Notable Employee Benefits Articles of 2013

By Kathryn J. Kennedy

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Kathryn J. Kennedy is a professor of law and the associate dean for advanced studies and research at the John Marshall Law School in Chicago. She would like to thank Claire Toomey Durkin, associate director of research and instruction at the school's library; Gregory Cunningham, part-time library reference assistant; and Monika Cwikla, her research assistant. They were instrumental in compiling the 80 law review articles considered for this article. Kennedy gives special thanks to Melissa Travis, who read and critiqued many of the healthcare reform law review articles.

Kennedy summarizes 10 noteworthy law review articles published in 2013 on various topics in employee benefits law.

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A. Introduction

This is the fourth year that *Tax Notes* has invited me to summarize the 10 law review articles that employee benefits scholars and practitioners should have read in the previous year.[1] For the last four years, healthcare reform and executive compensation have dominated employee benefits. However, we continue to see interest in retirement plans, especially in plan investments and public pensions. The bulk of 2013's scholarship focused on all three of these areas.

B. Criteria

The considered articles had to satisfy the following:

- the author must be a full-time law professor, or for a coauthored piece, the first or second listed author must be a full-time law professor;
- the article must have been published or expected to be published during 2013 or the academic 2012-2013 term; and
- the article must have appeared or be expected to appear in a student-edited law journal or student-edited law review (or faculty- and-student-edited law journal or law review) affiliated with an American Bar Association accredited law school.[2]

Those benchmarks excluded several exceptional articles by academics who published in practitioner journals.

Reading all the qualifying articles was daunting. The excellent scholarship I encountered will assist the courts, regulators, and bar alike. And it was refreshing to see so many students' notes and comments on employee benefits as more law schools add the area to their curricula.[3]

As one of the faculty advisers to *The John Marshall Law Review*, I read all the notes and comments published in the law review over a given academic year and recommend one piece to be nominated for the national Scribe award. That judging of notes and comments is based on their readability, scholarship, persuasion, use of footnotes, and innovativeness. This exercise was not that different but it did involve reading more articles — 80 in total — and evaluating them using different criteria:

- Did the article force me to think about an area of employee benefits law in a different way?
- Did the author undertake a difficult topic and if so, did he provide the necessary background information to understand the topic? Did he pose original ideas?
- Did the author rely on legal analyses or policy arguments in suggesting new proposals?
- Did the author use empirical data to decipher whether the law was accomplishing its objectives and to recommend alternative solutions?
- Did the author provide historical perspective if necessary to ascertain how the law was evolving?
- Was the author clear and persuasive in his recommendations?
- Did the author meaningfully contribute to academic scholarship?

Not all criteria were present in every article chosen, but I used them to gauge how creative and substantive an author's proposals would be for legal scholarship. I may not have agreed with all the authors' conclusions, but I found their approaches innovative and thought provoking. The following is not a list of what I perceive as the 10 best employee benefits law review articles of 2013, but rather a list of what I consider the 10 most *noteworthy* law

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[1]Professor Bridget J. Crawford began the tradition in 2009 with her article related to estate planning, "Law Review Articles You Should've Read (but Probably Didn't) in 2009," *Tax Notes*, Jan. 18, 2010, p. 397.

[2]I excluded from consideration my articles published in 2013.

[3]The John Marshall Law School continues to provide the only LLM in employee benefits in the United States. Georgetown University Law Center offers a certificate of study in employee benefits through its LLM programs or as a standalone program.

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review articles on employee benefits and executive compensation issues published in 2013 that a broad audience of employee benefits professionals would find relevant and worthy of attention.

C. The Chosen Ones

Although in the past I reviewed articles alphabetically by the author's last name (and for those articles with more than one author, I reviewed them alphabetically by the last name of the first author), this year I reviewed them according to three categories: retirement plans, healthcare reform, and executive compensation. Because two of the chosen authors in the executive compensation category wrote for the same edition of the *University of Pennsylvania Law Review* on similar topics, I coupled them under that category. After I discuss them, I mention a short essay by professor Lynn Stout, not as an 11th article, but as an insightful critique of them.

