



# Proceedings

A monthly newsletter from McGraw-Hill Education



March 2019 Volume 10, Issue 8

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## *Dear Professor,*

Spring is near! Welcome to McGraw-Hill Education's March 2019 issue of Proceedings, a newsletter designed specifically with you, the Business Law educator, in mind. Volume 10, Issue 8 of Proceedings incorporates "hot topics" in business law, video suggestions, an ethical dilemma, teaching tips, and a "chapter key" cross-referencing the March 2019 newsletter topics with the various McGraw-Hill Education business law textbooks.

You will find a wide range of topics/issues in this publication, including:

1. Whether the United States Supreme Court will support or oppose President Donald Trump in his effort to build a wall along the United States-Mexico border, based on executive powers exercised in response to a "national emergency";
2. Settlements reached in the Colin Kaepernick and Eric Reid collusion cases against the National Football League (NFL);
3. The United States Supreme Court's decision as to whether the Trump administration can add a citizenship question to the 2020 U.S. Census;
4. Videos related to a) the United States Copyright Office's determination that "The Carlton" dance cannot be copyrighted and b) a Babe Ruth baseball card purchase for \$2 that could be worth millions;
5. An "ethical dilemma" related to OpenAI's (a non-profit supported by Elon Musk) decision to not release "fake news"-generating technology; and
6. "Teaching tips" related Article 2 ("Colin Kaepernick, Eric Reid Settle Collusion Grievances against NFL") of the newsletter.

Here's hoping the spring season arrives soon for you!

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## Of Special Interest

This section of the newsletter covers three (3) topics:

1) Whether the United States Supreme Court will support or oppose President Donald Trump in his effort to build a wall along the United States-Mexico border, based on executive powers exercised in response to a "national emergency";

2) Settlements reached in the Colin Kaepernick and Eric Reid collusion cases against the National Football League (NFL); and

3) The United States Supreme Court's decision as to whether the Trump administration can add a citizenship question to the 2020 U.S. Census.

## Hot Topics in Business Law

### Article 1: "Will the Supreme Court Stop Trump's National Emergency?"

<https://www.cnn.com/2019/02/15/politics/national-emergency-supreme-court/index.html>

According to the article, President Donald Trump is well aware that his national emergency declaration will face legal challenges, but he's moving forward anyway.

"We will have a national emergency and we will then be sued," Trump said in the Rose Garden recently. "We'll possibly get a bad ruling, and then we'll get another bad ruling, and then we'll end up at the Supreme Court and hopefully we'll get a fair shake."

Trump's frustration draws from the number of times courts have already blocked White House policies, such as the travel ban and ending the Obama-era Deferred Action for Childhood Arrivals program.

The President isn't wrong to anticipate yet another slew of legal challenges: House Democrats, for one, have been discussing legal options, according to a Democratic aide. Some groups, like the American Civil Liberties Union, have already announced lawsuits.

How and where these legal challenges proceed is unclear, but it's likely they'll bubble up to the Supreme Court -- potentially testing for the first time the 1976 law that formalized the structure by which a president can declare a national emergency.

"There's been virtually no litigation in the 43-history of the National Emergencies Act about that statute," said Steve Vladeck, a CNN Supreme Court analyst and professor of law at the University of Texas School of Law. "To a large degree, what is about to happen is notprecedented," he added.

Prior to the 1976 law, President Harry Truman had declared a national emergency only to have it blocked by the Supreme Court. What Truman didn't have then but that Trump has now is statutes, previously passed by Congress, to fall back on, Vladeck said.

To that end, the administration could face legal challenges on what statutes he relies on to merit pulling from funds that haven't been appropriated for his wall. Trump invoked Section 2808 of Title 10 of the US Code, which allows him to dip into a stash of Pentagon funds that are earmarked but have no



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signed contracts for spending that money. Section 2808, specifically, requires the use of the armed forces.

Groups and individuals filing suit could argue that based on what troops have already done along the border, much of which has been supporting US Customs and Border Protection, the military isn't required.

Landowners whose property is on the line for seizure could also mount a challenge, though that's not necessarily specific to the national emergency.

Generally, the government is allowed to acquire privately owned land if it is for public use, otherwise known as eminent domain. It has been done in the past and is expected to be used to construct new barriers. Landowners, in these cases, are often fighting for what is known as just compensation -- what they deem a fair price for their property. In general, Customs and Border Protection can proceed with construction even if lawsuits are ongoing.

The courts in which these cases would land depend on who is bringing the challenge and where they're located. Trump predicted Friday that the 9th US Circuit Court of Appeals would be involved, though it's not clear when or if that would happen.

Trump has frequently railed against the 9th Circuit as "very unfair." The 9th Circuit ruled against the President's travel ban, a version of which was eventually taken up to and upheld by the Supreme Court.

Whatever the case, Trump faces an uphill battle in building his border wall through means outside of the \$1.375 billion provided by Congress.

National emergencies can last for one year and then terminate, unless the President renews the declaration 90 days prior, said Robert Chesney, who served in the Justice Department and teaches at the University of Texas at Austin School of Law. Every six months, Congress can consider whether to put forward a "joint resolution" to terminate the emergency.

