

## Teaching Business Associations Law in the Evolving New Market Economy

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JOAN MACLEOD HEMINWAY\*

## Teaching Business Associations Law in the Evolving New Market Economy

“ALL HOPE ABANDON, YE WHO ENTER HERE.”<sup>1</sup> This essay consists of the ruminations of a frustrated, yet doggedly determined, business law instructor. Proceed at your own risk — mindful of the potential for an ultimate reward.

### I. SO MUCH TO DO, SO LITTLE TIME . . .

It is late July. (Please suspend reality with me for a moment if you are reading this at some other time in the year.) As I yet again prepare to teach Business Associations in the fall, I admit to being overwhelmed — perhaps more overwhelmed than usual. I already pack a lot into my course; but the complexity of the basic U.S. laws governing business associations has become an annoyance of late, at least in this context.

Life’s too short, so maybe I shouldn’t care. But I do — not just because students will want to see a syllabus soon (although that is, indeed, a strong motivation). I also care, however, because I believe that the Business Associations course — variously named at U.S. law schools<sup>2</sup> — is important to the practice of law and,

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1. DANTE ALIGHIERI, *THE DIVINE COMEDY*, *Inferno*, Canto 3, l. 9, at 19 (Tom Griffith ed., Reverend H. F. Cary trans., Wordsworth Classics of World Literature 2009) (1472).

2. A quick, random inspection of law school websites reveals that the course may be labeled Business Associations, Business Organizations, or may be offered in narrower form or in multiple — sometimes sequenced — offerings (e.g., a course on unincorporated business associations and a course on corporations, or courses on closely held and publicly held businesses). See generally Robert W. Hamilton, *Entity Proliferation*, 37 SUFFOLK U. L. REV. 859, 862 n.3 (2004) (noting various different names for the basic business law course at U.S. law schools); Kelly Y. Testy, *Corporate Social Responsibility: Adding Value(s) to Corporate Law: An Agenda for Reform*, 34 GA. L. REV. 1025, 1026–27 (2000) (referencing “the basic Corporations course (or perhaps “Business Associations,” “Entities,” or “Organizations”) offered to upper-level students”). Some schools are offering basic and “enriched” offerings under the same or different names. Some of the differences among law school curricula in this area may result from identifiable trends; others may result from individualized curricular structures and faculty resource issues in specific law schools. See, e.g., Thomas R. Hurst, *Teaching Limited Liability Companies in the Basic Business Associations Course*, 34 GA. L. REV. 773, 775 (2000) (describing trends

therefore, the program of legal education in the United States. Many students take the course.<sup>3</sup> It is a course covered on state bar examinations.<sup>4</sup> The theory, policy, and doctrine relating to business enterprises is significant in many different practice settings and, to some extent, is essential to (or at least useful in) life outside the legal profession. Business entities supply relevant context to much of what we use in life and interact with almost every day. The legal structures of those businesses, if properly conceived and implemented, enable the businesses to exist, survive, and thrive.<sup>5</sup>

Perhaps I should give a brief overview of the doctrinal content of my Business Associations course before going on a rant, of sorts. (A detailed description is included in Part IV.) A top-level description of the course should help orient the uninitiated to the source of my concern and position my course within the spectrum of possible content-driven options for teaching a course of this kind. This is especially important because the coverage of the basic course in business law in U.S. law schools differs significantly from school to school.<sup>6</sup> By necessity (borne of few faculty and other curricular resources to devote to the part of the curriculum), the coverage at The University of Tennessee College of Law (undertaken in a four-credit-hour, single-semester offering) is broad and comprehensive. But because the two of us who teach the course at The University of Tennessee come from different practice backgrounds (I practiced transactional — principally *ex ante* advisory —

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and current approaches in basic business law courses); Faith Stevelman, *Globalization and Corporate Social Responsibility: Challenges for the Academy, Future Lawyers, and Corporate Law*, 53 N.Y.L. SCH. L. REV. 817, 836 n.83 (2008/09) (“[T]here is some variation in the number of credits allocated to the introductory Corporations or Business Associations course, and this affects the scope of coverage of the course.”).

3. Afra Afsharipour, *Integrating the Financial Crisis in the Business Associations Course: Benefits and Pitfalls*, J. BUS. & TECH. L. 5, 6 (2010) (“As reported in a recent survey of law teachers, the vast majority of law students take the Business Associations course”); Testy, *supra* note 2, at 1027 (“Usually, this course is not required, although at most law schools the vast majority of students take it.”); Robert B. Thompson, *The Basic Business Associations Course: An Empirical Study of Methods and Content*, 48 J. LEGAL EDUC. 438, 438–39 (1998) (describing data indicating that almost all law students take the basic business law offering at U.S. law schools).

4. Afsharipour, *supra* note 3, at 6 (noting that most students take the foundational business law course “because the course is viewed as a ‘bar course.’”); Howard M. Friedman, *The Silent LLC Revolution—The Social Cost of Academic Neglect*, 38 CREIGHTON L. REV. 35, 71–73 (2004) (describing the ways in which topics involving business organizations are tested on different U.S. state bar examinations); Robert M. Lloyd, *Hard Law Firms and Soft Law Schools*, 83 N.C. L. REV. 667, 685 (2005) (“In most states, the bar exam tests heavily on subjects like . . . business associations.”).