Retirement Plans

1. Jack M. Beermann, "The Public Pension Crisis," 70 *Wash. & Lee L. Rev.* 3 (2013). Professor Beermann highlights the financial and human crises that await the payment of public pension plans: the financial pressure that will occur when public employees become entitled to pension benefits, the possible reduction in government services to pay for those benefits, and, if the benefits cannot be paid in full, the consequences to former public employees who likely are not entitled to Social Security. The article discusses the magnitude of the fiscal problems associated with pension plans by focusing on California, which has one of the largest unfunded pension liabilities in the country. Beermann asks whether public pension benefits are excessive when they are compared with private pensions and whether they have been subject to abuse. He dismisses comparisons between public pensions that do not offer Social Security benefits to private pensions that do, because Social Security involves survivor benefits for spouses and children, a small death benefit, and the potential for multiple benefits for former spouses. He points out that public pensions offered to state and local employees are simply part of their compensation package. Beermann refutes politicians' claims that public employees are the "new privileged class in America."[4] He contends that while there have been instances of excessive public pensions because of pension "spiking" (that is, when an employee's final average earnings are substantially increased to increase his pension), those examples should not taint the whole system.

In writing about achieving pension reform, Beermann concludes that not funding pension liabilities does not violate states' balanced budget requirements. The real obstacle to pension reform, he says, comes from most state constitutions' prohibiting the reduction of public pension benefits, and he notes the variety of state constitutional mandates. There also are contract-based and labor law protections for state and local employees covered under collective bargaining agreements, making reform difficult. Beermann examines whether the federal constitutional provisions in the contract clause could be used to promote state pension reform. Given the judicial history of the clause, it is unlikely courts would invoke it to allow states to reduce their financial obligations, he writes. Similarly, the takings clause, which bans the federal government from taking property deemed for public use without compensating property owners, is not a satisfactory route to pension reform. Relying on that clause is unlikely because a participant's right to a pension promise is not regarded as property unless the pension is held to be a contract under the contract clause or state law pension doctrine.

Beermann writes that although federal and state constitutional and statutory provisions obstruct state pension reform, he rejects a federal bailout that would guarantee pension obligation bonds issued by states. Achieving that result would not only be difficult and complex, but the moral hazard issues would be significant because some public pension promises are excessive and abusive. Beermann concludes that as state and local entities look to shift to defined contribution 401(k)-style plans, the public pension crisis may be less about the underfunding of those plans and more about the "steady elimination of economic security for middle class workers," because public employees typically belong to collectively bargained plans.[5]

2. James Kwak, "Improving Retirement Savings Options for Employees," 15 *U. Pa. J. Bus. L.* 483 (2013). Professor Kwak begins with a history of the United States' retirement security crisis, showing the shift from traditionally defined benefit plans to defined contribution plans, especially toward 401(k) plans. Solving the retirement security crisis, he writes, means that people should accumulate sufficient replacement income for retirement. That involves three features: saving adequately, generating sufficient investment income, and not spending those funds prematurely.

Kwak cites research showing that investing in low-cost-index mutual funds that seek to track the overall performance of the market or a market

[4] 70 *Wash. & Lee L. Rev.* 3 at 19 (2013).

[5] *Id.* at 93.

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segment is a superior strategy to investing in more expensive, actively managed mutual funds that seek to outperform the market or a market segment. Because actively managed mutual funds have expense ratios of 74 basis points (using 2009 data) as compared with low-cost-index mutual funds with expense ratios as low as 6 basis points, plan participants that use active funds will erode their retirement savings because of lower investment returns (after expenses). Coupled with active funds not outperforming the market, active funds are an expensive choice for most plan participants.