## Discussion Questions

1. With regard to the subject national emergency declaration, what exactly is a national emergency?

*A national emergency is defined as a serious, unexpected, and often dangerous situation adversely affecting the nation and requiring immediate action. As far as a president's determination as to what exactly constitutes a national emergency, that is a subjective decision subject to congressional and/or judicial review.*

2. Should there be any limitations on a president's decision to declare a national emergency? If so, what specifically should those limitations be?

*This is an opinion question, so student responses may vary.*



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3. What is eminent domain, and how does it relate to building a wall along the United States-Mexico border?

*Eminent domain is the government's right to seize private property for a public purpose. The eminent domain right is exercised subject to a) notice to the landowner (with or without the landowner's consent) and b) payment to the landowner for the fair market value of the property seized.*

## Article 2: "Colin Kaepernick, Eric Reid Settle Collusion Grievances against NFL"

<https://www.usatoday.com/story/sports/nfl/2019/02/15/colin-kaepernick-settles-collusion-grievance-against-nfl/2882780002/>

*Note: In addition to the article, please also see the video included at the above-referenced internet address.*

According to the article, Colin Kaepernick and Eric Reid have settled their respective collusion grievances against the National Football League (NFL).

Attorney Mark Geragos, who has represented the two players in the matter, and the NFL each confirmed the confidential agreement in a joint statement recently.

"For the past several months, counsel for Mr. Kaepernick and Mr. Reid have engaged in an ongoing dialogue with representatives of the NFL," Geragos and the NFL said in the statement. "As a result of those discussions, the parties have decided to resolve the pending grievances. The resolution of this matter is subject to a confidentiality agreement so there will be no further comment by any party."

Financial terms of the settlements were not disclosed. Yahoo! Sports reported a final hearing on the collusion grievances had been scheduled for this month.

The NFL Players Association said in a statement that it is not aware of the details of the settlements but supported the players' decision.

"We continuously supported Colin and Eric from the start of their protests, participated with their lawyers throughout their legal proceedings and were prepared to participate in the upcoming trial in pursuit of both truth and justice for what believe the NFL and its clubs did to them," the union said in the statement. "We are glad that Eric has earned a job and a new contract and we continue to hope that Colin gets his opportunity as well."

Kaepernick, who was the first NFL player to kneel during the national anthem as a means of protesting police brutality and racial inequality, filed his grievance against the NFL in October 2017 under the league's collective bargaining agreement. Reid, Kaepernick's former teammate, filed a similar grievance in May.



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The players alleged that NFL owners had colluded to keep them out of the league because of their protests, which sent ripples across the league during the 2016 and 2017 seasons — particularly after President Donald Trump used an expletive at a rally to describe protesting players, and blasted the NFL for allowing the protests in the first place.

A decision on the case was initially expected in the first half of 2019, but a settlement looked to be the eventual outcome after a decision handed down August. That's when Stephen Burbank, the arbitrator who handled the case, denied the NFL's motion for a summary judgment, a maneuver — if granted — would have dismissed the case.

Burbank had much of the evidence in the case at that point, which included numerous depositions. NFL Commissioner Roger Goodell, NFL Executive Vice President Troy Vincent and Dallas Cowboys owner Jerry Jones were among those deposed in the case.

Geragos even attempted to depose Trump and Vice President Mike Pence, USA TODAY Sports reported in June.

## Discussion Questions

1. Define collusion.

*Collusion is defined as a secret or illegal cooperation or conspiracy, especially in order to cheat or deceive others. Collusion is a secret plan by two or more individuals to do something unlawful or harmful.*

2. In the context of labor-management relations, why is collusion illegal?

*Collusion is illegal in the labor market because it interferes with the workings of the market. More particularly, collusion might result in a worker not being paid his or her true worth, or as alleged in the Colin Kaepernick case, not being hired at all.*

3. What is a collective bargaining agreement?

*A collective bargaining agreement is a contract between labor and management specifically outlining the terms and conditions of employment. If a union represents labor, a collective bargaining agent represents labor in negotiating the specific terms and conditions of the collective bargaining agreement with management.*

## Article 3: "Supreme Court to Hear Case on Census Citizenship Question"

<https://www.nytimes.com/2019/02/15/us/politics/supreme-court-census-citizenship.html>



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According to the article, the United States Supreme Court agreed recently to decide whether the Trump administration may add a question about citizenship to the 2020 census questionnaire that will be sent to every household in the nation.

The court's move added a highly charged and consequential blockbuster to what had been a fairly sleepy term. The justices have mostly avoided controversy while they adjusted to the new conservative majority created by the arrival in the fall of Justice Brett M. Kavanaugh.

The federal government has long gathered information about citizenship, but since 1950, it has not included a question on it in the forms sent once a decade to each household. Last month, a federal trial judge blocked the Commerce Department from adding the question, saying that the process that led to the decision was deeply flawed.

The Supreme Court stepped in before any appeals court had ruled on the matter, and it put the case on an unusually fast track. The Supreme Court's speed was almost certainly a result of a looming deadline — the census forms are set to be printed in June.