5. See Mitchell F. Crusto, *Unconscious Classism: Entity Equality for Sole Proprietors*, 11 U. PA. J. CONST. L. 215, 233 (2009) (“Legal entity status, or entity status, is one of the most significant and most ignored features of business life.”); John Ohnesorge, *Legal Origins and the Tasks of Corporate Law in Economic Development: A Preliminary Exploration*, 2009 BYU L. REV. 1619, 1620 (2009) (“Corporations and other business entities are so obviously important to economic life . . .”); Larry E. Ribstein, *Corporations or Business Associations? The Wisdom and Folly of an Integrated Course*, 34 GA. L. REV. 973, 976 (2000) (“Without a full study of alternative business forms, students miss theoretical as well as practical issues relating to choice of form.”).

6. See Charles R.T. O’Kelley, *Delaware Corporation Law and Transaction Cost Engineering*, 34 GA. L. REV. 929, 929 n.1 (2000) (“The first course in the business law curriculum at most American law schools is entitled Corporations, Business Associations, or Business Organizations. The exact coverage of these courses differs dramatically from school to school.”).

business law, and my colleague, Paula Schaefer, was a business litigator), there is some natural variation in coverage even as between us.

From a basic structural standpoint, after covering fundamental agency law rules and legal aspects of business, my Business Associations course addresses the key rules in partnership, limited liability partnership, limited partnership, limited liability company, and corporate law on a comparative basis. This part of the course necessarily engages both the internal governance frictions of each form of entity and the relationship of the internal constituents to others with whom the entity interacts. There's also a bit of corporate finance and securities law thrown in along the way to support an overall understanding of the law and the legal and practical context in which it operates. Then, after setting out these basic legal rules and norms, the course moves on to a few in-depth topics in corporate law, typically: substantive and procedural aspects of complex (derivative and securities) business litigation; the intricacies of the substance and process of the law relating to basic (a.k.a. fundamental) corporate changes; the structure of, legal authority for, and fiduciary duties operative in change of control transactions; and in recent years (time permitting), professional responsibility issues in business law (most of which also are covered in our foundational course in professional responsibility, but I like to highlight the business aspects in my Business Associations course, when possible). That's already a tall order in four credit-hours over a single semester.

But there's more. I attempt to ground the key doctrinal topic areas in theory and policy and tie the doctrine, theory, and policy to applied practice skills. These additional attributes of the course are played out in the classroom and in exercises and assignments done outside class. The classroom environment is based on collaboration and collegiality. We focus on working together to analyze and synthesize statutory and decisional law with the objective of advising a client or colleague who is unfamiliar with the law of business associations.<sup>7</sup> I integrate practical skills and professionalism into the course wherever possible, emphasize teamwork (since law is rarely — and seldom well — practiced alone), focus on close reading skills (including in the context of statutory construction and interpretation) and effective communication, and attempt to convey the special need for and desirability of engaging these skills and values in the business law setting.

This is a lot to do in four hours a week of class time. (It's a bit exhausting just documenting it all here.) To accomplish these complex tasks and objectives, the course involves the use of several mandatory assessment tools: a few online quizzes or polls, two writing assignments, a group oral midterm examination, and a traditional written final examination. Class interactions focus less on the methodology of legal reasoning than its practical use in context. There are, in short, a lot of moving parts in my course plan that I have determined are essential to my

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7. See Testy, *supra* note 2, at 1032 (describing virtues of using the basic business entities course “to highlight the lawyer’s role as counselor, planner, negotiator, drafter, and collaborator”).

teaching of the course. At some point, adding anything to the content or the pedagogy of this four-credit-hour, three-ring-circus-type course involves subtracting something somewhere else.

## II. ONGOING CHANGES IN LAW AS A TEACHING CHALLENGE

Making things more difficult in this regard: the continuous rapid evolution in the available forms of business entity. For some of us, limited liability companies still seem new (they did not exist when I attended law school in the early-to-mid 1980s).<sup>8</sup> Yet, one might now classify limited liability companies as relatively well settled in the overall landscape of business entity law.

New forms of business association are introduced on a relatively regular basis, and state legislatures continue to tinker with existing forms of entity at the same time.<sup>9</sup> Moreover, the attributes of these forms differ (sometimes substantially) from state to state.<sup>10</sup> Therefore, even as we acknowledge the overall complex picture of business associations, it is hard to get a handle on the specifics; it is hard to know exactly how to count the number of different types of business entities that exist across jurisdictions in the United States (if one takes a broad view of what constitutes a single business entity). The labels that legislators put on the different forms of entity only take us so far.

*“[E]ntity proliferation” with respect to business entities is a useful general description of an impossibly broad subject. There may be useful insights or comparisons even though counting all possible variations is impractical. Every year, hundreds of law professors successfully teach courses dealing with business forms and business relationships without becoming mired in issues surrounding the proliferation of business entities.*<sup>11</sup>

It is certainly true that we can and do (and truly *must*) marginalize or ignore certain forms of entity in teaching the basic Business Associations course.<sup>12</sup>

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8. See generally Hurst, *supra* note 2, at 773 (describing the rapid proliferation of the limited liability company form in the United States).

9. See Testy, *supra* note 2, at 1045 (“The last decade has witnessed a sea change in the selection and use of business forms. Traditional sole proprietorships, partnerships, and corporations have given way to more creative forms of business, many of which combine attributes across the lines of the three traditional forms.”).

10. See Hamilton, *supra* note 2, at 864 (“[T]here are numerous significant differences in liability and tax rules from state to state that may be applicable to entities with the same name. Indeed, the names of business forms as used in specific states are not always consistent with each other, though it is possible to classify most variations in business forms under the basic categories of general partnership, limited partnership, corporation, and limited liability company.”).

11. *Id.* at 861.

