal text of legal rules accompanied by factual analysis, issue recognition and other legal analytics to make factual findings and recognize legal issues in making each lawful end result. In recognizing the use of methodology and operations, methodological order includes using legal text and its qualities to move only a lawful end result to the next stage of business decision-making and planning methodologies and another matter of ongoing business operations. Managers and executives need this sensitivity, order and scrutiny to stay within the requisite latitude or discretion of legal text accompanied by legal analytics of a managerial evaluation. Managers use a managerial evaluation to avoid relying on emotion or intuition and remain cognizance of ethical, public policy and organizational conflicts by reflecting on the limits of their latitude to use lawful end results. Thus, legal text supports a managerial evaluation by using managerial discretion theory to set the boundaries for use of lawful situations, feasible alternatives, employment practices and other end results before moving to the next stage of business decision-making and planning and next matter of business operations.

2. Using Legal Rationality to Add Sensitivity to Managerial Evaluation

Legal rationality supports a managerial evaluation to recognize the normative values of lawful decisions, strategies and matters under ethical, organizational policy and public policy questions regarding the usability of lawful situations and validity of lawful alternatives and other end results. Managerial discretion theory accompanied by a managerial evaluation, which is a legal-managerial method and information, enhances rational business thinking in recognizing and deciding whether managers need to find and weigh ethical, public policy or organizational policy concerns likely to undermine end results. Legal rationality supports managerial evaluation and other legal-managerial tools and methods to add analytical scrutiny in

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interests exist in society and legal rules protect the important interests).

184. *See id*. (recognizing that conflicting interests exist in society and legal rules determine the important interests to resolve conflict).

recognizing the need to consider public interests,[185] ethical standards[186] and organizational directives[187] that could undermine selecting the decision and its implementation.[188] Next, legal rationality adds methodological order to a managerial evaluation to recognize and decide whether each lawful end result could breach or conflict with a public interest, ethical standard or organizational directive before moving to the next stage or another matter. Thus, a managerial evaluation uses legal rationality to aid business rational thinking in deciding whether a lawful situation and other end results breach an ethical standard,[189] raise a public policy concern[190] or violate an organizational directive by exceeding their managerial latitude to continue decision-making, planning and operations.

3. Using Legal Interests to Increase Sensitivity in Managerial Evaluation

A managerial evaluation rests on identifiable legal interests, both private

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185. *See* Michael Hadani et al., *The CEO as Chief Political Officer: Managerial Discretion and Corporate Political Activity*, 68 J. BUS. RSCH. 2330, 2331 (2015) (finding the impact of managerial discretion on public policy to be mixed). Hadani and coauthors define corporate political activity as "discrete activities such as electoral campaign donations, lobbying, grassroots advocacy, petitioning, organizing media campaigns, participating in trade associations and other related activities." *Id*. at 2331 (citing Hart, *The Political Theory of the Firm*, *in* THE OXFORD HANDBOOK OF BUSINESS AND GOVERNMENT 173–90 (D. Coen, W. Grant, & G. Wilson, eds.)); *see also* Hillman, A., & Hitt, M. *Corporate Political Strategy Formulation: A Model of Approach, Participation and Strategy Decision*s, ACAD. MGMT. REV. 825–842 (1999).

Hadani and coauthors make conclusions and recommendations to board of directors on the corporate value of exercises of CEO's managerial discretion on corporate political activity. *Id*. at 2336. Hadani and coauthors state that "those responsible for the oversight and direction of executive leadership . . . should not take at face value any argument made by executives regarding . . . any public policy option." *Id.* at 2336. Hadani and coauthors find the impact of managerial discretion on public policy as political activity is mixed. *Id*. Specifically, they examined the impact of CEO on public policy and found positive, negative or no effects on policy outcomes of firms. *Id*.

186. Susan Key, *Perceived Managerial Discretion: An Analysis of Individual Ethical Intentions*, 14 J. MANAGERIAL ISSUES 218, 229–30 (2002) (explaining that managerial discretion affects ethical decision-making in situations that raise ethical dilemmas).

187. *Id.* at 220 (finding that organizational directives and policies exist but may be confusing, ambiguous and ineffective).

188. Rapoport & Tiano, *supra* note 39, at 1284 (describing how legal analytics and methodology can aid legal and business decision-makers to increase rationality, writing "when raw data are analyzed and transformed into data analytics insights, an end user can uncover important trends, averages, correlations, and patterns").

189. Key, *supra* note 186, at 220 (examining managerial discretion of managers who possess perceived latitude that had been granted to address ethical dilemmas).

190. *See* Hadani et al., *supra* note 185, at 2331 (examining the impact of CPAs on public policy and finding positive, negative or no effects of CPAs on policy outcomes of firms).

and public, in weighing the latitude of business managers, executives and policymakers by identifying and verifying the legality of situations, which in some instances, permit managers to better define or recognize the best situation or factual matter. In evaluating the legality of situations, a managerial evaluation is a legal-managerial method and information that aids managers to identify and verify the most useful, lawful situation.[191] Managers and executives can recognize and work with a comparable situation if circumstances permit recognizing the best situation among several situations rather than a unique problem or situation with only one solution. Under a legal rule, the domain of lawful situations may include one or more lawful situations that are more productive or beneficial in advancing a decision objective and justify the decision need than the actual situation recognized or defined by the manager. A managerial evaluation also recognizes and weighs the usability of the best, lawful situation by modifying or rejecting its use in the processes of decision-making and planning and ongoing factual matters of business operations.

On furthering organizational and public interests, the lawful implementation of a decision can still raise a public policy, ethical or organizational concern that involves undermining a public interest,[192] breaching an ethical standard[193] or violating an organizational directive.[194] Although this lawful implementation can comply with a legal rule, it may still impose harm on organizations, persons and society[195] by not fully advancing a social norm, business custom or public interest.[196] For example, an employment decision or practice could recognize retirement security but refuse to grant any retirement benefits as wanted by public policy.[197] In

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191. Key, *supra* note 186, at 220.

192. *See* 29 U.S.C. § 1051(1) (exempting welfare benefit plans, such as dental and life insurance, from nonforfeiture or vesting requirements, thus allowing employers more latitude in terminating these plans under most circumstances); 42 U.S.C. § 2000e-2 (not providing coverage of independent contractors who perform work for the principal or employer).

193. Key, *supra* note 252, at 220 (recognizing corporate policies and ethical standards may fail to have positive effects on corporate decision-making).

194. *Id*.

195. *Id*. (recognizing ethical standards may not prevent unethical conduct). Under a managerial analysis with law, the managerial evaluation and its use of managerial discretion theory can recognize a policy conflict, ethical dilemma and organizational breach but may need to defer to other counselors and their disciplines and professions to give a final solution to this conflict, dilemma or concern.

196. *See* 42 U.S.C. § 2000e-2(a) & (b) (not providing coverage of independent contractors who perform work for the principal or employer).

197. *See* 29 U.S.C. § 1001 (enacting ERISA to establish employee benefit rights for employees participating in retirement and welfare benefit plans).

another instance, a lawful factual matter could recognize an equal employment opportunity concern but still unfairly treat unskilled, low-income contract workers by not hiring minority workers.[198] Such refusal or unfair treatment raises a public policy concern or ethical question whether the lawful hiring practice or decision undermines an important federal public interest and should be discontinued by the organization. Finally, lawful situations can include managerial limits on exercises of contract, property or business rights[199] to avoid interfering with important public interests, such as equal employment opportunity[200] and retirement security.[201] Therefore, legal interests support a managerial evaluation by increasing methodological order to and analytical scrutiny of the discretion or latitude of managers and organizations to recognize and address the usability of lawful situations and factual matters.

C. Foundation for Legal-Managerial Analytics to Determine Legality

The foundation of legal text, interests and rationality supports finding and using a managerial analysis with law to ensure fact sensitivity, methodological order and analytical scrutiny of business situations and factual matters and marketing, statistical and other information, findings and conclusions in the stages of decision-making and planning and matters of business operations. Legal text, interests and rationality support a managerial analysis with law to add methodological order and fact sensitivity to and increase analytical scrutiny in making lawful and examining unlawful end results. Legal interests include public interests and private interests of business, society and organizations.[202] Next, legal text includes fact-sensitive statements of legal rules and their purpose governing business

198. *See* 42 U.S.C. § 2000e-2 (not providing coverage of independent contractors who perform work for the principal or employer).

199. *See* Key, *supra* note 186, at 220. Managerial discretion is a business theory that demonstrates the theory of law and business by its very nature. Managerial discretion theory is most explanatory when nationally protected business or economic rights exist giving managers and executives the latitude to make decisions, plans and matters; Crossland & Hambrick, *supra* note 30, at 803-04. Also, these rights can be violated by a breach of a duty in making unlawful decisions, strategies and practices. *See* Albrecht et al., *supra* note 171, at 35–40. Managerial discretion also demonstrates that managers and executives can make nonconforming ethical, organizational and policy decisions, plans and practices.

200. *See* 29 U.S.C. §§ 1001 *et. seq.* (government regulation of the administration of gratuitously or voluntarily established employee benefit plans by employers).

201. *See* 42 U.S.C. § 2000e-2 (government regulation of employment practices to prohibit employment discrimination based on race, color, sex, religion and national origin).

202. *See* Joseph T. Mahoney, Anita M. McGahan & Chris N. Pitelis, *The Interdependence of Private and Public Interests.* 20 ORG. SCI. 1034, 1035 (2009).

situations, relationships and transactions. Lastly, legal rationality includes the use of analysis and adds more reasoning in making a rationale for the decisions and other conclusions. Legal text, interests and rationality enable the integration of law and business by supporting a managerial analysis with law to add methodological order, fact sensitivity and analytical scrutiny by forming and using combinations of legal and business principles, analysis or methods to make lawful and examine unlawful end results.

1. Using Legal Interests to Make and Examine End Results

Legal interests are needed to make lawful and examine unlawful end results. These interests protect persons and organizations by imposing obligations and mandates to secure rights and freedoms of our society and economic system, such as closing a business or expanding business operations. Legal interests support forming and using legal-managerial tools and methods to ensure the making of lawful end results, such as feasible alternatives and employment practices, with legitimate decision needs and objectives that may not always be consistent with private interests.[203] Legal-managerial analytics and methods rely on legal interests to add methodological order and analytical scrutiny of end results to ensure the need for and use of marketing, statistical and other findings, information and conclusions do not offend purposes and undermine needs of common law and regulation. This order and scrutiny exists in making and using combinations of amendable properties of legal and business analytics and methodologies to form stage- or matter-specific legal-managerial tools and methods. These combinations provide methodological order and analytical scrutiny of business and other findings and information within stages and matters. The methodological order ensures the end result of each stage or matter has a specific business purpose, such as implementing the decision, in making and executing the decision, plan or matter.[204] Thus, the need for

203. Calabresi & Melamed, *supra* note 94, at 1090 (recognizing that conflicting interests can cause government to grant entitlements to protect legal rights).

204. Crossland & Hambrick, *supra* note 25, at 803 (explaining that common law and regulation permitting greater managerial discretion enable managers to create greater workforce flexibility). On using business principles and analytics, common law and government regulation are rarely an absolute restriction or limit on using business situations and happenings that are explained by business theories and principles. For example, the at-will doctrine is a common law restriction that limits discharges or terminations of employer-employee relationships only for cause under common law or a regulation. *See, e.g.*, 42 U.S.C. § 2000e-2 (government regulation of employment discharge and other practices to prohibit employment discrimination based on race, color, sex, religion and national origin). Most likely, the greatest limit on using business situations to further business needs and objectives is a lack of creativity, innovation or originality in finding and then choosing the most effective, lawful situations, alternatives

each end result must be known by managers and executives to determine whether each end result furthers its stated decision need and objective and accomplishes its intended decision purpose before moving to the next stage.

Business managers and executives need an appropriate legal-managerial tool and method supported by legal interests to find the legality of business information, findings and conclusions whether they are making lawful or examining unlawful end results. This legality must be sensitive to the business purpose of an end result and consistent with the purpose of the rule. For example, managers make an end result that is the decision to lay off a large number of employees to reduce labor cost. Labor, financial and other information and findings used to make the layoff decision must support the decision and business need for a layoff and objective to reduce cost. The decision and its implementation must be consistent with the legal purpose of the at-will doctrine to avoid making a wrongful discharge.[205] The employment-at-will doctrine, a legal principle and its purpose, gives employers the authority to freely discharge employees for almost any reasons or needs.[206] In decision-making and planning methodologies and business operations, legal interests add methodological order to business findings and information of the layoff to ensure that the end result or decision furthers the decision objective and justifies the need for the layoff. This order and scrutiny are applied by one or more legal-managerial tools and methods at a stage or matter to ensure an end result is consistent with the legal rule and its purpose and is least likely to cause criminal or civil litigation at the completion of decision-making, planning and operations. Legal-managerial tools and methods add fact sensitivity, methodological order, and analytical scrutiny to ensure end results, which use findings, information and conclusions, do not violate common law and regulation but do further decision and organizational objectives and needs, such as to allocate labor costs.

2. Using Legal Rationality to Make and Examine End Results

A managerial analysis with law has the capability to make lawful and examine unlawful end results of business decision-making and planning and matters or practices of business operations. In examining unlawful end results, legal rationality adds reasoning and a rationale by using legal-managerial tools to recognize and avoid using unlawful information, findings and conclusions in making and completing an end result. Legal

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and other end results in making decisions, strategies and practices.

205. *See* Morriss, *supra* note 138, at 681 (explaining the development and application of the at-will employment doctrine).

206. *Id*.

rationality ensures that a lawful end result is rational by increasing consistency between the end result and the decision objective and the stated needs of decision-making, planning and operations. Legal-managerial tools and methods ascertain the legality of end results to increase rational thinking by keeping end results within the common law or regulatory purpose and by connecting end results to the decision objective and need.[207] The legality of an end result depends on using one or more legal-managerial tools and methods, such as the combination of finding the legal issue and identifying only feasible decision alternatives.[208] Thus, this combination and others are used to ascertain and understand the legality by completing or examining all end results, for example, all alternatives of decision-making, strategies of planning and matters of operation.

Examining unlawful end results requires a unique legal-managerial tool or method to precede or follow another unique legal-managerial tool or method to determine if rational thinking took place at each end result of each stage of past decision-making and planning and past matter of past business operations. A combination of applying a business principle to a legal rule (managerial evaluation) in the recognition of the situation can be followed in the next stage by combining the recognition of the legal issue with identifying all possible alternatives (issue recognition-identifying alternatives) to determine the illegality of business and other findings, information and conclusions of feasible alternatives. Legal rationality enables legal-managerial tools and methods to determine the illegality of end results by adding rational thinking to making end results and testing the closeness of the relationship between end results and the decision objective of and need for decision-making, planning or operations. For example, one legal-managerial tool combines the recognition of the legal issue and identification of feasible alternatives. This legal issue-feasible alternative tool adds analytical scrutiny to determine whether a legal issue was raised by a finding, information or conclusion used in identifying the feasible alternatives of an unlawful decision. Legal-managerial tools and methods find and examine whether end results of past decision-making, planning and operations are unlawful. These tools and methods add analytical scrutiny to ensure rational business thinking is considered in examining the legality of end results, such as the identification of feasible alternatives. Lawful end results must be used to move to the next stage or matter. Moreover, methodological order ensures legal rationality is used to test whether each alternative and other end results purposely further the desired and legitimate decision objective and the justifiable decision need. Thus, legal rationality

207. *See* Holloway, *Concept*, *supra* note 11, at 167.
208. *See id.* at 180.

supports legal-managerial tools and methods to determine the cause of illegality by finding and examining unlawful end results and testing the rationality of the connection between each end result and the decision objective and need of unlawful business decision-making, planning and operations.

3. Using Legal Text to Make and Examine End Results

Legal texts state substantive law that includes common law rules, legislative acts and administrative regulations to govern business situations and happenings that include relationships, transactions and behaviors. In common law and regulation, the regulated situations and happenings govern or control organizations and their managers and executives by imposing duties or obligations under legal prohibitions and mandates.[209] Legal text supports a managerial analysis with law to form and use legal-managerial tools, methods and information in making lawful and examining unlawful end results of decision-making, planning and operations.

In making lawful end results, the legality of end results occurring at stages of decision-making and planning and matters of operations depend on the legality of business and other information, findings and conclusions under the text of legal rules. Legal-managerial tools and methods ascertain the illegality of information and findings using legal rules and statutory provisions that describes and explains a set of facts detailing a mandate on or prohibition of happenings, transactions, relationships and other facts. For instance, a corporation establishes a flexible workforce objective and a production need for its manufacturing operations to temporarily increase production caused by global competition. It wants to establish a temporary workforce of temporary employees, contract workers and part-time employees. Corporate managers and human resources specialists gather information, findings and data on the gender, race, positions, numbers and skills of needed part-time employees, temporary employees and contract workers. These managers also gather more data and information on union sentiment, workforce diversity, compensation, health care and other areas to make findings and conclusions that would be used in flexible workforce decision-making and operations. Legal text of state common law and state and federal employment regulation, which includes employee rights and employer duties,[210] is used with one or more legal-managerial tools and

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209. *See* Calabresi & Melamed, *supra* note 122, at 1090–91 (1972) (explaining that government made legal rules and principles to protect public and private interests); *see* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 710 (1917) (listing duties as one of the eight jural conceptions that identify and explain legal relations).

210. *See* Crossland & Hambrick, *supra* note 30, at 803 (finding that employers that

methods, such as combining issue recognition-feasible alternatives in recognizing legal issues. These tools and methods ascertain and explain the legality or lack of it in matters relating to employment and other information, findings and conclusions in identifying or verifying feasible alternatives and other end results of decision-making to establish a flexible workforce.

Managers and their lawyers may find the need to review or examine past decision-making, planning and operations. This organizational need is to find how the legal rules applied to one or more end results which resulted in an unlawful decision or its implementation, or in an unlawful course of action of planning and an unlawful matter of operations. Such decisions, courses of action and matters can violate federal and state law by not following or considering legal rules or advice accompanied by analytics, such as recognizing the legal issue. The need to examine unlawful decisions, courses of actions and matters include one or more unlawful end results and may also include lawful end results breaching a normative value that disrupts business operations.