Without immediate action from the court, the solicitor general, Noel J. Francisco, told the justices, “the government will be disabled for a decade from obtaining citizenship data through an enumeration of the entire population.”

The Supreme Court scheduled arguments for late April, and it is expected to rule before the end of June.

The case — *United States Department of Commerce v. New York*, No. 18-966 — is the latest test of the scope of executive power in the Trump era. Last year, the justices upheld President Trump's authority to restrict travel from several predominantly Muslim countries. More recently, the court rejected the administration's request to reinstate a ban on asylum claims by immigrants who cross the southern border illegally.

Recently, Mr. Trump said he expected his declaration of a national emergency to build a border wall to be challenged in court. He predicted that the administration would lose in the lower courts but prevail in the Supreme Court.

The census case has its roots in the text of the Constitution, which requires an “actual enumeration” every 10 years, with the House of Representatives to be apportioned based on “the whole number of persons in each state.”

“By its terms, therefore, the Constitution mandates that every 10 years the federal government endeavor to count every single person residing in the United States, whether citizen or noncitizen, whether living here with legal status or without,” Judge Jesse M. Furman of the Federal District Court in Manhattan wrote last month in his decision, setting out the consensus view.





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Critics say that adding the question on citizenship would undermine the accuracy of the census because both legal and unauthorized immigrants might refuse to fill out the forms. By one government estimate, about 6.5 million people might decide not to participate.

That could reduce Democratic representation when congressional districts are drawn in 2021 and affect the distribution of hundreds of billions of dollars in federal spending. Judge Furman found that were the question added, Arizona, California, Florida, Illinois, New York and Texas would risk losing seats in the House and that several states could lose federal money.

Dale Ho, a lawyer with the American Civil Liberties Union, which challenged the addition of the citizenship question, said that it “would cause incalculable damage to our democracy.”

“The evidence presented at trial exposed this was the Trump administration’s plan from the get-go,” Mr. Ho said.

Wilbur Ross, the commerce secretary, has said that he ordered the question to be added in response to a December 2017 request from the Justice Department, which said that data about citizenship would help it enforce the Voting Rights Act of 1965.

In a detailed decision after an eight-day trial, Judge Furman concluded that Mr. Ross had dissembled, saying that “the evidence is clear that Secretary Ross’s rationale was pretextual.”

“While the court is unable to determine — based on the existing record, at least — what Secretary Ross’s real reasons for adding the citizenship question were, it does find, by a preponderance of the evidence, that promoting enforcement of the” Voting Rights Act, or V.R.A., “was not his real reason for the decision,” Judge Furman wrote. “Instead, the court finds that the V.R.A. was a post hoc rationale for a decision that the secretary had already made for other reasons.”

Judge Furman had called for Mr. Ross to be questioned under oath, but the Supreme Court blocked that order in October. Justice Neil M. Gorsuch, joined by Justice Clarence Thomas, said the court should have gone further, shutting down all pretrial fact-gathering in the census case. Justice Gorsuch added that there was no indication of bad faith in Mr. Ross’s conduct.

“There’s nothing unusual about a new cabinet secretary coming to office inclined to favor a different policy direction, soliciting support from other agencies to bolster his views, disagreeing with staff or cutting through red tape,” Justice Gorsuch wrote at the time. “Of course, some people may disagree with the policy and process. But until now, at least, this much has never been thought enough to justify a claim of bad faith and launch an inquisition into a cabinet secretary’s motives.”

In November, the Supreme Court rejected a request from the Trump administration to halt the trial, over the dissents of Justices Thomas, Gorsuch and Samuel A. Alito Jr.

In his ruling last month, Judge Furman relied on evidence in the so-called administrative record, meaning the materials the government said Mr. Ross had considered before making his decision. Evidence presented at the trial showed that Mr. Ross had wanted to add the question long before the request from the Justice Department. The letter from the Justice Department, Judge Furman wrote,



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was an attempt “to launder their request through another agency — that is, to obtain cover for a decision that they had already made.”

Documents disclosed in the case showed that Mr. Ross had discussed the citizenship issue early in his tenure with Stephen K. Bannon, the former White House chief strategist and an architect of the Trump administration’s tough policies against immigrants, and that Mr. Ross had met at Mr. Bannon’s direction with Kris Kobach, the former Kansas secretary of state and a vehement opponent of unlawful immigration.

“In a startling number of ways,” Judge Furman wrote, “Secretary Ross’s explanations for his decision were unsupported by, or even counter to, the evidence before the agency.”

Judge Furman ruled that the administration had violated federal statutes. But he rejected a constitutional challenge based on equal protection principles, saying that there was not enough evidence in the record to conclude that Mr. Ross had intended to discriminate against minorities and unauthorized immigrants.

The lawsuit challenging the addition of the question was filed by New York, other states, localities and advocacy groups. They said that asking the question was a calculated effort by the administration to discriminate against immigrants.

“Adding a question about citizenship to the census would incite widespread fear in immigrant communities and greatly impair the accuracy of population counts,” Letitia James, New York’s attorney general, said on Friday after the Supreme Court agreed to hear the case.