While that problem is not new, Kwak proposes a new solution. While the courts rely on ERISA section 404(c) to protect plan fiduciaries from liability for losses because of participant-directed investment decisions, Kwak argues that they should rely on ERISA section 404(c) only if an employer offers indexed funds. Kwak invokes principles of trust law, including providing the duties of diversification, minimizing unreasonable costs, and avoiding imprudent delegation. In doing so, he paints a presumption in favor of passive (index) funds and one against active funds. Thus, Kwak calls for more modifications to the ERISA section 404(c) regulations to provide a meaningful safe harbor, which should be limited to include only low-cost-index funds covering major segments of the securities market, and a money market fund or otherwise low-risk investment alternative. That will involve a regulatory change by the Labor Department, not a major change in the way courts have been interpreting trust investment law. The result will reduce fees paid by plan participants and increase the retirement savings available to them. That would be a win-win for plan participants.

3. Peter J. Wiedenbeck, Rachael K. Hinkle, and Andrew D. Martin, "Invisible Pension Investments," 32 *Va. Tax Rev.* 591 (2013). Conducting research supported in part by a grant from the Center for Empirical Research in the Law at Washington University School of Law, Wiedenbeck, Hinkle, and Martin analyze the investment composition of funds accumulating in private pension plans. In 2009, that amounted to more than $6.28 trillion in assets. Large private pension plans are required to annually report asset and liability numbers on Schedule H of Form 5500 to the Labor Department. Large private pension plans must also disclose direct investments (for example, preferred or common stock, corporate or governmental debt, or real estate). A significant percentage of the pension plan's assets might be in indirect investments such as collective investment vehicles (for example, common trust funds managed by banks, trust companies, or financial institutions), pooled separate accounts managed by insurance companies, and master trusts (involving the joint investment of assets by more than one employer's pension plan or plans sponsored by a group of employers commonly controlled).

Those indirect investment vehicles are referred to as direct filing entities (DFEs) and may or may not be required to report their own annual financial reports (Form 5500 and Schedule H). Linking the DFE's returns with the investing pension plans' returns has "not been comprehensively achieved."[6] When the linking does not occur, it renders the pension plan's investment position invisible, making the evaluation of the plan's investments almost impossible, write the authors. In 2010, large single-employer defined benefit plans had more than 64 percent of their total plan assets in DFEs.

The authors' research highlights the differences in the asset compositions of defined benefit, defined contribution, and collectively bargained defined benefit plans. With 35 percent of plans that use DFEs filing internally inconsistent returns, that further prevents the linking of DFE financial information with that of the investing pension plan, the authors say. Because one of ERISA's purposes is to provide comprehensive and accurate data regarding a private pension plan's assets and liabilities, the Labor Department should require more specific information regarding the statement of assets and liabilities. That would enable plan participants and regulatory agencies to more accurately evaluate the risk and return features of a given plan. That feedback to the regulatory agencies would result in a meaningful contribution to employee benefits scholarship.

Healthcare Reform

4. Jonathan H. Adler and Michael F. Cannon, "Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA," 23 *Health Matrix: Journal of Law-Medicine* 119 (2013). The Patient Protection and Affordable Care Act (PPACA) extends tax credits and subsidies for the purchase of health insurance through state-run insurance exchanges. This article challenges the IRS's regulatory interpretation to extend tax credits and subsidies to the purchase of health insurance through federal exchanges. The authors use the text, structure, and legislative history of the PPACA to demonstrate that the IRS's interpretation is contrary to Congress's and indefensible on legal grounds. Because the eligibility of tax credits and subsidies can result in penalties on employers and individuals, they are likely to have

[6] 32 *Va. Tax Rev.* 591 at 592 (2013).

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standing, and they will undoubtedly challenge the IRS's interpretation in court.