12. Maryland real estate investment trusts and Maryland business trusts come to mind in this regard. See MD. CODE ANN., CORPORATIONS AND ASSOCIATIONS §§ 8-101–801 (LexisNexis 2007) (real estate investment trusts); MD. CODE ANN., CORPORATIONS AND ASSOCIATIONS §§ 12-101–912 (LexisNexis 2007) (business trusts).

However, the growth in the number of different kinds of business entities cannot be completely ignored in teaching a basic business law class that may be the only course a law student takes regarding the legal structures through which business operations are conducted. State bar examination authorities may make the choices easier or harder for an instructor who (wisely, in my view, especially for courses taught in a state school that prepares students principally for one state bar) is attentive to bar examination content in establishing coverage parameters. Specifically, to the extent that the range of business associations that may be tested on the examination is unclear, an instructor is afforded little guidance on the forms of entity to teach.<sup>13</sup>

Regardless of the precise number of new businesses entities that exist or are being created, it is clear that the number of new business forms introduced by federal and state legislatures over the past thirty years has been significant.<sup>14</sup> The 1990s were a particularly active time for the introduction of new business forms.<sup>15</sup> Some of these forms represent hybridized versions of pre-existing business entities, adding pieces of the attributes of one form to those of another to offer additional benefits to business venturers.<sup>16</sup> Fifteen years ago, Professor Mark Loewenstein portrayed the then existing (and, presciently, the current) business entity law environments and the appeal of multiple forms of business entity accurately when he noted that:

*[A] challenge facing state corporate law is the increasing number of alternative forms of business organization from which organizers of a business can choose. In recent years, states have adopted legislation authorizing the creation of a number of new forms of business organization,*

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13. The Supreme Court Rules defining the coverage of the bar exam in Tennessee, for example, are unclear in this regard, except as to agency, partnership, and corporate law. *See, e.g.*, TENN. SUP. CT. R. 7, § 4.04 (2012), available at <http://www.state.tn.us/lawexaminers/docs/rul7.pdf> (noting, with respect to the scope of the Tennessee bar examination, that “familiarity” with “Business organizations (including agency, partnerships and corporations)” is “essential” after stating that “[t]he examination is not designed to test the applicant’s knowledge of specific law school subjects”).

14. *See, e.g.*, Harry J. Haynsworth, *The Unified Business Organizations Code: The Next Generation*, 29 DEL. J. CORP. L. 83, 85–86 (2004) (“The increase in the number of business forms is bewildering to practicing lawyers, judges, law professors, and legislators. Almost every year, a new type of entity or a major revision to an existing business organization statute is promulgated or enacted.”); Robert R. Keatinge, *Universal Business Organization Legislation: Will It Happen? Why and When*, 23 DEL. J. CORP. L. 29, 31 (1998) (“The number and variety of distinct statutory legal forms of business organization have grown dramatically since the late 1980s.”); Robert J. Peroni, *Tax Reform Interrupted: The Chaotic State of Tax Policy in 2003*, 35 MCGEORGE L. REV. 277, 286 (2004) (“[T]here are an increasing number of alternative forms of business entity that combine some corporate attributes (e.g., limited liability) with a single level of tax, such as limited partnerships, limited liability partnerships, and limited liability companies.”).

15. Keatinge, *supra* note 14, at 46 (“[T]he number of forms has increased during this decade as has the flexibility and specificity of the organic statutes governing them. Additions to the established corporation, S corporation, general partnership, and LP include the LLC, the LLP, and the limited liability limited partnership, each of which provides a unique combination of properties.”).

16. Peroni, *supra* note 14, at 286.

*such as limited liability companies, limited liability partnerships, limited liability limited partnerships, and limited partnership associations. These entities were initially created to allow their owners to combine the limited liability features of a corporation with the favorable pass-through tax treatment of a partnership. But they are also attractive to business organizers who do not necessarily seek the advantages of pass-through taxation because these entities provide more organizational flexibility than does the traditional corporation. This greater flexibility is a reflection of the same pressures that have moved corporate law away from mandatory provisions.*<sup>17</sup>

When I left practice and began teaching full time in the law school setting back in 2000, it was virtually a *fait accompli* that I would teach all (or almost all) of these key forms of business association to some degree. That was what students at The University of Tennessee College of Law needed. And that is what I have done.

Most recently, however, lobbyist and legislative attention in the proliferation of business entity laws has been focused on distinguishing those for-profit business associations that concentrate on owner wealth maximization as a central goal from those for-profit business associations that also concentrate on serving the public (social, environmental) good.<sup>18</sup> As a result of these more recent legislative efforts, those of us who teach the fundamental business law offering (or offerings) in U.S. law schools now find ourselves considering whether and how to introduce our students to social enterprise<sup>19</sup> and, more specifically, low-profit limited liability

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17. Mark J. Loewenstein, *A New Direction for State Corporate Codes*, 68 U. COLO. L. REV. 453, 454–55 (1997).

18. See generally Keren G. Raz, *Toward an Improved Legal Form for Social Enterprise*, 36 N.Y.U. REV. L. & SOC. CHANGE 283, 308 (2012) (“[T]he emerging forms permit a business to strive toward a social mission while attracting both donors and investors.”); Michael D. Gottesman, *From Cobblestones to Pavement: The Legal Road Forward for the Creation of Hybrid Social Organizations*, 26 YALE L. & POL’Y REV. 345, 346 (2007) (“Nonprofits are often constrained by a lack of capital. For-profits are often constrained by legal duties to maximize profit and not social outcomes. Hybrid organizations . . . address both of these constraints by allowing mission-driven nonprofits to access capital more readily and by allowing for-profits to commit themselves to achieving social goals.”); Heather Sertial, Note, *Hybrid Entities: Distributing Profits with a Purpose*, 17 FORDHAM J. CORP. & FIN. L. 261, 263 n.4 (2012) (explaining how hybrid entities combine capital-raising features of for-profit business structures with the social-goal-orientation of archetypal non-profits.).