These injurious but lawful end results did not include adequate uses of fact sensitivity, methodological order and analytical scrutiny by using appropriate legal-managerial information, tools and methods to find and weigh legal rules that were applied to facts and information and to make conclusions in business decision-making, planning and operations. First, methodological order is forming legal-managerial tools or methods, such as recognition of a legal issue, at a stage or matter, such as recognition of situation, to allow managers and executives to test legality or application of a legal rule in forming and using a legal issue-decision situation tool before moving to next stage or matter. Second, analytical scrutiny is using a legal-managerial tool, such as legal issue-decision situation, to ascertain whether a legal issue existed in the recognition of the situation of unlawful decision-making. Third, fact sensitivity is using a legal-managerial tool, such as factual analysis-feasible alternatives, to ascertain and explain the nature and consequences of a feasible alternative as an end result under a legal rule. This sensitivity, order and scrutiny are provided by forming legal-managerial tools, methods and information to find and analyze unlawful end results and only lawful end results breaching normative values, such as ethical standards or organizational policy.

The managerial analysis with law creates and uses specific legal-managerial tools, methods and information to recognize the need for and analyze the application of common law rules and statutory provisions, preferably as legal advice accompanied by legal analytics, in the process of

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exercise less managerial discretion have less employer flexibility in making layoffs and reassignments).

making decisions and plans and conducting business operations. These tools, methods and information examine illegality of business situations, needs, findings, information and conclusions of each stage of unlawful business decision-making and planning and each matter of unlawful business operations. For instance, managers implement the workforce decision by recruiting and hiring contract workers who later argue or dispute that they are contract workers under corporate work guidelines, instructions, schedules and compensation. Now, a federal court of appeals agrees with the contract workers holding that they were employees under the employer-employee relationship.[211] Now, managers must examine their unlawful decision-making by using stage- or matter-specific legal-managerial tools, methods and information that are created or formed for a specific stage, such as combining finding the legal issue and selecting the best alternative to form an issue-best alternative tool. This issue-best alternative (decision) tool ensures factual sensitivity and analytical scrutiny to examine labor, employment, organizational or other findings, information and conclusions of the best decision alternatives. In using a legal-managerial tool, methodological order ensures reviewing any legal issues that were raised at the stage of selecting the best alternative and only a lawful end result is permitted to move to the next stage of decision-making and planning and next matter of operations. Thus, a managerial analysis with law resting on legal text can test or examine unlawful business situations and financial, marketing and other information, findings and conclusions to determine the illegality of end results at stages of business decision-making and planning and matters of business operations.

VIII. CONCLUSION

The theory of law and business is an existing or emerging reality of modern legal and business education that teaches legal, business and other knowledge and qualitative and quantitative analyses and methodologies. Modern legal and business education teaches business, legal, statistical and other findings, data and information for use in business decision-making, planning and operations. The theory of law and business is based on the reality that business is not totally or completely restricted by common law

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211. *See* Vizcaino v. Microsoft Corp., 120 F.3d 1006, 1009–10 (9th Cir. 1997) (recognizing that the Internal Revenue Service ("IRS") had applied traditional agency law principles to determine whether independent contract workers were employees under ERISA and that decision of IRS was consistent with *Nationwide Mutual Insurance Co. v. Darden*, though its decisions could still raise a legal issue); *see also* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 318–19 (1992) (holding that the courts must apply traditional agency law principles to determine whether an independent contract worker is an employee under ERISA).

rules and statutory provisions. This reality creates the need to more precisely use relevant common law and regulation within stages of business decision-making and planning and matters of business operations. Most proactively, the use of common law and government regulation recognizes and addresses legal issues and regulatory concerns in meeting business competition, pursuing market opportunities, addressing organizational needs and creating competitive advantages. Consequently, the theory of law and business is an integration of law and business explaining and aiding managers and executives to use legal rules and statutory provisions to make an effective and lawful end result at the completion of each stage of business decision-making and planning and each matter of business operations. Thus, the theory of law and business gives credence to modern education by resting squarely on a jurisprudential foundation enabling the integration of law and business and complementing uses of business principles, analytics or methodologies to better use of law in business and its organizations, institutions and disciplines.

The jurisprudential foundation enables the integration of law and business to support a managerial analysis with law that aids managers and executives in making lawful and examining unlawful decisions, strategies and practices. The foundation enables the theory of law and business to integrate law and business by making specific and purposeful combinations of legal and business knowledge, legal and business analytics, and legal and business methodologies. Moreover, the foundation supports the managerial analysis with law by combining legal and business knowledge, legal and business analytics and judicial and business methodologies to add more fact sensitivity, analytical scrutiny and methodological order in the use of common law and regulation in stages of business decision-making and planning and matter of business operations. Thus, the jurisprudential foundation enables a conceptual framework and supports an analytical framework to use common law and regulations to explain and demonstrate the existence of the theory of law and business.

The jurisprudential elements of legal interests, text and rationality integrate law and business by combining legal and business knowledge, analytics and methodologies sharing basic knowledge-, analytical- and methodological-based properties of creating and using knowledge and recognizing and engaging in logical and rational thinking of legal and business disciplines. First, the jurisprudential elements support the managerial analysis with law by adding more fact sensitivity, analytical scrutiny and methodological order by forming and using legal managerial tools, methods and information to determine legality, ascertain illegality and recognize violations of normative values of end results at stages of decision-making and planning and matters of business operations. Second, the

jurisprudential elements of the foundation enhance the explanatory nature of business principles and theories and expand the analytical and methodological utility of business analytics and methodologies in using legal rules accompanied by legal analytics in business decision-making, planning and operations. Third, the foundation underpins the theory of law and business by creating a legal-business taxonomy and using legal-managerial analytics to assess and explain the impact of common law and regulation on business and its disciplines and organizations by recognizing, measuring and categorizing limits on, losses from and failures of business organizations, institutions and their managers and executives. Thus, the foundation of legal text, interests and rationality provide fact sensitivity, methodological order and analytical scrutiny in stages of making creative, innovative and effective decisions, strategies and practices under common law and regulation.

NO HARM NO FOUL?: THE REMNANTS OF PURE CONSUMER HARM IN MONOPSONY CASES UNDER THE SHERMAN ACT

WILLIAM JACKSON*

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I. INTRODUCTION

Monopsonies are often seen as the "mirror image" of monopolies, where a single buyer controls a market rather than a single seller.[1] This mirror-image interpretation has guided the jurisprudence of monopsony claims under the Sherman Act.[2] While they share many theoretical similarities,

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1. Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L.J. 1509, 1514 (2013).

2. *See id.* (discussing the evolution of monopsony jurisprudence following the Supreme Court's holding in *Weyerhaeuser*); *see also* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 320 (2007).

monopsonies and monopolies can have different effects in practice, especially concerning the prices consumer pay.[3]

These practical differences between monopolies and monopsonies hold serious implications for the application of the antitrust laws, namely the Sherman Act, and subsequently the plaintiffs seeking relief from anticompetitive conduct.[4] Current precedent in monopsony cases have frequently confused the lower courts' attempts to apply the Sherman Act to monopsony issues, generally providing a high burden to overcome for small sellers facing large, powerful buyers.[5] At the end of the day, this burden results in employees, service providers, and other manufacturers of raw materials having to abide by higher prices and poor conditions–outcomes that the antitrust laws were designed to prevent.[6]

Some economists and antitrust scholars have labeled monopsony "the new monopoly" to emphasize the impact that undue buyer power is having on the modern American economy.[7] Similar to how Congress targeted monopolies by passing the Sherman Act and other antitrust laws, as well as the U.S. Supreme Court's subsequent enforcement of those laws last century, these scholars suggest that monopsonies are due for a similar reckoning–beyond the scope of monopsony under these laws as they currently exist.[8] Despite the call for new, monopsony-specific laws, the current text of the Sherman Act and judicial interpretation leave plenty of room for a course correction to more effectively target buyer power.[9] By recognizing the practical difference between monopsonies and monopolies and enforcing the Sherman Act's core goal of protecting competition, courts can level the playing field for the workers and other plaintiffs who have been largely barred from relief

3. *See* Roger G. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589, 606 (2005) (discussing how welfare justifications for allowing buyer power are rarely passed on to consumers in practice); Roman Inderst & Christian Wey, *Buyer Power and Supplier Incentives*, 51 EUR. ECON. REV. 647 (2007) (measuring the differences in prices paid by consumers in monopoly versus monopsony scenarios).

4. *See* Stucke, *supra* note 1, at 1514–15.

5. *See id.* at 1544–45; *see also Weyerhaeuser Co.*, 549 U.S. at 320–21.

6. *See* Stucke, *supra* note 1, at 1544.

7. *See, e.g.*, Debbie Feinstein & Albert Tseng, *Buyer Power: Is Monopsony the New Monopoly?*, 2019 A.B.A. SEC. ANTITRUST L. 12, 12 (noting that antitrust agencies are paying greater attention to monopsony issues); Roger D. Blair & Kelsey A. Clemons, *Is Monopsony the New Monopoly? Yes!*, 34 ANTITRUST 84, 88 (2019) (explaining that a monopsonist's profit maximization subsequently leads to decreased supply and higher consumer prices).

8. *See generally* Feinstein & Tseng, *supra* note 7 (tracking the FTC's recent investigations of mergers between firms with substantial buyer power).

9. *See generally* Blair & Clemons, *supra* note 7 (describing how monopsony results in a decrease in total surplus, which can serve as evidence of harming competition under the Sherman Act).

for anticompetitive buying practices.[10]

Part II of this Comment discusses the contested development of the consumer harm standard under the antitrust laws, the economic underpinnings of monopsonies as opposed to traditional monopolies, and the problems that courts have faced (or more frequently ignored) when deciding monopsony cases under the Sherman Act. Part III analyzes how courts that have abandoned a strict requirement of consumer harm are better able to conform with the true purpose of the Sherman Act. Part IV recommends that the U.S. Supreme Court must formally disavow the consumer harm standard in monopsony cases, or Congress must amend the Sherman Act to account for the fundamental differences between monopolies and monopsonies to better protect workers and small suppliers.

II. CONFLICTING VIEWS OF CONSUMER HARM FOR MONOPSONY CASES

To understand the conflict underlying the role of consumer harm in monopsony cases under the Sherman Act, one must understand both the economic underpinnings of monopsony and the development of the interpretation of the Sherman Act's purpose. While courts have attempted to align legal interpretations of monopsony with economic theory, the apparent consistency with traditional monopoly cases does not quite line up in practice.[11] Furthermore, despite the lower courts' struggles with this inconsistency, the Supreme Court has failed to adjust, or at least to clarify, how to address the problems with the mirror-image approach to these cases.[12]

A. Monopsony in Theory and Practice

Pure monopsonies occur when a single buyer dominates a market, as opposed to monopolies, which occur when a single seller dominates a market.[13] While pure monopsonies are rare, oligopsony scenarios, where a

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10. *See* Stucke, *supra* note 1, at 1531–32 (discussing the high burden of proof faced by monopsony plaintiffs due to the difficulties of showing direct evidence of anticompetitive harm in labor and other input markets).

11. *See id.* at 1514 (stating that "developing the legal standards for evaluating monopsonization claims will be more complex than simply mirroring the monopolization standards").

12. *See id*. at 1550–51 (critiquing the Chicago school consumer welfare prescription previously used by courts assessing monopsony cases).

13. Julie Young, *Monopsony*, INVESTOPEDIA, https://www.investopedia.com/terms/m/monopsony.asp (last updated Nov. 21, 2020) ("A monopsony is a market condition in which there is only one buyer, the monopsonist. Like a monopoly, a monopsony also has imperfect market conditions. The difference between a monopoly and monopsony is primarily in the difference between the controlling entities. A single buyer dominates a monopsonized market while an individual seller controls a monopolized market.").

few buyers dominate a market, occur more frequently.[14] For simplicity, consider "monopsony" to account for both pure monopsonies and oligopsonies since both present similar anticompetitive effects and are treated similarly under the antitrust laws.[15] Monopsony power permits a buyer in a market to lower prices below the competitive equilibrium.[16]

Typically, monopsonies exist in one of two types of markets.[17] First, monopsonies exist in input markets, where small sellers must sell their goods to an intermediary that sells the final product in the consumer-facing market.[18] For example, a grocery chain may purchase produce from farmers in order to resell the produce in its grocery stores.[19] Second, monopsonies exist in labor markets, where an employer has the power to hold down wages for employees or impose other anticompetitive measures, such as non-compete clauses or no-poaching agreements.[20]

While monopolistic behavior typically translates directly to higher prices being paid by consumers, monopsonistic behavior does not usually produce significant price effects in the consumer-facing market.[21] The monopsonist

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14. *See id*.

15. *See* Stucke, *supra* note 1, at 1513–14 (describing how the Supreme Court has treated monopsony cases as the "mirror image" of monopoly cases and is thus subject to the same legal standards); *see also* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 321 (2007); Khan v. State Oil Co., 93 F.3d 1358, 1361 (7th Cir. 1996) ("[M]onopsony pricing . . . is analytically the same as monopoly or cartel pricing and [is] so treated by the law."); Vogel v. Am. Soc. of Appraisers, 744 F.2d 598, 601 (7th Cir. 1984) ("[M]onopoly and monopsony are symmetrical distortions of competition from an economic standpoint."); John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should* Brooke Group *Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding*, 72 ANTITRUST L.J. 625, 653 (2005) (describing monopsony as the "mirror image" of monopoly).

16. *See* Young, *supra* note 13.

17. *See id.*

18. *See id.*

19. *See* U.S. DEP'T OF JUST. COMPETITION AND AGRICULTURE: VOICES FROM THE WORKSHOPS ON AGRICULTURE AND ANTITRUST ENFORCEMENT IN OUR 21ST CENTURY ECONOMY AND THOUGHTS ON THE WAY FORWARD 8 (2012); John Freebairn, *Effects of Supermarket Monopsony Pricing on Agriculture*, 62 AUSTL. J. OF AGRIC. & RES. ECON. 548, 549–51 (2018).

20. *See* Suresh Naidu et al., *More and More Companies Have Monopoly Power over Workers' Wages. That's Killing the Economy*, VOX (Apr. 6, 2018, 9:50 AM), https://www.vox.com/the-big-idea/2018/4/6/17204808/wages-employers-workers-monopsony-growth-stagnation-inequality (describing a no-poaching dispute between Jimmy John's corporate management with employees that prevented employees from taking jobs with competing sandwich shop chains); *see also* Young, *supra* note 13.

21. Adam Hayes, *Monopoly*, INVESTOPEDIA, https://www.investopedia.com/terms/m/monopoly.asp (last updated Sept. 1, 2021); *see* Stucke, *supra* note 1, at 1525–29 (describing how industries prone to monopolistic practices, such as meatpacking, tend to have inelastic products, so the depressed prices

swallows any additional profits generated by the depressed input prices.[22] Despite minimal price effects, monopsonistic behavior has a harmful impact on participants in input markets.[23] In labor markets, these effects include depressed wages, restrictions on employee competition, and unfair working conditions.[24] The fact that these anti-competitive practices face input markets rather than consumer-facing markets has confused antitrust analysis.[25]

B. Role of Consumer Harm Under the Sherman Act

The actual language of the Sherman Act is plain and broad, intentionally leaving room for judicial interpretation to determine the law's scope.[26] Courts have struggled with setting the boundaries of the Sherman Act.[27] The dominant modern view, promoted by the Chicago School of antitrust thought (spearheaded by Judge Robert Bork), favors "consumer welfare" as the primary goal of the Sherman Act (and the antitrust laws generally).[28] While

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in the input market does not translate to increased supply in the final product market).

22. *See* Stucke, *supra* note 1, at 1525–29.

23. *See* David Weil, *Why We Should Worry About Monopsony*, INST. FOR NEW ECON. THINKING (Sept. 2, 2018), https://www.ineteconomics.org/perspectives/blog/why-we-should-worry-about-monopsony; *see also* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2017) (describing how monopsony power has generated a functional imbalance between employees and employers both inside offices as well as in politics).

24. *See* Naidu et al., *supra* note 20; Eric Schlosser, *America's Slaughterhouses Aren't Just Killing Animals*, THE ATLANTIC (May 12, 2020), https://www.theatlantic.com/ideas/archive/2020/05/essentials-meatpeacking-coronavirus/611437/ (describing the poor, sometimes deadly, conditions faced by employees of the meatpacking industry).

25. *See* Gregory Day, *Anticompetitive Employment*, 57 AM. BUS. L.J. 487, 509–11 (2020) (suggesting that courts have been frequently confused about the correct standard to assess whether an antitrust injury has occurred in monopsony cases).

26. *See* 15 U.S.C. §§ 1–2 (outlawing "every contract, combination . . . or conspiracy, in restraint of trade," and monopolization, attempted monopolization, or conspiracy or combination to monopolize); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 318 (1897) ("Looking simply at the history of the bill from the time it was introduced in the [S]enate until it was finally passed, . . . [W]e are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein."); *see also* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

27. *See* Bork, *supra* note 26, at 35 (emphasizing the statute's intentional vagueness to allow for judicial deference in light of prevailing economic theories).

28. *See* ROBERT H. BORK, THE ANTITRUST PARADOX (1978); *see also* Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835 (2014) (detailing how consumer welfare overwhelmed other antitrust philosophies, like industrial organization, to dominate judicial interpretation of the Sherman Act).

the term "consumer welfare" facially appears to protect consumers, the term's true meaning reflects the maximization of aggregate surplus in a market for both consumers and producers.[29] Following this line of scholarship, the Supreme Court largely adopted consumer welfare as the primary purpose of the antitrust laws.[30] However, given the term's economic complexity, which differentiates from its facial meaning, both the Supreme Court and the lower courts have frequently applied a more literal meaning.[31] Accordingly, courts have occasionally contorted the goals of consumer welfare into what constitutes an antitrust injury under Sections 1 and 2 of the Sherman Act, requiring a showing of consumer harm.[32]

The antitrust injury doctrine was established in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[33] in which the Supreme Court emphasized that a plaintiff's injuries must go above and beyond being simply harmed by the defendant's economic conduct.[34] Rather, the defendant's conduct must harm

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29. *See* Crane, *supra* note 28, at 845–47 (discussing how Bork used the term "consumer welfare" as a Trojan horse for infusing antitrust interpretation with neoclassical values of economic efficiency).