Adler and Cannon explain how the PPACA depends on the states for its implementation and that as a result of that dependency, Congress created tax credits and subsidies for individuals and households that purchase health insurance through the state exchanges. However, the PPACA authorized the federal government to create a federal exchange in the event a state did not. When the article was written, only 17 states and the District of Columbia indicated their intent to create state exchanges. Thus, 33 states relied on the federal exchange. But the tax credits and subsidies are more than an inducement for states to create exchanges; they also play a role in the act's employer mandate and its individual mandate. If a state exchange doesn't exist, the employer mandate is unenforceable in that state and the federal tax credits and subsidies do not extend to the state's residence. The implementation of the PPACA without state participation through state exchanges would be difficult, if not impossible. To solve the problem, the IRS issued a ruling on May 18, 2012, extending the tax credits and subsidies to all those who purchased health insurance on a federal exchange.

The article explains the congressional intent behind tying the tax credits and subsidies to the delivery of health insurance through state exchanges and sets forth the pros and cons of the IRS ruling. Adler and Cannon analyze the IRS's interpretation against a backdrop of the text, structure, purpose, and legislative history of the PPACA. Despite the limited legal reasoning that the IRS may invoke, the authors find the IRS's interpretation wanting. Thus, the issue will have to be resolved by the courts, they conclude. That result could affect the success of the PPACA if tax credits and subsidies are unavailable to residents of 33 states that have decided not to set up state exchanges.

5. Allison K. Hoffman and Howell E. Jackson, "Retiree Out-of-Pocket Healthcare Spending: A Study of Consumer Expectations and Policy Implications," 39 *Am. J.L. & Med.* 62 (2013). Conducting research supported by a grant from the Social Security Administration funded as part of the Financial Literacy Research Consortium, Hoffman and Jackson undertake the first comprehensive examination of Americans' expectations on the out-of-pocket costs of healthcare in retirement and their ability to plan for them. Because Medicare and supplemental insurance involve out-of-pocket spending in terms of their premiums and direct payments for cost sharing and uninsured care, prior studies have shown that retirees are unprepared for those retiree healthcare costs. The authors first studied whether people understood the expected level of future healthcare spending by surveying more than 1,700 individuals in the Rand American Life Panel. They found a bimodal distribution of responses — 40 percent of respondents were at or above the median expert benchmark for annual out-of-pocket spending, but more than 50 percent fell below the experts' projections for the 25th percentile of retiree out-of-pocket spending. They took two different approaches in measuring out-of-pocket retiree healthcare costs: average monthly estimates and lump sum estimates. The latter approach was to determine whether respondents could properly estimate savings targets needed when they enter retirement. Younger cohorts offered estimates similar to their older cohorts, but women respondents projected 50 percent lower lifetime expenditures. Financial literacy may be necessary to help people translate between periodic and lump sum payments.

Secondly, Hoffman and Jackson found broad misperceptions about the risk of future healthcare spending because of unpredictable individual health experience, unexpected medical costs, and policy instability (for example, changes in Medicare or other government programs). Few respondents understood the magnitude of those risks. It was clear respondents could not differentiate among the three risks. While the authors' research did not identify a single solution, it did articulate the problem, suggest future research, and identify those solutions that could be "most promising."[7] Their findings show that for some individuals, the financial literacy gap on out-of-pocket retiree healthcare costs may be less than they anticipated, but for others, the gap suggests that better financial planning is needed. The authors advocate more deliberate interventions such as the use of architecture approaches or planning aids that walk people through financial decisions at critical points.

Most respondents struggled to estimate the certainty and the variability in spending due to the three risks associated with healthcare costs. The authors offered two approaches to improve risk protection in the face of these uncertainties: either change the supplemental insurance policies through regulatory reform to promote transparency or redesign Medicare and supplemental insurance to simplify choices and reduce risk across a greater pool of individuals.

Because of its empirical research, this article will begin a national dialogue on the amount of out-of-pocket healthcare costs that people anticipate they will need for retirement and how to manage the

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[7]39 *Am. J.L. & Med*. 62 at 67 (2013).

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risks associated with those costs. It marks an important contribution to scholarship about a matter of vital national interest.