In urging the Supreme Court to review Judge Furman’s decision, Mr. Francisco, representing the Trump administration, wrote that Mr. Ross had wide discretion over the census that could not be second-guessed by courts. He added that questions about citizenship have often been asked of at least a sample of the population in many earlier censuses and are commonplace in ones conducted by other developed democracies.

## Discussion Questions

1. As the article indicates, a federal trial judge recently blocked the United States Commerce Department from adding a citizenship question to the 2020 census questionnaire that will be sent to every household in the nation. The Supreme Court then intervened before any appeals court had ruled on the matter. In your reasoned opinion, should the Supreme Court have the authority to “fast-track” a case, or should the case instead progress through the normal appellate process before the Supreme Court exercises its right of review? Explain your response.

*Ultimately, the United States Supreme Court has appellate review authority over any case involving the interpretation and application of federal law. This includes the right to “fast-track” review of a particular case, especially if circumstances warrant immediate review.*





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2. Present your best argument as to why the federal government should include a citizenship question on the United States census.

*Although student responses may vary, in your author's opinion, the best argument as to why the federal government should include a citizenship question on the United States census is knowing the demographic make-up of the country so as to better represent the people of this country. This assumes, of course, that the government will use such information in a positive, constructive way.*

3. Present your best argument as to why the federal government should not include a citizenship question on the United States census.

*Although student responses may vary, in your author's opinion, the best argument as to why the federal government should not include a citizenship question on the United States census is the chilling affect such a question might have on legal or illegal immigrant participation in the census. The concern here is that the legal or illegal immigrant population might not participate in the census for fear of real or imagined retaliation, thus resulting in lack of representation in government. Our democracy depends on participation of the populace.*



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## Video Suggestions

### Video 1: “‘The Carlton’ Dance Can’t Be Registered, Copyright Office Rules in ‘NBA 2K16’ Case”

[https://abcnews.go.com/US/carlton-dance-registered-copyright-office-rules-nba-2k16/story?id=61104198&cid=clicksource\\_4380645\\_11\\_post\\_hero\\_card\\_hed](https://abcnews.go.com/US/carlton-dance-registered-copyright-office-rules-nba-2k16/story?id=61104198&cid=clicksource_4380645_11_post_hero_card_hed)

*Note: In addition to the video, please also see the following article included at the above-referenced internet address:*

### “‘The Carlton’ Dance Can’t Be Registered, Copyright Office Rules in ‘NBA 2K16’ Case”

According to the article, a judge recently ruled that "The Carlton" -- a whimsical dance performed by Alfonso Ribeiro in "The Fresh Prince of Bel-Air" -- cannot be registered, dealing a blow to the actor's attempts to sue two video game makers over their apparent use of the dance.

The U.S. Copyright Office denied Ribeiro a copyright for the dance he made famous on the 1990s hit TV show, The Associated Press reported.

Ribeiro filed lawsuits last December against Take-Two Interactive and Epic Games, the makers of the games "NBA 2K16" and "Fortnite," respectively.

Both games allow players to do dances in character and Ribeiro alleged that the games used versions of the "Carlton" groove. Ribeiro was seeking relief and damages from the games' creators, including "profits attributed to its misappropriation of The Dance and Ribeiro's likeness," the lawsuit against Epic Games said. The copyright news was part of the Take-Two case.

Take-Two and Epic Games declined to comment on the Copyright Office's decision.

When it comes to copyright law, dance can get a little tricky. A full choreography can be copyrighted but a basic move cannot. According to The Associated Press, the Copyright Office decided that "The Carlton" does not constitute a work of choreography.

Ribeiro is not the only entertainer upset over video games' apparent use of dance moves. In January, rapper BlocBoy JB sued Epic Games for using a



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dance he claims is one he invented. Russell Horning, a 17-year-old known as "Backpack Kid" also sued the company.

In December, rapper 2 Milly sued Epic Games over the use of a dance the musician claims he invented in 2011 for the song "Milly Rock." Epic Games asked a federal judge to throw out that lawsuit on Monday, saying the dance in the game is different from 2 Milly's moves.

Meanwhile, "Scrubs" actor Donald Faison has taken interest in a "Fortnite" dance that closely resembles one he did on the doctor show.

"Dear fortnite... I'm flattered? Though part of me thinks I should talk to a lawyer..." he tweeted last April.

"There is no Epic lawsuit just epic dancing..." he added in a November tweet.

A hearing on the motion to dismiss the Take-Two Interactive lawsuit is scheduled for March 18.

## Discussion Questions

1. What is a copyright?

*A copyright is a form of intellectual property protected by federal law. More particularly, it is the right of exclusivity (i.e. the right to control the dissemination and use of copyrighted material) afforded to the creator of a literary or artistic work.*

2. With regard to a copyright violation, what legal remedies are available to the copyright holder?

*There are two (2) legal remedies available to the copyright holder in response to a copyright violation:*

*a) The right to request an injunction (more specifically, a court order) prohibiting the defendant from further violation of the copyright (a temporary injunction pending the outcome of the litigation, and a permanent injunction if the copyright holder prevails in the litigation); and*

*b) The right to receive money damages (base either on profits lost by the copyright holder due to the copyright violation, or profits gained by the copyright violator due to the violation).*

3. As the article indicates, in terms of copyright law, a full choreography can be copyrighted but a basic dance move cannot. Why not?