19. See, e.g., Jaclyn Cherry, *Charitable Organizations and Commercial Activity: A New Era: Will the Social Entrepreneurship Movement Force Change?*, 5 J. BUS. ENTREPRENEURSHIP & L. 345, 348–49 (2012); Robert A. Katz & Antony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59, 59 (2010); Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 342 (2009); Antony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility?*, 34 SEATTLE U. L. REV. 1351, 1353 (2011); Linda O. Smiddy, *Introduction*, 35 VT. L. REV. 3, 3–4 (2010); Celia R. Taylor, *Berle and Social Businesses: A Consideration*, 34 SEATTLE U. L. REV. 1501, 1505–06 (2011); Christen Clarke, *California’s Flexible Purpose Corporation: A Step Forward, A Step Back, or No Step at All?*, 5 J. BUS. ENTREPRENEURSHIP & L. 301, 307–08 (2012).

companies (L3Cs),<sup>20</sup> benefit corporations,<sup>21</sup> and other like forms of entity, in addition to the now standard corporate and unincorporated business forms.<sup>22</sup>

Yet, the explosive growth of hybridized business forms is far from the only coverage concern<sup>23</sup> for instructors teaching the basic law school offering on business entities. In the last ten years, securities regulation has become more closely intertwined with corporate law and has encroached further into corporate governance law — the body of legal rules that define the relations between and among constituents in business enterprises.<sup>24</sup> The Sarbanes-Oxley Act of 2002,<sup>25</sup>

20. See, e.g., Cassady V. Brewer, *A Novel Approach to Using LLCs For Quasi-Charitable Endeavors (a/k/a "Social Enterprise")*, 38 WM. MITCHELL L. REV. 678, 679–82 (2012); Ryan J. Gaffney, *Hype and Hostility for Hybrid Companies: A Fourth Sector Case Study*, 5 J. BUS. ENTREPRENEURSHIP & L. 329, 331 (2012); J. Haskell Murray & Edward I. Hwang, *Purpose with Profit: Governance, Enforcement, Capital-Raising and Capital-Locking in Low-Profit Limited Liability Companies*, 66 U. MIAMI L. REV. 1, 3–5 (2011); Dana Brakman Reiser, *Governing and Financing Blended Enterprise*, 85 CHI.-KENT L. REV. 619, 620–30 (2010); Dana Brakman Reiser, *Blended Enterprise and the Dual Mission Dilemma*, 35 VT. L. REV. 105, 108–11 (2010); Elizabeth Schmidt, *Vermont's Social Hybrid Pioneers: Early Observations and Questions to Ponder*, 35 VT. L. REV. 163, 163 (2010); John Tyler, *Negating the Legal Problem of Having "Two Masters": A Framework for L3C Fiduciary Duties and Accountability*, 35 VT. L. REV. 117, 117 (2010).

21. See, e.g., William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 818–19 (2012); Ann E. Conaway, *The Global Use of the Delaware Limited Liability Company for Socially-Driven Purposes*, 38 WM. MITCHELL L. REV. 772, 781 (2012); Rakhi I. Patel, *Facilitating Stakeholder-Interest Maximization: Accommodating Beneficial Corporations in the Model Business Corporation Act*, 23 ST. THOMAS L. REV. 135, 137–38 (2010); Dana Brakman Reiser, *Charity Law's Essentials*, 86 NOTRE DAME L. REV. 1, 38–39 (2011); Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 593–94 (2011); Steven Munch, *Improving the Benefit Corporation: How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form*, 7 NW. J. L. & SOC. POL'Y 170, 171 (2012).

22. See, e.g., Hamilton, *supra* note 2, at 859 (noting that it sometimes is hard to tell whether a new business form is, in fact, a modified version of an existing form); Charles R.T. O'Kelley, *Foreword: The Many Passions of Teaching Corporations*, 34 GA. L. REV. 423, 426–27 (2000) (asking whether professors should teach students the ins and outs of corporations as a legal device or the social possibilities of corporations).

23. I acknowledge here that teaching is not all about content and coverage. Coverage is a necessary, yet insufficient, focus for the pedagogy in a foundational course on business entities, transactions, and disputes. Having said that, I am not alone in acknowledging that doctrinal growth and change have effects on law teaching. See, e.g., Jay M. Feinman, *The Future History of Legal Education*, 29 RUTGERS L.J. 475, 479 (1998) (“[T]he expansion of the law has caused the core of required substantive material to decline, and the substance taught tends to be much more an introduction to principles—vocabulary—in assorted areas. Recognizing that the body of the law is very large and frequently changing, the new law school spends less time on the simple acquisition of substantive doctrinal knowledge in area after area.”).