6. Amy Monahan and Daniel Schwarcz, "Saving Small Employer Health Insurance," 98 *Iowa L.R.* 1935 (2013). As Monahan and Schwarcz note, the effect of the PPACA on small employers "has received remarkably little attention in the academic literature."[8] They demonstrate that the PPACA creates perverse incentives for small employers to retreat from offering group health insurance and to offer self-insured group health insurance and have neither affordable nor minimum value coverage for low-income employees so that they preserve the premium and cost-sharing subsidies available to them on the exchanges. The authors discuss the incentives and penalties under the PPACA applicable to small employers and conclude that an employer's decision to offer health insurance correlates less with its size and more with the income profiles of its employees.

Monahan and Schwarcz say that small employers with predominantly low-income employees will not offer PPACA health insurance because if they did, their employees would lose the cost-sharing subsidies available through the exchanges and ultimately be worse off. The ability to use pretax dollars to pay for employer-provided coverage does not outweigh the benefits of the premium tax credits and cost-sharing subsidies available through the exchanges to individuals. In contrast, small employers with high-income employees have substantial incentive to offer employer-provided health insurance because of the value of the tax exclusion for its employees. Small employers with both high- and low-income employees have an incentive to offer neither "affordable" coverage nor coverage of "minimum value," because not doing so preserves the ability of low-income employees to take advantage of the subsidies on the exchanges, while high-income employees could continue to receive employer-provided coverage. The authors discuss different strategies that small employers could use to accomplish those results and point out that the consequences of their decisions will affect the size of the small group market within the exchanges. And that might pose a negative fiscal effect on the PPACA.

Monahan and Schwarcz address small employers with unusually low-risk employees who decide to offer self-insured group health insurance. That practice would threaten to destabilize the exchanges. Because the PPACA allows small employers that offer self-insured group health insurance to escape many of its requirements (for example, that insurance does not have to include essential health benefits, participate in risk-adjustment programs, comply with medical loss ratios, undergo a review of premium increases, and satisfy requirements that deductibles not exceed select maximum levels), it creates powerful incentives to self-insure to reduce compliance costs and increase flexibility. Small employers that offer self-insured low-actuarial value plans will "dump" high-risk employees onto the exchanges (because a low-actuarial cost plan is unattractive to someone with high expected medical costs) and retain the low-risk employees under the employer-provided plan. That would expose the exchanges to adverse selection leaving few tools to contain costs.

Monahan and Schwarcz conclude by offering some strategies that would preserve the integrity of the exchanges: regulating stop-loss coverage if a small business decides to offer self-insured health insurance, designing exchanges to make them more attractive to compete against self-insured plans, more rigorously regulating brokers that sell stop-loss coverage, and limiting the ability of small businesses to switch to exchange coverage once their employees become high-risk. This article accomplishes its goal of heightening awareness of the issues facing small employers as they deliver healthcare to their employees.

Executive Compensation

7. Tamara C. Belinfanti, "Beyond Economics in Pay for Performance," 41 *Hofstra L. Rev.* 91 (Fall 2012). Much of the prior scholarship on pay for performance (PFP) focuses on the economics of executive pay, but professor Belinfanti draws attention to behavioral dynamics — individual, situational, cultural, and institutional — to determine what motivates executives. She recommends five ways to use behavioral dynamics in compensation policy and design to improve executive efficiency and performance. The two economic models used to define the PFP model — the optimal contracting and managerial power models — do not resolve what it means to perform well and what incentives push executives to perform in a way that is the least expensive to the employer. Those models establish that the problem is not with PFPs but with how they have been implemented. Belinfanti discusses each model's advantages and disadvantages.

Belinfanti uses behavioral dynamics to analyze four parts of executive compensation: contract length, optimum "compensation mix," assumed biases by employers and board members in the selection of peer groups for compensation comparison purposes, and use of ex ante financial metrics. Two insights develop: Using an economics model to give incentives to executives may result in not providing enough incentives to accomplish long-term growth

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[8] 98 *Iowa L. Rev*. 1935 at 1951 (2013).

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while providing too many incentives that ''crowd out'' other goals (such as ''creativity, trust, empathy, honesty, and self-confidence'').[9] Belinfanti argues that the PFP model should be expanded beyond the economic models to include behavioral dynamics. Doing that will help us better understand the decision-making process of executives.