30. *See* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (citing ROBERT BORK, THE ANTITRUST PARADOX 66 (1978)) ("Respondents engage in speculation in arguing that the substitution of the terms 'business or property' for the broader language originally proposed by Senator Sherman was clearly intended to exclude pecuniary injuries suffered by those who purchase goods and services at retail for personal use. None of the subsequent floor debates reflect any such intent. On the contrary, they suggest that Congress designed the Sherman Act as a 'consumer welfare prescription.'").

31. *See*, *e.g.*, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224–25 (1993) (citing Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 331 (1990)) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition."); Atl. Richfield Co., 495 U.S.at 340 (applying *Brooke Group*'s consumer-facing price analysis to vertical restraints); *Reiter*, 442 U.S. at 343 (clarifying the antitrust injury doctrine's relationship to consumers); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 321 (2007); *see also* Kirkwood, supra note *15*, at 635 (contrasting the Sherman Act with the Robinson Patman Act and noting that, unlike the framers of the Robinson Patman Act, the framers of the Sherman Act "intended to proscribe only conduct that threatens consumer welfare"); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209, 212–14 (1986) (arguing for an approach to anticompetitive exclusion that is consistent with the prevailing view that antitrust is concerned with preserving competition and preventing harm to consumers).

32. *See* Crane, *supra* note 28, at 848–51 (providing, for example, that some courts have required strict price increases as a showing of consumer harm to meet the antitrust injury requirement); C. Scott Hemphill & Nancy L. Rose, *Mergers That Harm Sellers*, 127 YALE L.J. 2078, 2087–88 (2018).

33. 429 U.S. 477 (1977) (arguing that some courts have construed the antitrust injury requirement to require showing end-consumer harm, creating difficulties for anticompetitive conduct found solely in input markets).

34. *Id.* at 489 ("Plaintiffs must prove *antitrust* injury, which is to say injury of the

competition overall—not just a single competitor.[35] Without showing such injury, a plaintiff will fail to state a plausible claim, and the lawsuit will be vulnerable to a motion to dismiss.[36] Usually, harm to competition occurs in the form of price effects or output effects, which are considered sufficient to prove that the defendant had market power that harmed the plaintiff.[37] However, evidence of such effects can be difficult to show in a complaint, creating hardship for private antitrust plaintiffs seeking relief under the Sherman Act.[38]

C. Moving to Monopsony

The Supreme Court has addressed monopsony issues in antitrust cases since the inception of the Sherman Act; whether the antitrust laws apply to these cases has never been in doubt.[39] However, these early opinions frequently did not address the fact that monopsonies differed from monopolies in any meaningful way, classifying them all as "monopolies."[40] In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,[41] the Supreme Court held that monopsony claims should be treated the same as monopoly claims under the Sherman Act, given their theoretical similarities.[42] Analogously, a monopsonization claim under Section 2 must make two showings.[43] First, the plaintiff must show the possession of buyer power in the relevant market.[44] Second, the plaintiff must show an attempt

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type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.").

35. *See id.*

36. *See id.*; *see also* Bell Atl. Corp. v. Twombly, 550 U.S. 554 (2007).

37. *See* Proof of "Antitrust Injury", 11 Federal Antitrust Law § 78.6 (2021).

38. *See* William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221, 1242–43 (1989).

39. *See*, *e.g.*, Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 219 (1948) (answering the question whether uniform prices set by sugar beet refiners with buyer power against local beet farmers violated the Sherman Act).

40. *See id.* at 240 (classifying the refiners' monopsony over beet prices as a "monopoly").

41. 549 U.S. 312 (2007).

42. *Id.* at 322 ("The kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization.").

43. *See id.*; Jay M. Zitter, Annotation, *What Constitutes Monopsony Within Meaning of § 2 of Sherman Act (15 U.S.C.A. § 2)*, 49 A.L.R. Fed. 2d 515 (2010).

44. *See* Zitter, *supra* note 43.

to acquire or maintain that power.[45]

The per se standard of analysis has seldom been applied to monopsony cases; the rule of reason analysis has been the standard for monopsony cases.[46] The rule of reason follows a burden-shifting framework that allows anticompetitive effects to be rebutted by a defendant by showing a sufficient procompetitive justification for the restraint under consideration.[47] Rule of reason analysis also opens the door for consideration of ancillary restraints, a framework through which a court may deem an otherwise anticompetitive practice permissible under the Sherman Act if the restraint demonstrates sufficient procompetitive effects.[48] This combination of factors has complicated the analysis of monopsony cases, given the aforementioned theoretical differences between monopolies and monopsonies.[49] Anticompetitive effects are typically measured through increased market prices in the consumer-facing market under the consumer welfare standard, so suppressing prices in an input market is unlikely to meet that evidentiary bar.[50] To further complicate matters, employers have significant discretion in labor markets to impose restrictions on wages on a case-by-case basis.[51] As a result, some individuals are harmed, but individual harms are

45. *See id.*

46. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2157 (2021) (holding that rule of reason analysis was appropriate in a monopsony case, even where the anticompetitive practice met the textbook definition of price fixing).

47. *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018) ("[T]he plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. . . . If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. . . . If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.").

48. *See* Brown v. Pro Football, Inc., 50 F.3d 1041, 1056–57, 1061 (D.C. Cir. 1995); N. Jackson Pharmacy, Inc. v. Caremark Rx, Inc., 385 F. Supp. 2d 740, 747 (N.D. Ill. 2005); ANTITRUST BASICS, L. J. PRESS § 1.03 (2021) ("Under the [ancillary restraints] doctrine, the courts must determine whether the nonventure restriction is a naked restraint on trade, and, therefore, illegal, or whether the restriction is one that is ancillary to the legitimate purpose of the business . . . . [A]n ancillary restraint of trade may violate the antitrust laws if the ancillary restraint does not survive a rule-of-reason analysis.").

49. *See* Day, *supra* note 25, at 507–08.

50. *See id.* at 509–10 (providing, forexample, that "[i]f a software company depresses the wages of custodians, the act would unlikely affect salaries throughout the greater labor market.").

51. *See id.* at 514–15 (explaining that some courts give significant deference to employers "pursuant to the theory that a cartel aiming to suppress mobility or wages is permissible so long as the employer had an ulterior goal based on efficiencies").

traditionally insufficient to show antitrust injury.[52] The lower courts have struggled to reconcile these conflicting interests.[53]

One coalition of courts has continued to apply a strict consumer harm standard in monopsony cases, including courts in the Fourth and Ninth Circuits.[54] In *Aya Healthcare Services v. AMN Healthcare*,[55] the court dismissed a claim against a healthcare buyer because the complaint did not allege harm against the consumer.[56] The court emphasized that the "[p]laintiffs [did] not allege that prices increased from $X to $Y amount as a result of the alleged conduct" and therefore failed to state an antitrust injury.[57] Similarly, in *Petrie v. Virginia Board of Medicine*,[58] the Fourth Circuit ruled against a chiropractor whose services were restricted on the grounds that she could not point to harmful effects on the consumer market overall, which is a requirement under Section 1 of the Sherman Act.[59] In *Jemsek v. North Carolina Medical Board*,[60] the court similarly ruled against a physician whose services were restricted for failure to provide evidence of an anticompetitive effect.[61]

The other coalition has abandoned the consumer harm standard in monopsony cases, including courts in the Third and Sixth Circuits.[62] In *Ogden v. Little Caesar Enterprises, Inc.*,[63] the U.S. District Court for the Eastern District of Michigan held against an employee under Section 1 of the Sherman Act who argued that the employer's no-poaching clause constituted anti-competitive collusion.[64] Similarly, in *Eichhorn v. AT&T Corp.*,[65] the

52. *See id.*; Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) ("Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.").

53. *See* Day, *supra* note 25, at 515 (discussing the inconsistencies among courts in imposing liability on labor cartels).

54. *See*, *e.g.*, Petrie v. Va. Bd. of Med., 648 F. App'x 352 (4th Cir. 2016); Aya Healthcare Servs. v. AMN Healthcare, No. 17cv205-MMA, 2017 U.S. Dist. LEXIS 201993 (S.D. Cal. Dec. 6, 2017).

55. 2017 U.S. Dist. LEXIS 201993.

56. *See id.* at *20.

57. *Id.* at *15.

58. 648 F. App'x 352 (4th Cir. 2016).

59. *See id.* at 356.

60. No. 5:16-CV-59-D, 2017 U.S. Dist. LEXIS 23570 (E.D.N.C. Feb. 21, 2017).

61. *Id.* at *23–24.

62. *See* Day, *supra* note 25, at 510–11.

63. 393 F. Supp. 3d 622 (E.D. Mich. 2019).

64. *Id.* at 627.

65. 248 F.3d 131 (3d Cir. 2001).

Third Circuit sided against AT&T employees contesting a no-hire agreement because the agreement did not have anticompetitive effects on the wages for the labor market.[66]

D. NCAA v. Alston

Monopsony once again reached the Supreme Court over a decade after the Court's decision in *Weyerhaeuser* in its opinion in *NCAA v. Alston*.[67] The Court held against the NCAA as a monopsonist in the market for student-athletes under Section 1 of the Sherman Act, striking down restraints on compensation for athletes.[68] The Court still reckoned with the effects on consumer demand in evaluating whether the NCAA's restraints were unreasonable using a rule of reason analysis.[69] Notably, the Court did not require a showing that the NCAA's conduct directly harmed consumers in order for the restrictions to be unreasonably anticompetitive.[70] However, this issue was uncontested by the parties, therefore the Court's formal stance on consumer harm remains unclear.[71]

In a concurring opinion, Justice Brett Kavanaugh argued that the holding should be extended to remove other restrictions imposed by the NCAA that were not at issue in the case.[72] Rather than focusing on the consumer side like the majority, Kavanaugh substantively considered the effects of the NCAA's price-fixing labor on the student-athletes.[73] Since the student-athletes faced artificially depressed compensation relative to their skills, they were harmed such that the NCAA's restrictions were unreasonable.[74] The district court defined the relevant market as the "college education market,"

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66. *Id.* at 145–46 (applying the ancillary restraints doctrine to non-compete agreements and determining that the effects in the labor market were insufficient for the restraint to be unreasonable).

67. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

68. *Id.* at 2154, 2166.

69. *Id.*

70. *Id.* at 2154 (highlighting that whether the NCAA's restrictions in fact decreased student athletes' compensation was not in dispute).

71. *Id.* at 2154–55 ("[The parties] do not contest that the NCAA enjoys monopoly (or, as it's called on the buyer side, monopsony) control in that labor market . . . . Nor does the NCAA suggest that, to prevail the plaintiff student-athletes must show that its restraints harm competition in the seller-side (or consumer facing) market . . . . With these matters taken as given, we express no views on them.").

72. *Id.* at 2167 (Kavanaugh, J., concurring).

73. *Id.* (finding issue with the majority opinion, which primarily focused on the NCAA's offered procompetitive effects to determine whether the restraint was, in fact, unreasonable).

74. *Id.* (disagreeing with the NCAA's "incorporati[on] [of] price-fixed labor into the definition of the [amateur college sports] product").

apparently analyzing the anticompetitive effects on student-athletes rather than consumers, which the Supreme Court affirmed.[75]

As demonstrated through the lower courts' struggle to decide monopsony cases consistently with *Weyerhaeuser*, the current state of the law is murky.[76] A more rigid analytical framework that considers the practical inconsistencies between monopolies and monopsonies must be applied to clear the waters.

III. CONFLICTING CONSUMER HARM

Courts upholding the consumer harm standard in monopsony cases have maintained that the purpose behind antitrust is to act as a shield for consumers.[77] These cases generally display one or both of the following characteristics: (i) a mismatch between the defined market and the non-competitive practice at issue, or (ii) a definition of the relevant antitrust injury that does not match the previously defined market.[78]

A. Mismatching Markets

Monopsony cases implementing the consumer harm standard tend to confuse input and output markets.[79] In *Jemsek*, the court held that the plaintiff failed to sufficiently allege an antitrust claim because she failed to allege a valid market.[80] The plaintiff did define a market, though, specifically the market between chiropractors and medical practitioners where the two sides compete as buyers of certain medical services.[81] However, the court did not accept this as a valid market to allege an antitrust claim, expressing that it did not see where the consumer fit into the market as defined in the complaint.[82] This misconception might derive from an economic misconception that markets generally reflect towards

75. *Id.* at 2151–52.

76. *See*, *e.g.*, *Alston*, 141 S. Ct. at 2141; Eichhorn v. AT&T Corp., 248 F.3d 131 (3d Cir. 2001); Ogden v. Little Caesar Enters., 393 F. Supp. 3d 622 (E.D. Mich. 2019); Jemsek v. N.C. Med. Bd., No. 5:16-CV-59-D, 2017 U.S. Dist. LEXIS 23570 (E.D.N.C. Feb. 21, 2017).

77. *See* Day, *supra* note 25, at 510 ("[B]ecause 'anticompetitive conduct in labor markets does not necessarily harm consumers,' workers 'will face an uphill battle under current law.'").

78. *See Alston*, 141 S. Ct. at 2141; *Eichhorn*, 248 F.3d at 131; *Ogden*, 393 F. Supp. 3d at 622; *Jemsek*, 2017 U.S. Dist. LEXIS 23570.

79. *See*, *e.g.*, *Jemsek*, 2017 U.S. Dist. LEXIS 23570, at *39.

80. *Id.*

81. *Id.* at *36–37.

82. *Id.* at *37–38.

consumers—not sellers.[83]

B. Inconsistent Injuries

Furthermore, these courts tend to narrowly define an antitrust injury for the alleged market, even where that market is narrowly defined if the plaintiff does not show a sufficiently broad effect.[84] In *Aya Healthcare Services, Inc.*, the plaintiff alleged evidence of price increases for consumers in its complaint.[85] The court rejected the complaint's evidence for failing to show concrete price increases outside anecdotal allegations.[86] The court's decision seemingly ignores the concrete no-poaching restraints and other collusive agreements among competitors.[87] On appeal in the Ninth Circuit, the court similarly rejected the allegations regarding labor constraints and collusion as circumstantial, affirming the district court's finding that the plaintiff failed to show antitrust injury.[88] Requiring quantitative showings of price increases places a high burden on plaintiffs to monopsony claims since, as previously discussed, anticompetitive practices in labor markets rarely translate to increased prices.[89]

Courts that have abandoned the consumer harm standard in monopsony cases have recognized the antitrust laws' purpose of the promotion of competition rather than strictly protecting consumers.[90] Their reasoning emphasizes the harms anticompetitive practices can have, other than against the consumer.[91] In *Ogden*, although the court held against the plaintiff on other grounds, it recognized that a no-poaching agreement can be sufficient

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83. *See* Day, *supra* note 25, at 507 ("[M]odern antitrust prioritizes consumers. When exclusionary conduct affects competition, the analysis tends to scrutinize whether consumers incurred higher prices.").

84. Aya Healthcare Servs. v. AMN Healthcare, No. 17cv205-MMA, 2017 U.S. Dist. LEXIS 201993, at *7–8 (S.D. Cal. Dec. 6, 2017).

85. *Id.* at *16.

86. *Id.* at *16–18.

87. *See id.*

88. Aya Healthcare Servs. v. AMN Healthcare, Inc., 9 F.4th 1102, 1113 (describing the plaintiff's offered evidence regarding labor constraints as "a far cry from the evidence of consumer preference, supracompetetive prices, and lower quality services that constitutes indirect evidence of harm to competition").

89. *Aya Healthcare Servs.*, 2017 U.S. Dist. LEXIS 201993, at *18–19; *see* Stucke, *supra* note 1, at 1531 (discussing the high burden of proof faced by monopsony plaintiffs due to the difficulties of showing direct evidence of anticompetitive harm in input markets).

90. *See id.* at *15–17; *see also* Day, *supra* note 25, at 508 (discussing the historical development of the antitrust laws as a remedy for competition, rather than competitors).

91. *See* Day, *supra* note 25, at 521 (citing non-price anticompetitive outcomes, including wage deflation, in labor markets).

for an antitrust injury without showing price increases, as the court required in *Aya Healthcare Servs*.[92] Interestingly, the Third Circuit in *Eichorn* still defined its market relative to the products facing consumers.[93] However, the court recognized the anticompetitive effects, particularly the no-hire agreement, relative to the impact on the employees and evaluated whether the plaintiffs had shown a sufficient antitrust injury, albeit not a sufficient one to win the case.[94]

C. Implied Abandonment?

In *NCAA v. Alston*, the Court did not require the plaintiff to provide evidence of direct consumer harm, but its basis for doing so is unclear.[95] The Court accepted that the NCAA did not contest that the plaintiffs must show harm to consumers directly.[96] Instead, the Court seemingly adopted the interpretation of the Sherman Act of *Mandeville Island Farms v. American Crystal Sugar Co.*,[97] which expanded the range of groups the Sherman Act was intended to protect.[98] Rather than limiting the protections offered by the Sherman Act to a specific group, the Court in *Mandeville Island Farms* affirmed the Sherman Act to be a protector of competition.[99] The Court's reasoning in *Mandeville Island Farms* differs significantly from the Chicago School's favored consumer welfare purpose.[100] *Mandeville Island Farms* emphasizes that courts should not read so far into anticompetitive outcomes, but rather should be focusing on the anticompetitive practices or restraints themselves.[101] Subsequent Supreme Court opinions on antitrust issues

92. *See Aya Healthcare Servs.*, 2017 U.S. Dist. LEXIS 201993, at *X; Ogden v. Little Caesar Enters., 393 F. Supp. 3d 622, 630, 634–35 (E.D. Mich. 2019).

93. Eichhorn v. AT&T Corp., 248 F.3d 131, 147 (3d Cir. 2001) ("As we recently stated, '[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.'").

94. *Id.* at 146–47.

95. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2154–55 (2021).

96. *Id.*

97. 334 U.S. 219 (1948).

98. *Id.* at 236 ("The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these . . . . The [Sherman] Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.").

99. *See id.*

100. *Compare id.* (emphasizing anticompetitive restraints), *with* BORK, *supra* note 28 (emphasizing anticompetitive outcomes).

