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Sham on You: Too Good to Be True

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SHAM ON YOU: TOO GOOD TO BE TRUE

by

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ABSTRACT

Of course, many taxpayers manipulate their affairs to minimize their taxes. The new December 2017 limits on state tax deductions evidence, however, the more endemic nature of the sham problem. Some state government officials have joined the loophole quest on behalf of their citizens. For instance, some states have proposed new state tax credits for "voluntary" contributions to state charities. Treasury Secretary Mnuchin aptly challenged this "ridiculous" attempt to "dress up" nondeductible tax payments as deductible charitable contributions. Despite Mnuchin's convincing rebuke, state officials carry on with their ongoing avoidance efforts.

In addition, similar avoidance schemes permeate many other legal areas such as property law, contract law, family law, and copyright law. While some courts strike down the sham attempts, other courts are less vigilant. Occasionally, some courts even endorse the workaround to achieve a desired goal.

How should the legal system respond to all these legal gymnastics? First, lawmakers should avoid even sanctioned indirect workarounds. Even though intended as a narrowly circumscribed allowance, these endorsed maneuvers foster disrespect for legal requirements and create an air of legitimacy for other unintended manipulations. Instead, lawmakers should endeavor to achieve their desired ends more directly, without resort to these problematic formalisms.

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Unsanctioned schemes present a more intricate challenge. After analyzing the reasons behind the current judicial inertia, this Article crafts a new sham defense system sensitive to the root causes. A precise, but limited, sham definition provides the first line of a defense against the most egregious cases. Next, a balanced summary judgment approach further reinforces the new sham definition. Finally, legislative recommendations for vulnerable provisions complete the necessary protection.

"Show, is not Substance: Realities Govern Wise Men."[1]

Introduction

Despite their ongoing commitment, Angela and David Boyter undertook a seemingly bizarre annual ritual. They would divorce late each year only to remarry early the following year.[2] What motivated these annual two-step reversals? Marriage increases the taxes of certain couples under our tax system, with marital status determined as of December 31 each year.[3] The Boyters thus wanted to maintain their marital status but without the marriage tax penalty. In that spirit, they used their claimed tax savings to fund an annual vacation together.

The December 2017 federal tax bill[4] generated a similar response this year, with a surprising twist as to the identity of the manipulators. The tax bill imposed a new $10,000 limit on most state and local tax deductions.[5] In response, New York Governor Andrew Cuomo and other state government officials endorsed the following scheme to avoid these new limits. Since the new $10,000 limit does not apply to charitable contributions, certain high-tax states like New York would grant their citizens state tax credits for "voluntary" charitable payments to state funds.[6] Treasury Secretary Steven Mnuchin called this a "ridiculous" attempt to dress up non-deductible state tax payments as deductible charitable contributions.[7] Section I.A provides more detail on this most current manifestation of the legal sham problem.

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1. William Penn, Some Fruits of Solitude ¶ 259 (Headley Bros. 1905) (1693).

2. Boyter v. Comm'r, 668 F.2d 1382, 1384 (4th Cir. 1981); *see* Kerry Abrams, *Marriage Fraud*, 100 Cal. L. Rev. 1, 24–26 (2012) (discussing *Boyter*).

3. I.R.C. § 7703(a)(1).

4. Pub. L. No. 115–97, 131 Stat. 2054 (2017) (popularly known as the Tax Cuts and Jobs Act).

5. I.R.C. § 164(b)(6)(B).

6. *See, e.g.*, Michael Rainey, *New York Embraces Tax Workarounds, but There Could Be Trouble Ahead*, Fiscal Times (May 2, 2018), http://www.thefiscaltimes.com/2018/05/02/New-York-Embraces-Tax-Workarounds-There-Could-Be-Trouble-Ahead.

7. Aubree Eliza Weaver, *Mnuchin: Deducting Property Tax as Charity Is "Ridiculous,"* Politico (Jan. 11, 2018, 3:23 PM), https://www.politico.com/story/2018/01/11/mnuchin-property-tax-as-charity-ridiculous-336543 (Mnuchin stated that "I think it's one of the more ridiculous comments to

As well documented elsewhere, these two instances present just the tip of the iceberg for the tax system.[8] But the problem of legal shams extends well beyond taxes. The flip side to the *Boyter* case provides one such illustration. Some individuals formally marry without the Boyters' genuine commitment in order to obtain immigration or other legal benefits.[9]

The first year law school curriculum further evidences the pervasiveness of legal machinations. Property law teaches the strawman technique under which a temporary transfer to a third party can facilitate an otherwise unobtainable legal result.[10] Contract law presents two formalistic ways to possibly evade the consideration requirement for a contract modification: (1) a two-step rescission and re-formation, or (2) the inclusion of a nominal "peppercorn." Section I.B provides a more expansive discussion of how the sham problem permeates these and other non-tax areas as well.[11]

Ample commentary focuses on the appropriate tax law response to such machinations. The non-tax areas have generated some commentary as well, albeit typically focused just on the one particular legal area under consideration. The pervasiveness of the problem in so many diverse areas, however, evidences the need for a more coordinated response. This Article fills that gap, developing broader responses for application across the board to engender more respect for legal requirements. In

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think you can take a . . . tax that you are required to make and dress that up as a charitable contribution. . . . I hope that the states are more focused on cutting their budgets and giving tax cuts to their people in their states than they are in trying to evade the law.").

8. *See infra* note 73 (discussion of the extensive tax shelter problem).

9. Other benefits could include health benefits or spousal evidentiary privileges. *See, e.g.*, Edward Stein, *Looking Beyond Full Relationship Recognition for Couples Regardless of Sex: Abolition, Alternatives, and/or Functionalism*, 28 Law & Ineq. 345, 367 (2010).

10. For instance, traditional common law required the "four unities" for a joint tenancy, including the creation of the joint interests at the same time and through the same instrument. As such, a current owner could not create a joint tenancy at common law without a temporary strawman transfer. A similar common law rule precluded a transfer of fee title to one person with a simultaneous transfer of an easement to another person. See the discussion at Section I.B.2 *infra* for greater detail on the use of the strawman as a way around these legal limitations.

11. This will include copyright law and consumer protection law.

particular, Section II explores why courts sometimes grant legal effect to formalistic machinations, which then leads to appropriate responses.

Section II.A first considers two reasons why courts sometimes actually endorse the legal workaround. Stare decisis provides the first explanation: courts want to reach a desired result but are reluctant to discard long-standing precedent. Second, courts sometimes sanction formal workarounds as proxies for an indirect goal. While perhaps seemingly innocuous at first, this Section highlights the unwitting danger of these approaches. As evidenced by much tax literature and two intriguing anecdotes, these permissible workarounds can encourage unintended legal disregard elsewhere. For instance, this Section shares a classroom exchange where one of my insightful students suggested use of the property law strawman to navigate around an adverse tax Code provision. Given this pernicious carryover impact, Section II instructs that judges should opt instead for more direct solutions to the stare decisis or proxy scenarios.

Section II.B then shifts to areas where courts tolerate, but do not endorse, the formalistic result. Section II.B.1 explains how vagueness and overbreadth concerns underlie such judicial inaction, partly attributable to the lack of a concrete sham definition. Section II.B.2 therefore crafts a precise, but limited, sham definition sensitive to overbreadth concerns. Given the limited scope, the Section suggests providing additional protection through the summary judgment screening mechanism. Finally, Section II.B.3 highlights how legislatures can better insulate vulnerable provisions against shams with built-in protective clauses.

I. The Problem

While workarounds are endemic to the tax area, the problem permeates many non-tax areas. After Section A recaps the current tax scenario, Section B presents six different other areas to highlight the pervasive nature of the challenge for the legal system.

A. The Current State and Local Tax Manifestation

Prior to 2018, state income and real estate taxes were freely deductible for regular federal tax purposes.[12] With such deductibility, citizens in

12. I.R.C. § 164(a)(1)–(3), (b)(6)(B). As discussed *infra* note 158, the deduction already was limited for alternative minimum tax (AMT) purposes. Further, note how the limitation matters only if the taxpayer itemizes

high-tax states did not bear the full brunt of heavy state taxes. Rather, a significant portion shifted over to citizens in low-tax states.[13] The recent tax bill, however, capped the deduction of most state taxes at $10,000.[14] Citizens in high-tax states now bear the full cost of state tax charges which exceed the $10,000 cap.[15]

Many high-tax states understandably resisted this real cost increase of their taxes to their citizens. In response, several such states (including New York, California, New Jersey, Illinois, and Connecticut) have sought loopholes around the new $10,000 limit.[16] Drawing upon the lack of a comparable cap on charitable contributions,[17] these

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deductions (rather than taking the standard deduction). Finally, note how the limit applies also to local taxes; the text references only state taxes throughout for ease of exposition.

13. With a federal tax deduction, a percentage of the state tax payment (equal to the taxpayer's marginal tax rate) initially gets passed on to the federal government. Assume for instance that a taxpayer in a high-tax state (1) pays $30,000 in state and local taxes and (2) faces a federal tax rate of 30%. Prior to 2018, the taxpayer could deduct the full $30,000 payment for regular federal tax purposes, which would save $9,000 in federal taxes. And so the taxpayer's true cost was only $21,000. This shifts the cost to citizens in low-tax states since the decreased federal tax collections then generally will spread across all states to all U.S. citizens.

14. I.R.C. § 164(b)(6)(B). Note that foreign taxes and property taxes incurred in a trade or business (or I.R.C. § 212 for profit) are not subject to this cap.

15. Consider again the example in note 13, *supra*. With the new $10,000 limit, the taxpayer could deduct only $10,000 for regular federal tax purposes, which would save only $3,000 in federal taxes, increasing the true cost to $27,000 (from $21,000).

16. *See* Laura Mahoney, *Revised Tax Deduction Cap Workaround on Deck in California*, BNA Daily Tax Rep.: St. (June 5, 2018), https://www.bna.com/revised-tax-deduction-n73014476252/; Che Odom, *Illinois House Passes Charity Workaround of Federal Deduction Cap*, BNA Daily Tax Rep.: St. (Apr. 18, 2018), https://www.bna.com/illinois-house-passes-n57982091280/; Rainey, *supra* note 6.

17. After the bill, charitable contributions remain fully deductible, subject only to more generous existing caps keyed to the amount of (adjusted) gross income. *See* I.R.C. § 170(b).

workarounds endeavor to convert excess state tax payments into charitable contributions.[18]

The Illinois approach provides a useful representative example. As originated in the Illinois House, the bill initially provided a new 100% state tax credit for contributions to a new Illinois Education Excellence Fund.[19] For example, a $10,000 contribution would generate a $10,000 credit (i.e., a dollar for dollar credit). The Illinois Senate later modified the House bill to reduce the credit percentage to 90% (e.g., a $9,000 credit for a $10,000 contribution).[20] As analyzed in Section II.B.2, such reduction to a 90% credit appears to improve the optics but does not alter the sham nature of the arrangement.

B. Extension to Non-Tax Areas

As discussed below, the sham problem permeates many diverse areas of law.

1. Marriage and Divorce

Sham marriage and divorce neatly demonstrates both tax and non-tax exposure. As noted in the Introduction, the Boyters attempted to avoid the marital tax penalty through an annual two-step divorce and remarriage.[21] The Fourth Circuit remanded the case to the Tax Court

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18. As discussed *infra* at notes 161–163 and accompanying text, the Treasury Department subsequently promulgated regulations to counteract these workarounds.

19. See I.R.C. § 170(c)(1) for how charitable contributions include a "contribution or gift to or for the use of a State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes."

20. For the text of Illinois bill HB 4237 (and the modifications over time), see *Bill Status of HB4237*, Ill. Gen. Assembly, http://www.ilga.gov/legislation/BillStatus.asp?DocNum=4237&GAID=14&DocTypeID=HB&LegId=108676&SessionID=91&GA=100 (last updated Jan. 8, 2019).

21. Boyter v. Comm'r, 668 F.2d 1382, 1384 (4th Cir. 1981). Certain couples pay higher taxes if married (as of December 31) than if unmarried. This results from the way our joint return system first aggregates each spouse's earnings and then calculates the couple's tax based on joint marital

"to determine whether the divorces, even if valid under [state] law, are nonetheless shams and should be disregarded for federal income tax purposes for the years in question."[22]

The non-tax issues generally flow from the inverse of the Boyter's sham divorce: sham marriages to achieve some non-tax marital benefit. Such non-tax benefits can include health benefits, immigration or naturalization purposes, or spousal immunity.[23] And so the non-tax law must grapple with when to ignore the marriage and negate the desired marital benefits. Interestingly, the flip side sham marriage also could provide tax benefits as sometimes two individuals pay less aggregate tax if married (a so-called "marital bonus" couple).[24] The tax law thus could induce a reverse Boyter annual marriage late each year, followed by a quick divorce early the following year.