8. Martin Gelter, ''The Pension System and the Rise of Shareholder Primacy,'' 43 *Seton Hall L. Rev.* 909 (2013). Professor Gelter begins with a history of the corporate governance debate of whether managers should be beholden only to shareholders or whether they also have a responsibility to stakeholders (employees, creditors, customers, communities). Beginning around 1980, managerial capitalism gave way to investor capitalism (shareholder primacy), Gelter writes. Gelter takes a novel approach to the reason for that shift by attributing it to changes in the pension system — turning away from traditionally defined benefit plans to defined contribution plans, particularly 401(k)s. Employees contributing to defined contribution plans have become, as described by Chancellor Strine of the Delaware Court of Chancery, ''forced capitalists.''[10] That has resulted in a fundamental change in the supply side of the markets, placing greater importance on the interests of the financial investors. That is what accounts for the transformation of corporate governance to a shareholder primacy model instead of a managerial or agency model.

Employees and retirees as investors favor pro-shareholder policies, and institutions managing pension assets have become active equity investors. That connection between pension and corporate governance systems advocates shareholder primacy, because retirement savings is tied to strong capital markets. Gelter offers data on the growth of retirement savings, particularly defined contributions, and the number of participants invested in those savings. He provides numerous reasons for the shift from a defined benefit to defined contribution model for retirement savings. That shift has had some unintended consequences that favor pro-shareholder policies as employees' and retirees' wealth is tied to the capital markets, instead of the employer. The shift has also contributed to the rise of the ''transparency coalition,'' which demands managers be more transparent and accountable to the public. Gelter concludes that ''shareholder primary, with its positive and negative implications, will be here to stay.''[11]

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[9]41 *Hofstra L. Rev*. 91 at 132 (2012).
[10]43 *Seton Hall L. Rev*. 909 at 911 (2013).
[11]*Id*. at 970.

9. Barry E. Adler and Marcel Kahan, ''The Technology of Creditor Protection,'' 161 *U. Pa. L. Rev.* 1773 (2013). The past four decades of scholarship on executive pay have focused on the theories of agency, property rights, and finance to reconcile the conflict between a company's shareholders and its managers (that is, its executives) and the conflict between a company's shareholders and its creditors. The agency costs between a company's shareholders and its managers have decreased for a multitude of reasons — regulatory initiatives, equity compensation, outside directors, increased activism of institutional shareholders, and increased use of hedge funds. Because of that, there is a heightened awareness of the conflict between a company's shareholders and its creditors, especially as executives represent shareholders. Adler and Kahan propose new contractual protections for a company's creditors, subject to some limits, against third parties.

When lending money to a company, creditors rely on contractual limitations including covenants to accelerate right of payment if specified events occur. However, if the company becomes insolvent, those remedies are not effective. That deficiency could be solved if the creditor had contractual obligations enforceable against third parties. Adler and Kahan explain what creditor remedies could be extended against directors and officers, shareholders and corporate affiliates, and other creditors. Their proposal for third-party liability is an optional remedy against a new creditor that lends on terms that violate a loan agreement that existed between an earlier creditor and the company. That remedy would be limited to cases when the third parties were on actual or constructive notice of the creditor's rights of enforcement against them. Adler and Kahan's innovative solution would better align executives' behavior with the rights of the company's creditors, promoting better corporate governance.

10. Edward B. Rock, ''Adapting to the New Shareholder-Centric Reality,'' 161 *U. Pa. L. Rev.* 1907 (2013). This article appeared in the same edition as the article by Adler and Kahan. It has a similar focus. Market and corporate practices have reduced the shareholder-agency costs over the past few decades. Professor Rock examines the implications that shift has had on shareholder-creditor costs. Will it lead to an increased need for creditor protection because managers are now more aligned with shareholders? Rock advocates less for a change in the law and more for a change in conversation.