101. *See Mandeville Island Farms*, 334 U.S. at 242–43 (holding a case of monopsony price-fixing as per se illegal, and maintaining that antitrust goals were to protect competition, not competitors); BORK, *supra* note 26, at 7, 11 (arguing that "consumer

largely avoided the restraint-focused reasoning of *Mandeville Island Farms*, especially after the Chicago School went mainstream in the late 1970s.[102] Use of the per se rule grew even more limited, tending to emphasize anticompetitive effects over declaring certain conduct to be *per se* illegal.[103]

The Supreme Court's tacit acceptance of the issues before it, without having felt obligated to remand with the requirement of direct consumer harm, suggests that the Court would side with the Third and Tenth Circuits, abandoning the consumer harm standard in monopsony cases for a more flexible approach.[104] Movement away from the Chicago School of thought[105] has been discussed among antitrust practitioners and scholars alike.[106] As argued by Justice Gorsuch, writing for the majority:

> Judges must be mindful, too, of their limitations—as generalists, as lawyers, and as outsiders trying to understand intricate business relationships. Judges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare. Judges must also be open to clarifying and reconsidering their decrees in light of changing market realities. Courts reviewing complex business arrangements should, in other words, be wary about invitations to "set sail on a sea of doubt."[107]

welfare" should be the primary concern under antitrust analysis).

102. *See*, *e.g.*, Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978) (expanding the application of an effects-focused rule of reason analysis for claims under Section 1 of the Sherman Act).

103. *See*, *e.g.*, Balmoral Cinema, Inc. v. Allied Artists Pictures Corp., 885 F.2d 313, 316 (6th Cir. 1989) ("[T]he Court said that application of the *per se* rule turns on whether the practice facially appears, always or almost always, to tend to restrict competition and decrease output or rather to increase efficiency and competition . . . . *Per se* analysis should not be extended 'to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious . . . .' That is the situation we have here."); Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006) (quoting Nat'l Soc'y of Pro. Eng'rs, 435 U.S. at 692 ("Per se liability is reserved for only those agreements that are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'")); Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289 (1985) ("This *per se* approach permits categorical judgments with respect to certain business practices that have proved to be predominantly anticompetitive.").

104. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2167 (Kavanaugh, J., concurring) (introducing the "ordinary 'rule of reason' scrutiny" term).

105. *See generally* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979) (describing the "Chicago School" and its rivalry with the "Harvard School"); George L. Priest, *Bork's Strategy and the Influence of the Chicago School on Modern Antitrust Law*, 57 J.L. & ECON. S1, S1–S2 (2014) (detailing the Chicago School's impact on antitrust).

106. *See* Posner, *supra* note 105, at 926; Priest, *supra* note 105, at S2.

107. *Alston,* 141 S. Ct. at 2166 (quoting United States v. Addyston Pipe & Steel Co.,

While paying homage to the concept of consumer welfare, the emphasis on market realities suggests a holistic use of the rule of reason in line with the reasoning of post-Chicago thought, focusing on the unfairness suffered by the players as opposed to the purported benefits gained by consumers.[108]

On the other hand, the Supreme Court's tacit acknowledgment of the issue in *Alston* may reflect simple ambivalence rather than acceptance.[109] Recognizing the ambivalence of the issue and the potential for legislative action on the issue, the Court may have desired to allow for Congressional input.[110] The language in *Alston* expresses sympathy for the position that the Court's hands are largely tied by precedent under the Sherman Act as it is currently written.[111] As stated by the Court, stitching together prior cases on the matter:

> "[R]ules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve." After all, even "[u]nder the best of circumstances," applying the antitrust laws "can be difficult" — and mistaken condemnations of legitimate business arrangements "are especially costly, because they chill the very' procompetitive conduct the antitrust laws are designed to protect." Indeed, static judicial decrees in ever-evolving markets may themselves facilitate collusion or frustrate entry and competition. To know that the Sherman Act prohibits only *unreasonable* restraints of trade is thus to know that attempts to "[measure] small deviations is not an appropriate antitrust function."[112]

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85 F. 271, 284 (6th Cir. 1898)).

108. *See* Priest, *supra* note 105, at S8–S9; *see also* Warren Grimes, *Breaking Out of Consumer Welfare Jail: Addressing the Supreme Court's Failure to Protect the Competitive Process*, 16 RUTGERS BUS. L. REV. 49 (2020) (discussing the role of non-price preferences in the competitive process and differentiating these from the price-focused standards advocated by the Chicago School).

109. *See Alston*, 141 S. Ct. at 2161.

110. *See* David McCabe & Steve Lohr, *Congress Faces Renewed Pressure to 'Modernize Our Antitrust Laws'*, THE N.Y. TIMES (June 29, 2021), https://www.nytimes.com/2021/06/29/technology/facebook-google-antitrust-tech.html (discussing the desire by many members of Congress to update the antitrust laws to combat specific Big Tech anticompetitive practices that have avoided scrutiny under the current laws); *see also Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring) ("If it turns out that some or all of the NCAA's remaining compensation rules violate the antitrust laws, some difficult policy and practical questions undoubtedly ensue . . . . Legislation would be one option.").

111. *See Alston*, 141 S. Ct. at 2161; *see also* Herbert Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J.L. & BUS. 369 (2016).

112. *Alston*, 141 S. Ct. at 2161 (internal citations omitted) (quoting Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (Cal. 1983); Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004)).

At the same time, the court expresses significant deference in line with its previous jurisprudence surrounding the application of the rule of reason.[113]

Justice Kavanaugh's concurrence reflects the reasoning found in those cases of the Third and Sixth Circuits.[114] Like in those cases, Justice Kavanaugh reasons that procompetitive outcomes are often used as shields against antitrust enforcement when consumer harm is used as the relevant standard.[115] He goes further than the majority opinion, decrying the behavior of universities that spend the money earned as a result of their student athletes' labor on things that have little to no bearing on creating positive outcomes for consumers, such as "[c]ollege presidents, athletic directors, coaches, conference commissioners, and NCAA executives tak[ing] in six- and seven-figure salaries."[116] This language seems to suggest that Justice Kavanaugh believes that pro-competitive justifications are, at least in this case, a shield for NCAA executives and other higher-ups in collegiate athletics to protect exorbitant profits and high salaries.[117] This line of reasoning harkens back to early antitrust cases decided by the Supreme Court, through which the Court asserted that increasing or maintaining profits is not a real procompetitive justification to counteract an anticompetitive restraint.[118]

Given these considerations, the role of *Alston* and its application to monopsonistic restraints generally remains unclear.[119] While its reasoning could be extended to consider non-educational restraints, the Court

113. *See*, *e.g.*, Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284–85 (2018) (noting that the plaintiffs, having relied exclusively on direct evidence of anticompetitive effects, did not have sufficient evidence to carry their burden).

114. *See Alston*, 141 S. Ct. at 2166–69 (Kavanaugh, J., concurring); Eichhorn v. AT&T Corp., 248 F.3d 131, X (3d Cir. 2001); Ogden v. Little Caesar Enters., Inc., 393 F. Supp. 3d 622, X (E.D. Mich. 2019) (holding that procompetitive outcomes in the consumer-facing market often overwhelm private plaintiffs suing for labor market anticompetitive harm).

115. *See Alston*, 141 S. Ct. at 2166–69 (Kavanaugh, J., concurring) (reasoning that anticompetitive harm is anticompetitive harm regardless of procompetitive rationales and suggesting that weighing whether certain harms are less significant than others violates the primary purpose of the Sherman Act to protect competition).

116. *Id.* at 2168 (emphasizing the racial inequities generated by the revenue of college athletic programs).

117. *See id.*

118. *See* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 695 (1978); *see also* Eleanor M. Fox, *What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect,* 70 ANTITRUST L.J. 371, 372–73 (noting an alternative to the microeconomic model that focuses on the market mechanism, rather than simply effects, and distinguishing this from a protectionist model designed to benefit small, inefficient firms).

119. *See Alston*, 141 S. Ct. at 2161.

seemingly refused to go in that direction.[120]

D. Section 1 Versus Section 2 Monopsony Cases

Although the Sherman Act prescribes different causes of action between Section 1, relating to multilateral agreements among competitors, and Section 2, pertaining to unilateral action to obtain monopoly/monopsony power, courts have often conflated these claims.[121] Further complicating the analysis of the relevant standard for a respective claim under one of these causes of action, the number of Section 1 claims significantly outnumbers those under Section 2.[122] Given the fraction of antitrust claims that are monopsony claims relative to monopoly claims, the number of opinions on Section 2 monopsonization claims is small.[123] Accordingly, there has been little to no guidance from higher courts, including the Supreme Court, that addresses the differences in standards between Section 1 agreements among buyers with market power and Section 2 monopsonization.[124] Given the prevalence of monopsonies in labor markets, where firms rarely conduct bilateral agreements and rely instead on unilateral employment contracts and hiring practices, the lack of Section 2 monopsonization jurisprudence creates difficulties for individual plaintiffs attempting to overcome the antitrust

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120. *See* Matt Marx et al., *Mobility, Skills, and the Michigan Non-Compete Experiment*, 55 MGMT. SCI. 875, 883–85 (2009) (examining the Michigan Antitrust Reform Act's effects on non-competes in Michigan); *see also* Norman D. Bishara & Evan Starr, *The Incomplete Noncompete Picture*, 20 LEWIS & CLARK L. REV. 497, 527 (2016) (reviewing research on Michigan's evolving enforcement of noncompete agreements). *But see* Ashley Jo Zaccagnini, *Time's Up: A Call to Eradicate NCAA Monopsony Through Federal Legislation*, 74 SMU L. REV. F. 55, 75 (2021) (arguing that the NCAA's monopsony power cannot be sufficiently resolved through the antitrust laws and that Congress must take specific action to fill in the gaps that the Sherman Act cannot).

121. *See* 15 U.S.C. §§ 1–2; *see also* Day, *supra* note 25, at X; *e.g.*, FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 422 (1990) ("[R]espondents' boycott 'constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act.' . . . As such, it also violated the prohibition against unfair methods of competition in § 5 of the FTC Act."); Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 290 (1985) ("This Court has long held that certain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as *per se* violations of § 1 of the Sherman Act."); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 694–95 (1978) ("The Sherman Act does not require competitive bidding; it prohibits unreasonable restraints on competition.").

122. *See* DEP'T OF JUST., ANTITRUST DIV., DEP'T OF JUST. ANTITRUST DIVISION WORKLOAD STATISTICS (stating that the Antitrust Division pursued fifty-six possible Section 1 violations in 2019 but only two Section 2 violations).

123. *See id.*

124. *See id.*

injury requirement.[125]

IV. HARM AND FOUL

The use of a pure consumer harm standard in monopsony cases creates an unreasonably high bar for plaintiffs who have been affected by anticompetitive actions by buyers that do not meet the traditional definition of an antitrust injury.[126] This is especially true in the case of employees and employers.[127] The United States has reached a crossroads in terms of buyer power that the antitrust laws must be updated to address.[128] As economic studies have proven, monopsonies do not always translate to higher prices paid by consumers; they frequently lead to the opposite.[129] Using the ancillary restraints approach to justify anticompetitive restraints that lead to procompetitive effects for consumers can lead to adverse effects for workers and other small producers.[130] As in *Aya Healthcare Services* and *Petrie*, courts consistently rule against employee plaintiffs by adopting an ancillary restraints approach in their rule of reason analyses.[131] Defendant entities can quickly respond to such complaints with the argument that the restriction is beneficial to the consumer, where the harmed worker has the burden to prove otherwise.[132]

Meanwhile, influential buyers continue to grow in their market power, allowing the subjugation of workers who struggle to make ends meet.[133] For

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125. *See* Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 134–35 (2008) (describing the leverage gained by employers over employees in the non-compete arena).

126. *See* Naidu, et al., *supra* note 20; Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, X (2018).

127. *See* Day, *supra* note 25, at 505 (arguing that employers have experienced disproportionate leniency under the Sherman Act, due to both judicial interpretation and inaction by the FTC and DOJ).

128. *See* Naidu et al., *supra* note 20.

129. *See id.*; Day, *supra* note 25, at 508 (explaining how monopolies and monopsonies differ with respect to the impact they have on consumers' buying power).

130. *See* Day, *supra* note 25, at 520–21 (attributing negative labor market effects to the restraints that may generate procompetitive outcomes in the consumer-facing market).

131. *See*, *e.g.*, Aya Healthcare Servs. v. AMN Healthcare, No. 17cv205-MMA, 2017 U.S. Dist. LEXIS 201993, at *16–17 (S.D. Cal. Dec. 6, 2017); Petrie v. Va. Bd. of Med., 648 F. App'x 352, 356 (4th Cir. 2016).

132. *See Aya Healthcare Servs.*, 2017 U.S. Dist. LEXIS 201993, at *16–17; *Petrie*, 648 F. App'x at 356.

133. *See* Mark Paul & Mark Stelzner, *Rethinking Collective Action and U.S. Labor Laws in a Monopsonistic Economy*, WASH. CTR. FOR EQUITABLE GROWTH (Dec. 20, 2018), https://equitablegrowth.org/rethinking-collective-action-and-u-s-labor-laws-in-a-

example, certain delivery and transportation apps such as Uber, DoorDash, and platforms that enlist workers through a gig model have pushed hard to avoid providing benefits and complying with other labor regulations.[134] Generally, these companies classify their workers as contractors to avoid such regulation.[135] Arguably collusive in the labor market, these companies have argued that requiring their workers to have full employment status would lead to higher prices passed on to consumers.[136] Under an ancillary restraints model, it is not difficult to see how these procompetitive effects could be seen as outweighing the harm on the laborers by lowering the costs faced by consumers, increased supply of rides, and similar justifications.[137] Similarly, other technology companies, including Apple and Google, have allegedly fixed the wages of millions of employees.[138]

Analysts have argued that Amazon has gained both monopoly and monopsony power over the last decade.[139] On the monopsony side, this

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134. *See* Dara Kerr, *Uber and Lyft Experiment with Labor Practices Amid Driver Shortage*, THE MARKUP (June 1, 2021, 8:00 AM), https://themarkup.org/news/2021/06/01/uber-and-lyft-experiment-with-labor-practices-amid-driver-shortage (describing how rideshare companies have been able to avoid increasing wages for drivers, despite a significant decrease in labor supply due to the Covid-19 pandemic); *see also* Mark Anderson & Max Huffman, *Labor Organization in Ride-Sharing–Unionization or Cartelization?*, 23 VAND. J. ENT. & TECH. L. 715 (2021).

135. *See* Kate Conger, *Uber and Lyft Drivers in California Will Remain Contractors*, THE N.Y. TIMES (Nov. 7, 2020), https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html (detailing how the ballot measure that would require drivers to be hired employees was rejected by California voters). *But see* Wilfred Chan, *The Workers Who Sued Uber and Won*, DISSENT MAGAZINE (May 5, 2021), https://www.dissentmagazine.org/online_articles/the-workers-who-sued-uber-and-won (detailing how the U.K. Supreme Court ruled in favor of Uber drivers suing for employment status and protections such as minimum wage and paid annual leave).

136. *See* Andrew Wallender, *Uber's Worker Business Model May Harm Competition, Judge Says*, BLOOMBERG L. (June 21, 2019, 2:58 PM), https://news.bloomberglaw.com/daily-labor-report/ubers-worker-business-model-may-harm-competition-judge-says; *see also* Diva Limousine, Ltd. v. Uber Techs., Inc., 392 F. Supp. 3d 1074, X (N.D. Cal. 2019) (holding that Uber's contractor model for workers likely violates both state and federal antitrust laws).

137. *See Diva Limousine*, 392 F. Supp. 3d at 1081 (discussing the procompetitive effects of the existing contractor employment model used by Uber and other ride-share companies).

138. *See* Mark Ames, *Revealed: Apple and Google's Wage-Fixing Cartel Involved Dozens More Companies, Over One Million Employees*, PANDO (Mar. 25, 2014), https://pando.com/2014/03/22/revealed-apple-and-googles-wage-fixing-cartel-involved-dozens-more-companies-over-one-million-employees/ (detailing how a secretive wage fixing cartel became public).

139. *See*, *e.g.*, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017) (analyzing Amazon's dominance in a wide range of sectors and the potential harms that

includes Amazon's role as a buyer both of labor and as a middleman for buying and reselling other companies' products.[140] Amazon employees have decried poor labor conditions for years.[141] However, it is possible that courts using the consumer harm standard, coupled with the doctrine of ancillary restraints, would not impose antitrust liability should a suit be brought under the Sherman Act.[142] Amazon can offer a rebuttal that there are procompetitive justifications for these practices, as they allow benefits to flow to consumers in the form of rapid delivery and low prices.[143] Similarly, Amazon's influence with consumers also enables the company to put significant pressure on its suppliers, forcing them to carry more of the costs so that Amazon can resell at a low price.[144] Therefore, an individual or class plaintiff going after Amazon on monopsony grounds stands little chance under the current state of Sherman Act jurisprudence.[145]

Several pathways to combating the problem of growing buyer power in the modern economy exist.[146] However, among these solutions must be an explicit rejection of the consumer harm standard in monopsony cases; the Supreme Court must make a firm stance on this issue.[147] While the Court's reasoning in *Alston* opens the door for monopsony analysis without consumer harm, it fails to explicitly replace the standard.[148] The Court must grant certiorari to a monopsony case that would allow it to reaffirm the actual goals of the antitrust laws hidden amongst the Chicago School's confusion and formally reject a requirement of showing consumer harm for antitrust

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may result from it).

140. *See id.*

141. *See* Annie Palmer, *Amazon Warehouse Workers Injured at Higher Rates than Those at Rival Companies, Study Finds*, CNBC (June 1, 2021, 11:11 AM), https://www.cnbc.com/2021/06/01/study-amazon-workers-injured-at-higher-rates-than-rival-companies.html; Danielle Abril, *Amazon Workers Can Still Fight for Better Conditions, Even if Union Efforts Fail. Here's How.*, FORTUNE (Apr. 13, 2021, 6:51 PM), https://fortune.com/2021/04/13/amazon-workers-union-efforts-collective-power-working-conditions-activism/.

142. *See* Laura Alexander, *Monopsony and the Consumer Harm Standard*, 95 GEO. L.J. 1611, 1621–22 (recognizing the breadth of the ancillary restraints doctrine and the barriers it poses for monopsony plaintiffs).

143. *See* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 694-95 (1978).

144. *See* Eugene Kim, *As Amazon's Dominance Grows, Suppliers Are Forced to Play by Its Rules*, CNBC (Dec. 21, 2017; 2:20 PM), https://www.cnbc.com/2017/12/21/as-amazons-dominance-grows-suppliers-are-forced-to-play-by-its-rules.html.

145. *See* Alexander, *supra* note 142, at 1621.

146. *See* Day, *supra* note 25, at 531–32.

147. *See id.*; Khan, *supra* note 139, at 716.

148. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2155 (2021) (declining to express views on whether pro-competitive effects proffered in one market can offset anticompetitive effects in another).

injuries. There is reason to believe that a future Amazon lawsuit will provide a case that affords this opportunity.[149] The newly-appointed FTC commissioner, Lina Khan, has expressed a willingness to resume investigations against the company's practices.[150] Under President Biden's leadership, the antitrust agencies have been encouraged to pursue anti-competitive practices previously left alone.[151] A recent executive order specifically aims "to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of . . . monopsony—especially as these issues arise in labor markets . . . ."[152]

However, there remains the possibility that the Court would refuse to go so far as to reject the consumer harm standard.[153] In that case, it may be necessary to introduce legislation to amend the antitrust laws to ensure fair treatment of monopsony victims.[154] Such legislation is no far cry; legislators for years have advocated for updating the Sherman Act and the other antitrust laws to reflect current economic priorities.[155] For instance, Senator Amy Klobuchar has introduced the Competition and Antitrust Law Enforcement Reform Act, which attempts to fill some gaps in the Sherman and Clayton Acts regarding monopsonies.[156] Furthermore, states have taken the initiative

149. *See* Marcy Gordon, *Amazon Asks for FTC Head to Step Aside from Antitrust Investigations*, PBS (June 30, 2021, 5:48 PM), https://www.pbs.org/newshour/economy/amazon-asks-for-ftc-head-to-step-aside-from-antitrust-investigations (noting that the FTC has been leading investigations of large technology companies such as Facebook).

150. *See id.*; *see also* Khan, *supra* note 139 (advocating for increased antitrust enforcement action against Amazon given significant increases in both seller and buyer power).

151. Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 14, 2021); *see also* Matthew Perlman, *Sweeping Biden Order Aims to Attack Lack of Competition*, LAW360 (July 9, 2021, 9:59 AM), https://www.law360.com%2Farticles%2F1401687%2Fsweeping-biden-order-aims-to-attack-lack-of-competition&usg=AOvVaw1ukPY1iBP9WnNmpWRH6-7C (stating how the executive order is going to increase the likelihood of equal opportunities in the market industry).

152. Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 14, 2021).

153. *See Alston*, 141 S. Ct. at 2162 (stating how the district court found that the NCAA student-athlete's abilities to prove that a "substantially less restrictive alternative" rule existed to achieve the same procompetitive benefits was satisfied when the NCAA was able to).

154. *See* Lauren Feiner, *Congress Just Finished Its Big Tech Antitrust Report — Now It's Time to Rewrite the Laws*, CNBC (Oct. 7, 2020, 7:49 AM), https://www.cnbc.com/2020/10/07/after-congress-big-tech-antitrust-report-its-time-to-rewrite-the-laws.html.

155. *See id.* ("[L]awmakers on both sides of the aisle have remained interested in antitrust reform . . . .").

156. Bill Baer, *How Senator Klobuchar's Proposals Will Move the Antitrust Debate Forward*, BROOKINGS (Feb. 8, 2021), https://www.brookings.edu/blog/techtank/2021/02/08/how-senator-klobuchars-

to fill in the gaps left by federal antitrust law.[157]

V. CONCLUSION

The continued use of the consumer harm standard in monopsony cases conflicts with the antitrust laws' purpose and allows powerful buyers to impose unfair conditions on laborers and small sellers alike.[158] While they share theoretical similarities, in practice monopolies and monopsonies have different outcomes in their respective markets, especially in terms of the prices paid by consumers.[159] Further, these practical differences have led to current inconsistent application of the consumer harm standard in monopsony cases at the district court and circuit court levels. The Supreme Court's holding in *Alston* and its limited application to educational benefits failed to provide an answer for whether a showing of pure consumer harm is required for monopsony plaintiffs to prevail under the Sherman Act.[160] For now, the challenges faced by lower courts in assessing the claims of monopsony plaintiffs, balancing the purpose of the Sherman Act as a shield for competition against the consumer harm standard, will likely continue. Finally, the consumer harm standard should be abandoned on monopsony cases, given the unreasonably high bar it presents for plaintiffs and its impact on workers.

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157. *See*, *e.g.*, J. Mark Gidley et al., *New York's Sweeping New Antitrust Bill—Requiring NY State Premerger Notification ($9.2M Filing Threshold) and Prohibiting "Abuse of Dominance" —Inches Closer to Becoming Law*, WHITE & CASE (June 11, 2021), https://www.whitecase.com/publications/alert/new-yorks-sweeping-new-antitrust-bill-requiring-ny-state-premerger-notification (reporting on the state of New York releasing a promising antitrust law).

158. *See* Day, *supra* note 25, at 510–11.

159. *See id.* at 508, 510–11.

160. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2162 (2021).

CUBAN IMMUNITY CRISIS: HOW SOVEREIGN IMMUNITY IMPACTS ENFORCING THE HELMS-BURTON ACT AGAINST BUSINESS VENTURES IN CUBA

WALTER SPAK*

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I. INTRODUCTION

The Foreign Sovereign Immunities Act ("FSIA") created a presumption of immunity for foreign sovereign nations against litigation or injury through private actions by stripping jurisdiction from U.S. courts.[1] However, there are exceptions to the immunity laid out in the Act.[2] Specifically, Sections 1605(a)(2) and (3) lay out exceptions to property takings and commercial activity conducted by the foreign sovereign.[3]

In 1996 Congress passed the Cuban Liberty and Democratic Solidarity Act of 1996 ("Helms-Burton Act") in response to the totalitarian regime of the Cuban Government, which posed an ongoing national security threat to the United States.[4] Title III of the Act aimed to deter investors from conducting business in Cuba and with Cuban businesses by creating a private right of action against persons or entities who "traffic" in property confiscated by the Cuban government.[5] The legislation defines "traffic" relatively clearly and expansively and makes Title III fairly evident regarding how to apply it.[6] Similarly defined is "confiscated" in subsection (4) of the same section as "the nationalization, expropriation, or other seizure by the Cuban Government of ownership or control of property" so long as there has not been some type of recourse for the confiscation.[7]

In *Exxon Mobil Corp. v. Corporación CIMEX S.A.*,[8] the United States

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1. *See* 28 U.S.C. §§ 1602–1607 (finding that immunity for foreign states from U.S. courts would serve interests of justice and protect rights of both parties).

2. *See id.* § 1605 (providing general exceptions to jurisdictional immunity for a foreign state).

3. *See id.* § 1605(a)(2)–(3).

4. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C. §§ 6021–6091 (justifying action against the Cuban government by highlighting economic and political concerns against the Castro regime).

5. John B. Bellinger III et al., *Two Years of Title III: Helms-Burton Lawsuits Continue to Face Legal Obstacles*, ARNOLD & PORTER, https://www.arnoldporter.com/en/perspectives/publications/2021/05/two-years-of-title-iii-helmsburton-lawsuits?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration.

6. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 4(13) ("[A] person 'traffics' in confiscated property if that person knowingly and intentionally [directly or indirectly engages with confiscated property] . . . " and explicitly excluding certain activities from this definition).

7. *Id.* § 4(4) (providing additional restrictions on the definition of "confiscated").

8. 534 F. Supp. 3d 1 (D.D.C. 2021).

District Court for the District of Columbia evaluated the question of sovereign immunity for three related Cuban corporations under Title III of the Helms-Burton and the FSIA.[9] The Court evaluated exceptions for waiving immunity under both Title III and the FSIA, comparing vague Title III language and the established exceptions under the FSIA.[10] The Court held there was jurisdiction of the primary CIMEX corporation but stayed the motion to dismiss to provide the opportunity for discovery to establish jurisdiction for the remaining two.[11] The Court assigned the temporary stay because Title III did not waive the plaintiff's sovereign immunity contention but instead relied on the commercial activity exception for the FSIA.[12]

This Comment will address how Title III of the Helms-Burton Act waives sovereign immunity for establishing jurisdiction without requiring evaluation of FSIA exceptions. Provided Exxon can successfully establish injury in fact, as required in Title III, the Court should deny the defendant's two additional motions to dismiss the claims on grounds of sovereign immunity.[13]

Furthermore, the Court oddly addressed the question of standing for the claim of action based on redressability and injury in fact.[14] There is ongoing confusion for Title III cases based on the injury of the confiscation of property itself or the "trafficking" of such property.[15] For Cuban defendants, this question would only apply to sovereign related actions, as there would be no claim to injury from non-government entities simply for the expropriation of the land.[16]

Part II of this Comment discusses the historical relationship between the United States and Cuba leading up to the Helms-Burton legislation, the rationale behind the Helms-Burton Act, and the history and application of the FSIA. Part III analyzes the Helms-Burton legislation to evaluate whether Title III of the Act implicitly waives sovereign immunity for actions against foreign sovereign nations. Additionally, Part III applies this analysis to show how the court should decide *Exxon Mobil Corp.* Part IV recommends steps to take to clarify the restrictions around litigation under Title III moving forward, as well as how to clarify the use of the Title as cases continue to file

9. *See id.* at 10–11

10. *See id.* (walking through the discussion between Title III and the FSIA to compare appropriate methods for waiving immunity).

11. *See id.* at 29–30.

12. *See id.*

13. *See id.*

14. *Id.* at 30–31.

15. *See id.*

16. *See id.*

into the courts. Finally, Part V concludes by recapping the major rationale for the presence of the sovereign immunity waiver within Title III, as well as drawing attention to the uncertainty around Helms-Burton legislation under the changing political climate.

II. A CONSISTENT CONCERN WITH CUBA LEADS TO A HISTORY OF STEPS FOR PROTECTING THE WESTERN WORLD

In 1959, Fidel Castro took control of the Cuban government following the Cuban revolution overthrowing President Fulgencio Batista and establishing a socialist state.[17] Following Castro's rise to power, he visited the United States to meet with then-President Richard Nixon on relatively welcome terms.[18] But over the next half-century and now twelve presidents later, the relationship between the two nations has experienced a failed invasion, a nuclear crisis, and an ongoing asylum situation.[19] Throughout the years, the U.S. has handled the political relationship inconsistently through changing embargoes and legislation, including the Helms-Burton Act in 1996.[20]

A. The Historical Impact Leading to the Rise of the Helms-Burton Act

In the late 1950s, Fidel Castro took control of the Cuban government and implemented significant changes to political practices in Cuba, creating tension between the United States and Cuba.[21] As part of the Castro regime, the Cuban government nationalized all foreign assets in Cuba and significantly raised taxes on imports from the U.S.[22] Similarly, the nationalization of industries in Cuba led to the exiting of many businesses and set the initial cause of action for the expropriation of lands in Cuba.[23]

17. *See* Adam Epstein, *A Timeline of US-Cuba Relations Since the Cuban Revolution*, QUARTZ (Nov. 26, 2016), https://qz.com/314271/a-timeline-of-us-cuban-relations-since-the-cuban-revolution/.

18. *See* Greg Myre, *The U.S. And Cuba: A Brief History Of A Complicated Relationship*, NPR (Dec. 17, 2014, 2:09 PM), https://www.npr.org/sections/parallels/2014/12/17/371405620/the-u-s-and-cuba-a-brief-history-of-a-tortured-relationship.

19. *See id.*

20. *See* Epstein, *supra* note 19 (highlighting the complicated relationship between the U.S. and Cuba throughout the years).

21. *See U.S.-Cuba Relations*, COUNCIL ON FOREIGN RELATIONS, https://www.cfr.org/timeline/us-cuba-relations (Jun. 13, 2021) [hereinafter *U.S.-Cuba Relations*]; Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C. §§ 6021–6091 (highlighting economic and political concerns against the Castro regime); Cuban Democracy Act of 1992 § 7, 22 U.S.C. 6001 (citing the similar policy goals for a transition of Cuban government).

22. *See U.S.-Cuba Relations*, *supra* note 21.

23. *See id.*

Tensions generally worsened over the next few decades enduring the Cold War and further embargoes until 1992, under President George H.W. Bush, the U.S. tightened sanctions against Cuba after the fall of the Soviet empire.[24] In 1996, the Clinton Administration signed the Helms-Burton Act, further tightening and codifying the sanctions on Cuba instituted under President H.W. Bush.[25] The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, also known as the Helms-Burton Act, named after former Senator Jesse Helms and Representative Dan Burton, aimed to enforce the embargo between the U.S. and Cuba during the Clinton Administration.[26] The intent for passing the Act was to bring about a peaceful transition to a representative democracy and economic market in Cuba.[27] The Act stipulated that the restrictions implemented may only be lifted once the Castro regime is no longer in control and Cuba began a political transition.[28] The Act included numerous provisions that impacted the relationship between the U.S. and Cuba, from television broadcasting to extradition.[29]

Initially, the Act received much criticism from U.S. ally organizations and governments, as potential litigation and embargo enforcement against Cuba went against the goal of independent sovereignty and international law.[30]

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24. *See id.*

25. *See id.*

26. *See id.*; Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 302(d).

27. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 3 (stating the purposes of the Act "(1) to assist the Cuban people in regaining their freedom and prosperity, as well as in joining the community of democratic countries that are flourishing in the Western Hemisphere; (2) to strengthen international sanctions against the Castro government; (3) to provide for the continued national security of the United States in the face of continuing threats from the Castro government of terrorism, theft of property from United States nationals by the Castro government, and the political manipulation by the Castro government of the desire of Cubans to escape that results in mass migration to the United States; (4) to encourage the holding of free and fair democratic elections in Cuba, conducted under the supervision of internationally recognized observers; (5) to provide a policy framework for United States support to the Cuban people in response to the formation of a transition government or a democratically elected government in Cuba; and (6) to protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime.").

28. *See id.* § 205 (requiring that the political transition must include Cuba allowing free elections, free press, and releasing political prisoners); *see also* John B. Bellinger et al., *supra,* note 5.

29. *See, e.g.*, Cuban Liberty and Democratic Solidarity (LIBERTAD) Act §§ 107, 113 (promoting free and democratic television broadcasting and establishing extradition requirements).

30. *See* Press Release, General Assembly, Assembly Again Seeks Repeal of Extraterritorial Measures Like United States Helms-Burton Act Against Cuba, U.N. Press Release GA/9349 (Nov. 5, 1997) (identifying examples of global reactions to the Helms-Burton Act) [hereinafter U.N. Press Release Against Extraterritorial Measures].

The EU introduced a council regulation protecting against extra-territorial impacts of legislation, and a United Kingdom extension to their statute protecting trading interests.[31] The EU Council, UK, Mexico, and Canada all expressed hesitancy regarding the Helms-Burton Act and sought to limit its enforceability in foreign jurisdictions.[32] The criticism focused on the Act's potential to contradict international law and the sovereignty of the nations.[33] Mexico and Canada condemned Title IV of the Act, saying it violated the North American Free Trade Agreement (NAFTA)[34]

The Bush Administration contemplated enforcing the suspended Title but ultimately believed that the resulting litigation would cause more difficulties than benefits.[35] The Obama Administration eased many of the restrictions between the U.S. and Cuba to improve the situation between the two nations.[36]

The Trump Administration was much harsher when it came to relations with Cuba as part of the somewhat protectionist economic policy, which aimed to support U.S. producers rather than relying on foreign trade.[37] Over two years after taking office, President Trump let the Title III suspension lapse in May of 2019 as a deviation from precedent administrations which

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31. Council Regulation 2271/96 of Nov. 22, 1996, Protecting Against the Effects of the Extra-Territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom, 1996 O.J. (L 309) 1 (EC); The Extraterritorial US Legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996, SI 1996/3171 (Eng.).

32. *See* U.N. Press Release Against Extraterritorial Measures, *supra* note 30; *see also* Pawel K. Chudzicki, *The European Union's Response to the Libertad Act and the Iran-Libya Act: Extraterritoriality Without Boundaries*, 28 LOY. U. CHI. L.J. 505, 505–06 (1997).

33. *See* Jeffrey Dunning, *The Helms-Burton Act: A Step in the Wrong Direction for United States Policy Toward Cuba,* 54 WASH. U. J. URB. & CONT. L. 213, 213 n.3 (1998) (noting the initial backlash that the Helms-Burton Act received from neighboring countries and trade partners).

34. *Id.* at 229.

35. Bellinger, III et al., *supra* note 5.

36. *See* Mimi Whitfield, *One of Obama's Parting Acts: Suspending Lawsuit Provision of Helms-Burton*, MIAMI HERALD (Feb. 6, 2017, 5:24 PM), https://www.miamiherald.com/news/nation-world/world/americas/cuba/article131092324.html#storylink=cpy (providing, for example, that the U.S. reopened its Cuban embassy, entered into twenty-two agreements with Cuba "on topics of mutual interest" and resumed commercial airline and cruise services to Cuba under the Obama Administration).

37. *See* Matthew Lee & Joshua Goodman, *Trump Hits Cuba with New Sanctions in Waning Day*s, PBS (Jan. 11, 2021, 6:48 PM), https://www.pbs.org/newshour/politics/trump-hits-cuba-with-new-terrorism-sanctions-in-waning-days (highlighting the Trump Administration's issuance of new sanctions on Cuba and other relation-straining moves such as restricting "flights, trade, and financial transactions between the U.S. and [Cuba]").

maintained the suspension to avoid the risk of diplomatic friction.[38] It is unclear how the Biden Administration will address the Helms-Burton Act, but it has been reported that it is a low priority for Biden's cabinet and agenda.[39] Conversely, President Biden has recently received additional pressure to engage with Cuba and lift restrictions to better serve human rights in the country and ease the unilateral restriction.[40] While the Biden Administration does not appear to intend to normalize relations with Cuba anytime soon, the recent protests for economic and governmental reform in Cuba may impact the Helms-Burton legislation and force a reaction sooner than anticipated.[41]

B. Breakdown of the Helms-Burton Legislation

There are four main Titles within the Act covering a wide variety of topics.[42] Title I focuses on the existing embargo and sanctions between the U.S. and Cuba, including trade and financial transaction restrictions.[43] Title II focuses on the U.S. policy to help transition the Cuban government to a democratic one.[44] Title IV deals with the denial of visas to the U.S. and also

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38. *See* Judith Alison Lee et al., *President Trump Ramps up Cuba Sanctions Changes – Allows Litigation Against Non-U.S. Companies Conducting Business in Cuba*, GIBSON DUNN (May 1, 2019), https://www.gibsondunn.com/president-trump-ramps-up-cuba-sanctions-allows-litigation-against-non-us-companies-conducting-business-in-cuba/.

