# Volume 55:1

Author: Susan Pace Hamill
Article title: Some Musings as LLCs Approach the Fifty-Year Milestone

**Abstract is the article's Introduction, minus footnotes:**

In less than twenty years, limited liability companies, or LLCs, became the fastest growing business organization form in the United States and indisputably emerged in the mainstream alongside corporations and partnerships. In 2017, the most recent year for which IRS Statistics of Income figures were available, 2,696,149 LLCs filed returns with the Internal Revenue Service (the "IRS"). This number represents well over three times the number of LLCs that filed returns in 2000. In 2017, over one-fourth of the more than ten million total business organizations were LLCs, an impressive increase when compared to LLCs accounting for 10% of all business organizations in 2000. Over this period, general and limited partnerships became less significant. Although corporations still accounted for the majority of business organizations filings in 2017, the percentage of business organizations filing as corporations dropped by almost 10% when compared to the 2000 filings, and many of those businesses chose to become corporations before LLCs became widely available and are now stuck there—a situation I describe as the "Hotel California effect." These figures, along with the explosive growth of LLCs compared to an overall decrease of corporations, predict that the gap between the number of businesses conducted as corporations and LLCs will continue to close in the future.

Primarily aimed at readers who are not experts, this article identifies what makes LLCs so special and how they traveled from obscurity to the mainstream so quickly. It also highlights business law issues and abusive practices exposed by the current use of LLCs and explains why these problems are not caused by LLCs. Finally, this article demystifies the challenges of teaching and understanding LLCs within the framework of all business organizations.

Simply put, LLCs are the first domestic business organization form to combine direct corporate limited liability and partnership tax status. The LLC's creation and characteristics can be best understood as a dance between state and federal law. Despite broad federal power under the Commerce Clause and business being a quintessential example of interstate commerce, state law authorizes business organization forms and dictates the provisions in each business organization statute, and state courts interpret those laws. When determining the federal income tax consequences to the business organization and its owners, federal tax law largely yields to state law, notwithstanding the spirit of the Supremacy Clause. Business organizations designated by state law as corporations are taxed at both the entity and shareholder levels or, if the corporation qualifies for and properly elects to be taxed as a small business corporation, at the shareholder level under a modified flow-through regime with many restrictions. Business organizations designated by state law as "unincorporated," including partnerships and LLCs, are almost always taxed as partnerships under a complete flow-through regime free of the many traps that plague corporations.

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Author: Eliot T. Tracz
Article title: What Next for the Indirect Purchaser Rule?

**Abstract is the article's Introduction, minus footnotes:**

"The goal of antitrust is . . . the operation of competitive markets." "Competition" means "a state of affairs in which prices are sufficient to cover a firm's costs, but not excessively higher, and firms are given the correct set of incentives to innovate." To that end, Congress has enacted several statutes creating both criminal and civil penalties for anticompetitive actions; one of these statutes is the Clayton Act of 1914 (the "Clayton Act"). In its key provisions, the Clayton Act prohibits tying and exclusive dealing, governs mergers between businesses, and provides treble damages and attorney's fees to successful antitrust plaintiffs. The Clayton Act also encourages private civil suits as a means of antitrust enforcement.

One area that antitrust laws have sought to regulate is the distribution and organization of production. "Every business firm purchases at least a few of its inputs, and most of them purchase a great deal." When the firm at the head of the distribution engages in monopolistic practices, such as overcharging, the entire market is affected because "[m]onopoly prices generally filter down through the entire distribution ladder . . . ."

One method of addressing this monopolistic practice is through indirect purchaser suits. An indirect purchaser is a market participant who does not buy goods directly from the manufacturer. Instead, indirect purchasers are often the end users in a distribution chain, though an intermediary may also be an indirect purchaser. For example, when a shoe manufacturer sells to a wholesaler, who then sells to a store chain, who then sells to a consumer, the wholesaler occupies the role of direct purchaser, while the store chain and the consumer are indirect purchasers. The consumer is also the end user.

Unsurprisingly, indirect purchaser suits have been the subject of important United States Supreme Court cases. In 1977, the Supreme Court in *Illinois Brick Co. v. Illinois* found that only the first purchaser in line—the direct purchaser—should obtain the entire overcharge as damages, without reduction for the amount that it had passed on to purchasers beneath it in the distribution chain. Later, in 2019, the Supreme Court handed down its decision in *Apple Inc. v. Pepper*, the latest in a series of antitrust cases that considers indirect purchasers. *Apple* involved a class action by iPhone users who alleged antitrust violations against Apple—specifically that the Apple App Store served as a bottleneck through which iPhone users had to pass in order to purchase apps.