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brackets. Importantly, these joint brackets typically are larger than—but not twice as large as—the unmarried brackets. The penalty also stems from our use of progressive rates. Our progressive rate system applies higher rates as income crosses over certain thresholds. The marriage penalty aspect arises where the joint thresholds are not twice as large as the single thresholds. Thus, a married couple's taxes can increase upon marriage (a marital penalty) when the spouses earn roughly the same amount as each other. In the other direction, marriage can reduce a couple's taxes (a marital bonus) when one spouse earns a great deal more than the other.

22. *Id.* at 1388.

23. *See, e.g.*, Stein, *supra* note 9, at 367. For a comprehensive analysis of sham marriages, see Abrams, *supra* note 2. For some marriage sham cases, see, for example, Garcia-Jaramillo v. INS, 604 F.2d 1236, 1238 (9th Cir. 1979) (finding a sham marriage where the husband offered the wife money to marry him as he sought legal residency, and the parties never lived together); United States v. Rubenstein, 151 F.2d 915, 919 (2d Cir. 1945) ("[I]f the spouses agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, they have never really agreed to be married at all. They must assent to enter into the relation as it is ordinarily understood, and it is not ordinarily understood as merely a pretence, or cover, to deceive others.").

24. This can arise when one spouse earns a great deal more than the other. As noted *supra* note 21, the marital tax brackets typically are larger than the single brackets. This allows some of the high-earner's income to shift to a lower bracket when the low-earner spouse has not filled up half of the marital bracket.

2. Property Law Strawman Transfer

Black's Law Dictionary definition of strawman neatly presents the legal challenge: "a third party used in some transactions as a *temporary* transferee to allow the principal parties to accomplish something that is *otherwise impermissible*."[25] This well-accepted definition might seem innocuous enough on a first read. On further reflection, though, it seems antithetical to the Fourth Circuit's potential sham disregard of the Boyter's temporary divorce and Mnuchin's fair rebuke of the current state tax dodge.

Lawyers typically receive their first exposure to the strawman technique in their Property Law class. A joint tenancy traditionally required the "four unities of title" under common law. This required the creation of each person's ownership interests at the same time (unity of time) and through the same conveying instrument (unity of interest).[26] This prevented an existing owner (Ellie) from establishing a joint tenancy with a new owner (Nellie). The strawman technique developed as a way around the problem.[27] Ellie would transfer the property to a temporary strawman (say Ellie's lawyer) who would then convey the property back to Ellie and Nellie as joint tenants. In form, Ellie and Nellie established their ownership interests at the same time and through the same instrument. Consistent with the *Black*'s definition above, property law generally respected this formal workaround of the unities of time and interest.

Most jurisdictions relaxed the traditional common law requirements over time and now allow a joint tenancy creation by a single transfer from the existing owner.[28] Property law strawman transfers nonetheless remain relevant today in any jurisdiction that retains the old common law rule.[29] In addition, a similar common law rule precluded a

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25. *Straw Man*, Black's Law Dictionary (10th ed. 2014) (emphasis added).

26. Riddle v. Harmon, 102 Cal. App. 3d 524, 527 (Cal. Ct. App. 1980). The two other unities are (identical) interests and (joint whole) possession. If the four unities did not exist at the tenancy's inception, the ownership would be as tenants in common (without the joint tenancy's right of survivorship). *See, e.g.*, R.H. Helmholz, *Realism and Formalism in the Severance of Joint Tenancies*, 77 Neb. L. Rev. 1, 4–5 (1998).

27. Helmholz, *supra* note 26, at 5.

28. Sometimes by case, sometimes by statute. *See id.*

29. *See, e.g.*, Jesse Dukeminier et al., Property 397 (9th ed. 2018) (noting "the modern *trend* is away from requiring adherence to the old four unities for purposes of creating joint tenancies" (emphasis added)).

transfer of fee title to one person (Fiona) with a simultaneous transfer of an easement to another person (Ed). The straw man similarly avoided that common law restriction: the existing owner would first transfer title to Ed, and then Ed would transfer title to Fiona, reserving an easement.[30] Finally, even in jurisdictions now permitting a direct joint tenancy creation, uncertainty sometimes remains regarding a severance of the joint tenancy without the strawman use.[31]

3. Contract Law

Contract law generally requires two-sided consideration: a reciprocal exchange between the parties. Assume, for instance, that Charlie Contractor agrees to perform remodeling services for Harry Homeowner in exchange for $50,000 upon completion of the work. This satisfies two-sided consideration as Charlie promises to perform the services and Harry promises to make the $50,000 payment. Further assume that Charlie later asks Harry for an additional $10,000 ($60,000 total) after starting the work. Harry agrees but then refuses to pay the additional $10,000 upon completion of the work. If Charlie sues on the $10,000

30. *See* Jesse Dukeminier, *Cleansing the Stables of Property: A River Found at Last*, 65 Iowa L. Rev. 151, 174 (1979) (cited with approval in Dukeminier et al., *supra* note 29, at 771) for such technique, noting that the common-law rule still survives in some states. In similar fashion, see Thomas F. Guernsey, *The Mentally Retarded and Private Restrictive Covenants*, 25 Wm. & Mary L. Rev. 421, 433 n.79 (1984) ("In addition to expressly prohibiting any use of the property for a group home, the covenanting parties can achieve a similar result by expressly prohibiting any mentally retarded individual from living on the property, or by defining 'family' as individuals related by blood or marriage. The enforceability of the covenant, however, depends upon the satisfaction of certain requirements. . . . The primary problem for parties seeking to create such a covenant is establishing privity of estate in those jurisdictions where simultaneous privity (transfer of land simultaneously with the creation of the restriction) is required for the covenant to run. The parties can meet this requirement, however, merely by transferring their separate interests to a strawman, who then would reconvey the property subject to the restrictive covenant.").

31. *See, e.g.*, Helmholz, *supra* note 26, at 13 (explaining, "lawyers in jurisdictions where the matter remains uncertain will doubtless continue to use the conveyance to a strawman as a matter of prudence").

unfulfilled promise, Harry can raise the lack of consideration for this additional promise under the pre-existing duty doctrine. While Charlie carried out his promise to perform, he already promised such performance in exchange for Harry's original $50,000 promise. Accordingly, Harry's later promise for those same services lacks consideration.

Assume that Charlie knows some contract law. He insists that the parties simultaneously (1) tear up the original contract with all its specifications (as to work, timeline, $50,000 price, etc.), and (2) replace it with a new contract identical in all respects other than an increased price of $60,000. Should this bolster Charlie's claim to the additional $10,000 payment? As this two-step maneuver evokes the state tax charitable workaround, one can imagine Mnuchin's reaction to this inquiry: it seems "ridiculous" that this formal maneuver would convert a non-enforceable promise into an enforceable one.

Yet a number of contract decisions have given dispositive weight to such simultaneous "rescission" of the original contract and "reformation" of a new contract. Consider for example some language from the oft-cited *Schwartzreich* opinion:

> Any change in an existing contract, such as a modification of the rate of compensation, or a supplemental agreement, must have a new consideration to support it. In such a case the contract is continued, not ended. Where, however, an existing contract is terminated by consent of both parties and a new one executed in its place and stead, we have a different situation and the mutual promises are again a consideration. Very little difference may appear in a mere change of compensation in an existing and continuing contract and a termination of one contract and the making of a new one for the same time and work, but at an increased compensation. There is, however, a marked difference in principle. Where the new contract gives any new privilege or advantage to the promisee, a consideration has been recognized, though in the main it is the same contract.[32]

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32. Schwartzreich v. Bauman-Basch, Inc., 231 N.Y. 196, 203 (N.Y. 1921).

Commentators have highly critiqued this formalistic approach.[33] For instance, the influential *Corbin on Contracts* treatise states that "this reasoning is logically and practically bad."[34] And while some jurisdictions have rejected its application,[35] the rescission and re-formation approach continues to persist in contract law.[36]

The contract modification scenario also links to a second formalistic workaround: use of some token value to create the appearance of an enforceable exchange. For instance, suppose now that Charlie agrees to change a burnt-out lightbulb "in exchange" for Harry's additional $10,000 promise. Should the new promise now be enforced on the grounds that Charlie provided new consideration? Once again, it seems "ridiculous" to think that the lightbulb change induced the $10,000 promise in return. Some courts apply a "peppercorn" approach, however, where any return performance can satisfy the consideration requirement.[37] If applied here, the $10,000 additional promise would be enforceable due to such new consideration.[38]

Finally, apart from contract modifications, the peppercorn consideration issue also can arise on the initial promise. This raises whether

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33. *See, e.g.*, Restatement (Second) of Contracts § 89, cmt. b (Am. Law Inst. 1981) (rejecting the simultaneous rescission and new agreement concept as "fictitious.").

34. 2 Joseph M Perillo & Helen Hadjiyannakis Bender, Corbin on Contracts § 7.15 (rev. ed. 1995). As *Corbin on Contracts* further notes, *Schwartzreich* might have reached an acceptable result on the particular facts. *Id.* As developed more fully below, though, courts should explicitly link any pre-existing duty exceptions to those particular facts. The misleading formalistic workaround confuses the law and can engender a more general disregard of the law.

35. *See, e.g.*, Zhang v. Eighth Judicial Dist. Court, 103 P.3d 20, 21 (Nev. 2004).

36. *See, e.g.*, Thales Alenia Space Fr. v. Thermo Funding Co., LLC, 959 F. Supp. 2d 459, 465 (S.D.N.Y. 2013) ("A release of a preexisting obligation can occur at the same time the parties enter into a new agreement, in which case the new promise is not inadequate consideration under the preexisting duty rule.").

37. As discussed *infra* note 101, some courts take a more substantive approach.

38. For the possible application of the peppercorn doctrine to contract modifications, see, for example, Rachel Arnow-Richman, *Employment Law Inside Out: Using the Problem Method to Teach Workplace Law*, 58 St. Louis L.J. 29, 46 (2013).

a peppercorn of consideration should convert a non-enforceable gift promise into an enforceable exchange promise.

4. Copyright Law

A copyright holder owns the "exclusive rights to . . . perform the copyrighted work publicly."[39] This includes the exclusive right "to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."[40]

Aereo, Inc. took television program broadcasts and retransmitted them to subscribers by streaming them over the internet for a monthly fee. The copyright holders sued for infringement as they did not authorize such use, and Aereo did not pay a licensing fee. Aereo claimed that its transmissions were not "public" performances since (1) Aereo used thousands of small antennas (in lieu of a central antenna), and (2) each small antenna was dedicated to the use of one subscriber alone (i.e., an arguably isolated, non-public use).[41]

Consider Judge Chin's reaction to Aereo's non-public position at the circuit court level:

> Aereo's "technology platform" is, however, a sham. The system employs thousands of individual dime-sized

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39. 17 U.S.C. § 106(4) (Lexis, Mar. 2019).
40. *Id.* § 101.
41. Aereo's argument as set forth in the Supreme Court's opinion:

> [A]n Aereo subscriber receives broadcast television signals with an antenna dedicated to him alone. Aereo's system makes from those signals a personal copy of the selected program. It streams the content of the copy to the same subscriber and to no one else. One and only one subscriber has the ability to see and hear each Aereo transmission. The fact that each transmission is to only one subscriber, in Aereo's view, means that it does not transmit a performance "to the public."

ABC, Inc. v. Aereo, Inc., 573 U.S. 431, 446 (2014).

> antennas, but there is no technologically sound reason to use a multitude of tiny individual antennas rather than one central antenna; indeed, the system is a Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law. After capturing the broadcast signal, Aereo makes a copy of the selected program for each viewer, whether the user chooses to "Watch" now or "Record" for later. Under Aereo's theory, by using these individual antennas and copies, it may retransmit, for example, the Super Bowl "live" to 50,000 subscribers and yet, because each subscriber has an individual antenna and a "unique recorded cop[y]" of the broadcast, these are "private" performances. Of course, the argument makes no sense. These are very much *public* performances.[42]

Judge Chin's description of the attempted workaround neatly captures the essence of the problem. In addition, while the Supreme Court ultimately vindicated the position, if not Judge Chin's language, the Second Circuit actually found for Aereo. Professor Liebesman's commentary on Chin's dissent further evidences the legal challenge: "As Judge Chin noted . . . Aereo's 'system . . . [is] over-engineered in an attempt . . . to take advantage of a perceived loophole in the law.' . . . *Yet one person's loophole and sham is another person's work-around for the purpose of complying with the law*."[43]

5. Usurious Interest Limitations

Usurious interest statutes limit the permissible interest rates on covered loans. Such usurious "statutes are for the protection of borrowers against greedy lenders who seek to take unfair advantage of their

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42. WNET Thirteen v. Aereo, Inc. (Aereo II), 712 F.3d 676, 697 (2d Cir. 2013) (Chin, J., dissenting) (alteration in original), *rev'd sub nom.* ABC, Inc. v. Aereo, Inc., 573 U.S. at 431.