39. *See* Karen DeYoung, *New Cuba Policy on hold while Biden Deals with Bigger Problems*, WASH. POST (June 27, 2021, 11:53 AM), https://www.washingtonpost.com/national-security/biden-cuba-policy/2021/06/27/dde275f6-d0f6-11eb-8014-2f3926ca24d9_story.html (reporting various perspectives as to what issues take priority over addressing the Helms-Burton Act).

40. *See* Carmen Sesin, *Over 100 Democrats Urge Biden to Engage with Cuba, Lift Restrictions*, NBC NEWS, https://www.nbcnews.com/news/latino/100-democrats-urge-biden-engage-cuba-lift-restrictions-rcna9072 (Dec. 16, 2021, 7:54 PM) (detailing how over 100 House members urged the Biden administration to lift trade restrictions amid economic and humanitarian crises).

41. *See* Dan Roe, *Helms-Burton Lawsuits Remain in Gridlock as Window to Litigate Closes for Some*, LAW.COM, (Aug. 27, 2021, 4:08 PM), https://www.law.com/dailybusinessreview/2021/08/27/helms-burton-lawsuits-remain-in-gridlock-as-window-to-litigate-closes-for-some/; *see also* Samantha Schmidt, *Cuba's President Confronts a Nation in Crisis. Among His Challenges: 'He's No Fidel.'*, WASH. POST (July 17, 2021, 7:00 AM), https://www.washingtonpost.com/world/2021/07/17/cuba-protests-president-crisis/ (identifying the recent protests in the Summer of 2021 in Cuba for the progressive changes to make the economy and government more democratic).

42. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 § 1, Pub. L. No. 104–114, 110 Stat. 785–86 (codified at 22 U.S.C. 6021–6091) (detailing the table of contents for the Helms-Burton Act).

43. *See id.* §§ 101–116.

44. *See id*. §§ 201–206.

addresses confiscated or taken property in Cuba claimed by U.S. nationals, further enforcing the restriction on travel between the two nations.[45]

Title III of the Helms-Burton Act provides a manner for U.S. nationals with a claim to property confiscated by the Cuban government to sue parties that may be "trafficking" that property to which they claim.[46] Title III includes a provision that grants the President of the United States the ability to suspend the right to private action as necessary to support a national interest.[47] This suspension only lasts for six months and must be renewed to stay suspended at the end of each period.[48] Sitting presidents have consistently suspended the use of Title III since its enactment, including Clinton, Bush, and Obama.[49] President Trump, however, was the first president to let the suspension lapse and enforced Title III in 2019 for the first time, allowing private citizens to sue businesses that had previously profited from utilizing the confiscated land in Cuba.[50]

C. Lasting Impact and Existing Legal Consequences Since the Enforcement of Title III

Though it was anticipated that the lapse in suspension would allow for a flood of lawsuits, there was an underwhelming number that flowed into the courts, considering experts estimated thousands of potential plaintiffs.[51] The few Title III lawsuits filed after the suspension lapsed, focusing on the "trafficking" aspect of the Act.[52] These lawsuits largely included businesses dealing with U.S. ports of exit or entry, as well as the international airport near Havana.[53] The suits therefore involved multiple cruise lines, American

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45. *See id*. § 401.

46. *See id.* §§ 301–306.

47. *Id.* § 306(b).

48. *Id.*; *see also* John H. Jackson, *Helms-Burton, the U.S., and the WTO*, AM. SOC'Y INT'L L. (Mar. 03, 1997), https://www.asil.org/insights/volume/2/issue/1/helms-burton-us-and-wto (describing the use of the Title III suspension under the context of World Trade Organization treaties).

49. *See* Bellinger, III et al., *supra,* note 5; Jackson, *supra* note 48.

50. *See* Bellinger, III et al., *supra,* note 5; *see also* COUNCIL ON FOREIGN RELS., *supra*, note 24.

51. *See* John B. Bellinger, III, et al., *The Helms-Burton Act's Unexpected Boomerang Effect: Most Lawsuits Have Targeted U.S. Companies*, ARNOLD & PORTER, https://www.arnoldporter.com/en/perspectives/publications/2020/03/the-helms-burton-acts (Mar. 3, 2020) (identifying only ten suits in the first three months after the suspension lapsed in May 2019 and only fifteen in the following seven months).

52. *See* Bellinger, III et al., *supra,* note 5 (describing how defenses against Title III lawsuits focused on the scope of the broad definition of "trafficking" under the Helms-Burton Act).

53. *See id.*

and South American airlines, hotel groups, booking sites, and nationalized businesses.[54]

Cases against TripAdvisor in 2021 and American Airlines in late 2020 are ongoing under Title III for profiting off booking travelers to confiscated beachfront resorts in Varadero, Cuba, satisfying the commercial activity exception from the FSIA.[55] More suits have entered the courts but have been slow to move forward, and it is unclear how they will fare due to inconsistency in the rationale for dismissal and defenses.[56]

Title III cases are officially certified under the U.S. Foreign Claims Settlement Commission to validate any true claim to recovery under the Helms-Burton Act.[57] Many of these lawsuits naturally deal with transportation to and from Cuba as they are cases revolving around rightful claims to ports, airports, and other tourism-related locations, such as hotel properties.[58] Most of the lawsuits focus on the interpretation of certain phrases in the provision, including "trafficking" and "lawful travel."[59] Additionally, the court in *Exxon* is now grappling with how to interpret the application of sovereign immunity under Title III for sovereign defendants.[60]

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54. *See, e.g.*, Glen v. Am. Airlines, Inc., 2020 U.S. Dist. LEXIS 138148 (N.D. Tex. Aug. 3, 2020), *rev'd*, 7 F.4th 331 (5th Cir. 2021) (regarding land confiscated by the Cuban government and developed into hotels advertised by an airline); Glen v. Tripadvisor LLC, 529 F. Supp. 3d 316 (D. Del. 2021) (regarding the same land at issue in *Glen v. Am. Airlines, Inc.*, but against travel agencies advertising those hotels); Complaint ¶ 26–39, Marti v. Iberostar Hoteles Y Apartamentos S.L., 2020 U.S. Dist. LEXIS 170005 (S.D. Fla. Sept. 17, 2020) (regarding a similar claim against a hotel development managed by the defendant); Havana Docks Corp. v. Carnival Corp., 2019 U.S. Dist. LEXIS 231289 (S.D. Fla. Oct. 7, 2019) (regarding the operation of cruise lines at a port confiscated by the Cuban government).

55. *See Am. Airlines, Inc.,* 2020 U.S. Dist. LEXIS 138148, at *1–2; *Tripadvisor LLC*, 529 F. Supp. 3d at 321.

56. *See* Bellinger, III et al., *supra,* note 5 ("[F]ewer than [ten] cases total have entered the discovery phase of litigation, suggesting that plaintiffs are finding it tough to get past even the motion to dismiss stage.").

57. *See* Exxon Mobil Corp. v. Corporación CIMEX S.A., 534 F. Supp. 3d 1, 7 (D.D.C. 2021).

58. *See Am. Airlines, Inc.*, 2020 U.S. Dist. LEXIS 138148, at *2; *Tripadvisor LLC*, 529 F. Supp. 3d at 321; *Havana Docks Corp*., 2019 U.S. Dist. LEXIS 231289, at *2; Garcia-Bengochea v. Carnival Corp., 407 F. Supp. 3d 1281, 1284 (S.D. Fla. 2019).

59. *See id.*; *see also* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 §§ 301–306, 22 U.S.C. 6081–6085 (explaining how "[t]he wrongful confiscation or taking of property belonging to United States nationals by the Cuban Government, and the subsequent exploitation of this property at the expense of the rightful owner, undermines the comity of nations, the free flow of commerce, and economic development").

60. *See* Bellinger, III et al., *supra,* note 5 (referring mainly to the findings in Exxon Mobil v. Corporación CIMEX S.A., 534 F. Supp. 3d 1 (D.D.C. 2021)).

D. Sovereign Immunity and Title III: Breakdown of Exxon Mobil v. Corporación CIMEX S.A. and Subsidiaries

The primary sovereign immunity case under Title III in the courts right now involves the American corporation, Exxon Mobil, seeking compensation from three Cuban petroleum companies: Corporación CIMEX, CIMEX (Panama Subsidiary), and Cuba Petroleum ("CUPET").[61] In 1960, the Cuban government, under Castro, expropriated the oil and gas assets held by then Exxon Mobil subsidiary, Standard Oil.[62] The Castro government issued a series of resolutions that expropriated the companies' rights to the Cuban property by prohibiting them from operating and abandoning the property, including the oil refinery, multiple product terminals, and over a hundred service stations.[63]

In this case, the basis for recovery comes under the Foreign Claims Settlement Commission ("FCSC").[64] Congress established the FCSC in 1964, in coordination with the International Claim Settlements Act of 1949.[65] The FCSC establishes the claim's validity and the appropriateness of the amount of recovery sought from U.S. nationals, and certified Exxon's claim in 1969 of roughly 71 million dollars as a result of the expropriation.[66]

Under Helms-Burton Title III, the Court must address the "trafficking" activities of the CIMEX Cuban Corporations split into three separate defendants, of which the first defendant corporation is CIMEX Corporation ("CIMEX").[67] CIMEX operates hundreds of "7-Eleven" equivalent stations across Cuba, including confiscated land of the Exxon subsidiaries.[68] These stations operate as service stations for petroleum as well as a style of marketplace and the opportunity to process money transfers often received as "remittances" from the United States to Cuba.[69]

61. Exxon Mobil Corp. v. Corporación CIMEX S.A., 534 F. Supp. 3d at 6–7 (D.D.C. 2021) (following the origin of the case under Title III based on Exxon Mobil's oil and gas assets in Cuba that the company owned and operated through subsidiaries).

62. *Id.* (providing background for the basis of the lawsuit that prior to the expropriation in 1960, Exxon (then known as Standard Oil) owned multiple subsidiaries operating out of Cuba, which included Esso Standard Oil out of Panama and two additional Esso companies out of Cuba).

63. *Id.* at 7.

64. *Id.*

65. International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621–1645o; *see also Exxon Mobil Corp.*, 534 F. Supp. 3d at 7.

66. *See Exxon Mobil Corp.*, 534 F. Supp. 3d at 7–8.

67. *Id.* at 8–9.

68. *Id.* at 8.

69. *Id.* at 8–9, 18 ("A remittance is initiated when a U.S. resident designates a recipient in Cuba for a transfer of money . . . .).

This "remittance business" is a major source of both currency and income for the Cuban economy and operates through a license to manage wire transfers from the U.S.[70] Exxon alleges the defendants processed roughly 3.6 billion dollars' worth of remittances in 2018 alone, of which 90% came from the U.S.[71]

The second defendant is CIMEX Panama ("CIMEX Panama"), a Panamanian subsidiary of the first defendant.[72] There is no alleged "trafficking" of lands in Cuba of CIMEX Panama, but the plaintiff argues the corporation should be liable through CIMEX Cuba.[73]

The third named defendant is Cuban Petroleum ("CUPET"), Cuba's state-owned oil company, which currently operates ESSOSA's confiscated oil refinery and other aspects of the confiscated property, including the terminals and infrastructure in place during their operation in the 1960s.[74] CUPET consistently operates with foreign partners as business ventures, otherwise known as commercial activities.[75] The main claim to damage, alongside its commercial activities with CUPET in the U.S. is pollution through negligent operation breaking into the United States maritime boundary between the U.S. and Cuba.[76]

Both parties agree that Cuba owns all three defendant corporations, and therefore, would presumptively be immune from litigation as a foreign state under the Foreign Sovereign Immunities Act.[77] However, Exxon argues that the following statutory provisions waive sovereign immunity.[78] Exxon asserts that Title III of Helms-Burton, the FSIA commercial activity exception, and the FSIA Expropriation exception should all provide a waiver of immunity against the Cuban defendants.[79]

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70. *Id.* at 9.

71. *Id.*

72. *Id.* at 7.

73. *See id.* at 9 ("Exxon . . . claims that CIMEX and CIMEX (Panama) 'are alter egos of one another' . . . [sharing] 'the ultimate same ownership, with the same officers and directors . . . out of the same office at the same address without any regard for corporate formalities or respecting the separateness of either entity.' ").

74. *Id.*

75. *Id.* ("CUPET engages in business with foreign companies, . . . provides 'offshore exploration opportunities for . . . international companies,' and 'host[s] conferences seeking foreign partners for oil and gas exploration and production.' ").

76. *Id.*

77. *Id.* at 10; *see* Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1607 (establishing the exceptions which provide waiver to sovereign immunity jurisdiction).

78. *See Exxon Mobil Corp.*, 534 F. Supp. 3d at 11–29 (discussing Title III of the Helms-Burton Act and the two FSIA exceptions to waive sovereign immunity for the defendants).

79. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 §§ 301–

The court addresses the previous Supreme Court precedent and the clear congressional silence on the question of immunity in the Helms-Burton legislation overpowering the Title III waiver argument by citing *Argentina Republic v. Amerada Hess Corp*.,[80] which held that the sole manner for waiving immunity for sovereign defendants is through the FSIA exceptions.[81] The court dismissed Exxon's argument that Title III inherently waives sovereign immunity based on the "except as provided in this subchapter" clause.[82] Because the court denied the assertion based on Title III alone, the court then evaluates whether immunity should be waived based on the two FSIA exceptions.[83]

The FSIA Commercial Activity exception requires "direct effects" from the defendants' actions on the commercial activity of the plaintiff to show the sovereign nation is operating as a commercial actor rather than a government.[84] The Court looked several factors, including remittances, sale of imported U.S. goods, continued use of confiscated property, competition in the global oil market, and the pollution of U.S. waters to decide on the commercial activity exception.[85] The expropriation exception solely bases the claim on the injury caused by the illegal land expropriation not conducted through valid means such as eminent domain.[86]

Further, once the Court establishes jurisdiction over the defendants through an immunity exception, there still must be injury-in-fact to warrant standing.[87] This standing question poses a precedential decision on what injury must specifically be the injury as a result of Title III protection.[88]

306, 22 U.S.C. §§ 6081–85; 28 U.S.C. § 1605(a)(2)–(3).

80. 488 U.S. 428 (1989).

81. *See Exxon Mobil Corp.*, 534 F. Supp. 3d at 11 (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989)) ("It has been a common refrain since the Supreme Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.* that 'the FSIA [is] *the sole basis* for obtaining jurisdiction over a foreign state in our courts.' ").

82. *See id.*

83. *See id.* at 14.

84. *See id.* at 17; 28 U.S.C. § 1605(a)(2).

85. *See Exxon Mobil Corp.*, 534 F. Supp. 3d at 17–25.

86. *See id.* at 26 ("[F]or the exception to apply . . . the court must find that: (1) rights in property are at issues; (2) those rights were taken in violation of international law; and (3) a jurisdictional nexus exists between the expropriation and the United States.").

87. *See id.* at 30–31.

88. *See id.* (quoting Spokeo v. Robbins, 578 U.S. 330, 339 (2016)) ("To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." (internal quotations omitted)).

Unfortunately, the Court here does not address this question in depth.[89]

E. Sovereign Immunity Precedent Cases Dictating the Boundaries of the Court's Evaluation for Exxon Mobil Corp. v. Corporación CIMEX

The first and most restrictive case that the *Exxon Mobil* court addresses is *Argentine Republic v. Amerada Hess Shipping Corp.*[90] *Amerada Hess* included a monumental decision from the Supreme Court that held the FSIA was the only method that could properly waive sovereign immunity and gain jurisdiction over sovereign defendants.[91] Further, when the defendant is a sovereign nation, the U.S. courts must apply the FSIA to form jurisdiction over the defendant per one of the enumerated exceptions as sovereign nations are traditionally immune from jurisdiction in U.S. courts.[92] Because Argentina's actions did not fall under any of the FSIA exceptions to sovereign immunity, and a respondent must adhere to the FSIA in order to bring a case in U.S. Courts, Argentina was subject to regulations by the United States.[93] *Republic of Argentina v. Weltover, Inc.*[94] evaluated whether the Argentina's default on certain bonds issued as part of a plan to stabilize its currency was an act taken "in connection with a commercial activity" that had a "direct effect in the United States" so as to subject Argentina to suit in an American court under the Foreign Sovereign Immunities Act of 1976."[95] *Saudi Arabia v. Nelson*[96] similarly evaluated whether the sovereign was subject to an FSIA exception when defendant nation committed various intentional torts and affirmed the holding exclusively requiring the FSIA as the sole method of waiving sovereign immunity through the enumerated exceptions.[97] The courts established the precedent adhering to the FSIA twice in the five years preceding the passage of the Helms-Burton

89. *See id.* at 30–31; *see also* Bellinger et al., *supra* note 5.

90. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989).

91. *See id.* at 433, 441–43 (considering sovereign immunity after Argentina bombed a tanker in international waters under the Alien Tort Statute); *see also* 28 U.S.C. § 1330.

92. *See Amerada Hess*, 488 U.S. at 433–35 (quoting Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 493 (1983)) ("[T]he FSIA 'must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity.' ").

93. *See id.* at 443 ("The FSIA is clearly one of the 'local laws' to which respondents must 'conform' before bringing suit in United States courts.").

94. 504 U.S. 607 (1992).

95. *Id.* at 611 (identifying the Court's identification of the issue presented).

96. 507 U.S. 349 (1993).

97. *Id.* at 354–55 (considering sovereign immunity where the plantiff alleged battery, false imprisonment, and other sources of personal injury against a foreign state")

Act through these two cases.[98]

Similar to *Exxon Mobil*, *Cicippio-Puleo v. Islamic Republic of Iran*[99] addressed the sovereign immunity right of action.[100] A family brought action against the Republic of Iran for damages as a result of being held hostage in the country.[101] The family argued for waiving sovereign immunity for the nation under the terrorism exception of the FSIA.[102] While the Court agreed that the terrorism exception should waive immunity under FSIA, simply waiving immunity does not provide a private right of action against the nation as a whole.[103]

The Court in *Banco Nacional de Cuba v. Sabbatino*,[104] in 1964, made clear that exceptions to the presumption of foreign immunity must be clearly delineated.[105] In *Sabbatino*, the petitioner brought action against the sovereign nation to recover the value of similarly expropriated land under the Act of State Doctrine.[106] The Act of State Doctrine specifically precluded the courts of the United States from inquiring into the validity of public acts of a sovereign nation.[107] The Court concluded that if the scope of the Act of State Doctrine must be determined based on the validity of the expropriation in the foreign nation's jurisdiction, it must fail.[108] The Court in *Exxon* walks through the holding in *Sabbatino* to contrast the lack of explicit instructions on dealing with the FSIA in the Helms-Burton Act, but specifically addressing how to treat the contradiction with the Act of State Doctrine.[109]

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98. *See Amerada Hess*, 488 U.S. at 443 ("We hold that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country, and that none of the enumerated exceptions to the Act apply to the facts of this case.").