The Supreme Court's ruling in *Apple* left untouched two concerning issues regarding the indirect purchaser rule. First is the fact that the indirect purchaser rule directly conflicts with the language of section 4 of the Clayton Act, which gives the right to sue to "any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." Basic rules of statutory interpretation seem to indicate that indirect purchasers would fall within the category of "any person," yet that is not the case at present.

Second, the indirect purchaser rule misallocates the award of damages, as the award should go to end users rather than direct purchasers. The reason for this is that that "the end user is the only person in the distribution chain who is unable to pass anything on." This issue of pass-on costs cuts right to the heart of indirect purchaser litigation.

This article suggests that the time is ripe for the courts to address both whether the indirect purchaser rule is inconsistent with the Clayton Act and whether indirect purchasers should be the ultimate recipient of damage awards. Section II discusses the text of the Clayton Act and the development of the indirect purchaser rule through case law. Section III then discusses the statutory interpretation issues inherent in the case law. Finally, Section IV argues that overcharge damages should only be available to end users, rather than intermediaries in the distribution chain.

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Author: Dustin Romney
Article title: Natural Rights, the Constitution, and Modern Land Use Regulation: Traditionalist Insights for the Affordable Housing Crisis

**Abstract is the article's Introduction, minus footnotes:**

*"It is as ridiculous to assert, that before the establishment of civil laws and society, there was no rule of justice to which mankind were subject, as to pretend that truth and rectitude depend on the will of man, and not on the nature of things."*

Long before Moses carved in stone "Thou shalt not steal," humans understood that there is a natural, moral right to property. Unfortunately, this basic tenet has fallen out of style, as evidenced by this line from a contemporary property law textbook: "Our property law system is based on the concept that property is a human invention, not the result of divine gift or natural right. Thus, property exists only to the extent that it is recognized by the government . . . ." My reaction to that line was the genesis of this paper.

The debate over the origins and justifications of property law is not merely an academic exercise. It has real consequences in terms of the level of government regulation that will be tolerated, which, in turn, affects a host of important outcomes, such as affordable housing, the ease of opening or expanding a business, and corruption. The nation's ongoing housing affordability crisis is at least in part a result of our acquiescence to the government's hostility toward natural and constitutional property rights. Unfortunately, many individuals are doubling down and calling for even more government control. The goal of this paper is to counter that trend and call attention to the first principles that made America the world's greatest economic power. Policies are not evaluated in a vacuum, free from more foundational concepts about natural rights and the proper role of government. In order to have an informed conversation about land use and housing affordability in our increasingly crowded cities, we need to ensure that our philosophical premises are on sound footing.

This paper is divided into three parts: (1) a natural right to property exists independent of government action; (2) this natural right was understood by the Framers and provides the best model for understanding the Constitution's property clauses; and (3) our modern land use regulatory system is inconsistent with these natural and constitutional law principles and is in desperate need of reform in the direction of these principles.

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Authors: Christopher Elko & Richard A. Bales
Article title: Worldwide Response to Covid-19 Through a Labor and Employment Law Lens


ABSTRACT

In the wake of the deadly Covid-19 pandemic of 2020, governments across the world were faced with a difficult balancing act. The methods of controlling the virus and protecting public health made standard labor procedures impossible. Many governments responded with a form of lockdown or quarantine, thus forcing large portions of the labor force to be temporarily or permanently unemployed. For those who were able and allowed to continue work, new safety precautions were needed. Each government responded with measures concerning labor issues differently based on the specific needs of their populations.

This article compares the various measures taken across the world in six different areas of labor law: workplace safety precautions, wage replacement, job retention, protection for underrepresented portions of the economy, child care laws, and the role of social partners in the decision-making process. This article also analyzes how these laws have been exploited, the disparate impact the laws have had on women and lower social classes, and how the role of social partners such as labor unions may be affected moving forward.


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Authors: Jason M. Gordon, Benjamin W. Akins & Jennifer L. Chapman
attach bio links to names:
Article title: Fiduciary Duty Within the Parent-Adolescent Entrepreneurial Relationship


ABSTRACT

The world of entrepreneurs is as diverse as the world of entrepreneurial ideas. No mold exists, and people from all walks and stages of life have set their business ideas in motion. Increasingly, legal minors represent one such group of entrepreneurs. These aspiring capitalists are usually reliant on their parents or guardians by operation of law. As such, a special kind of fiduciary relationship is created between the two parties. To date, no state has clearly defined the bounds or rules of this relationship. This reality is unfortunate but solvable. The existing bodies of law surrounding the fiduciary nature of partners in a partnership and the fiduciary nature of trustees are highly instructive. By borrowing aspects from both of those well-defined sets of laws, this article proposes a hybrid approach to adequately define a guardian's fiduciary duty to their child in entrepreneurial endeavors.