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Foreword

Robert J. Rhee
rrhee@law.umaryland.edu

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Robert J. Rhee*

Foreword

I am pleased to introduce this collection of essays on "Teaching Business Law in a New Economic Environment," which was a panel discussion at the 2012 annual conference of the Southeastern Association of Law Schools.[1] Individually, each submission provides practical ideas spawned from classroom and professional experiences; collectively, the essays are formed from grander questions concerning curriculum and pedagogy.

Teaching business law has special challenges. While students bring to law school basic intuitions about rights, wrongs, and entitlements, that same intuition does not apply so readily when students begin the study of business law. At the core, business law involves the laws applicable to business organizations, and the law imports or deals with interdisciplinary concepts from fields such as economics, finance, accounting, management, industrial organization, and the like. Business Associations, the introductory class in a business law curriculum in most law schools, confronts coverage issues in the face of increasing choice in organizational forms. Business law is increasing in complexity with regulations at state, federal, legislative and judicial levels, and the interconnections of the regulation of corporate governance, corporate finance, securities, capital markets, and macroeconomic management. Compounding the problem is that our student body on the whole is young, inexperienced, and drawn from college education in political science, government, philosophy, history, English, and other humanities and social sciences, and so even an understanding of basic concepts like "stock" cannot be assumed.

The questions of curriculum and pedagogy are also more compelling now in light of two broader economic factors affecting lawyers and law schools. First, the financial crisis of 2008–2009 triggered a major recession that adversely affected the legal profession. Some commentators who study the legal profession have even suggested that structural changes in the legal profession were already taking place

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* Marbury Research Professor of Law & Co-Director, Business Law Program, University of Maryland Francis King Carey School of Law.

1. *See* Southeastern Association of Law Schools, *2012 Annual Conference*, SEALS http://sealslawschools2.org/wp-content/uploads/2013/01/SEALS-Program-2012_06.23.12.pdf (last visited Feb. 19, 2013) (the panel was held on Friday, August 3, 2012).

before 2007 and that the financial crisis merely accelerated a structural transformation of the legal profession and the way in which legal services are delivered.[2] Second, our current difficult economic environment and the difficulties of the legal profession have reinvigorated the self-examination of whether law schools are producing "practice ready" lawyers or whether the economics of law schools work.[3]

These complexities and grand reality of teaching and training the twenty-first century business lawyer are the assumptions of each essay. Thus, Michelle Harner frames the common core questions: What should we teach? How should we teach it?[4] While these questions arguably apply to most fields of law, and without dismissing other subjects, these issues are acute in the field of business law. Not surprisingly, then, several common themes bind the diversity of opinions and methodologies expressed in this collection of essays.

The essays of Michael Guttentag, David Millon, and Shruti Rana recognize that business organizations are not just economic enterprises existing in the corner of private contracts and market transactions among factors of production. The economist's desire for core abstraction in thinking about agency, transaction cost, and efficiency are not exclusive of the idea that business organizations are political and social creatures incorporated into the broader socio-political fabric — the questions "why do firms exists?" and "what makes firms efficient?" being distinct from "what is a firm?" And, this reality raises implications for the ethical dimensions of the corporate enterprise.

Professor Guttentag discusses how to incorporate the political aspects of the corporate enterprise such as *Citizens United v. Federal Election Commission*,[5] and how this perspective can facilitate a discussion of the differences between manager and shareholder interests, the problems with the implementation of a shareholder primacy norm, and the role of the transactional lawyer.[6]

Professor Millon discusses how to approach the subject of shareholder primacy, a core aspect of an old and ongoing discussion of the revolution of the corporate form and the purpose of the corporation in societies committed to the rule of law

2. *See, e.g.*, William D. Henderson & Rachel M. Zahorsky, *Paradigm Shift*, ABA J., July 2011, at 40 (discussing how law job stagnation may have started before the recession, and how it may be a sign of lasting change).

3. *See* Margaret Martin Barry, *Practice Ready: Are We There Yet?*, 32 B.C. J. L. & Soc. Just. 247 (2012); John J. Farmer, Jr., *To Practice Law, Apprentice First*, N.Y. Times, Feb. 18, 2013, at A17 ("The recession worsened, but did not cause, the predicament now: a mountain of student debt and dearth of legal jobs, even as there is a crying need for legal services."); Steven M. Davidoff, *The Economics of Law School*, N.Y. Times, Sept. 25, 2013, at DEALBOOK F8 ("Law schools have come under fire during these tough economic times, with critics saying that they leave too many graduates in debt, chasing too few employment opportunities.").

4. Michelle Harner, *Teaching Business Law Through an Entrepreneurial Lens*, 8 J. Bus. & Tech. L. 169 (2013).

5. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913 (2010).

6. Michael D. Guttentag, *Teaching* Citizens United v. FEC *in the Introductory Business Associations Course*, 8 J. Bus. & Tech. L. 161 (2013).

and market-based economies.[7] Students therefore need to understand that societal, political and economic values, and not the rule of law, lead managers to prioritize current stock price over long-term strategic investment and cultivation of the well-being of key nonshareholder constituencies.