43. Yvette Joy Liebesman, *When Does Copyright Law Require Technology Blindness?* Aiken *Meets* Aereo, 30 Berkeley Tech. L.J. 1383, 1439 n.248 (2015) (emphasis added).

debtors."[44] Texas for instance generally provides for a 10% interest cap on loans.[45] Similar to the state tax cap, some lenders try to avoid such limits by converting interest into other borrower charges. Consider the following commentary on a "disappointing and perhaps analytically unsound" 2004 Fifth Circuit decision:

> Although Texas technically caps interest rates on all loans at ten percent through a traditional usury cap, payday lenders operate through an exception to the cap called the Credit Service Organization or CSO model. . . .
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> Under the CSO loophole, a payday loan becomes a three-party transaction and CSOs act like brokers between the lender and borrower. . . . The broker sometimes charges an enormous fee—for example $1,500 on a $2,000 loan . . . —for the service of obtaining credit from a lender. Although the lender itself is subject to the ten percent interest rate limit, the CSO claims to be providing a separate brokering service, not offering a loan, and thus claims they can charge any fee they like.
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> . . . This is despite the fact that it is not necessary to have three parties to these transactions, and despite the obvious implication of the substance-over-form test or duck test. Under the duck test, you can change the name of something, but the law will consider the thing's true nature, not the name, when deciding what the thing is and when deciding whether two things with different labels are functionally the same. . . .
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> Nevertheless, . . . the Fifth Circuit held that CSO fees do not constitute "interest" under the usury statute, and are thus not subject to Texas usury laws.[46]

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44. Swindell v. Fed. Nat'l Mortg. Ass'n, 387 S.E.2d 220, 222 (N.C. Ct. App. 1990).

45. Tex. Fin. Code Ann. §§ 302.001(b); 342.004(a) (Lexis, Mar. 2019).

46. Nathalie Martin & Robert N. Mayer, *What Communities Can Do to Rein In Payday Lending: Strategies for Successful Local Ordinance Campaigns Through a Texas Lens*, 80 L. & Contemp. Probs. 147, 156, 158

This duck test critique of the Fifth Circuit's opinion[47] also links to Australian Justice Gray's neat statement in a non-tax labor law case: "the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck."[48]

6. Low-Income Buyer Protections

Under a contract for deed (CFD), the buyer makes installment payments over time to the seller. The home deed does not pass to the buyer until completion of all the installment payments to the seller.[49] An unregulated CFD thus allows lenders to bypass typical borrower foreclosure

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(2017) (citations omitted) (commenting on Lovick v. Ritemoney Ltd., 378 F.3d 433 (5th Cir. 2004)).

47. As the excerpt notes, the Fifth Circuit relied on the fact that the Texas legislature provided for both capped interest rates and uncapped CSO charges. Linking ahead to one of Section II's main themes, though, the court nonetheless could have shown more of a willingness to sham suspect arrangements. Perhaps the Fifth Circuit felt constrained by their role in interpreting Texas law. And setting up another Section II theme, the Texas legislature could have taken greater care to avoid a legislative scheme that encourages low-grade workarounds. For more on the importance of legislative care in this context, see Ann Baddour, *Why Texas' Small-Dollar Lending Market Matters*, 12 E-Perspectives, no. 2, 2012, https://capitol.texas.gov/tlodocs/83R/handouts/C2702013041512301/fb4dbdfc-de6b-4e40-98a1-16b4bde84cad.PDF ("2001–2011: The Era of Loopholes. . . . A 2006 letter from the Texas Attorney General's Office regarding the legality of the CSO lending model stated, 'On its face, the CSO model does not appear to be prohibited under Texas law. . . . Any discussion of whether this model is the best public policy choice for the state of Texas is one that must be addressed by the legislature and has not been explored by this office.' The Fifth Circuit decision, in combination with the Attorney General letter, led to an explosion of CSO registrations by payday and auto title companies in Texas. In 2004, there were 250 registered CSO locations. By November 2011, there were over 3,400 registered locations, the vast majority being payday and auto title loan businesses." (second omission in original)).

48. *Re Application by Porter* (1989) 34 IR 179, 184 (Fed. Ct. Austl.).

49. Peter M. Ward, Heather K. Way & Lucille Wood, *Protecting Homebuyers in Low-Income Communities: Evaluating the Success of Texas Legislative Reforms in the Informal Homeownership Market*, 41 L. & Soc. Inquiry 152, 158 (2016).

law protections.[50] In order to provide foreclosure and other protections for low-income buyers, Texas passed regulations in 1995 covering a CFD transaction.[51]

Reminiscent of the usurious interest area, lenders attempted several workarounds to avoid these CFD regulations, including the rent-to-own (RTO) structure.[52] The resident likewise makes payments over time, but such payments are labeled as "rents" under a "lease." The resident similarly also can obtain eventual ownership, now via the exercise of an option to buy the property at a declining price over time. In many ways, the arrangement operates similarly to the CFD. As nicely framed by one commentator, the issue is whether the RTO is really a sales transaction "in disguise."[53]

The Texas problem arose since the initial legislation explicitly covered only CFDs. The Texas legislature eventually extended the regulatory protection to RTOs and other workarounds, but such corrections took ten additional years.[54] Despite such ultimate correction, Texas's CFD experience illustrates the broader legal challenge for several reasons. First, the RTO workaround extends beyond home sales to other

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50. Lenders generally must comply with foreclosure law before repossessing a buyer's home for nonpayment of the mortgage.

51. Ward, Way & Wood, *supra* note 49, at 160–61 ("[B]uyers under CFDs no longer automatically forfeit all prior payments when they miss one or several consecutive payments or otherwise default under the contract. Instead, if a buyer has paid less than 40 percent of the amount owed, the buyer has at least 30 days to make a late payment. In cases where the buyer has made either 40 percent or 48 months of payments, the buyer is entitled to a foreclosure process, including the right to recapture any equity in the home. In the event of a default under the contract, the seller must then follow a nonjudicial foreclosure process.").

52. *Id.* at 177 (They also used "deeds in lieu of foreclosure, or security deeds. In these transactions, the seller utilizes traditional seller financing with a note and deed of trust, but then requires the buyer to waive the right to foreclosure proceedings and to give the deed back to the seller to hold as security in the event the buyer defaults on the note.").

53. Jim Hawkins, *Renting the Good Life*, 49 Wm. & Mary L. Rev. 2041, 2050 (2008). This involved analysis of RTOs for sale of goods (rather than homes), thereby triggering additional bankruptcy and UCC protections. *Id.* at 2048–50.

54. Ward, Way & Wood, *supra* note 49, at 161.

consumer protection areas.[55] Second, treatment of an RTO as a disguised sale could trigger the earlier usurious interest limitations.[56] Finally, Texas's delayed correction supports one key recommendation below: greater use of anti-abuse provisions in the initial legislation to ensure more timely protection.[57]

II. The Response

What explains the prevalence of these workarounds? In some cases, courts actually endorse the workaround to achieve a desired goal. In other cases, courts merely tolerate the formalism due to a reluctance to police the area. But in either case, the current judicial approach problematically contributes to the mentality that legal requirements can be avoided through machinations. As such, the legal system needs a more coordinated response across the many areas. Section A first addresses endorsed workarounds, highlighting why judges should instead accomplish their goals more directly. Section B then focuses on unsanctioned workarounds. It provides a new defense system sensitive to the reasons underlying the judicial reluctance to police abusive transactions.

A. Endorsed Workarounds

Sanctioned workarounds rest upon two main explanations: stare decisis and proxies. First, courts sometimes support formal workarounds to achieve desired outcomes without explicitly overturning precedents under stare decisis. Second, courts sometimes utilize formalisms as proxies to achieve something more meaningful. The two subparts below will address these points in turn, highlighting why a more direct approach would improve the law in each situation.

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55. See the discussion on the sale of goods at note 53, *supra*.

56. An RTO avoids the usurious issue if respected as a lease until exercise of the option since the payments constitute rent rather than principal and interest. James J. White, *The Usury* Trompe l'Oeil, 51 S.C. L. Rev. 445, 448 (2000) ("Because there is no obligation to keep paying, most states treat [the RTO] as a lease not subject to the usury law on loans, but some states differ." (citations omitted)).

57. *See infra* Section II.B.3.

1. Stare Decisis

Stare decisis instructs that the common law should not be altered lightly. Common justifications for this reluctance to overturn precedent include certainty and predictability of the law.[58] But sometimes, stare decisis invites disingenuous workarounds to achieve desired outcomes while attempting to maintain an appearance of stare decisis.[59] As discussed below, this helps to explain the property and contract law examples above.

Recall first the property law strawman workaround of the four unities for joint tenancies. In eventually setting aside the four unities, the California *Riddle v. Harmon* opinion cited an earlier law review article by leading jurist Traynor on the perils of excess adherence to stare decisis:

> "We are given to justifying our tolerance for anachronistic precedents by rationalizing that they have engendered so much reliance as to preclude their liquidation. Sometimes, however, we assume reliance when in fact it has been dissipated by the patent weakness of the precedent. Those who plead reliance do not necessarily practice it." (Traynor, *No Magic Words Could Do It Justice* (1961) 49 Cal. L. Rev. 615, 622–623.). . . .
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> . . . .

58. *See, e.g.*, Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 Mich. L. Rev. 1, 9 (2012) ("There is a cluster of considerations commonly cited in support of the system of precedent that seems to invoke rule-of-law values. These include the importance of certainty, predictability, and respect for established expectations. By commanding that judges follow previous decisions, stare decisis is supposed to make it easier for people facing a new situation to predict how the courts will deal with it: they will deal with it in the way that they have dealt with similar situations in the past, rather than striking out unpredictably with a new approach of their own.").

59. *See, e.g.*, Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. Colo. L. Rev. 1011, 1020–21 (2003) ("To take disingenuous distinguishing (distinguishing the plainly indistinguishable) first: It undeniably happens, and every lawyer has her favorite example of it.").

> In view of the rituals that are available to unilaterally terminate a joint tenancy, there is little virtue in steadfastly adhering to cumbersome feudal law requirements.[60]

Stare decisis likewise helps to explain the contractual pre-existing duty workarounds (rescission/re-formation or peppercorn consideration). Similar to the property strawman technique, some courts sanctioned such workarounds due to dissatisfaction with the pre-existing duty doctrine. Consider Professor Goldstein's insights about teaching contract law:

> First, when courts frequently invoke fictions to avoid applying a rule it is reasonable to infer that the rule is losing its hold. Judges tend to respect precedent and are understandably reluctant to announce that they have disregarded a rule of long-standing in order to reach a result it will not allow. Yet at times precedent may lead in directions judges believe are unreasonable or unjust. Faced with such a predicament, some courts employ some fiction to reach a palatable outcome without demonstrating overt disrespect for a rule. Courts have often performed intellectual gymnastics to escape the consequence of the legal duty rule. For instance, courts have allowed the mutual rescission two-step in cases where the two steps occur simultaneously. They have found consideration for a modification in dubious circumstances. Cases that use such ingenuity[61] to avoid a rule suggest courts are not enamored with the rule.[62]

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60. Riddle v. Harmon, 102 Cal. App. 3d 524, 529–530 (Cal. Ct. App. 1980). While the quote itself does not explicitly use the stare decisis term, the Traynor quote is lifted from a passage with many explicit stare decisis references. Roger J. Traynor, *No Magic Words Could Do It Justice*, 49 Cal. L. Rev. 615, 622 (1961) ("Yet judges continue reluctant to take the initiative in overruling a precedent whose unworthiness is concealed in the aura of stare decisis.").