24. Corporate governance is defined in many different ways by many different commentators for use in many different contexts. The definition here is my own for use in this broad context, but it closely resembles those of others using the term in a similarly broad context. See, e.g., Allison Dabbs Garrett, *Themes and Variations: The Convergence of Corporate Governance Practices in Major World Markets*, 32 DENV. J. INT'L L. & POL'Y 147, 147 (2004) (“At its most basic, corporate governance deals with the relationships among various stakeholders with respect to the control of corporations.”); Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187, 189 (1991) (“Corporate governance is a means of ordering the relationships and interests of the corporation’s constituents: stockholders, management, employees, customers, suppliers, other stakeholders and the public. The legal rules that constitute a corporate governance system provide the framework for this ordering.”); Paul Rose, *Regulating Risk by “Strengthening Corporate Governance,”* 17 CONN. INS. L.J. 1, 3 (2010) (noting that corporate governance may be seen as, among other things, “a description of the relationship between corporate stakeholders”).



securities offering reforms in 2005,<sup>26</sup> the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>27</sup> in 2010, and the Jumpstart Our Business Startups (JOBS) Act<sup>28</sup> and Stop Trading on Congressional Knowledge (STOCK) Act<sup>29</sup> in the spring of 2012 all affect the norms of corporate law and the interrelated practice of corporate finance. All are federal law initiatives that directly impact interrelations between and among internal (and, in some cases, external) constituents of business enterprises through the regulation of public companies (and indirectly may impact governance for private business associations).

### III. THE TASK OF TEACHING BUSINESS ASSOCIATIONS

These and other legal and regulatory challenges and changes, together with the effects of globalism and the Internet and a more fluid (and difficult) legal education environment, force us to reconsider our coverage and overall pedagogy in courses like Business Associations. Questions abound. What forms of business entity should be covered in a standard Business Associations course? How can an instructor cover both the basic structural elements of each form of entity and the important nuances of, for example, the different fiduciary duties of constituents in each business form? Is it possible to teach (and learn) skills and professionalism with all the substantive clutter? And what about comparative and international concepts to help prepare our students for the global business and legal world they'll be entering? Can our aspirational goals for this course be met in a standard three-credit-hour or four-credit-hour course?<sup>30</sup> What does a *successful* course offering in Business Associations look like?

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25. Pub. L. No. 107–204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

26. See Securities Offering Reform, Securities Act Release No. 8591, Exchange Act Release No. 52,056, Investment Company Act Release No. 26,993, 70 Fed. Reg. 44,722, 44,722 (Aug. 3, 2005) (codified in scattered sections of 17 C.F.R.).

27. Pub. L. No. 111–203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S.C.).

28. Pub. L. No. 112–106, 126 Stat. 306 (2012) (codified in 15 U.S.C.).

29. Pub. L. No. 112–105, 126 Stat. 291 (2012) (codified in scattered sections of the U.S.C.).

30. See, e.g., Robert C. Clark, *Bases and Prospects for Internationalization of Legal Education in the United States*, 18 DICK. J. INT'L L. 429, 438 (2000). In addressing integrating international law into more courses in the curriculum, Dean Clark noted that:

Most people who teach serious substantive courses, say corporations or financial institutions, feel they have so much to do that it is hard to even think of devising, mastering, and teaching an international module in such a course. Every time we've tried to launch such a pattern by committee or program head recommendation, it really hasn't caught on. What does one need that might make the technique work? Well, money can help. If you give people money to spend their summer research time or a semester to develop an international-law module that they then understand and "own," then maybe the approach will work. Meanwhile, it might be good to foster specialized courses with an international slant. For example, if you get an enthusiastic teacher of something like international joint ventures or cross-border M&As, that may get a bigger and better response from students, as well as sustainable faculty involvement.

The answers to these and other related questions depend on many factors, including: the extent of the current and future resources of the institution (e.g., the number of instructors for the course, the financial capacity and institutional desire to grow the instructor ranks with new tenure-track or tenured hires, visiting professors, and adjuncts, etc.); the overall curriculum and degree requirements at the institution; the knowledge and experience of the instructors; the teaching and learning objectives of the instructors; and the number, background, capabilities, and employment objectives of students in the class. However, there are undoubtedly goals, judgments, strategies, tactics, and tools that we can share with each other that may help all of us to better design and execute our teaching in Business Associations (or a similar foundational business entities offering) this year and beyond. Our colleagues have shared valuable insights of this kind over the years.<sup>31</sup> Particularly rich is a 2000 volume of the *Georgia Law Review* featuring a series of essays on business law education.<sup>32</sup> My hope is that we can continue and

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*Id.* The same is true for new forms of business entity and securities law issues, the principal topics I am raising for consideration here. But the inclusion of international and comparative law topics in Business Associations continues to be a matter of debate for instructors.

31. See, e.g., Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1315 (2003) (calling on "fellow corporate law professors to rethink how we teach business courses, especially the basic course in business associations" in light of the Enron affair and the enactment of the Sarbanes-Oxley Act of 2002); Robert J. Rhee, *The Madoff Scandal, Market Regulatory Failure and the Business Education of Lawyers*, 35 J. CORP. L. 363, 385–86 (2009) (proposing that instructors require students to learn basic business concepts); Cheryl L. Wade, *Attempting to Discuss Race in Business and Corporate Law Courses and Seminars*, 77 ST. JOHN'S L. REV. 901, 907 (2003) ("I have asked my students in Corporate Governance and Accountability to make the connection for themselves between economic disparities among racial groups in the United States and the social irresponsibility of corporate citizens that discriminate."); Cheryl L. Wade, *Teaching Gender as a Core Value in Business Organizations Class*, 36 OKLA. CITY U. L. REV. 545, 545–46 (2011) (mentioning the author's teaching of gender in her Business Associations course and a corporate governance seminar); Elliott J. Weiss, *Accounting and Taxation: Teaching Accounting and Valuation in the Basic Corporation Law Course*, 19 CARDOZO L. REV. 679, 680 (1997) (arguing that "it is important—and perhaps even essential—to teach accounting and valuation as part of the basic corporation law course").