99. 353 F.3d 1024 (D.C. Cir. 2004).

100. *See id.* at 1026–27 (acknowledging the waiver to sovereign immunity under the terrorism exception to the FSIA).

101. *Id.* at 1026.

102. *Id.* at 1028.

103. *See id.* at 1032 (explaining that the relevant statutory provision "is merely a jurisdiction-conferring provision that does not otherwise provide a cause of action against either a foreign state or its agents").

104. 376 U.S. 398 (1964).

105. *Id.* at 401; *see also* Exxon Mobil Corp. v. Corporación CIMEX S.A. 534 F. Supp. 3d 1, 13–14 (pointing out the Congressional intent for creating specific limits on Title III enforcement and adding additional exceptions to sovereign immunity over time).

106. *See* 376 U.S. at 406.

107. *See id.* at 438.

108. *See id.* at 439 (discussing that "since the act of state doctrine proscribes a challenge to the validity of the Cuban expropriation decree in this case, any counterclaim based on asserted invalidity must fail").

109. *See Exxon Mobil Corp.*, 534 F. Supp. 3d at 13–14.

Finally, the *Exxon* court utilized *Owens v. Republic of Sudan*[110] and *Opati v. Republic of Sudan*[111] to support the requirement for FSIA amendments when intending to adjust sovereign immunity exceptions.[112] *Owens* and *Opati* are a part of the same procedural history and brought action based on the same cause of action, implementing the "terrorism exception" to the FSIA waiving sovereign immunity for the Republic, which abrogates sovereign immunity for state sponsors of terrorism that resulted in severe personal injury or death.[113] Following various terrorist attacks in the Republic of Sudan and Iran, the petitioners in *Owens* brought action against both nations as terrorism sponsors.[114] Prior to 1996 there was no remedy for actions of terrorism against U.S. citizens until the "terrorism exception" went into effect as an amendment to the FSIA.[115] The court concluded that the amended terrorism exception provided an opportunity for action just as the preexisting FSIA exceptions.[116]

III. ANALYZING EXXON MOBIL TITLE III ARGUMENTS AND FSIA EXCEPTIONS WITH SOVEREIGN IMMUNITY PRECEDENT

The primary case offered by *Exxon* presents numerous relevant questions that would set significant precedent by discussing and holding in-depth.[117] Foremost present is the question of Title III's implied waiver of immunity.[118] Because the provision itself is silent on how sovereign immunity specifically should be handled in Title III cases, the court can look at the legislative goals, plain language, and legislative history of the Act.[119]

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110. 864 F.3d 751 (D.C. Cir. 2017).

111. 140 S. Ct. 1601 (2020).

112. *See Exxon Mobil Corp.*, 534 F. Supp. 3d at 14; 864 F.3d at 764–65; 140 S. Ct. at 1606 (providing an example for FSIA amendment requirement with the Antiterrorism and Effective Death Penalty Act).

113. *See Exxon Mobil Corp.*, 534 F. Supp. 3d at 21–22 ("The 'terrorism exception' explicitly abrogates foreign sovereign immunity.").

114. 864 F.3d at 762.

115. *Id.* at 763–64.

116. *Id.* at 764 ("[A] plaintiff proceeding under the terrorism exception would follow the same pass-through process that governed an action under the original FSIA exceptions.").

117. *See* 534 F. Supp. 3d 10–29; *see also* Bellinger et al., *supra* note 5 (identifying the significant issues the Court can address based on Exxon Mobil's arguments and the sovereign immunity questions within the FSIA and Title III of the Helms-Burton Act to establish future precedent).

118. *See Exxon Mobil Corp.*, 534 F. Supp. 3d at 11 (noting that the plaintiff's opening argument is unusual in that it does not immediately jump to the FSIA to establish exceptions but aims to establish jurisdiction through Title III first).

119. *See generally* Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State*

Based on the rationale, legislative intent, language used, and definitions provided in Helms-Burton Title III, the Act likely provides an implied exception to sovereign immunity. This is despite the D.C. District Court's initial holding, utilizing the FSIA exceptions to formulate the requirements for Title III cases to establish implied jurisdiction without going beyond FSIA and court requirements.[120] The court continued on to hold sovereign immunity should be waived for the primary named defendant (CIMEX) based on enumerated exceptions to sovereign immunity as established in the FSIA.[121] Based on the lawmakers' goals when passing the Act, there are many potential legislative intentions to help interpret the ambiguity; these range from tightening the embargo and sanctions, to disincentivizing businesses from operating in Cuba and with the Cuban government, and pushing efforts to convert Cuba to a more democratic society.[122]

A. Using the Historical Relationship to Evaluate the Legislative Intent

The historical relationship between the U.S. and Cuba helps establish the mindset of the legislators to determine the intent behind the legislation.[123] As expressed in Congressional debates discussing the Act on the Senate floor, Senators addressed the benefits of the Act while debating the issues of the potential downfalls of particular language.[124] Since Title III specifically

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Courts, 80 MARQ. L. REV. 161 (1996) (following use of legislative history and intent to interpret a statute when the language is ambiguous); *A Guide to Reading, Interpreting, and Applying Statutes*, Georgetown University Law Center (2017), https://www.law.georgetown.edu/wp-content/uploads/2018/12/A-Guide-to-Reading-Interpreting-and-Applying-Statutes-1.pdf (highlighting the four tools of statutory interpretation: plain text, legal interpretations, context and structure, and purpose).

120. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 §§ 301–306, 22 U.S.C. §§ 6081–6085; *see also Exxon Mobil Corp.*, 534 F. Supp. 3d at 14 (holding that an implicit waiver to sovereign immunity under Title III of the Helms-Burton Act is insufficient to deny a motion for dismissal); *Interpretation*, *Statutory Interpretation (Construction of a Statute or Statutory Construction)*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (2012) ("The first priority is to consider the plain language of the statute.")

121. *Exxon Mobil Corp.*, 534 F. Supp. 3d at 29.

122. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act §§ 301–306; Dortzbach, *supra* note 119, at 170–71 (establishing the significance of legislative history in statutory interpretation); Bellinger, *supra* note 5 (outlining background on the Title III suits).

123. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 2; Ivie v. Smith, 439 S.W.3d 189, 203 (Mo. 2014) ("[T]he canons of statutory interpretation are considerations made in a genuine effort to determine what the legislature intended. Statutory interpretation should not be hyper-technical, but reasonable and logical and should give meaning to the statute.").

124. *See, e.g.*, 141 CONG. REC. S15077-02 (daily ed. Oct. 12, 1995); 141 CONG. REC. S15106-01 (daily ed. Oct. 12, 1995); 141 CONG. REC. S15055-01 (daily ed. Oct. 11,

had Cuba confiscation in mind, there are likely two sides for evaluating the intended consequences of the Title.[125] The first is that the legislators anticipated litigation with Cuban companies, therefore they involved the Cuban government.[126] The alternative is that they intended to avoid Cuba altogether and prevent businesses from partnering there, and disincentivize any desire to partner with Cuba for U.S. and foreign businesses alike.[127]

It likely was not anticipated that Cuban defendants would be willing to litigate in U.S. Courts.[128] Therefore, it is unlikely the legislators intended for Title III to lead to cases against Cuban residents, businesses, or governments.[129] The alternative would be more reasonable to anticipate as the rationale due to historical sanctions and protectionism against the island nation.[130] Based on the historical relationship, the legislation would likely lean away from implied sovereign immunity due to the seeming low expectation of lawsuits against Cuban defendants.[131]

B. Intended Goals of Passing Title III

The rationale and intent for passing Title III specifically provide an

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1995).

125. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 2 (identifying the significance of confiscation around the act, as it was specifically written to protect the rights of U.S. nationals to "own and enjoy property" which has been wrongfully confiscated or taken by the Cuban government and exploited for profit at the expense of the rightful owner).

126. *See id.* § 3 (intending "to protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime"); *see also* Bellinger et al., *supra* note 51 (discussing the Act's intent to put pressure on Cuban companies).

127. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 3 (intending "to provide for the continued national security of the United States in the face of continuing threats from the Castro government of terrorism, theft of property from United States nationals by the Castro government, and the political manipulation by the Castro government of the desire of Cubans to escape that results in mass migration to the United States").

128. *See* Bellinger, et al., *supra* note 51 ("Perhaps the most surprising development is that the Cuban companies have shown up to defend their case at all, as the Cuban government has historically rarely litigated in U.S. courts.").

129. *See id.*

130. *See id.* (providing historical background information as it relates to the Helms-Burton legislation and the relationship between the U.S. and Cuba, including the full embargo on Cuba in 1962, labeling Cuba a terrorism sponsor in 1982, and tightening sanctions in 1992).

131. Bellinger et al., *supra* note 51 (noting the legal issue of whether Title III waive sovereign immunity and summarizing arguments from both sides regarding Congress's intent).

important interpretation of Helms-Burton and its application.[132] Under the Clinton administration, the intent for Helms-Burton was to strengthen the embargo and restrictions between the U.S. and Cuba.[133] For Title III specifically, the intent was to provide U.S. nationals a way of recovering from the confiscated land they claimed in Cuba.[134] As the Cuban government confiscated the land, it seems a logical progression to anticipate Cuban businesses would "traffic" such land.[135] As the legislators did not intend for U.S. companies to be victims of lawsuits for "trafficking" the confiscated Cuban land, the intent focused on recovering from foreign-owned businesses — likely including Cuban businesses.[136] Since the legislation was only in effect under the Castro and totalitarian regime, Cuban businesses, by default, would be sovereign-owned companies.[137] When examining Title III specifically, it leans toward an implied waiver of immunity.[138]

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132. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 3, 301.

133. *See id.* ("This trafficking in confiscated property provides badly needed financial benefit . . . to bring democratic institutions to Cuba through the pressure of a general economic embargo at a time when the Castro regime has proven to be vulnerable to international economic pressure."); *see also* Bellinger et al., *supra* note 5 ("Congress passed Title III of the Helms-Burton Act in 1996 to scare investors away from Cuba by allowing U.S. nationals to sue any persons or entities who "traffic" in property confiscated by the Castro regime.").

134. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 3; S. Res. 158, 104th Cong., 141 CONG. REC. 15078 (1995) (statement of Sen. Jesse Helms) (stating the intent of the Act as to "protect the interest of U.S. nationals whose property was wrongfully confiscated by Fidel Castro and his henchmen").

135. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 2; *see, e.g.*, Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela, 743 F. App'x 442, 443–47 (D.C. Cir. 2018) (exemplifying how prior instance of governmental taking for government use of that property).

136. *See* Bellinger et al., *supra* note 51 (identifying the unintended consequences that the legislation has led to more lawsuits against American persons and entities rather than foreign owned or Cuban businesses as initially expected); *see also* S. Res. 158, 104th Cong., 141 CONG. REC. 15077 (1995) (statement of Sen. Jesse Helms) ("What [the Act] does not do . . . is . . . adversely affect, in any way, the rights of any certified American claimants. Not one.").

137. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 205 (identifying specifically how the transition government must not include either "Fidel Castro or Raul Castro"); *see also* Exxon Mobil Corp v. Corporación CIMEX S.A., 534 F. Supp. 3d 1, 10 (D.D.C. 2021) (stipulating that the "parties wholly agree that Cuba wholly owns defendants . . . as agencies or instrumentalities of a foreign state").

138. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 302 ("In an action brought under this section, any judgment against an agency or instrumentality of the Cuban Government shall not be enforceable against an agency or instrumentality of either a transition government in Cuba or a democratically elected government in Cuba.")

C. What the Specific Language and Structure of the Act Indicates

The language used in Title III and the rest of the Helms-Burton Act is perhaps the most persuasive argument to help provide further indications toward sovereign immunity intent.[139] Section 301 of Helms-Burton provides "protection against wrongful confiscations by foreign nations," and "den[ies] traffickers any profits from economically exploiting Castro's wrongful seizures."[140] It explicitly refers to protection and recovery from "foreign nations" and "economic exploitation" from confiscations specifically under the Castro government, appearing to include protection against foreign nations.[141]

Section 302 provides "any judgment against an agency or instrumentality of the Cuban Government shall not be enforceable against an agency or instrumentality of either a transition government in Cuba or a democratically elected government in Cuba."[142] The provision explicitly prevents recovery against the Cuban government only if it is either a "transition government" or "democratically elected in Cuba."[143] This language implies that if Cuba is still under a Castro-style totalitarian regime, a U.S. national should be entitled to recovery against the Cuban government.[144] Similarly, the earlier version of the bill introduced to the Senate in October 1995 included a provision that specifically addressed that no judgment shall be entered against the Cuban government.[145] This language was removed for the final draft of the bill the Senate passed in 1996 to specifically address that the only scenario that prevented enforcement against the Cuban government was in the instance of a transition or democratically elected Cuban government.[146]

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139. *See id.* §§ 301–306; Jimenez v. Quarterman, 555 U.S. 113, 118 (2009) ("As with any question of statutory interpretation, [the] analysis begins with the plain language of the statute.").

140. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 301(10)–(11) (citing the findings section of Title III to specifically show what Title III aims to address and provide for U.S. nationals).

141. *Id.*

142. *See id.* § 302(d) (showing the intent of the legislation that there was initial expectation to recover directly from the Cuban government as a defendant).

143. *See id.* (following the language of the legislation to show that recovery from the Cuban government was intended and expected until the Cuban regime began transitioning toward a democratic economy and government).

144. *See id.* (showing that purpose of the Title was to provide opportunity for recovery for U.S. nationals for those trafficking their claimed land while additionally providing provisions for recovery from the Cuban government and tintended for U.S. nationals to bring action against the Cuban government within the Title).

145. The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995, 141 CONG. REC. S15055 (detailing an early version of the Helms-Burton Act, including section 302(c)(3), which was removed from the final version of the bill).

146. *Compare id.*, *with* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act

Additionally, Section 302(g) states "deposit of excess payments by Cuba" — not by Cuban persons — but addressing Cuba specifically, so it was conceivable that there would be recovery from the Cuban government.[147] The choice language and sections used seem to lean toward an implied waiver of immunity, as it seems intended that actions against the Cuban government would be commonplace.[148]

Furthermore, the Exxon Mobil argument that the "except as provided in this subchapter" language and intent similarly requires an implied waiver of sovereign immunity when in contradiction with the FSIA, though appropriately denied in court, brings up valuable discussions to be used instead.[149] Exxon argues that the language of "except as provided in this subchapter" shows congressional intent to take Title III cases outside of the restrictions of the FSIA when in direct contradiction with the FSIA.[150] Additionally, based on this language, Title III must apply provided there is a conflict between the FSIA and Title III.[151] The potential conflict exists as long as it prevents the opportunity for a private right of action; however, according to *Ciccipio-Puleo*, simply providing a right to action does not by default provide immunity.[152] The contradiction does not exist nor was it intended to exist within the legislation. Rather, the legislation was intended to be in line with the FSIA requirements, not go beyond it.[153] After properly denying the position that a contradiction between the two pieces of legislation requires Title III to govern, the court implies that the case must be in line with the FSIA requirements to succeed, further implying accordance with FSIA exceptions.[154]

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§ 302, 22 U.S.C. § 6082(d).

147. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 302(g).

148. *See id.*; Jimenez v. Quarterman, 555 U.S. 113, 118 (2009).

149. Exxon Mobil Corp. v. Corporación CIMEX S.A., 534 F. Supp. 3d 1, 14–15 (D.D.C. 2021) (rejecting Exxon's argument concerning implied waiver of immunity).

150. *See id.* (citing 22 U.S.C. § 6082(c)(1)) (arguing that, because Title III specifically refers to Title 28, which includes the FSIA, it is intended to be read as a diversion from the requirements in Title 28 rather than in coordination with them).

151. See *id.* at 15 (arguing that Title III trumps FSIA).

152. *See id.* (stating as long as the FSIA requires further jurisdiction establishment outside of Title III, as it was intended to do, Title III's purpose of providing a right to action to U.S. nationals is frustrated under the FSIA and therefore creates a conflict that the "except as provided in this subchapter" language is meant to overcome).

153. *See* The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995, 141 CONG. REC. S15055 (statement of Sen. Jesse Helms) ("It requires . . . that any actions brought against a State entity must be in accordance with the Foreign Sovereign Immunities Act.").

154. *See Exxon Mobil Corp.*, 534 F. Supp. 3d at 22 ("The clause is most naturally understood to mean that where an *express* provision of Title III directly contradicts an *express* provision of Title 28, including the FSIA, the text of Title III governs.").

It is also important to note that while the court heavily takes into account the discreet absence of directly addressing sovereign immunity in the legislation, conversely arguing the specific intent for what is included is valuable as well.[155] While brief, the legislation provides a statutory limitation of two years for private action against "traffickers."[156] If it were intended to include further limitations to actions under Title III, it likely would have been included in this section as well.[157]

D. Legislative Definitions Provided

The legislation provides straightforward definitions of "trafficking" and "persons."[158] Section 302(a) identifies a civil remedy in liability for trafficking confiscated land by "any person."[159] A "person" is defined in the legislation broadly and expansively.[160] "Traffics" is also defined in section 401(b)(2) to expansively include a broad range of possible conduct to be subject to liability.[161] The definitions provided in the legislation should favor waiving sovereign immunity as it was originally written to included sovereigns as potential traffickers and persons meaning any person or entity, including any agency or instrumentality of a foreign state.[162]

E. Relevant Sovereign Immunity Decisions

Courts have dealt with waiving sovereign immunity almost exclusively based on the FSIA.[163] The Supreme Court precedent is the most challenging

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155. *See id.* at 18 (holding that the "settled distinction" from *Ciccippio-Puleo* defeats Exxon's argument as it provides a right to private action for the plaintiff's the legislation as a whole is "silent as to sovereign immunity"); *Ivie v. Smith*, 439 S.W.3d 189, 203 (2014) (quoting the defendant's argument "in favor of invoking the canon of construction that the expression of one thing implies the exclusion of another," which in turn focuses on what is specifically included in the language itself)

156. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 § 605, 22 U.S.C. § 6084 (creating a statutory limitation on the right to private action but not addressing any additional restriction).