61. Contrast the use of ingenuity with the discussion of disingenuous distinctions at note 59, *supra*.

62. Joel K. Goldstein, *The Legal Duty Rule and Learning About Rules: A Case Study*, 44 St. Louis U. L.J. 1333, 1352–53 (2000) (footnotes

These endorsed workarounds might seem advantageous given the desired litigated outcomes along with seeming adherence to precedent. But the changed outcomes ultimately do contravene stare decisis, albeit in a circuitous way. More importantly, the roundabout approach generates two unfortunate problems. First, the unnatural state of the law evolves into a trap for the unwary.[63] For instance, without close knowledge of contract or property law, who would know to undertake the formalistic extra steps of the strawman or two-step rescission techniques?

Beyond the trap for the uninformed, the deeper problem concerns those with knowledge of the law. These endorsed workarounds instruct that the law sanctions purely formalistic workarounds of legal requirements. The following classroom experience neatly evidences the problem, and motivated this Article along with a similar anecdote

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omitted). While he does not use stare decisis at that juncture, he does link this to stare decisis in a later passage:

> The legal duty rule provides an opportunity to consider stare decisis as a basis for applying a common law rule. To be sure, precedent has its claims and law students learn of the judicial tendency to apply rules of earlier cases to decide later controversies. To some extent, the legal duty rule continues to be applied because of its status as precedent. *Foakes* relied on that rationale. . . . The claims of precedent are stronger where an old rule brings certainty or has engendered reliance.

Id. at 1358.

63. *See, e.g.*, Lieving v. Hadley, 423 S.E.2d 600 (W. Va. 1992) ("We recognize that the law defining the survivorship principles of joint tenancies, tenancies by the entirety and tenants in common are very old. At common law, when two (or more) people owned a piece of property in both of their names and all four unities existed (time, title, interest and possession), then they held as joint tenants with a right of survivorship. This often created traps for the unwary and forced many to go through straw transactions in order either to create or break the unities. The legislature wanted to create a scheme based on the intent of the parties as opposed to the common law unities."); *see also* John W. Fisher, II, *If Judgment Creditors Cannot Set Asunder a Debtor Spouse's Interest in the Marital Home, What Can They Do?*, 97 W. Va. L. Rev. 339, 350 (1995) (discussing *Lieving*).

below.[64] Code section 267 disallows losses on sales to related parties.[65] A federal tax classroom problem evidenced the disallowance on a sale by a mother of devalued land to her daughter. An astute student recently suggested that the mother first sell the land to her lawyer, followed by the lawyer's immediate sale to the daughter to take the loss. I responded that while this cleverly solved the problem "in form," this should not work as the substance (a sale by mother to related daughter) would trump the engineered form (sale by mother to unrelated lawyer).

The student impressively pushed back, referencing the strawman technique learned in his Property class. On the spot, I attempted to reconcile the divergent tax and property law approaches (which I admittedly had never considered before). I noted how the strawman technique would allow well-informed taxpayers to accomplish indirectly a tax reduction that could not be done directly under the Code, thereby negating the loss limitation.[66] I added how the tax law needs to protect against such artifices to protect the fisc, concerns not implicated by property law.

Further reflection after class, however, exposed the unsatisfying nature of the law. Even setting aside the fiscal issues, why structure the law to provide such varying results based on such formalistic maneuvers? The astute student's impressive linkage highlighted the pernicious carryover problem.[67] If the law sanctions the workaround outcome, why not just permit the direct application so as to avoid the traps for the unwary and the (unintended and undesired) carryover impact on other areas. Additional language from the *Riddle v. Harmon* case supports this conclusion: "Common sense as well as legal efficiency dictate that a joint

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64. *See* discussion at notes 77–78 and accompanying text *infra*.

65. Taxpayers generally prefer to accelerate their tax losses, and save taxes currently under time value of money principles.

66. *See* David A. Weisbach, *Formalism in the Tax Law*, 66 U. Chi. L. Rev. 860, 863–64 (1999) (discussing attempted tax avoidance scheme where taxpayers used a partnership to "do indirectly what would have been a [taxable] event had it been done directly" and how "most people . . . respond that the partnership rules can't mean that. If they did, the [taxable event] rule would be meaningless, as it could be avoided at will."). See also the *Harmon v. Riddle* court's indirect versus direct use at text accompanying note 68 *infra*.

67. It is quite impressive when budding lawyers can link together strands of law from different subject matters.

tenant should be able to accomplish directly what he or she could otherwise achieve indirectly by use of elaborate legal fictions."[68]

In addition to its insightful rejection of the problematic direct/indirect divide, the opinion's legal fiction reference further reinforces the carryover (or tainting) effect. The usage of legal fictions has generated much long-running controversy. While most of the legal fictions debate falls beyond this Article's scope,[69] one aspect stands fully on point: consistent recognition how legal fictions can foster a disregard for the law. For instance, Judge Gerber wrote how, "[l]ike other legal fictions, [the] unprincipled [felony murder] rule breeds disrespect."[70] As Professor Blinka has written on several occasions regarding evidence law, legal fictions can "breed cynicism and disrespect for the law"[71] and "invite[] abuse of and, worse, disrespect for a trial system that strives very hard to get at the truth."[72] Jeremy Bentham's rhetorical flourish

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68. Riddle v. Harmon, 102 Cal. App. 3d 524, 530 (Cal. Ct. App. 1980).

69. This Article focuses on transactional legal fictions. In contrast, for example, John Miller's article focuses on a different kind of tax legal fictions, involving various constructs such as constructive ownership rules. John A. Miller, *Liars Should Have Good Memories: Legal Fictions and the Tax Code*, 64 U. Colo. L. Rev. 1, 2–4 (1993).

70. Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 Ariz. St. L.J. 763, 775 (1999).

71. Daniel D. Blinka, *Why Modern Evidence Law Lacks Credibility*, 58 Buff. L. Rev. 357, 415 ("[T]he [Federal Rules of Evidence] should be revised to eliminate the technical hearsay impediments to using prior consistent or inconsistent statements. Trial lawyers, abetted by case law, have wisely circumvented the restrictions anyway, but at the cost of useless fictions and confusing jury instructions that breed cynicism and disrespect for the law.").

72. Daniel D. Blinka, *Ethical Firewalls, Limited Admissibility, and Rule 703*, 76 Fordham L. Rev. 1229, 1262 (2007). Likewise, see Louise Harmon, *Fragments on the Deathwatch*, 77 Minn. L. Rev. 1, 73, 82 (1992) ("But when the members of the deathwatch sue as nominal, procedural plaintiffs, the courts employ a legal fiction: a pretense that the silent, curled-up daughter is doing the asking, and not the people who file the petition. What would we gain by dispensing with that pretense? Judicial honesty. Recognition by the courts that the members of the deathwatch are people in pain. Release from the awkwardness of fabricating intent for someone who no longer has any intent. Respect for a judicial system that confronts openly the reality of a situation, a judicial system that does not need the smoke screen of a legal

against legal fictions also captures the carryover problem:[73] "They [lawyers] feed upon untruth, as the Turks do upon opium, at first from choice and with their eyes open, afterwards by habit, till at length they lose all shame, avow it for what it is, and swallow it with greediness, not bearing to be without it."[74]

In sum, the law should avoid these stare decisis workarounds as they contravene their stated goal and also raise ancillary problems. Instead, courts should just directly modify the common law where appropriate. The modern trend away from these formalistic techniques evidences movement in the right direction. Hopefully all jurisdictions ultimately will follow suit.[75]

2. Form as a Desired Proxy

The contracts consideration area provides an alternative proxy explanation for endorsed shams. Courts occasionally use a formalism as a proxy for a more substantive point. For instance, even a "peppercorn"

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fiction. . . . It is true that the use of the legal fiction may engender disrespect for a judicial system that cannot openly confront the reality of the situation.").

73. In similar carryover fashion, much tax law commentary expresses concern that tax avoidance by some increases similar behavior by others. Professor Sulami, for instance, succinctly captures this tainting concern: "transactions that claim inappropriate tax benefits breed disrespect for the tax system and the law, which increases non-compliance" by others. Orly Sulami, *Tax Abuse—Lessons from Abroad*, 65 SMU L. Rev. 551, 557 (2012). For a similar sentiment, see Noël B. Cunningham & James R. Repetti, *Textualism and Tax Shelters*, 24 Va. Tax Rev. 1, 3 (2004) ("Corporate tax shelters breed disrespect for the tax system—both by the people who participate in the tax shelter market and by others who perceive unfairness." (quoting U.S. Treas. Dep't, The Problem of Corporate Tax Shelters: Discussion, Analysis and Legislative Proposals 3 (1999)); *see also* Joseph Bankman, *The Economic Substance Doctrine*, 74 S. Cal. L. Rev. 5, 22 (2000) ("The shelters of the early 1980s were thought to erode confidence in, and compliance with, the tax law. The same can be said, perhaps, of today's corporate tax shelters.").

74. Jeremy Bentham, *A Comment on the Commentaries*, *in* A Comment on the Commentaries and A Fragment on Government 59 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1977).

75. *See, e.g.*, Dukeminier et al., *supra* note 29, at 397 (noting "the modern trend is away from requiring adherence to the old four unities for purposes of creating joint tenancies").

of consideration arguably serves notice to the promisor of the promise's enforceability.[76] As developed below, however, peppercorn consideration only weakly serves this so-called cautionary function. More importantly, similar to the stare decisis area, peppercorn consideration exacerbates the carryover problem.

A second recent teaching anecdote evidences the pernicious carryover impact of the peppercorn rule.[77] A tax student, who was working part time for a practicing lawyer, shared the following exchange. The lawyer stated that gift tax consequences could be avoided by "selling" valuable property to a family member for a small fee. Based on our tax class, though, the astute student pushed back on substance over form grounds. The lawyer defended his statement by reference to contract law, claiming that any consideration effectively converts a gift to an exchange. The practicing lawyer (who was not a tax expert) falsely applied the contract law approach to tax law.[78]

The following quote from a tax commentator reinforces this anecdote. The commentator alerted readers that the contracts peppercorn approach would not carry over to another tax law issue:

> It is important that the "business" requirement be satisfied in more than a cursory or convenient manner. A peppercorn may constitute adequate consideration for a contract in theory under the common law, but with

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76. David Gamage & Allon Kedem, *Commodification and Contract Formation: Placing the Consideration Doctrine on Stronger Foundations*, 73 U. Chi. L. Rev. 1299, 1309 (2006) ("The 'cautionary' rationale. Another formal argument claims that the consideration doctrine ensures that a promisor intends to be legally bound and that she does so only after sufficient deliberation. By requiring an extra step—the transfer of consideration—before rendering a promise enforceable, the doctrine prevents promisors from hastily committing themselves to obligations they might later regret. The ritual of consideration also ensures that the promisor intends to be bound legally. Even a promisor who fully intends to perform at the time the pledge is made may wish not to render his promise legally enforceable. By failing to receive consideration in return for the promise, the promisor can ensure that the legal system will not become involved in the event of breach." (footnotes omitted)).

77. As noted above, these anecdotes helped to motivate this Article.

78. Note that there are special part sale/part gift rules for tax purposes. *See* Reg. §§ 1.1001–1(e), 1.1015–4. In contrast, contract law generally treats a part sale/part gift as a sale.

> respect to establishing the existence of a business being carried on, the taxpayer should ensure that the alleged business is reasonably considered as such.[79]

In addition to its problematic carryover potential, peppercorn consideration poorly correlates to its ultimate goal. The stated cautionary purpose rests on the promisor's knowledge of the link between stated consideration and enforceability of the promise.[80] Once again, why not just achieve the desired outcome more directly? For instance, the consideration requirement could be waived where the promisor states an intent to be bound.[81] The well-reasoned Uniform Commercial Code section 2–205 on firm offers takes this approach,[82] as did an earlier

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79. Roch Martin, *Recent Income Tax Developments*, 40 Alta. L. Rev. 19, 42 (2002).

80. For rejection of the possible cautionary function justification, see Gamage & Kedem, *supra* note 76, 1310 ("And any formality would similarly ensure that the promisor intended to be bound. Neither evidentiary nor cautionary arguments can justify the consideration doctrine. . . . Although we clearly need some mechanism for distinguishing binding contracts from empty statements, existing formal accounts do not show why the consideration doctrine best serves this role. To the extent we believe in the principle of honoring parties' intentions, we should instead enforce all promises where the promisor clearly declares that she wishes to be bound."); Val Ricks, *Assent Is Not an Element of Contract Formation*, 61 Kan. L. Rev. 591, 639–640 (2013) ("If the peppercorn is merely nominal, or in name only, then it has legal effect not because it induces the promise, even objectively, but because it is a formality, like a seal. In the actual cases, however, the peppercorn language does not have that function at all."); Celia Taylor, *My Modest Proposal*, 18 St. Thomas L. Rev. 117, 120 (2005) ("[U]se of a peppercorn, which, while perhaps providing some small evidentiary guidance, does not fill the cautionary . . . function.")