*Copyright protection requires a unique literary or artistic work. A full choreography would be more unique than a basic dance move, which could be quite generic and therefore undeserving of copyright protection.*

## **Video 2: "Babe Ruth Card Bought for \$2 Could Be Worth Millions"**



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<https://www.upi.com/Babe-Ruth-card-bought-for-2-could-be-worth-millions/9291549566306/>

*Note: In addition to the video, please also see the following article included at the above-referenced internet address:*

## **“Babe Ruth Card Bought for \$2 Could Be Worth Millions”**

According to the article, a California man said the Babe Ruth baseball card he bought for \$2 from a collectibles store could turn out to be worth millions.

Dale Ball of Visalia said he spotted the card with an \$8 price tag at Action Sports and Coin in Sparks, Nev., and ended up paying only \$2 because the store was having a sale that day.

He said the owner did not appear to realize the card might be an authentic Shotwell W-575-1 Babe Ruth card, an ultra-rare collectible with only two known surviving copies.

"I said, 'why is it only \$8,'" Ball said of his conversation with the shop owner. "He says, 'I can't find it anywhere in the magazines. I think it's fake.'"

Ball said he researched the card online for days before discovering it might be one of the rare cards printed by the Shotwell Company in 1921.

The collector said he had the card examined by an antiques expert in Beverly Hills, who shared his opinion that the item is genuine. He said the card must be authenticated and graded by the Beckett Company before its status can be made official.

Ball said he is willing to sell the card -- but not for less than \$2 million.

## **Discussion Questions**

1. Discuss the effect that a unilateral mistake of fact has on the enforceability of a contract.

*A unilateral mistake of fact is a mistake regarding a particular fact related to the contract made by one of the contracting parties. As a matter of contract law, a unilateral mistake of fact does not affect the contract when the mistake is unknown to the other contracting party.*

2. Discuss the effect that a bilateral mistake of fact has on the enforceability of a contract.

*A bilateral (also known as mutual) mistake of fact is a mistake regarding a particular fact related to the contract made by both of the contracting parties. When both parties enter into a contract under a mutually-mistaken understanding concerning a basic assumption of fact (or law) on which the contract is made, the contract is voidable by the adversely affected party if the mistake has a material effect on the agreed-upon exchange.*

3. In your reasoned opinion, is the card seller entitled to a legal remedy in this case? If so, why, and if not, why not?



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*This is an opinion question, so student responses may vary. The answer to the question will depend, in large part, on whether there was a unilateral or bilateral mistake of fact in this case.*



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## Ethical Dilemma

### Of Special Interest

This section of the newsletter addresses OpenAI's decision to not release "fake news"-generating technology.

### **“Too Scary? Elon Musk’s OpenAI Company Won’t Release Tech That Can Generate Fake News”**

<https://www.usatoday.com/story/tech/2019/02/15/elon-musks-openai-fake-news-generator-too-scary-release/2880790002/>

According to the article, the spread of fake news is already a very real problem. Artificial intelligence could make the problem even worse.

That prospect is so frightening that an Elon Musk-backed non-profit called OpenAI has decided not to publicly circulate AI-based text generation technology that enables researchers to spin an all-too-convincing--and yes, fabricated--machine-written article.

“Due to our concerns about malicious applications of the technology, we are not releasing the trained model,” OpenAI blogged.

Such concerns go beyond just generating misleading news articles. OpenAI worries about deception, bias and large-scale abuse.

For instance, malicious people might exploit the technology to impersonate others online, automate the production of faked social media content, and automate the production of spam or phishing attacks.

Musk himself has been outspoken about AI's risks to human civilization.

The OpenAI technology, known as GPT-2, is designed to predict the next word given all the previous words it is shown within some text. The language-based model has been trained on a dataset of 8 million web pages.

The model is described as “chameleon-like — it adapts to the style and content of the conditioning text. This allows the user to generate realistic and coherent continuations about a topic of their choosing.”

In one example, the researchers fed GPT-2 the following human-written text:

*In a shocking finding, scientist discovered a herd of unicorns living in a remote, previously unexplored valley, in the Andes Mountains. Even more surprising to the researchers was the fact that the unicorns spoke perfect English.*





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The machine generated the rest of the article, a portion of which is printed here:

*“The scientist named the population, after their distinctive horn, Ovid’s Unicorn. These four-horned, silver-white unicorns were previously unknown to science.*

*Now, after almost two centuries, the mystery of what sparked this odd phenomenon is finally solved.*

*Dr. Jorge Pérez, an evolutionary biologist from the University of La Paz, and several companions, were exploring the Andes Mountains when they found a small valley, with no other animals or humans. Pérez noticed that the valley had what appeared to be a natural fountain, surrounded by two peaks of rock and silver snow.*

*Pérez and the others then ventured further into the valley. ‘By the time we reached the top of one peak, the water looked blue, with some crystals on top,’ said Pérez.*

*Pérez and his friends were astonished to see the unicorn herd. These creatures could be seen from the air without having to move too much to see them – they were so close they could touch their horns.”*

OpenAI concedes that the system isn’t perfect. It took 10 tries, for example, to generate this unicorn article. (To read the rest of the fake AI-generated story go to the OpenAI blog.)