Professor Rana discusses how the financial crisis can be used to teach a comparative and critical perspective on business law.[8] The goals are two-fold: first, to sensitize students to business in an era of globalization; second, to teach different perspectives on the role of business law. With Chinese commercial and Islamic finance laws in mind as examples, a dialogue can be had on the creation of a legal framework for commerce that is more directly infused with social or ethical and moral principles.

The essays of Christyne Vachon, Joan Heminway, Michelle Harner, and Ann Scarlett address the problem of practical training of business lawyers. Each contributor has distinguished herself in prior professional practice, and this valuable perspective is seen in their teaching methods. A core function of business lawyers is to advise clients on entity choice and to draft the corresponding documents. This function requires an expert knowledge of business organizational law and skill in executing a transaction, which is converting knowledge to advice to document or work flow toward the achievement of client solutions. Sensitizing students to the fact that practice means more than reading a case and analyzing it is an important training function.

Professor Vachon teaches Business Associations over two semesters: the first covers the basic doctrines of agency law, partnerships, LLCs, and corporations; the second shifts to developing skills in drafting, planning, and advising, and this portion of the course requires students to assume the role of counsel in various and more specific contexts of business transactions.[9] This perspective permits the incorporation of headline and more complex laws such as the Sarbanes-Oxley[10] and Dodd-Frank[11] Acts.

Professor Heminway notes the proliferation of business entities, which has placed coverage stress on traditional courses like Business Associations.[12] She addresses this problem by framing the course as an entity choice problem. This

7. David Millon, *Shareholder Primacy in the Classroom After the Financial Crisis*, 8 J. BUS. & TECH. L. 189 (2013).

8. Shruti Rana, *Teaching Amidst Transformation: Integrating Global Perspectives on the Financial Crisis into the Classroom*, 8 J. BUS. & TECH. L. 195 (2013).

9. Christyne J. Vachon, *Double Dutch: Teaching Business Associations in Two Semesters*, 8 J. BUS. & TECH. L. 211 (2013).

10. Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (2002) (codified in scattered sections of parts 11, 15, 18, 28, and 29 of the U.S.C.).

11. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111–203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S.C.).

12. Joan MacLeod Heminway, *Teaching Business Associations Law in the Evolving New Market Economy*, 8 J. BUS. & TECH. L. 173 (2013).

approach not only binds a disparate set of rules, but the approach is distinctly transactional since a business transactional lawyer's core repertoire of issue and advice is the formation and maintenance of a business organization.

Professor Harner discusses ways in which role-playing and simulations can be used in business law courses like Business Associations and Business Planning with practical training in mind.[13] This methodology is particularly helpful in contextualizing the real world of business, a world in which clients want their advisers to solve problems and not just to provide an analysis of them, value creation is expected, and decisions are made under uncertainty.

Professor Scarlett discusses how she teaches Business Associations with a litigation perspective.[14] A litigation approach can be used not only in the post-mortem inquiry "what went wrong" but also the provision of proactive advice geared toward liability avoidance and management. Students ought to learn that a part of business risk is legal risk, and that both the transactional lawyer and the litigator share the common duty of reducing this risk for their clients.

Lastly, the essays of Maurice Stucke, Verity Winship, and Kamille Wolff Dean concern the problem of perspective in teaching the complexity of business law. How should the substance of business law be taught? The perspectives are many. Some insights in this group of essays are that business law is an interdisciplinary field, that corporate law is federal law as well, and that business law can be suffused throughout a broader portion of the law school curriculum.

Professor Stucke discusses how the recent financial crisis has raised questions about whether economic theories and their assumptions have sound basis.[15] He suggests that in the field of antitrust the field of behavioral economics may help explain and reveal current flaws in the law based upon assumptions of the neoclassical economic model and provide more realistic, empirically based assumptions.

Professor Winship suggests that corporate law, traditionally understood as state law, can be seen from the perspective of federal law.[16] The importance of federal law and the continued foray of federal law into the regulation of the corporation cannot be understated. She raises the possibility that federal corporate law can be a standalone course in the business law curriculum.

Professor Dean suggests that the financial crisis of 2008–2009 revealed the interconnection of Wall Street, Main Street, and K Street, and the way in which business affects the broader society.[17] The law school curriculum should reflect this

13. Harner, *supra* note 4.

14. Ann M. Scarlett, *Incorporating Litigation Perspectives to Enhance the Business Associations Course*, 8 J. Bus. & Tech. L. 201 (2013).

15. Maurice E. Stucke, *Teaching Antitrust After the Financial Crisis*, 8 J. Bus. & Tech. L. 207 (2013).

16. Verity Winship, *Teaching Federal Corporate Law*, 8 J. Bus. & Tech. L. 215 (2013).

17. Kamille Wolff Dean, *Teaching Business Law in the New Economy: Strategies for Success*, 8 J. Bus. & Tech. L. 221 (2013).

reality by offering more business law courses, and by injecting current business and legal developments and their bases more broadly throughout the curriculum.

These essays represent a small cross-section of the diverse ways in which business law is taught in the academy and the current thinking about curriculum and pedagogy for educating business lawyers. In reading them, one sees innovation and experimentation, suggesting perhaps the green shoots of change in the challenging new economic environment.