81. This links back to the stare decisis discussion *supra* in Section II.A.1: courts should just accomplish their goals more directly where possible.

82. U.C.C. § 2-205 (Am. Law Inst. & Unif. Law Comm'n 1951) provides: "An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months. . . ." In unfavorable contrast, the Restatement (Second) of Contracts § 87 (Am. Law Inst. 1981) provides that: "An offer is binding as an option contract if it is in writing and signed by the offeror, *recites a purported*

proposal by the highly influential Samuel Williston.[83] This would send a direct, rather than a mixed, message without the troubling carryover impact. Again, the law should endeavor to avoid rules where substantive results turn on meaningless aspects.

B. Unsanctioned Shams

Section II.A highlighted how courts sometimes actually endorse the workaround. This Section B now focuses on situations where a court tolerates, but does not sanction, the dodge. Section B.1 first presents several reasons why courts sometimes tolerate the workaround despite the lack of approval. Once armed with a better understanding of the underlying judicial concerns, Section B.2 then crafts a new sham defense system, sensitive to both those judicial reservations and the need to foster more respect for legal requirements.

1. Explanations

This Section explores the reasons for the current judicial reluctance to police certain abusive workarounds. First, courts might not appreciate fully the sham nature of some workarounds or the broader carryover implications. Next, some courts hesitate to police workarounds given the indefiniteness of the inquiry. Finally, vagueness concerns fuel

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consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time. . . ." (emphasis added).

83. The Uniform Written Obligations Act provided that a signed written promise should not be unenforceable for lack of consideration if it contained "an additional express statement, in any form of language, that the signer intends . . . to be legally bound." Model Written Obligations Act § 1 (1925), *reprinted in Current Legislation: The Uniform Written Obligations Act*, 29 Colum. L. Rev. 206, 206 (1929). The drafter Williston noted: "It is something, it seems to me, that a person ought to be able to do, if he wishes to do it,—to create a legal obligation to make a gift." Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Thirty-Fifth Annual Meeting 194 (1925); *see also* Gamage & Kedem, *supra* note 76 (providing well-reasoned recent commentary with a similar point); Joseph Siprut, *The Peppercorn Reconsidered: Why a Promise to Sell Blackacre for Nominal Consideration Is Not Binding, but Should Be*, 97 Nw. U. L. Rev. 1809, 1813 n.25 (2003) (chronicling the history of the Act).

additional separation of powers concerns in legislative areas. The three subparts below address these points in turn.

a. Lack of Full Appreciation

Some courts might not fully recognize the sham characteristics or appreciate fully the broader stakes. As developed more fully below, the lack of a precise sham definition contributes to the problem of under-identified shams.[84]

Several cases illustrate this current lack of full appreciation. Consider again the clear-cut divorce and remarriage sham in *Boyter*. While the *Boyter* appellate court held that the annual divorce/remarriage could constitute a sham, they chose not to express a view on the merits.[85] They instead remanded the case back to the trial court for additional findings, missing out on a terrific opportunity to condemn more strongly such a blatant disregard for legal requirements.[86] In addition, a dissenting judge wrote that the sham doctrine should not apply if the divorces were valid under state law.[87]

Consider next the *Aereo* copyright case, another clear-cut sham as per Judge Chin's opinion. While the Supreme Court ultimately validated Chin's take, Chin wrote in dissent in the circuit court. And the trial court likewise found in favor of the sham, as did a dissenting opinion at the Supreme Court level.[88] Once again, some judges resist the disregard of shams even in seemingly clear-cut cases.

While the Supreme Court ultimately disregarded the sham in *Aereo*, sometimes the sham-insensitive opinions stand as the force of law. For instance, consider the controversial *al-Hakim v. Commissioner*.

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84. This will be focus on Section II.B.2, *infra*.

85. *See* Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 Colum. L. Rev. 809, 845–46 & n.148 ("[O]ne federal appellate panel suggested that the Boyters' divorces might not be recognized under the tax code because they were 'shams.' . . . Without expressing a view on the merits, the panel remanded the case to the tax court. . . .").

86. See Professor Glasbeek's insightful quote *infra* note 177.

87. The majority opinion instructed that the sham doctrine could apply even if the state recognized the (out-of-state) divorces as valid. Boyter v. Comm'r, 668 F.2d 1382, 1388–89 (4th Cir. 1981) (Widener, J., dissenting).

88. ABC, Inc. v. Aereo, Inc., 573 U.S. 431, 462–63 (2014). The dissent was written by Justice Scalia, a textualist proponent. *See* discussion *infra* note 107.

Baseball player Lyman Bostock signed a contract, entitling his agent al-Hakim to a bonus of $112,500. Al-Hakim wanted all the cash in the current year but wanted to defer the tax reporting.[89] Drawing upon the fact that loans are not taxable income,[90] the engineered arrangement provided for (1) a deferred "fee" in ten annual installments of $11,250, with (2) a $112,500 "loan" to al-Hakim repayable in ten annual payments of $11,250.

The court surprisingly upheld the deferred income reporting[91] even though the agent received $112,500 cash in the first year with no further cash transfers.[92] In a noticeably short analysis, the Tax Court simply stated: al-Hakim "testified that the $112,500, which Bostock transferred to him, was a loan, and the letter, which al-Hakim sent to Bostock, supports al-Hakim's testimony. . . . Based on petitioner's testimony and its supporting documentation, we find that the $112,500 . . . was a loan, and not the payment of his $112,500 fee."[93] In noting the "seeming unreality of this case," Professor Klein concluded that "a strong argument can be made that the decision in *al-Hakim* is simply wrong."[94]

Finally, the contracts peppercorn area further evidences the uneven judicial recognition of the sham problem. Two points particularly

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89. A simple payment of the fee in the current year clearly would have required the inclusion of the full fee. Deferred reporting can lower the true tax cost in one of two possible ways. First, a delayed reporting lowers the true cost under time value of money principles (as the taxpayer retains the cash over time). Deferred reporting of a lump sum can also lower the applicable tax rate by leveling out the annual reported income under our progressive rate structure.

90. Loans are not taxable income despite the receipt of cash due to the offsetting obligation to repay.

91. Only $11,250 each year for ten years.

92. No further cash changed hands due to the matching schedules on the fee and loan.

93. Al-Hakim v. Comm'r, T.C. Memo 1987-136, 1987 Tax Ct. Memo LEXIS 136, at *22.

94. William A. Klein, *Tailor to the Emperor with No Clothes: The Supreme Court's Tax Rules for Deposits and Advance Payments*, 41 UCLA L. Rev. 1685, 1695 n.41 (1994). Professor Klein also highlighted two comparable cases which disregarded the formal arrangement. *Id.* The two cases are: Frierdich v. Comm'r, 925 F.2d 180 (7th Cir. 1991), and United States v. Ingalls, 399 F.2d 143 (5th Cir. 1968).

evidence this explanation for some courts' application of the peppercorn approach.[95] First, some courts state how a peppercorn or nominal consideration counts "if it is . . . in fact agreed upon."[96] This misses the mark, though, as a nominal peppercorn can never really induce the bargain. As Judge Posner aptly noted: "[s]light consideration, therefore, will suffice to make a contract or a contract modification enforceable. . . . [But] to surrender one's contractual rights in exchange for a peppercorn is not functionally different from surrendering them for nothing."[97] Second, some courts state how a peppercorn can suffice at law, but not in equity.[98] Such divide evidences understandable discomfort with the peppercorn approach, but such concern unfortunately does not then always carry over to regular remedies at law.

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95. As discussed above, several other reasons might explain some judges' willingness to validate a peppercorn. See, for example, above on cautionary function and below on preference for easier borders to patrol. As evidenced by the textual discussion, though, lack of full sensitivity to legal manipulations provides another explanation in some instances.

96. Hart v. Hart, 160 N.W.2d 438, 444 (Iowa 1968) ("The general rule is that consideration is not insufficient merely because it is inadequate. The legal sufficiency of a consideration for a promise does not depend upon the comparative economic value of the consideration and of what is promised in return. In other words, the relative values of a promise and the consideration for it do not affect the sufficiency of the consideration, and whatever consideration a promisor assents to as the price of his promise is legally sufficient. Even a nominal consideration . . . will sustain a promise if it is the consideration in fact agreed upon." (quoting 17 Am. Jur. 2d *Contracts* § 102) (omission in original)).

97. United States v. Stump Home Specialties Mfg., Inc., 905 F.2d 1117, 1122 (7th Cir. 1990). In similar fashion, see Perillo & Bender, *supra* note 34, § 5.17 ("By the word 'nominal' we mean 'in name only'—the purported consideration is given, but is not bargained for as part of an exchange. It is given as a mere pretense or formality.").

98. *See, e.g.*, Haft v. Dart Grp. Corp., Civ. A. No. 13736, 1994 WL 643185, at *2 (Del. Ch. Nov. 14, 1994); Mid-Town Petroleum, Inc. v. Gowen, 611 N.E.2d 1221, 1227 (Ill. App. Ct. 1993); Rose v. Lurvey, 198 N.W.2d 839, 841 (Mich. Ct. App. 1972) (in a matter involving the transfer of a parcel of land for a dollar, noted that "it is a general principle of contract law that courts will not ordinarily look into the adequacy of the consideration in an agreed exchange. Equity will, however, grant relief where the inadequacy of consideration is particularly glaring.").

b. Indefinite Borders Difficulties

The contracts peppercorn area also links to another reason for the reliance on seemingly inconsequential factors: the ease of enforcement. In theory at least, a "meaningful" consideration test would better differentiate enforceable bargains than the peppercorn approach.[99] But this requires the more difficult task of measuring the meaningfulness of consideration. In contrast, the peppercorn approach provides a more straightforward inquiry as to any consideration, no matter how inconsequential.[100] Some courts therefore prefer the peppercorn border despite its meaningless (in substance) tipping point given the preference for more definite borders.[101] In this regard, the lack of a precise sham definition again accentuates the problem.[102]

This analysis also links to the tax law's economic substance doctrine. The recently codified economic substance doctrine provides in relevant part that a "transaction shall be treated as having economic substance only if the transaction changes in a *meaningful* way (apart from Federal income tax effects) the taxpayer's economic position."[103] This highly controversial provision has generated much criticism over

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99. *See, e.g.*, Arnow-Richman, *supra* note 38, at 47–48 (noting that some courts might set aside "negligible" consideration and that "meaningful consideration, as opposed to a peppercorn, might go a long way toward making the [employer] changes palatable to workers.").

100. For courts' general reluctance to police adequacy of consideration, see, for example, *Rose*, 198 N.W.2d at 839.

101. Courts, of course, do utilize more open-ended approaches at times. This links more generally to the rules versus standards debate. *See, e.g.*, Cass R. Sunstein, *Problems with Rules*, 83 Cal. L. Rev. 953 (1995). As per the rules versus standards comparison, one downside to open-ended standards is the uncertainty in application.For one commentator's take that courts really do police for meaningfulness even if they say otherwise, see Ricks, *supra* note 80, at 641–42. If so, this explanation would not extend to the contracts peppercorn area. But even if so, courts should then state the rule explicitly to avoid confusion and the carryover impact noted above. See discussion of the second anecdote at notes 77–78 and accompanying text *supra*. And for another commentator's take that some courts do in fact apply the peppercorn approach, see Gamage & Kedem, *supra* note 76.

102. The lack of a clear definition also contributes to the judicial failure to recognize shams at times.

103. I.R.C. § 7701(o) (emphasis added).

its vagueness (including the meaningful aspect)[104] and the attendant possible overbreadth application to legitimate transactions.[105]

c. Special Issues Where Legislation

Legislation can further undercut some judge's willingness to disregard legal maneuvers. Where such machinations seemingly comply with a statute's literal language, some courts might raise a separation of powers concern.[106] This concern then arguably supports a more textualist approach to statutory interpretation, with greater reliance on literal compliance.[107] The above vagueness and overbreadth concerns[108] further fuel these legislation-specific impediments. Not only are the parameters indefinite, but they now operate in the space of specific statutory provisions.

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104. For a discussion on meaningful versus substantial, see Terence Floyd Cuff, *Section 7701(o)*, 70 N.Y.U. Ann. Inst. Fed. Tax'n § 13.14 (2012).