And researchers point to repetitive text or to topics that are switched in an “unnatural” way.

“Overall, we find that it takes a few tries to get a good sample, with the number of tries depending on how familiar the model is with the context,” OpenAI blogged. “When prompted with topics that are highly represented in the data (Brexit, Miley Cyrus, Lord of the Rings, and so on), it seems to be capable of generating reasonable samples about 50 percent of the time. The opposite is also true: on highly technical or esoteric types of content, the model can perform poorly.”

The company says it will release a smaller version of GPT-2, giving the AI community time to discuss the societal impact of such systems.

As general rule, though, OpenAI cautions the public to be more skeptical of the text they find online.

The debate about AI continued online. While some voiced concerns, others highlighted the potential. OpenAI's article "The article highlights the fears but imagine all the good!!!" tweeted Thomas Anglero, innovation director at IBM Norway.

## Discussion Questions

1. The term “fake news” has been circulated quite frequently in the last two years. What exactly is “fake news?”

*Fake news is a type of “yellow journalism” or propaganda that consists of deliberate disinformation or hoaxes spread via traditional print and broadcast news media or online social media. Yellow journalism is journalism based on sensationalism and crude exaggeration.*



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2. In your opinion, what is the best argument in favor of selling AI-based text generation technology? What is the best argument against selling such technology?

*Obviously, the best argument in favor of selling AI-based text generation technology is the revenue and profit generated from its sale—obviously, there is a market for such technology. The best argument against selling such technology relates to the concern that our democracy cannot long survive the technology-driven onslaught of such deliberate disinformation designed to confuse and mislead the public.*

3. In your reasoned opinion, should government regulate the dissemination and use of such technology? Why or why not?

*This is an opinion question, so student responses may vary. The argument against government regulation relates to the First Amendment (to the United States Constitution) “free speech” and “freedom of the press” provisions, and the argument that such government intervention would constitute censorship. The argument for such regulation would be based on the notion that the First Amendment was never intended to advance the dissemination of deliberate disinformation, particularly when such disinformation might compromise our democracy. In the “for what it’s worth” category, yellow journalism is not a new phenomenon in the United States—in print form, its heyday dates to the late 19<sup>th</sup> century.*



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## Of Special Interest

This section of the newsletter will assist you in addressing Article 2 ("Colin Kaepernick, Eric Reid Settle Collusion Grievances against NFL") of the newsletter.

## Teaching Tips

### Teaching Tip 1 (Related to Article 2--"Colin Kaepernick, Eric Reid Settle Collusion Grievances against NFL"):

For an excellent article regarding employer collusion and the labor market, with reference to the Colin Kaepernick case, please see the following article written by David Seligman, an attorney at Towards Justice in Denver, Colorado. Mr. Seligman and Towards Justice litigate on behalf of low-wage workers to address systematic injustices in the labor market.

#### "Kap, Collusion, and Labor Market Competition"

<https://onlabor.org/kap-collusion-and-labor-market-competition/>

There are only a few dozen people on the planet who can play quarterback in the NFL. Colin Kaepernick is one of them. Yet, even though he has expressed an eagerness to return to the playing field, Kaepernick has now been passed over for QB positions on several clubs. Many NFL stars—including Tom Brady, Richard Sherman, and Brandon Weeden (who was recently hired over Kaepernick for the Ravens' backup role)—are convinced that Kap's got the talent to be on the field. If that's true, then why is he still out of work?

If all the clubs have independently decided that Kaepernick isn't good enough to play for them that would be the perfectly innocent consequence of the teams acting out of their independent competitive interests. The teams may also be permitted to decide independently not to hire him because they're worried his protests would turn away their fans—though that may be objectionable and short-sighted.

But what if one or some teams would want to hire Kaepernick to improve their offenses (as many commentators and experts have argued he would), but have all agreed with the rest of the league to refrain from hiring him if their competitors will refrain from hiring him as well? Or what if the NFL, acting through and on behalf of the teams, has prohibited its members from acting in their own self-interest? That kind of concerted conduct would be something different.

That would likely violate both the NFL collective bargaining agreement and federal and state antitrust laws. It might even be criminal.

Colin Kaepernick recently filed a grievance under the league's CBA arguing that the teams have "colluded" to deny him employment in the NFL. The core of his argument isn't that the teams have treated him unfairly by independently refusing to hire him because of his protests. Rather, he takes



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issue with what he argues is the clubs' concerted conduct. If the teams were acting independently, he argues, one of them would have surely snatched him up by now.