32. See Richard A. Booth, *A Minimalist Approach to Corporation Law*, 34 GA. L. REV. 431, 432 (2000); Douglas M. Branson, *Teaching Comparative Corporate Governance: The Significance of "Soft Law" and International Institutions*, 34 GA. L. REV. 669, 697 (2000); Eric A. Chiappinelli, *Stories from Camp Automotive: Communicating the Importance of Family Dynamics to Corporate Law Students*, 34 GA. L. REV. 699, 700 (2000); Lawrence A. Cunningham, *Comparative Corporate Governance and Pedagogy*, 34 GA. L. REV. 721, 722 (2000); Lawrence A. Hamermesh, *Why I Do Not Teach Van Gorkom*, 34 GA. L. REV. 477, 478–79 (2000); Peter H. Huang, *Teaching Corporate Law from an Option Perspective*, 34 GA. L. REV. 571, 571–72 (2000); Hurst, *supra* note 2, at 779–80; Faith Stevelman Kahn, *Transparency and Accountability: Rethinking Corporate Fiduciary Law's Relevance to Corporate Disclosure*, 34 GA. L. REV. 505, 508–09 (2000); Paul G. Mahoney, *Contract or Concession? An Essay on the History of Corporate Law*, 34 GA. L. REV. 873, 873 (2000); Therese Maynard, *Teaching Professionalism: The Lawyer as a Professional*, 34 GA. L. REV. 895, 920–26 (2000); Charles R.T. O'Kelley, *Delaware Corporation Law and Transaction Cost Engineering*, 34 GA. L. REV. 929, 930 (2000); O'Kelley, *supra* note 22, at 426–27; Richard W. Painter, *Professional Responsibility Rules as Implied Contract Terms*, 34 GA. L. REV. 953, 970 (2000); Ribstein, *supra* note 5, at 984–85; Edward Rock & Michael Wachter, *Corporate Law as a Facilitator of Self Governance*, 34 GA. L. REV. 529, 543 (2000); Testy, *supra* note 2, at 1031–44; Robert B. Thompson, *Teaching Business Associations: Norms, Economics and Cognitive Learning*, 34 GA. L. REV. 997, 1001–07 (2000); Frederick Tung, *Limited Liability and Creditors' Rights: The Limits of Risk Shifting to Creditors*, 34 GA. L. REV. 547, 549 (2000).

extend this conversation in the current, expansive, changing legal employment and education environment by openly sharing actual examples and proposed models that address the teaching of relevant theory, policy, doctrine, and skills in light of new forms of entity and an increasingly detailed and complex securities regulation scheme.

As an initial bit of food for thought along these lines, I offer the following quote from a book-review essay, now almost 25 years old, written by Professor David Carroll (which also is offered as proof that many of the issues raised for discussion here are not entirely — really, at all — new).

*I hate teaching Corporations. At the University of Southern California, this four-hour course is supposed to cover partnerships, limited partnerships, basic agency, simple accounting concepts, corporate structure, special problems of close corporations, the regulation of corporate management, a touch of securities law, and a dash of corporate finance, as well as the federal regulation of insider trading, tender offers and freezeouts. The course creates an impact similar to the target pattern of an open-choke shotgun fired from a great distance.*

*There are several approaches to teaching this impossibly broad course. One approach is to provide a general survey of the entire area. This approach, however, develops into an un nourishing, intellectual gruel. Indeed, there is the danger of inflicting irreversible brain damage on students during the period when basic corporate concepts are being imparted. A more promising approach emphasizes the fiduciary duties of business managers, but I guess any approach must of necessity explore fiduciary duty concepts. Another approach is to dash through the basic structural material, give a week or two on the duty of care and loyalty, and spend the rest of the course on the sexy stuff involving the modern regulation of public corporations. The problem with this final approach is that it tends to build intellectual castles in air. For example, during a complex policy law discussion of a tender offer or freezeout, students might ask for a definition of “a distribution” or an exploration of the basic relationship between a shareholder and management. To complicate this mess even further, the backgrounds of the students range from MBA/CPA’s with business experience to poetry majors who have been sheltered by their parents.<sup>33</sup>*

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33. David W. Carroll, *Clark, Corporate Law: A Paradigm For Future Student Textbooks*, *Corporate Law*, 62 S. CAL. L. REV. 187, 187–88 (1988) (book review); see also Stevelman, *supra* note 2, at 835–39 (describing a “traditional” way of teaching the foundational course or courses on business entities). Apropos of the final comments in the quoted text, I recommend an engaging article on the overall softening of U.S legal education

After a quarter of a century, this assessment still resonates (at least with me) and describes many current issues we face as business law instructors teaching the basic course (although we now have even more basic forms of entity to teach . . .). Moreover, the three articulated approaches, while not exhaustive or even mutually exclusive, continue to represent viable approaches to organizing the material in the standard introductory business entities offering. This may be scary, depressing, amusing, comforting, inspiring, or evocative of some other emotional or psychological reaction. But it is what it is.

In the remainder of this essay, I reflect on Professor Carroll's appraisal and share with you some of my thoughts on teaching Business Associations in the current environment by giving you more details about what I do in my course at The University of Tennessee College of Law. The nature and content of my Business Associations course are necessarily shaped and constrained by institutional and personal characteristics that may or may not be consistent with those of other Business Associations instructors. Accordingly, I offer the particulars on my course not as a template or model, but rather as ideas that may reinforce what others teaching the course are doing or spark new ideas for use in future course planning.

#### IV. DETAILS ON MY BUSINESS ASSOCIATIONS COURSE

This part answers two principal questions. What organizing and executing principles do I use for my Business Associations course, and why? How do they relate to Professor Carroll's observations?