105. *See* Ellen P. Aprill, *Tax Shelters, Tax Law, and Morality: Codifying Judicial Doctrines*, 54 SMU L. Rev. 9, 34 (2001) ("Deciding whether over-inclusion or under-inclusion produces the greatest danger is an empirical question—how many tax shelters and at what size would be stopped by codifying judicial doctrines versus how many legitimate transactions and at what size would be stopped by this codification."); Charlene D. Luke, *The Relevance Games: Congress's Choices for Economic Substance Gamemakers*, 66 Tax Law. 551, 560 (2013) ("Codification may have put an end to arguments that the economic substance doctrine was invalid because of a lack of statutory authority, but such quasi-tax-protester arguments comprised only a small part of the criticisms leveled at the doctrine. In particular, the statute does not directly address various 'when' questions of economic substance: When will taxpayer action rise to the level of a 'transaction?' When will such a transaction be scrutinized under the doctrine? When will the doctrine be applied in preference to other tax authorities? When will a transaction be likely to fail the inquiries of the doctrine?").

106. *See, e.g.*, Coltec Indus., Inc. v. United States, 62 Fed. Cl. 716, 756 (2004), *vacated*, 454 F.3d 1340 (Fed. Cir. 2006).

107. William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 Mich. L. Rev. 1509, 1511 (1998) (book review) ("Yet Scalia's theory really is a new textualism. Theoretically, Scalia defends his approach based upon a strict formal separation of powers. . . ."). Note how Justice Scalia wrote the dissenting opinion in *Aereo*, *supra* note 88.

108. See discussion in Section II.B.1.b, including reference to the tax law's economic substance doctrine.

The earlier usurious interest example nicely illustrates the challenge in the face of legislation. On the one hand, the court certainly recognized the excessiveness of the interest charge to the supposedly protected borrower.[109] The court nonetheless declined to intercede on behalf of the borrower given the statutory scheme. Separate from its usurious interest provision, the Texas legislature allowed a loan broker to receive a "credit service fee."[110]

The earlier homebuyer protection area further highlights additional difficulties in legislative areas. Texas originally targeted contracts for deeds (CFDs), but not the comparable rent-to-own (RTO) arrangement. This induced some sellers to substitute RTOs for CFDs to avoid the buyer protections. While there was no court challenge in this instance, comparable RTO challenges have been raised in bankruptcy courts.[111] The bankruptcy courts have struggled with the issue, however, given some potential substantive differences in the RTO structure. For instance, RTOs might meaningfully differ depending on the exercise price on the buy option.[112] Given such ambiguity in the comparability, a court therefore might be reluctant to extend the coverage where the legislature specifically targets just the CFD.

2. The Judicial Response

Section B.1 highlighted several reasons why courts might tolerate certain shams without endorsing them. But just like endorsed shams, this current approach imposes a high cost as these tolerated shams foster disrespect for legal requirements. This Section therefore forges a pathway out of the quandary: a new sham defense system sensitive to the

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109. The court acknowledged that "a $1500 fee for a $2000 loan appears quite excessive." As such, the court did not evidence a lack of full appreciation for the sham nature. Lovick v. Ritemoney, Ltd., 378 F.3d 433, 443 (5th Cir. 2004).

110. See discussion in Section II.B.3.

111. *See* discussion *supra* note 53.

112. For instance, the RTO can operate very differently where the initial exercise price is set at fair market value and does not decrease for any rental payments. On the other hand, the RTO mirrors the installment sale where the exercise price initially is set well below FMV or declines upon rental payments. And in the middle, the RTO has some comparability in less extreme cases such as where the exercise price drops for some but not all of the rental payments.

concerns underlying the current inaction. First, Section B.2.a responds to the problematic lack of a clear sham definition. Section B.2.b then reinforces the proposed clear sham definition with a balanced summary judgment approach.

a. Baseline Protection: Pure Sham

The judicial sham application currently lacks consistency and vitality. Section II.B.1 highlighted several underlying reasons for the tepid approach: lack of full sham awareness, vagueness concerns, and uncertainty regarding legislative boundaries. The current lack of a clear sham definition fuels all these factors.[113] Accordingly, the precise, and limited, sham definition below addresses each of these root causes. Along with a better understanding of the spillover effects,[114] such definition should induce more vigorous protection against shams.

Consider first a possible sham definition targeting "results that are just too good to be true." This phrase intuitively appeals as it neatly captures the essence of the problem.[115] By itself, though, this very general definition would accentuate vagueness concerns.[116] A more precise

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113. For the lack of clear sham definition in tax law, see Karen Nelson Moore, *The Sham Transaction Doctrine: An Outmoded and Unnecessary Approach to Combating Tax Avoidance*, 41 Fla. L. Rev. 659 (1989). For the general importance of a good definition, see Henry T. Greely, *Banning "Human Cloning": A Study in the Difficulties of Defining Science*, 8 S. Cal. Interdisc. L.J. 131, 131 (1998) ("In legislating, the difficulty of writing a good definition is matched only by its importance.").

114. As discussed above, part of the problem is lack of focus on carryover impact, so part is also to drive home that point about the extent of the problem (and the spillover). And note how time might be ripe now to get attention with the noteworthy state tax situation.

115. *See* Phillip Blackman & Kirk J. Stark, *Capturing Federal Dollars with State Charitable Tax Credits*, 68 St. Tax Notes 59, 59 (Apr. 1, 2013) (charitable deduction "outcome may sound too good to be true"); *see also The IRS Is About to Lower the Boom on New Jersey's Effort to Make State Taxes Deductible for Federal Purposes*, Archer Law, https://www.archerlaw.com/the-irs-is-about-to-lower-the-boom-on-new-jerseys-effort-to-make-state-taxes-deductible-for-federal-purposes/ (last visited Apr. 9, 2019) ("As the old saying goes, 'if it sounds too good to be true, it probably is.'").

116. This might bring to mind Potter Stewart's memorable pornography definition in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J.,

standard thus should supplement this catchy phrase, which can be used as an additional guiding principle.[117]

The classic Tillie Goldstein case provides a possible more precise definition: do the transactions return the parties to their starting position?[118] While a good start, this does not address situations where the status quo will change with or without the workaround.[119] An

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concurring). For a vagueness reference to such standard, see, for example, H. Jefferson Powell, *The Regrettable Clause:* United States v. Comstock *and the Powers of Congress*, 48 San Diego L. Rev. 713, 742–43 (2011) ("Adopting 'I know it when I see it' as the standard for implementing the Necessary and Proper Clause would make the Court's five considerations look like a model of precision, and it would be ironic indeed if Justice Alito's opinion had in fact adopted this as a standard of review in light of his criticism of the Court's ambiguity.").

117. *See* Reg. § 1.6662–3(b)(1)(ii) ("Negligence [penalty] is strongly indicated where . . . [a] taxpayer fails to make a reasonable attempt to ascertain the correctness of a deduction, credit or exclusion on a return which would seem to a reasonable and prudent person to be 'too good to be true' under the circumstances. . . ."). *Cf.* Luke, supra note 105 at 560-61 ("[I]t is fair to say that the common law economic substance doctrine carried with it an unofficial step that was more of a smell test than a formalized inquiry. The boundaries of this unofficial economic substance inquiry were necessarily amorphous because abusive tax avoidance schemes may be built from smaller bits of law and facts that are inert when kept apart but catch fire when combined. Indeed, the necessity of an economic substance standard lies in the practical impossibility of stating in advance all possible abusive permutations given the size and complexity of the tax system. Sometimes a smell test is the best available choice, even if there is a natural hesitation to state baldly that tax consequences hinge on a judgment call.").

118. Goldstein v. Comm'r, 364 F.2d 734, 737 (2d Cir. 1966) (apart from the attempted tax savings, do the "transactions . . . within a few days return all the parties to the position from which they had started"). In this textbook classic, Tillie Goldstein won the lottery and her son steered her into a series of transactions designed to reduce the tax bite on the lottery winnings.

119. Compare the discussion of § 7701(o) economic substance standard in Cuff, *supra* note 104, § 13.14[10] ("The baseline for comparison is not always readily apparent. The baseline, in some situations, should be 'do nothing.' The analysis then might compare the results with the transaction and the results with doing nothing. Do nothing is not an alternative in many situations. A taxpayer may need to move from point A to point B. The taxpayer might move from point A to point B following a variety of paths. A

additional prong neatly captures those cases, as well. Namely, does the challenged workaround either (1) return the parties to their starting position or (2) alter the status quo in the same manner as a more normal and straightforward alternative pathway.[120]

This definition heeds the underlying reasons for the current lack of more aggressive enforcement. First, the preciseness of the definition should enhance the ability to identify the sham characteristics. Second, the limited nature of the definition addresses the vagueness, overbreadth, and separation of power concerns. As such, this approach should be able to entice even a textualist leaning jurist.[121] In this regard, the definition purposefully incorporates a more limited reach than the controversial economic substance doctrine. The definition targets just the most egregious cases with a complete lack of substance.[122] In contrast, recall how the broader meaningful change standard fuels vagueness and overbreadth concerns.

Consider now how this pure sham definition would capture some of the earlier extreme illustrations. The *Boyter* divorce and remarriage should be caught by the first prong as the two steps returned the parties right back to their starting point. The *al-Hakim* fee and loan arrangement should be caught by the second category as the end result matches the more straightforward simple fee payment.[123] The second prong likewise catches the contract two-step rescission, which places the parties in the same place as a simple renegotiated price term on the original deal.[124] Finally, Judge Chin's *Aereo* opinion is particularly on point. *Aereo* likewise should be caught by the second prong as the use

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court might identify one of these paths as a baseline. The court might compare the results under the transaction approach with the results under the baseline approach. A court might compare the transaction with doing the same thing in a normal, non-tax-motivated way.").

120. Cuff, *supra* note 104, § 13.14[10].

121. See Cunningham & Repetti, *supra* note 73, for how the sham doctrine should not trigger the same textualism concerns as the broader economic substance doctrine.

122. Note that Sections II.B.2.b and B.3 will provide additional backstop protection.

123. See discussion *infra* at note 149 for how a taxpayer might try to avoid application of the clear sham definition by highlighting possible bankruptcy differences.

124. Note that the modified deal could involve something other than the price term.

of many tiny individual antennas achieves the same result as the more straightforward central antenna.[125] In this regard, recall Chin's insightful reference to a Rube Goldberg machine: a machine intentionally designed to perform a simple task in an indirect and overcomplicated fashion.[126]

To round out the analysis, consider two more ambiguous cases to see the limits of the pure sham test.[127] Consider first the current state tax manifestation. As noted above, Illinois initially considered a 100% credit, with a later reduction to 90%. The 100% version should satisfy the clear sham definition as taxpayers pay the same amount to the state regardless of the workaround. For instance, assume Tommy Taxpayer owes Illinois $30,000 tax and contributes $20,000 to the Education Fund.[128] Tommy pays Illinois the same $30,000 total amount as his tax bill drops to $10,000.[129] The only impact is on the federal tax bill.[130] The 90% version arguably falls outside the pure sham definition as Tommy pays an extra $2,000 to Illinois on the same $20,000 charitable contribution.[131] On the other hand, Tommy still pays less overall after the

125. *See supra* text accompanying note 42 (quoting from Chin's dissenting opinion).

126. *Rube Goldberg*, Wikipedia, http://en.wikipedia.org/wiki/Rube_Goldberg (last visited Apr. 9, 2019).

127. In addition to the two textually ambiguous cases, the rent-to-own area likely would fall outside the definition due to the possible substantive differences. As discussed in Section II.B.3, *infra*, the RTO might be better served by legislative coverage given the complexity of the analysis.

128. This assumes that Tommy is quite mindful of the new $10,000 cap on state tax deductions. With such cap, $20,000 of his state taxes are nondeductible and could benefit from the conversion ($30,000 tax less $10,000 allowable deduction equals $20,000 nondeductible tax).

129. $30,000 tax less the $20,000 credit.

130. If respected for federal tax purposes, the workaround would generate a $30,000 deduction instead of a $10,000 deduction, saving Tommy $20,000 times the appropriate tax rate. For instance, at a 40% federal tax rate, Tommy would save $8,000 in federal tax from the workaround (if respected).

131. $32,000 total instead of $30,000 since the $20,000 contribution would generate an $18,000 credit with the reduced 90% credit. Thus, the state tax bill would now increase to $12,000 ($30,000 tax less $18,000 credit). This change in optics might have motivated the change. Note also how Illinois grabs some of the tax savings under this version (the 10% uncredited portion).

federal tax savings, and the reduced credit simply shifts some of those savings to Illinois.[132]

The peppercorn consideration issue provides another possible ambiguous case. On the one hand, peppercorn consideration substantively provides the "same" results as a complete lack of any consideration.[133] The standard therefore should be construed to catch the earlier hypothetical of a $10,000 promise to change a burnt-out lightbulb. On the other hand, the sham definition above does not explicitly cover situations with slight changes.