Rock begins with a historic analysis of the shareholder-manager and shareholder-creditor agency cost issues. He sorts through the strategies used to control shareholder-creditor agency costs: contracts, compensation, governance structures, and

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legal rules. He proposes the following strategies to curb shareholder-creditor agency costs: (1) covenants in debt contracts and pricing; (2) executive compensation to mirror the debt-equity capital structure of the company through deferred compensation and pension benefits; and (3) the presence of an institutional lender that would alter corporate governance. He concludes that while ''shareholder value maximization'' can be used to promote corporate governance, it can be overused.[12]

The articles by Rock and Adler and Kahan demonstrate the complicated legal trade-offs that must be struck to channel stakeholders' reward-seeking and risk-averse behavior responsibly and cost effectively.

A response by Lynn A. Stout, "The Toxic Side Effects of Shareholder Primacy, Response to the Technology of Creditor Protection and Adapting to the New Shareholder-Centric Reality," 161 *U. Pa. L. Rev.* 2003 (2013). This short essay critiques Rock's and Adler's and Kahan's articles. It puts them in perspective with the previous scholarship on shareholder primacy.

Professor Stout applauds the authors for considering the effect on corporate creditors of company managers being more aligned with shareholders. But she suggests they expand their analyses to include shareholder primacy's negative consequences. Stout addresses two of those negative consequences: shareholders fixating on the company's short-term instead of long-term future, and shareholders focusing on specific investments of creditors but also of other stakeholders such as employees, customers, and suppliers. However, she concludes that the cure for shareholder primacy has proven debilitating for public companies, prompting fewer private companies to go public, and for those that do, resulting in shorter life expectancies for their duration. If the benefits of the shareholder-centric model outweigh its costs, Stout responds to Rock's and Adler's and Kahan's articles by retaining the shareholder primacy but smoothing its edges through changes in creditors' rights and shareholders' obligation. Stout recommends corporate law experts stop lobbying for shareholder primacy, and instead embrace the new shareholder-centric reality despite its problems for creditors as noted by Rock, Adler and Kahan.

[12]161 *U. Pa. L. Rev*. 1907 at 1988 (2013).

A Brief Review of Corporate Tax Articles of 2013

By Jordan M. Barry, Karen C. Burke, and Monica Gianni

Jordan M. Barry is an associate professor at the University of San Diego School of Law. Karen C. Burke is the Richard B. Stephens Eminent Scholar in Taxation and Monica Gianni is a visiting assistant professor at the University of Florida Levin College of Law. The authors thank James W. Goodwin III, Justin Mannino, and Ian McKinley for their helpful assistance.

In this article, the authors provide a survey of corporate tax articles published in 2013.

This article provides a short survey of corporate tax articles published in 2013, with the goal of bringing readers' attention to articles that may be of interest but might have escaped their notice. Therefore its scope is limited in two major ways.

First, this article focuses on ''pure'' corporate tax articles. So, for example, it does not include articles primarily devoted to international tax, even though many of those articles have significant implications for corporate tax. That line was often challenging to draw, and some of the excluded articles are referenced in the footnotes.

Second, there are no articles that were published in Tax Analysts publications, under the premise that regular *Tax Notes* readers generally would have noticed them already. The article focuses mostly on law reviews and specialized tax journals, but not exclusively. Apologies to anyone whose excellent article may have been missed; please know that it was not intentional.

To help readers with particular areas of interest, the articles are organized into rough subject matter categories. Those categories are Corporate Tax Burden; Acquisitions and Reorganizations; *General Utilities* Repeal and Sections 336 and 338; International Aspects of the Corporate Income Tax; Taxation of Big and Small Business; Corporate Governance and Executive Compensation; and Relationship Between the Corporate Income Tax and Consumption Taxes.

A. Corporate Tax Burden

As a legal matter, the corporate income tax is imposed on corporations. However, in an economic sense, corporations are collections of people — shareholders, managers, employees, and other stakeholders — organized in a particular way. Therefore, the corporate income tax is actually a tax

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