I organize the core of the course (the first two-thirds to three-quarters of the semester) around choice of entity analysis.<sup>34</sup> I do this because, as a business transactional lawyer, that is the way I use the law in practice. That was true for my fifteen years of private practice, and it is true for the small amount of consulting that I do, the practice opportunities that I have with our business clinic students, and the state bar association work that I do as a member of the Executive Committee of the Tennessee Bar Association Business Law Section (which has spearheaded the adoption of a new Tennessee limited liability company statute<sup>35</sup> and revisions to the Tennessee Business Corporation Act<sup>36</sup> since I have been working

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in contrast to the hardening of the U.S. business environment: Robert M. Lloyd, *Hard Law Firms and Soft Law Schools*, 83 N.C.L. REV. 667 (2005).

34. I am not alone in choosing this approach. See George W. Dent, Jr., *Business Lawyers as Enterprise Architects*, 64 BUS. LAW. 279, 325 (2009) ("Courses in a business law sequence should focus on the role of enterprise architect . . . beginning with the basic Business Associations course. The basic course should cover both corporations and unincorporated entities because choice of entity is often a crucial issue for business lawyers."); Scott E. Thompson, *Developing a Comprehensive Approach to Teaching Lawyering Skills: A Response to the MacCrate Report, Fifteen Years Later*, 3 LIBERTY U. L. REV. 47, 61-62 (2009) (explaining how a business associations course with an emphasis on choice of entity promotes a better understanding of how to properly conduct, plan and draft corresponding entity formation documentation after client interaction).

35. Tennessee Revised Limited Liability Company Act, TENN. CODE ANN. §§ 48-249-101 to 1133 (2012).

36. Tennessee Business Corporation Act, TENN. CODE ANN. §§ 48-11-101 to 48-27-103 (2012).

with the section). The remainder of the course focuses on depth issues in corporate law — the most well-developed body of business entity law that we have in the United States. In the typical semester, this part of the course covers issues relating to complex business litigation, mergers and acquisitions, the overlay and encroachment of federal securities law on the state corporate law system, and (time permitting) professional responsibility in the business law setting (including the breadth of the professional responsibility rules on practicing before the Securities and Exchange Commission — rules that may be traps for the unwary in business law practice). I love this part of the course because my practice experience was in corporate finance (including offerings, mergers, and acquisitions). So, in essence, I organize and execute the course so that I can teach from the standpoint of my personal and professional strengths — strengths gained in my fifteen years of private practice before starting my academic career in law teaching.

I do focus on substantive coverage in establishing and implementing my course plan. I structure the course in an effort to ensure that my students — many of whom will not take another law school course focusing on matters of entity law — acquire knowledge of the basic legal rules and norms governing agency relationships and a number of different forms of business entity. Understanding that there is no possible way to cover all those rules and norms, I begin the course with a comparative entity unit. In this part of the course, we begin by honing in on a number of key concepts that repeat in the laws governing agency relationships and unincorporated business associations as we cover sole proprietorships, partnerships, limited liability partnerships, limited partnerships, and limited liability companies.<sup>37</sup> Then, we look at the corporate form in more depth — noting as we go where and how the rules and norms we earlier covered are reflected and not reflected in corporations. I give my students charts that they can fill in, one for each business form, to capture the rules and norms and citations for each (which I tell them are part of what they need to know to do well in the course — every rule must be supported with a citation). I tell them that they should use this tool or something like it to ensure that they understand the similarities and differences between and among the different business forms. I also make sure that they understand that this comparative information is a large part of what they need to enable them to choose a form of entity for a client's business. In this way, my course sounds a lot like an implementation of the first approach outlined in Professor Carroll's book review essay quoted above.<sup>38</sup>

Quite honestly, however, this part of the course is about more than the coverage of agency law and the law governing unincorporated and corporate business

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37. See generally Ribstein, *supra* note 5, at 984–85 (“The traditional way to cover unincorporated firms is to relegate them to a self-contained part of the course, usually the beginning. This at least has the attraction of making partnership type firms available as analogies and as part of the background for studying corporations.”).

38. Carroll, *supra* note 33, at 187.

associations. Along the way, we have the opportunity to pick apart some of the statutes and understand the way that they are organized. My philosophy here is that it always is better to teach the students to find the material than it is just to point out all the rules.<sup>39</sup> We use cases in this part of the course not only to illuminate and illustrate the application of rules and norms, but also to help us test them in other circumstances — sometimes, e.g., by extending the facts of the case into a related hypothetical. Also, many of the cases were decided under prior statutes or statutes that deviate from those excerpted in our statutory resource book (which is *not* identified as a supplement in my courses, since it is a primary text<sup>40</sup>). Understanding and application in this part of the course is assessed through (as I note, in passing, above) short quizzes or polls on the rules and norms and their application, a brief (one-page) writing assignment, and an oral midterm examination conducted in groups of three students each (two for one or two groups, if the number of students is not evenly divisible by three).<sup>41</sup> Students especially find the application of law to facts valuable in the oral midterm examination, which I structure as a simulated advisory session for me (as a partner in a firm or a judge) to prepare for a conversation that I have scheduled with a client or counsel. Moreover, they get the chance, through the midterm and other

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39. I am reminded here of (and have used in class) the oft quoted and paraphrased proverb that if you give a man a fish you feed him for a day, but if you teach him to fish, you feed him for a lifetime. Of course, I am not the first law school instructor to take this approach in educating students or to think of quoting or citing to this proverb in a law review article. See, e.g., Thomas Earl Geu & Martha S. Davis, *Work: A Legal Analysis in the Context of the Changing Transnational Political Economy*, 63 U. CIN. L. REV. 1679, 1732 (1994–1995); Marjory E. Kornhauser, *Cognitive Theory and the Delivery of Welfare Benefits*, 40 LOY. U. CHI. L.J. 253, 295 (2009); see also 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 511 n.19 (1996) (quoting *The International Thesaurus of Quotations* 646 (compiled by R. Tripp 1970) (“Give a man a fish, and you feed him for a day. Teach a man to fish, and you feed him for a lifetime.”)).