Along with the 90% credit scheme above, this ambiguity highlights a more general tipping point issue.[134] Since aggressive parties might claim that any change from the baseline avoids the sham disregard, why not expand the definitional scope to require a meaningful change? A full-fledged meaningful change standard revives, however, the vagueness and related concerns from Section II.B.1.[135] The next subpart thus considers a refined meaningful change approach to minimize those concerns.

b. Balanced Summary Judgment Expansion

Vigorous application of the pure sham definition above would significantly improve the law. But as previously noted, it puts pressure on the completeness of the sham: i.e., negligible changes might avoid the disregard.[136] This suggests strengthening the definition to include situations with only a non-meaningful change.[137] This heightened approach

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132. See discussion below in the next section for how an expanded test would clearly pick up the 90% scheme.

133. Gamage & Kedem, *supra* note 76 (some courts try to separate out gifts).

134. See also the discussion of possible bankruptcy differences in the *al-Hakim* case, *infra* note 149.

135. See, for example, the discussion of the tax law economic substance doctrine *supra*.

136. Consider, for example, a California legislator's attempt to improve the optics of the state tax workaround by moving the contributions to a local (rather than a state) charity to "put more distance between the government that gives the tax credit and the entity receiving the benefit." Mahoney, *supra* note 16.

137. *See supra* notes 103–105 and accompanying text; *see also* Arnow-Richman, *supra* note 38, at 48 (noting that some courts might set aside

has more viability for business tax transactions given the pervasiveness of the problem in that area.[138] For most areas, however, a full-fledged meaningful change approach falters due to the overbreadth, textualism, and separation of powers concerns above.[139] The ultimate quest thus

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"negligible" consideration and that "meaningful consideration, as opposed to a peppercorn, might go a long way toward making the [employer] changes palatable to workers").Note that the sham doctrine can start to blend into the broader economic substance doctrine. *See, e.g.*, Moore, *supra* note 113. There is some truth to that notion as the doctrines might properly be viewed on a continuum with sham doctrines occupying the more extreme end. Nonetheless, there is value to separating out the more extreme sham as the broader raises all the concerns discussed in the text. And again, the quest here is to craft a more limited approach, which addresses the concerns of a broader approach.

138. In this regard, Congress recently codified the economic substance doctrine with a meaningful test, applicable "only to transactions entered into in connection with a trade or business or an activity engaged in for the production of income." I.R.C. § 7701(o)(5)(B). The tax area is a breeding ground for manipulative commercial transactions due to the following reasons. First, the net income concept generally permits taxpayers to use net losses from one activity against income from another, subject only to certain limitations. *See, e.g.*, I.R.C. § 469. *Cf.* Sulami, *supra* note 73, at 560 ("[S]pecific anti-avoidance rules cannot legislatively define the almost infinite tax abusive transactions that may arise."). Second, the complexity and ambiguity of the tax law can encourage tax-sheltering activities. *See* Chris Evans, *Containing Tax Avoidance: Anti-Avoidance Strategies* 38 (Univ. of N.S.W. Faculty of Law Research Series, Working Paper No. 40, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1397468. Third, the large market of taxpayers allows a spreading of loophole-creation costs among a large number of buyers. *See* Bankman, *supra* note 73, at 18 ("A rule that allows taxpayers . . . to manufacture circumstances in which they arise would be ruinous to the fisc. . . . [O]ne might expect the creation of a tax-shelter industry devoted to discovering and marketing loopholes. The tax-shelter industry would be able to amortize costs over many taxpayers, thus greatly reducing the per-taxpayer cost of locating shelters. . . ."). More generally, see Cunningham & Repetti, *supra* note 73, at 55, for how tax law differs from other areas in some ways due to the "flurry of tax shelters."

139. Note how the economic substance doctrine has generated much controversy even in the tax area, which has more compelling factors for a stronger response. *See, e.g.*, David P. Hariton, *Economic Substance Complaint No. 1: 'Too Vague and Too Broad*,' 96 Tax Notes 1893 (Sept. 30, 2002). This further reinforces why a scaled back version is more appropriate for general application.

requires a screening mechanism that nets the more obvious cases with only negligible changes,[140] without triggering the open-ended concerns of the unlimited meaningful test. As developed below, a refined meaningful test strikes a better balance. This section presents such possible refinement, drawing upon the summary judgment mechanism used elsewhere to ferret out shams and likewise balance competing concerns.

The summary judgment approach would provide the following addition to the pure sham definition above (restated before the addition):

> Pure sham definition: Does the challenged workaround either (1) return the parties to their starting position, or (2) alter the status quo in the same manner as a more normal and straightforward alternative pathway?[141]
>
> Proposed Addition: In "non-pure sham" cases with some change to the appropriate baseline above (either the starting position or the normal alternative pathway), the party challenging the sham must satisfy the summary judgment standard that such change is not meaningful.

The summary judgment alternative comes to mind for several reasons. Consider first Judge Wald's description of summary judgment: "As originally envisioned by its drafters . . . the purpose of Rule 56 was to weed out frivolous and sham cases, and cases for which the law had a quick and definitive answer."[142] This speaks directly to the search here for a balanced filter, catching the more extreme cases without overstepping certain bounds. In this regard, the challenged party would need to show only that a reasonable person could find in their favor as to the meaningfulness of the change (i.e., a credible claim).[143] This lowered threshold for the challenged party addresses the overbreadth concerns.

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140. In other words, to avoid the contract consideration state of affairs where a peppercorn can change substantive results.

141. *See* Cuff, *supra* note 104.

142. Patricia M. Wald, *Summary Judgment at Sixty*, 76 Tex. L. Rev. 1897, 1897 (1998).

143. *E.g.*, William W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 481

In addition, a 2005 Delaware opinion evidences similar judicial use of the summary judgment standard in the cyberSLAPP area.[144] CyberSLAPP cases involve the attempt by the subject of an anonymous online criticism to obtain the identity of the anonymous critic. The following language from the opinion captures use of the standard along with the desired balancing aspect:

> We conclude that the summary judgment standard is the appropriate test by which to strike the balance between a defamation plaintiff's right to protect his reputation and a defendant's right to exercise free speech anonymously. We accordingly hold that before a defamation plaintiff can obtain the identity of an anonymous defendant through the compulsory discovery process he must support his defamation claim with facts sufficient to defeat a summary judgment motion.[145]

Additional commentary on the case highlights the desired screening aspect: "In other words, adoption of a summary judgment standard in the Internet-based anonymous speech cases provides a mechanism for weeding out odious cyberSLAPPs."[146] In similar fashion, the summary judgement approach would provide a screening device to weed out the obvious shams. Also, by using a standard already familiar to judges, it should facilitate the efforts to induce a more robust sham response by the judiciary. It also addresses the overbreadth and related concerns by lowering the substantive bar for the challenged party.

(1983) ("[A dispute over] an issue is genuine if reasonable persons could disagree.").

144. Alternatively, courts could balance the competing concerns by requiring the party alleging the sham to prove the lack of meaningfulness to any asserted change by clear and convincing evidence. Some states use this standard as a way to balance the competing concerns in the cyberSLAPP area. *See, e.g.*, Davis v. Cox, 351 P.3d 862 (Wash. 2015). This Article prefers the summary judgment standard given its recognized role for ferreting out shams. See, for example, Judge Wald's quote *supra* at text accompanying note 142.

145. John Doe No. 1 v. Cahill, 884 A.2d 451, 460 (Del. 2005).

146. Clay Calvert et al., *David Doe v. Goliath, Inc.: Judicial Ferment in 2009 for Business Plaintiffs Seeking the Identities of Anonymous Online Speakers*, 43 J. Marshall L. Rev. 1, 24 (2009).

Application to some of the prior illustrations highlights these appealing aspects. The approach would neatly resolve the contract peppercorn morass without triggering full resolution as to the adequacy of consideration.[147] An exchange would need only sufficient consideration to survive summary judgment as to its meaningfulness. On the flip side, peppercorn or nominal consideration clearly would no longer suffice. For instance, this would remove any lingering doubts as to the sham nature of the lightbulb hypothetical.[148] The summary judgment approach also would provide backstop protection against unconvincing claims of small or remote differences in some of the clear-cut sham cases.[149]

In the other direction, the approach would not overstep its mandate. For instance, the standard would not shut down rent-to-own structures, which do not mirror contracts for deeds. The approach also would sustain the usurious interest result in *Lovick* given the statutory structure with permissible credit service fees for loan originators and the ambiguity of the broker relationship to the transaction.[150]

Finally, let's consider Illinois's revised state tax proposal with a reduced 90% credit.[151] As noted above, this arguably provides some

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147. *See* Gamage & Kedem, *supra* note 76, at 1306 (use of "morass" to describe the confusion over its parameters).

148. *See* discussion *supra* in Section II.B.2.a.

149. For instance, the Boyters could point to small differences related to the fact that they were not actually married all 365 days each year. Similarly, *al-Hakim* could highlight possible differences related to the cross obligations in later years under bankruptcy law. Again, the summary judgment standard should efficiently disregard such insignificant or remote claims.

150. As discussed *infra* in Section II.B.3, the legislature is in the best position to provide protection given the competing statutory provisions.

151. Note how the state tax issue seems to fall outside the more expansive economic substance test under Code section 7701(o)(5)(b). *See* discussion *supra* note 138. Further note how the *Boyter* case discussed how sham concepts should extend to personal matters like marriage: "Although the sham transaction doctrine has been applied primarily with respect to the tax consequences of commercial transactions, personal tax consequences have often served as the motive for those transactions. The principles involved, moreover, are fundamental to the system of income taxation in the United States and should be applicable generally." Boyter v. Comm'r, 668 F.2d 1382, 1387 (4th Cir. 1981) (citations omitted).

substance due to the citizen's increased state payments.[152] For instance, a $20,000 charitable contribution requires an extra $2,000 state payment.[153] But this should not validate the arrangement as the citizen still saves money after the federal tax savings. At an assumed 35% federal tax rate,[154] the citizen still saves $5,000 with the 90% credit.[155] As deeper analysis shows the insignificance of such change, a government challenge should be sustained as a matter of law under the summary judgment approach. At a minimum, the citizen should bear some net cost to survive summary judgment. Credit percentages of 65% or more therefore should be disregarded even if they could pass through the initial pure sham definition.

In contrast, a 50% credit should withstand scrutiny under the summary judgment approach since the taxpayer bears 15% of the cost.[156] This further highlights the proposal's appeal as a 50% credit might fail a full-fledged meaningful change test. The summary judgment approach not only limits the reach of the judicial disallowance but avoids uncertainty over more legitimate arrangements. And linking to the next Section, Congress could specify the maximum permissible credit percentage for additional protection.

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152. Subsequent to the legislation, the Treasury Department promulgated regulations that generally require taxpayers to reduce the claimed charitable contribution by the amount of the state tax credit. See discussion of the proposed regulations *infra* at notes 161–163 and accompanying text.

153. A $20,000 contribution generates an $18,000 credit.

154. The federal tax rates range from 10% to 37% for 2018. I.R.C. § 1.

155. $7,000 in federal tax savings (35% × $20,000 deduction). $7,000 federal tax savings minus $2,000 extra state cost equals $5,000. In further proof of the sham nature, note how the citizen could save even more money by boosting his charitable contribution (to $22,222) to achieve a $20,000 tax credit like under the 100% option. If so, the extra $2,222 charitable contribution would generate a $2,000 state tax credit (90% × $2,222) *and* about $777 (35% × $2,222) in federal tax savings for a net $555 of overall savings. The citizen would not want to contribute even more since the state tax credits would not save any more state tax (as the citizen has already driven the state tax bill down to the $10,000 already deductible amount).

156. This results as the citizen saves 85% of the cost: 50% for state taxes plus 35% for federal taxes.

3. Anticipate the Workaround: Legislative Protection

Section II.B.2 provided a balanced judicial approach to address legitimate overbreadth concerns. Given practical limits on the judicial protection, legislatures can buttress the protection through more careful and specific drafting as appropriate. In particular, legislatures should contemplate specific anti-abuse provisions for vulnerable areas with unclear dividing lines, nuanced analyses, or known workarounds.