Kap's case isn't the first to raise concerns about employer collusion among professional sports clubs. Perhaps most famously, in the 1960s, St. Louis Cardinals Center Fielder (and underappreciated activist) Curt Flood challenged Baseball's "reserve clause," under which teams agreed not to hire players from other clubs—even after they'd completed their contracts—unless the player's team released or traded him. That agreement not to compete for the best players was, in Flood's view, a clear violation of the Sherman Antitrust Act, and when Flood was forced out of the league after refusing to sign on with the Philadelphia Phillies, who had acquired him in a trade, he sued the League. Flood ultimately lost his case in the U.S. Supreme Court because of Baseball's historic, common law antitrust exemption. But because of the attention Flood brought to the issue, the reserve clause died a few years later.

Flood's and Kaepernick's cases are also tied to a broader struggle that expands far beyond sports, and it has nothing to do with Kaepernick's role in initiating the powerful and politically-charged protests that we've seen throughout the NFL this season.

The right to be free from employer concerted conduct is critical to worker bargaining power and dignity. When employers in Baseball agreed not to hire baseball players on a free market, they effectively bound workers to their employers in a kind of indentured servitude. Flood once remarked that he felt like a "piece of property to be bought and sold irrespective of [his] wishes."

And we can see how similar kinds of anticompetitive conduct would harm wages and working conditions. Without the threat of being able to find employment elsewhere—a threat provided by a free and competitive market—a worker has very little leverage to extract better working conditions out of her employer. And without the threat that she could go and work for a competitor, a job applicant has almost no leverage to extract decent wages.

Recent research and advocacy has concluded that anticompetitive employer conduct may be much more prevalent than we'd imagined, and that the effects may be wide ranging. High-profile cases have alleged antitrust violations harming high-tech employees, animators, and nurses. And economists, policymakers, and advocates have observed that perhaps anticompetitive forces like those that Kaepernick purports to be up against are rigging the labor market and making it harder for workers to earn a decent wage through work.

Under the prior administration, federal regulators had targeted these practices and suggested that they would use enforcement to help level the playing field. In part based on the Council of Economic Adviser's recognition that anticompetitive forces could be playing a key role in suppressing wages, in 2016, President Obama's Department of Justice and Federal Trade Commission issued guidance stating that the Department would criminally prosecute employers that engaged in concerted conduct, including by agreeing not to hire each other's employees.

It's very unlikely that the NFL and its owners will be prosecuted criminally for refusing to hire Kap. But, if it turns out they did collude, they could be in big trouble. The NFL can't hide behind the fact



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that it's a single league that (like any single employer) can decide not to hire anyone it pleases. In a 2010 case, the Supreme Court decided that for antitrust purposes the NFL might not be a single entity, but rather 32 "independent centers of decision-making" that could not agree to surrender their independence on matters about which they'd otherwise compete—surely decisions about whom to hire are among the teams' core independent decisions.

Indeed, other franchises have been under heat for collusive employer conduct among their various competing parts. According to a recent *New York Times* article, fast-food franchises have been hit by antitrust suits for clauses in their franchise agreements that prohibit franchisees from poaching employees from one another. Through these provisions, the restaurant chains, which vehemently argue that they aren't joint employers of franchise employees, prevent workers from moving between restaurants in search of better working conditions. The agreements, according to economists, might help to explain why fast-food restaurants have enjoyed booming financial success, while fast-food wages have stagnated. (Full disclosure: my organization, Towards Justice, is counsel to the fast-food workers in one of those lawsuits.)

The NFL and its owners would also have difficulty arguing that they're protected because they're part of a multiemployer collective bargaining agreement. The Supreme Court has held that employers that participate in multiemployer bargaining can act concertedly only when their conduct grows out of and is directly related to the bargaining process. It's hard to see how a collective decision not to hire Kap would meet that standard. And besides, even if the owners didn't violate the antitrust laws by colluding, they would have violated the CBA, which independently prohibits collusive conduct, and under which Kaepernick filed his grievance.

There's still lots more to learn about what's happened to Colin Kaepernick, and there's lots and lots more to learn about the pervasiveness of anticompetitive practices in the labor market and how they might be suppressing wages. Collusive behavior by employers along with other constraints on labor market competition may help explain the mystery of why in a time of low unemployment, workers aren't seeing the increase in wages that they've been waiting for since the end of the Great Recession. The age-old fight for a free and competitive labor market is as critical as it's ever been. That fight is important to Kaepernick, and it's important to millions of other workers across the country.

## Teaching Tip 2 (Related to Article 2—"Colin Kaepernick, Eric Reid Settle Collusion Grievances against NFL"):

For another interesting article addressing employer collusion and the labor market, please see the following article written by Laura Padin, an attorney for the National Employment Law Project (NELP):

**"When Companies Collude to Suppress Workers' Wages"**



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<https://www.nelp.org/blog/federal-trade-commission-enforce-antitrust-law-wage-suppression/>

The NELP recently submitted a comment to the Federal Trade Commission (FTC) urging the agency to impose tougher penalties on companies that collude to suppress wages. We filed the comment in response to a proposed settlement in a case where the companies allegedly colluded to keep wages for therapists low, a violation of antitrust law. The proposed settlement imposes no civil liability or restitution requirements on the parties.