157. *See id.* (neglecting to create a statute of limitation for anything but private actions).

158. *See id.* 302(a).

159. *See id.*

160. *See id.* § 4(11) (including "any person or entity, including any agency or instrumentality of a foreign state").

161. *See id.* § 401 (b)(2).

162. *See id.* § 302(a), 401(b).

163. *See, e.g.*, Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442 (1989); Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993); Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 611 (1992) (holding that the FSIA is the sole method for establishing exceptions to sovereign immunity).

issue to overcome for the *Exxon* court and future courts dealing with Title III questions, as well as the Supremacy Clause.[164] The court's decision regarding the Supreme Court's precedent is likely valid because the lack of direct connection to FSIA from Title III does not establish a clear enough contradiction for Title III to be controlling here.[165]

Evaluating the remaining arguments, however, is less convincing.[166] The court's argument regarding the recovery from and transition government in Cuba is unconvincing as it is related to the Court's decision in *Sabbatino* requiring explicit legislation describing how to handle contradictory legislation.[167] The legislation excludes enforcement against a transition government in Cuba, but enforces recovery against a totalitarian Cuban government. This shift seemingly provides a clear intent to waive sovereign immunity for Cuba as a defendant.[168]

Additionally, the argument against an implied private right of action is based on the holding in *Cicippio-Puleo v. Republic of Iran.*[169] The court in *Exxon* utilizes *Cicippio-Puleo* to discuss on the converse that the existence of a waiver to sovereign immunity does not create a right to private action.[170] Therefore conversely, a private right of action does not implicitly create a waiver to sovereign immunity.[171]

Finally, as established in *Owens* and *Opati*, the precedent for amending the FSIA to abrogate sovereign immunity through an amendment in the text

164. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .").

165. *See* Exxon Mobil Corp. v. Corporación CIMEX S.A., 534 F. Supp. 3d 1, 19–21 (D.D.C. 2021) (holding that "[t]he vague phrase '[e]xcept as provided in this subchapter,' 22 U.S.C. § 6082(c)(1), cannot overcome Congress's silence in the face of clear Supreme Court precedent").

166. *See id.* at 14–23 (analyzing FISA jurisprudence to disestablish the plaintiff's argument regarding the "except as provided in this subchapter language").

167. *See id.* at 20–21 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964); *see also* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 302(d) ("[A]ny judgment against an agency or instrumentality of the Cuban government shall not be enforceable against an agency or instrumentality of either a transition government in Cuba or a democratically elected government in Cuba.").

168. *See id* § 302(d).

169. 353 F.3d 1024, 1027 (2004) (holding that simply waiving immunity for action against a sovereign entity does not in turn provide a private right to action).

170. *See Exxon Mobil Corp.*, 534 F. Supp. 3d at 12 (explaining that the court in *Cicippio-Pueolo* held that "the exitence of a waiver of sovereign immunity does not establish a private right of action").

171. *See id.*

is not an explicit requirement moving forward.[172] While the court in *Exxon* utilizes the "terrorism exception" precedent to require an explicit amendment to waive immunity, they find it "improbable" that the legislators would operate differently between providing the terrorism exception and the potential Title III exception.[173] Again, the *Exxon* Court's rationale that this legislation is simply subtly addressing the potential contradiction through the "subchapter" language is not extremely convincing, as the requirements for right of action under the Antiterrorism and Effective Death Penalty Act[174] do not remotely fall under the existing FSIA exceptions.[175] In contrast, the right of action under Title III must be based on "commercial activity" as established in the legislation.[176] Hence, a new exception is not necessary but is, by default, applicable and invocable.[177]

F. Implied FSIA Exceptions within Title III Requirements for Right of Action

Perhaps the strongest argument is in coordination with a clear connection between the FSIA exceptions and the Title III requirements.[178] As Title III clearly enumerates the requirements for certified right to action in the legislation, the language from the FSIA exceptions coincide quite nearly and were intended to do so.[179] As noted, the Court in *Exxon* specifically

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172. *See id.* at 14 (quoting "Title III's silence on sovereign immunity stands in stark contrast to Congress's abrogation of sovereign immunity in the terrorism exception"); Owens v. Republic of Sudan, 864 F.3d 751, 765 (2017); Opati v. Republic of Sudan, 140 S. Ct. 1601, 1609 (2020) (utilizing the terrorism exception of the FSIA which explicitly abrogates sovereign immunity per an amended exception setting precedent that any new exceptions to waive immunity against the FSIA must come in the form of a clear delineated amendment to the FSIA).

173. *Exxon Mobil Corp.*, 534 F. Supp. 3d. at 14 ("The court again finds it quite improbable that Congress would delineate the terrorism exception to sovereign immunity in incontrovertible terms but subtly dispatch the FSIA in Title III.").

174. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 28 U.S.C.) (identifying the explicit additional exception amending the FSIA for causes of action moving forward).

175. *See* 28 U.S.C. § 1605 (providing general exceptions to jurisdictional immunity for a foreign state); *Exxon Mobil Corp.*, 534 F. Supp. 3d at 14.

176. *See* 28 U.S.C. § 1605(a)(2) (stating a foreign state does not posess immunity from United States jurisdiction if an action is based on commercial activities); Cuban Liberty and Democratic Solidarity (LIBERTAD) Act §§ 301–306, 22 U.S.C. §§ 6081–6085.

177. *See* Exxon Mobil Corp. 534 F. Supp. 3d at 17; Cuban Liberty and Democratic Solidarity (LIBERTAD) Act §§ 301–306.

178. *See* 28 U.S.C. § 1605; Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 302.

179. *See* 28 U.S.C. § 1605; Cuban Liberty and Democratic Solidarity (LIBERTAD) Act §§ 301–306 (identifying the requirements of proof of rightful ownership and ongoing

addresses the Commercial activity and expropriation FSIA exceptions.[180] Based on the two exceptions, under the requirements in Title III, as long as the claim under Title III is FCSC certified, it should almost always fall under the same FSIA exceptions, further waiving immunity.[181]

Under Title III, there are specific requirements for the claim to be valid, including (and most importantly here) proof of rightful ownership of confiscated land and proof of ripe trafficking in the land.[182] Additionally, there are many conditions that claimants must meet before they can even get their claim into court, let alone have it adjudicated on its merits.[183] The FSIA expropriation exception is relevant for proof of property ownership, while the proof of trafficking coincides with the commercial activity FSIA exception.[184]

The FSIA expropriation exception requires three elements that the Court identifies: (1) property rights are at issue; (2) property rights were taken in violation of International Law; and (3) there is a nexus between the expropriation and the United States.[185] The third element works to establish standing in the courts based on a direct injury to Act as the nexus to certify the claim, which would be a case-by-case evaluation and must exist regardless of FSIA evaluation.[186] The first two elements, however, are addressed through intent or language provided in the legislation.[187] The first element of "rights of property are at issue" is the sole purpose for the Title.[188] As long as the claimant has a valid title to the confiscated property in Cuba,

or ripe trafficking in confiscated land); 141 CONG. REC. 15,077–78 (1995) (statement of Sen. Jesse Helms) ("It requires . . . including that any actions brought against a State entity must be in accordance with the Foreign Sovereign Immunities Act.").

180. *See Exxon Mobil Corp.*, 534 F. Supp. 3d. at 14–17.

181. *See id.* at 30–31 (explaining that "Title III provides for Exxon to receive the amount, if any, certified to it by the Foreign Claims Settlement Comission under the International Claims Act of 1949, plus interest").

182. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act §§ 4, 301–306

183. *See* 141 CONG. REC. 15,078 (explaining how current standing requirements, including minimum amount in controversy to provide proper diversity jurisdiction and proper notice, would still apply under new law).

184. *See* 28 U.S.C. § 1605(a)(3); Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 4.

185. *See Exxon Mobil Corp.*, 534 F. Supp. 3d at 26 (discussing the expropriation exception by breaking the analysis into three elements).

186. *See id.* at 26–27 (discussing why the expropriation exception would not apply to Exxon's claims under the three criteria the court previously established).

187. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act §§ 4, 302.

188. *See id.* § 301(2) (utilizing the purpose of the Title III legislation to assert property rights proving rightful ownership prior to unjust confiscation).

the Act provides a remedy for such action.[189] Similarly, the findings provide justification and purpose for enactment of Title III primarily to correspond with the rights of property element.[190] Finally, the term "confiscated" has been defined to include the nationalization, expropriation, or other seizure by the Cuban government of ownership or control of property.[191] Simply put, the elements of the FSIA expropriation exception are required and intended for a certified Title III claim and should similarly be considered as overlapping evaluations to either satisfy or fail to satisfy both pieces of legislation.[192]

For the commercial activity FSIA exception, the same rationale can reach the same conclusion as the expropriation exception since the court's analysis for subject matter jurisdiction sheds light on both pieces of legislation.[193] The Supreme Court and the FSIA provide insight into the requirements for the Commercial Activity FSIA exception saying that a "foreign state shall not be immune from the jurisdiction of the courts of the United States in any case . . . in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."[194] The exception requires that the action be based on a commercial activity that directly affects the United States.[195] The legislation also directly addresses how as long as there is a valid Title III claim and therefore a wrongful confiscation, there is a direct impact on the rights and expense of the rightful owner, as the "subsequent exploitation of this property at the expense of the rightful owner, undermines the comity of nations, the free flow of commerce, and economic development."[196] Both the FSIA and the Helms-Burton call on similar definitions of "commercial activity in the legislation specifically for "commercial activity by a foreign state."[197] Additionally, utilizing the

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189. *See id.* § 302.

190. *See id.* § 2, 301.

191. *See id.* § 4(4) (defining "confiscated").

192. *See* 28 U.S.C. § 1605(a)(3); Cuban Liberty and Democratic Solidarity (LIBERTAD) Act §§ 4, 301–306; Exxon Mobil Corp. v. Corporación CIMEX S.A., 534 F. Supp. 3d 1, 26 (D.D.C. 2021).

193. *See* 28 U.S.C § 1605(a)(3); *Exxon Mobil Corp.*, 534 F. Supp. 3d at 25–26.

194. Exxon Mobil Corp v. Corporación CIMEX S.A., 534 F. Supp. 3d 1, 15 (D.D.C. 2021) (quoting OBB Personenverkehr AG v. Sachs, 577 U.S. 27, 33 (2015)).

195. *See id.* (setting forth the applicable elements as "(1) whether Exxon's claim is "based upon" a "commercial activity" and (2) whether Defendants' alleged commercial activity "causes a direct effect in the United States").

196. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § § 301(2).

197. 28 U.S.C. § 1603(d)-(e) (defining "commercial activity" as "a regular course of commercial conduct or a particular commercial transaction or act); *id.* § 4(3) (accepting the FISA definition of "commercial activity").

provided definition of "traffics" from the Helms-Burton Act further evidences the overlap between the legislative intent and the FSIA exception to again show they should be evaluated as satisfying or failing both regardless of the scenario.[198] "Traffics" specifically invokes the phrase to engage in "commercial activity" pointing to the specific intention of the legislators by identifying "a person "traffics" in confiscated property if that person knowingly and intentionally . . . engages in a commercial activity using or otherwise benefiting from confiscated property . . . ."[199] While the Helms-Burton Act may not directly address the concern of sovereign immunity, the legislation overwhelmingly points to show the implicit waiver of immunity through its accordance with the FSIA requirements.[200] The Act is not wavering from the FSIA exceptions nor creating new ones, but simply utilizing the exceptions to provide a private right of action under the existing requirements of the Title III claims to ensure the satisfaction of both.[201]

IV. TITLE III INTENT AND HANDLING SOVEREIGN DEFENDANTS

This Comment argues that Title III likely includes an implicit waiver of sovereign immunity and should not bar plaintiffs from bringing lawsuits against the Cuban government-controlled companies trafficking their claimed land in Cuba. Specifically looking at *Exxon-Mobil v. Corporacion CIMEX*, Exxon must still show injury-in-fact for all three defendants regardless of the court's sovereign immunity decision.[202] Sovereign immunity alone should not bar them from doing so and should establish precedent for bringing claims under Title III based on the initial purpose of the legislation.[203]

Much of the Court's discussion that forces it away from the implied waiver of immunity from Title III comes from the inconsistency of expressly addressing certain requirements.[204] Potentially clarifying the existing legislation to directly address the concept of sovereign immunity in contrast with the FSIA and how it is intended to apply as it conversely does with the

198. *See* 28 U.S.C. § 1605; Cuban Liberty and Democratic Solidarity (LIBERTAD) Act §§ 4(13), 301–306 (adding depth to the definition of "traffics" with its Title III application).

199. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 4(13) (defining "traffics").

200. *See id.* § 4(11), 301–306 (imposing liability against "persons" construed broadly including "instrumentalities" of foreign states).

201. *See id.* §§ 301–306.

202. Exxon Mobil Corp. v. Corporación CIMEX S.A., 534 F. Supp. 3d 1, 30–31 (D.D.C. 2021).

203. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act §§ 301–306.

204. *See Exxon Mobil Corp.*, 534 F. Supp. 3d at 12–13.

"terrorism" exception would fix this inconsistency.[205] Since the political attitude toward Cuba has changed significantly in recent years, the easiest solution would be to add in a provision on how the Title III right to action is meant to apply with the FSIA exceptions, as well as in coordination with the Supreme Court decisions that deal with FSIA sovereign immunity directly.[206]

The court struggles extensively with the lack of explicit instructions on how to handle the FSIA in contrast with how Congress had done so previously.[207] Explicit instructions from Congress stating the intentions for the courts on how to handle the cause of actions under Title III would similarly fix this lack of clarity.[208] Moreover, as the Court finds it difficult to apply Title III as a waiver of immunity due to the potential friction with international relations, a set of instructions based on various scenarios to avoid further conflict would help clarify the issue to the courts. The fact that Congress had previously referred directly to provisions in the FSIA led to an issue of how the "except as provided in this subchapter" language is meant to apply.[209] Further addressing the direct contradictions the "except" language is meant to avoid would create a more explicit application for the courts as well moving forward.[210] For example, the express contradiction regarding the amount in controversy requirement to earn jurisdiction provides a clear intention through Congressional legislation.[211]

Similarly, in the past, when Congress has decided to make additional exceptions to the FSIA, it amended FSIA to make the exceptions consistent.[212] Directly addressing how the Helms-Burton Act would impact the use of the FSIA by pointing toward establishing jurisdiction under Title

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205. *See id.* at 14 (citing Owens v. Republic of Sudan, 864 F.3d 751, 763, (D.C. Cir. 2017); Opati v. Republic of Sudan, 140 S. Ct. 1601 (2020).

206. *See id.* at 13 (citing Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434–45; Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 611 (1992); Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993)).

207. *See id.* at 13 (quoting Fed. Republic of Germany v. Philipp, 141 S. Ct. 703 (2021)) ("Congress knew how to refer to a provision of the FSIA when it wanted to, the Court doubts that Congress would have cavalierly jettisoned for Title III actions . . . . [C]ourts generally presume that 'Congress . . . does not . . . hide elephants in mouseholes.' ").

208. *See id.*

209. *See id.* at 13–14 (providing examples of how to properly utilize the "except provided in this subchapter" provision).

210. *See id.*

211. *See id.*

212. *See id.* at 14 ("[W]hen Congress has devised new exceptions to the presumption of sovereign immunity in the past, it has amended the FSIA in plain and certain terms.").

III only would continue this consistency.[213]

Additionally, with the recent protests in Cuba pushing for economic and governmental reform in the nation, the provision in the Helms-Burton Act regarding enforcement against a transition government would be highly relevant.[214] If the protests make headway for a transition government, courts would likely have to address how to handle ongoing and pending cases.[215] It would be relatively unjust for companies to have simply outlasted litigation largely due to the ineffective Title for 25 years, and now the legislation would no longer be available for use.[216] The most reasonable way to handle this potential issue would be to allow a similar grace period as the statute of limitations in Title III.[217] Alternatively, providing the opportunity for existing legislation to come to a conclusion would both motivate potential plaintiffs to file their cases and force the courts in ongoing cases to make decisions.[218]

V. CONCLUSION

A significant issue that the District Court addresses in the opinion on April 20, 2021, involves the Supreme Court precedent in *Amerada Hess*.[219] Precedent establishes that FSIA exceptions are the only possible avenue for waiving sovereign immunity.[220] For a Court to decide that Title III waives immunity would cause issues for lower courts as it would be inconsistent with Supreme Court precedent, likely leading to another Supreme Court decision. Nevertheless, based on the Helms-Burton Act, waiving immunity

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213. *See id.*

214. *See* Schmidt, *supra* note 41; Helen Yaffe, *If the US Really Cared About Freedom in Cuba, It Would End its Punishing Sanctions*, THE GUARDIAN, https://www.theguardian.com/commentisfree/2021/aug/04/us-freedom-cuba-punishing-sanctions-critics-blockade (Aug. 4 2021, 4:00 PM) (opining how the Helms-Burton sanctions do more harm than good in the push for Cuban democracy); *see also* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 201, 22 U.S.C. § 6061 (referring to the Policy toward a transition government or democratically elected government in Cuba and how such a case would impact the use of the Helms-Burton legislation).

215. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 201.

216. *See* Roe, *supra* note 41 (addressing what might happen with the usefulness of the legislation if the lawsuits take too long in the courts and the claims pass away with the original claim holders).

217. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act § 305 (identifying the existing statute of limitations for filing cases as two years post trafficking activity).

218. *See* Bellinger et. al, *supra* note 5 (supporting the notion that cases have been slow to move through the courts and even enter the courts compared to the number of lawsuits that were excepted to enter the courts when the suspension of Title III lapsed in 2019).

219. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989).

220. *See id.*

for sovereign nations for certified claims under Title III is a logical conclusion when considering the necessary language and FSIA exceptions in place. There will continue to be turmoil around the Helms-Burton Act as long as the Title III suspension remains open. Until the Biden administration or subsequent administrations decide to initiate the suspension again, the question of how courts should handle Title III cases will require increasing clarity, but holding that Title III provides a waiver to sovereign immunity would be a significant step to clarifying Title III questions.

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