Consider now three prior illustrations where the legislature could have provided better protection for the statutory provisions. Recall first the most recent manifestation: the current state tax scenario. The citizen bears a percentage of the charitable contribution equal to the excess, if any, of 65% over the credit percentage.[157] And so with better anticipation,[158] Congress could have avoided the current debate by simply specifying the permissible percentage as part of their legislation. For instance, if Congress believed that the taxpayer should bear at least about half the cost,[159] Congress could have included the following clause to new Code section 164(b)(6):

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157. This assumes a 35% federal tax rate. If so, the citizen bears 65% after the federal savings. As such, the citizen bears some cost only to the extent the state credit falls below 65%.

158. The state tax deduction workaround existed before the 2017 bill, albeit on a much-reduced scale. Under the alternative minimum tax (AMT), certain taxpayers lost the benefit of state and local tax deductions, but not charitable deductions, even prior to the 2017 tax limits. And some limited state tax credit regimes were already in place (and may have motivated the current proposals). Not only did the IRS not aggressively pursue these regimes previously, the IRS actually issued an advice memorandum sanctioning some of these regimes, albeit on redacted facts and with a non-reliance disclaimer for other taxpayers. *See* Blackman & Stark, *supra* note 115. As to the seeming reversal in position as to this workaround, the prior AMT workaround impacted a lesser number of taxpayers and did not involve a newly enacted limitation. Also, taxpayer self-help avoidance of the AMT might be considered more acceptable given the notion that the AMT operates unfairly (and should be repealed or scaled back but for revenue concerns). In any event, there are many lessons here. In addition to the textual point on legislating around known workarounds, the IRS perhaps should be more careful in issuing even non-reliance guidance, which can be viewed as a statement of their current position. *Id.*

159. The designated credit percentage could be easily adjusted as Congress felt appropriate. So, if Congress believed that the taxpayer should

> This $10,000 limitation shall apply to any charitable contribution which generates a state tax credit of more than 15% of the contribution.[160]

Interestingly, after circulation of this Article's original draft, the Treasury Department promulgated regulations with a comparable 15% credit approach.[161] These regulations further demonstrate the appeal of more careful legislation for several reasons. First, regulations might be challenged as contrary to the legislative intent.[162] Second, even assuming validity of the regulations, uncertainty exists during the interim period between the legislative enactment date and the effective date of the later-promulgated regulations.[163] For instance, consider the inefficiencies associated with all the proposed workarounds prior to the regulatory promulgation.

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bear at least about a quarter of the cost, the disallowance percentage could be increased to 40%.

160. Congress also should consider inclusion of the following clause at the end: "and any other comparable transaction structured to avoid the $10,000 limitation." For the sometimes-occasional use of this approach in the tax law, see, for example, § 1031(f)(4) (providing general statement that anti-avoidance rules apply to any "transaction . . . structured to avoid" § 1031(f)) and § 1259(c)(1)(E) (targeting specified transactions and any "other transactions . . . that have substantially the same effect as a transaction described in any of the preceding subparagraphs"). This would make clear that the specification of a known workaround does not then insulate subsequent sham attempts from challenge. *See also* discussion *infra* note 168.

161. The regulatory approach technically differs in that it requires taxpayers to reduce the charitable deductible amount by the allowable state credit percentage (rather than subjecting the charitable contribution to the $10,000 limitation). Reg. § 170A-1(h)(3)(i). Similar to the textual suggestion, though, the regulations provide an exemption from such reduction if the credit percentage is 15% or less. Reg. § 170A-1(h)(3)(i), (vi). And so, like the textual suggestion, state credit percentages of 15% or less avoid any limitation.

162. *See, e.g.*, Richard L. Fox & Jonathan Blattmachr, *IRS Proposed Regulations Nullify $10,000 Annual SALT Limitation Workaround Attempts by States and Political Subdivisions*, Daily Tax Rep. (BNA), Oct. 1, 2018, at 14.

163. *See, e.g.*, Marc T. Finer, *IRS Proposed Regulations Take the Bite Out of State Workarounds of SALT Deduction Cap*, Daily Tax Rep. (BNA), Sept. 25, 2018, at 11.

Consider next the rent-to-own (RTO) workaround to avoid homebuyers' protections. RTOs might meaningfully differ from the contract for deed (CFD) installment sales depending on the option's exercise price.[164] Specific legislative protections appeal here given the ambiguous interpretative issues.[165] In this regard, the Texas legislature eventually extended the homebuyers' protections to all RTOs,[166] but only after the lapse of several years.[167] And so while Texas serves as a useful role model for its legislative protections, it also shows the way for possible improvements. With more careful planning,[168] the Texas legislature could have included RTOs initially. Similar to the regulatory analysis right above, such initial protections would have avoided the time lag in protection and the inefficient attempted workarounds.

Texas legislators also could have avoided the *Lovick* usurious interest litigation through more careful drafting. Despite highlighting that "a $1500 fee for a $2000 loan appears quite excessive," the *Lovick*

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164. *See* discussion *supra* note 112.

165. *See* discussion *supra* note 127.

166. *See* Tex. Prop. Code Ann. § 5.062(a)(2) (West 2015) ("[A]n option to purchase real property that includes or is combined or executed concurrently with a residential lease agreement, together with the lease, is considered an executory contract for conveyance of real property."). A more nuanced approach would have included RTOs only where the terms pushed the RTO particularly close to the installment sale. See discussion *supra* on the pricing terms of the option.

167. Ward, Way & Wood, *supra* note 49, at 160.

168. Note the rich body of literature on RTOs. For tax issues in the real estate area, see, for example, Donald J. Valachi, *Lease Option or Installment Sale? Determine the "Economic Realty" of Your Lease-Option Transactions—or the IRS Will*, CCIM Inst., https://www.ccim.com/cire-magazine/articles/lease-option-or-installment-sale/?gmSsoPc=1 (last visited Apr. 9, 2019). There is also a rich body of literature in the bankruptcy area. *See, e.g.*, Barkley Clark, Dennis R. Dow & Steven P. Smith, *"Rent-to-Own" Agreements in Bankruptcy: Sales or Leases?*, 2 Am. Bankr. Inst. L. Rev. 115, 115 (1994) ("[T]he proper characterization of rent-to-own transactions has been subject to substantial debate over the past ten years."). Given the subsequent workarounds, the legislature also could have originally included a general application clause to "and any other comparable transaction structured to avoid the intended protections for home buyers." If so, the legislature might want to specify some transactions that would not be caught so as to alleviate excess concerns. *See* Sheldon I. Banoff, *The Use and Misuse of Anti-Abuse Rules*, 48 Tax Law. 827, 842 (1995); *see also* discussion *supra* note 160.

court denied any relief.[169] The court justified this result on grounds that the Texas legislative scheme clearly allowed for an additional "credit service fee" payable to the loan broker. And since "the Texas Legislature has not restricted the amount of [such] service fee in proportion to the services provided; we cannot substitute our judgment."[170] This legislative scheme calls for built-in legislative protections given the interplay of the separate usurious interest and broker free statutory provisions.[171] Rather than relying on courts to police potential abuses, a better legislative scheme would specify the aggregate permissible amount of interest and fees.

Conclusion

Many people will "cheat," "cut corners," or "pull stunts" to minimize their taxes, of course.[172] But this scofflaw mentality manifests itself in many other legal areas as well. This Article exposes one source of this broader legal problem: a judicial willingness to accept certain transactional fictions. This Article provides several explanations for why courts sometimes elevate meaningless formalities over substance. And despite some validity to these explanations, the current approach carries an unacceptably high cost. Courts unwittingly foster the problematic belief that you can achieve indirectly what you cannot do directly.[173] Consider Professor Liebesman's statement in response to Judge Chin's sham opinion in the *Aereo* copyright case: "Yet one person's loophole and sham is another person's work-around for the purpose of complying with the law."[174]

And so how should the law respond to this broader challenge? This Article provides a multi-pronged approach. The first step involves formalisms that courts actually endorse as a way to achieve desired

169. Lovick v. Ritemoney, Ltd., 378 F.3d 433, 443 (5th Cir. 2004).

170. *Id.*

171. It also involves a complicated inquiry into the relationship and roles of the separate lender and broker.

172. *Tax Cheats: The Most Common Ways People Cheat on Their Taxes*, Intuit TurboTax Blog (Apr. 20, 2011), https://blog.turbotax.intuit.com/tax-tips/tax-cheats-the-most-common-ways-people-cheat-on-their-taxes-6377/.

173. See *supra* note 66.

174. Liebesman, *supra* note 43, at 1439 n.248.

goals. This occurs when courts use the formalism as a proxy for something else or as a way to alter outmoded rules without an outright rejection. While seemingly benign at first, these intended workarounds foster the problematic mindset that other unintended workarounds likewise comply with the law. Therefore, courts should endeavor to avoid such formalisms at all costs and instead achieve their desired goals in a more straightforward manner.

The next step focuses on unsanctioned workarounds, where courts tolerate rather than endorse the formalistic result. Professor Liebesman's quote above exposes one key root of the problem: the lack of a clear sham definition to separate out impermissible workarounds. Related to such uncertainty over the proper sham scope, this definitional gap accentuates vagueness concerns and overbreadth fears. This Article fills this key void, appropriately modifying a narrow sham definition in a classic tax law case.[175] Courts should disallow "pure shams" that either (1) return the parties to their starting position[176] or (2) alter the status quo in the same manner as a more normal and straightforward alternative pathway. Now armed with a clear definition and a better understanding of the enhanced stakes, courts can be most vigilant against clear shams utterly devoid of any real substance. By most readily striking these down, courts would send a clear message that legal compliance does not include blatant, meaningless workarounds.[177]

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175. Consider again the Second Circuit's "clear sham" definition in the classic Tillie Goldstein tax case, discussed *supra* note 118.

176. The Tillie Goldstein case provided only this first prong; this Article expands upon it to cover a broader range of transactions. *See* discussion *supra* notes 118–120.

177. As Professor Glasbeek neatly stated in an attempted workaround by an employer of employee protections case:

> Why would courts not seek to educate enterprises and their lawyers that their manipulative skills will not be allowed to undermine the spirit of what they have done, especially as this erosion is paid for by vulnerable people? They could treat the uses of different forms as shams. As Gray J put it, in a much-quoted but rarely applied flourish, courts could hold that 'the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck.'

Vigorous application of the pure sham definition above would significantly improve the law. The definition, however, does put pressure on the completeness of the sham: i.e., it contemplates no change relative to the baseline.[178] Individuals might attempt to avoid its application through restructurings with only possible or negligible differences to the baseline.[179] This supports additional protection as some possible or slight substance should not insulate the workaround from judicial review. The most obvious adjustment would require a meaningful, not just any, change to avoid sham status. Unfortunately, this theoretically appealing adjustment revitalizes the practical vagueness and overbreadth concerns.[180]

Further protection thus requires an additional screening mechanism. This Article located an enticing possibility in Judge Wald's description of the summary judgment standard: "As originally envisioned by its drafters . . . the purpose of [summary judgment] was to weed out frivolous and sham cases, and cases for which the law had a quick and definitive answer."[181] Summary judgment accomplishes this screening function by tossing out claims upon which no reasonable minds could disagree. The summary judgment concept could reinforce the sham definition in the following way. Upon a showing of a possible meaningful change by the challenged party, the challenging party would then have to show that no reasonable person could find such change to be meaningful. This balanced approach would neatly provide supplementary sham protection while also heeding practical overbreadth concerns.

These proposed changes would improve significantly the judicial protection against shams. Vagueness and related concerns, however, limit the available judiciary protection. The Article accordingly turned

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Harry Glasbeek, *The Legal Pulverisation of Social Issues:* Andar Transport Pty. Ltd. v. Brambles Ltd., 2005 TLJ LEXIS 11, 57 (2005) (quoting *Re Application by Porter* (1989) 34 IR 179, 184 (Fed. Ct. Austl.)).

178. The appropriate baseline is either the status quo or the more normal straightforward pathway for change.

179. *See supra* note 136 (discussing proposal by California legislator for state tax workaround).

180. This also raises separation of powers and textualism issues for areas involving legislation. See discussion at note 121 and accompanying text *supra* for how textualist-leaning jurists are less likely to apply as the scope expands.

181. Wald, *supra* note 142, at 1897.

its final attention to the legislature. Especially for vulnerable statutory provisions, legislators should focus more on possible workarounds. Drawing upon the tax law experience, legislation should include specific anti-abuse provisions against known workarounds.[182] This collective effort by the two branches would deliver the strong, and necessary, message that shams do not comply with the law.

182. As discussed *supra* note 160, the tax law sometimes takes this approach.