The case involves issues that are important to millions of America's workers. Two reasons for sluggish wage growth—the prevalence of “fissured” work and increasing labor market monopsony power (both explained below)—are at play in the case and will continue to depress wages until agencies, including the FTC, aggressively enforce the law.

The “fissured” workplace refers to the practice of outsourcing work to subcontractors such as staffing companies or to independent contractors. The staffing agencies in this case recruited and hired workers to be placed in homes to care for elderly and disabled individuals. Sometimes staffing companies label their workers as employees, and other times they label them as independent contractors. The more layers of businesses in the outsourcing chain, the less money there is to pay the workers, who too often work for poverty wages.

Increasing labor market monopsony power refers to reduced competition among employers, which shifts bargaining power to employers and allows them to dictate wages. Monopsony power not only allows employers to dictate wages, it changes the way they set wages—that is, these employers are more likely to outsource or “fissure” work in order to further reduce labor costs. Limited competition among employers also increases the risk of implicit or explicit collusion, such as agreements not to hire each other's workers, or (as is the case with the therapist staffing companies) agreements to coordinate on wage offers.

In 2016, the FTC and the U.S. Department of Justice published antitrust guidance warning that companies that collude on wages or other terms of employment face serious consequences, including civil and criminal liability. Considering the explicit warning in this guidance, it is inexplicable that the FTC has decided not to impose civil or criminal liability on the parties in this case, who are alleged to have engaged in clear violations of antitrust law and the guidance issued in 2016. The proposed settlement does not adequately compensate the therapists who were the victims of collusion. It also fails to deter other companies from colluding to suppress wages, which has significant consequences for the millions of people who work in staffing companies or are classified as independent contractors.

Given the clear violation of antitrust law and the FTC guidance and the far-reaching ramifications for America's workforce, in cases like this one, the FTC should seek remedies that make the injured workers whole and that effectively deter future wage





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fixing by employers. These cases have real-world consequences for our health care system, labor market competition, and the millions of independent contractors and other “nonstandard” or “gig” workers who rely on precarious and often poorly paid work for their livelihoods.



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## Chapter Key for McGraw-Hill Education Business Law Texts:

	Hot Topics	Video Suggestions	Ethical Dilemma	Teaching Tips
<b>Barnes et al., Law for Business</b>	Chapters 4 and 25	Chapters 8 and 14	Chapter 3	Chapter 25
<b>Bennett-Alexander &amp; Hartman, Employment Law for Business</b>	Chapter 15	N/A	N/A	Chapter 15
<b>Kubasek et al., Dynamic Business Law</b>	Chapters 5 and 42	Chapters 12 and 17	Chapter 2	Chapter 42
<b>Kubasek et al., Dynamic Business Law: The Essentials</b>	Chapters 5 and 24	Chapters 8 and 12	Chapter 2	Chapter 24
<b>Liuzzo, Essentials of Business Law</b>	Chapters 5 and 33	Chapters 9 and 28	Chapter 2	Chapter 33
<b>Langvardt et al., Business Law: The Ethical, Global, and E-Commerce Environment</b>	Chapters 3 and 51	Chapters 8 and 13	Chapter 4	Chapter 51
<b>McAdams et al., Law, Business &amp; Society</b>	Chapters 5 and 14	Chapters 6 and 18	Chapter 2	Chapter 14
<b>Melvin, The Legal Environment of Business: A Managerial Approach</b>	Chapters 2 and 11	Chapters 6 and 24	Chapter 5	Chapter 11
<b>Pagnattaro et al., The Legal and Regulatory Environment of Business</b>	Chapters 6 and 22	Chapters 8 and 11	Chapter 2	Chapter 22
<b>Sukys, Brown, Business Law with UCC Applications</b>	Chapters 2 and 24	Chapters 8 and 33	Chapter 1	Chapter 24



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## This Newsletter Supports the Following Business Law Texts:

Barnes et al., Law for Business, 13<sup>th</sup> Edition ©2018 (1259722325)  
Bennett-Alexander et al., Employment Law for Business, 9<sup>th</sup> Edition ©2019 (1259722333)  
Kubasek et al., Dynamic Business Law, 4<sup>th</sup> Edition ©2017 (1259723585) *New edition available for Summer/Fall 2019 use*  
Kubasek et al., Dynamic Business Law: The Essentials, 4<sup>th</sup> Edition ©2019 (125991710X)  
Liuzzo, Essentials of Business Law, 10<sup>th</sup> Edition ©2019 (1259917134)  
Langvardt (formerly Mallor) et al., Business Law: The Ethical, Global, and E-Commerce Environment, 17<sup>th</sup> Edition ©2019 (1259917118)  
McAdams et al., Law, Business & Society, 12<sup>th</sup> Edition ©2018 (1259721884)  
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Pagnattaro et al., The Legal and Regulatory Environment of Business, 18<sup>th</sup> Edition ©2019 (1259917126)  
Sukys (formerly Brown/Sukys), Business Law with UCC Applications, 14<sup>th</sup> Edition ©2017 (0077733738) *New edition available for Summer/Fall 2019 use*