40. Early in my teaching career, a colleague who was presenting on pedagogy at a conference suggested that students might not take a statutory “supplement” (the label commonly given to these texts by publishers) seriously because they think it includes merely supplemental information. I took this suggestion to heart and relabeled the statutory supplement as a “resource book” in both Business Associations and Securities Regulation (courses in which the use of the statutes and regulations are critical). I tell students that, for most of the course, if they forget one textbook at home or in their lockers, it had better be the casebook. (I usually try to note two exceptions—the days on which we are covering piercing the veil and fiduciary duties, since the legal rules and norms governing these areas come almost exclusively from decisional law.)

41. Students, including the research assistant who worked with me on this essay, see *supra* author’s footnote, tend to remark positively on the mix of assessment tools, which are innovations that are favorably noted in the academic literature on law teaching. See generally John M. Burman, *Oral Examination as a Method of Evaluating Law Students*, 51 J. LEGAL EDUC. 130, 134 (2001) (identifying the benefits of oral examinations as assessment tools in law school); Andrea A. Curcio, *Assessing Differently and Using Empirical Studies to See if it Makes a Difference: Can Law Schools do it Better?*, 27 QUINNIPIAC L. REV. 899, 908 (2009) (touting, among other things, the use of oral exercises, collaboration skills, and formative assessment in law school course offerings); Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 506 (2007) (noting the value of teaching students about the importance of cooperation with opposing counsel when doing transactional work); Greg Sergienko, *New Modes of Assessment*, 38 SAN DIEGO L. REV. 463, 468–74 (2001) (decrying the exclusive use of essay examinations in legal education); David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915, 1925 (2005) (suggesting that teamwork, creativity, and good judgment are critical components of good problem solving and successful lawyering).

assignments, to work in teams and practice their reading, analytical, and communication skills in a group setting. So, even this first part of the course is not merely a general survey of law (i.e., it is more than “unnourishing, intellectual gruel”<sup>42</sup>).

The back end of the course — the corporate depth part — gives students the opportunity to learn new, more specialized aspects of business entity law while, at the same time, reviewing key norms of corporate law and connecting corporate law to other bodies of law they have studied, are studying, or will study. For example, in the complex business litigation unit, students learn the specialized civil procedure aspects of derivative litigation and can review and reinforce their knowledge of fiduciary duties (as well as the business judgment rule, exculpation, indemnification, and director and officer liability insurance) in the process. The securities litigation and change of control units expose the students to alternatives to state law fiduciary duty actions (i.e., securities fraud actions and appraisal claims arising from the exercise of dissenters’ rights). The unit on basic corporate changes (including mergers and acquisitions) permits a nice review of corporate formation and governance norms and the tensions between management-centric and shareholder-oriented control devices in the corporation. Additionally, discussions about professional responsibility in the business law setting help students to understand the importance of knowing the professional consequences of choosing and pursuing different legal paths for business clients. In other words, the choice of path may determine the professional responsibility rules (state or federal rules) to which a lawyer is subject and with which a lawyer must comply. Student learning is assessed in this latter part of the semester through another writing assignment and a traditional written examination (which covers all material back to the beginning of the semester, but is weighted more toward the material covered in the course since the midterm).

Both parts of my Business Associations course contain material on fiduciary duty (among the rules and norms covered for agency relationships and those for each form of entity). I agree with Professor Carroll that any conception of a sound course offering covering the basics of business enterprises must comprise fiduciary duty principles.<sup>43</sup> For some, however (as he notes), it is an organizing principle for the course. That is not true for my Business Associations course.

Finally, as for Professor Carroll’s third approach, I cannot exactly say that my Business Associations course comprises a “dash through the basic structural material, . . . a week or two on the duty of care and loyalty, and . . . sexy stuff involving the modern regulation of public corporations.”<sup>44</sup> This approach does,

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42. See *supra* note 33 and accompanying text.

43. See Testy, *supra* note 2, at 1039 (“One of the staples of the basic Corporations course is the extensive treatment of the fiduciary duties that those in control of corporations owe to the enterprise.”).

44. Carroll, *supra* note 33, at 187.

however, come closest to describing what my course sets out to accomplish in its overall breadth of coverage; and certainly, the whole course *does* feel like a dash — a four-credit-hour sprint incorporating formative and summative assessment. I have often likened my course to drinking business entity law through a fire hose.

My students and I do not build “intellectual castles in air”<sup>45</sup> in my Business Associations course, as Professor Carroll suggests we might. I explicitly ground the subjects we cover at the end of the course as much as possible in the earlier course material and also expressly give the students individual anchoring principles for each of the depth areas we cover. But I have observed (as Professor Carroll noted) that classroom activity and assignments in the course are affected by differences in students’ backgrounds.<sup>46</sup> (Having said that, I am not confident that I ever have taught “poetry majors who have been sheltered by their parents.”<sup>47</sup>) Some students who do not have business or business-related backgrounds psych themselves out by convincing themselves that their classmates with business and business-related experience know it all already. I tell them what I honestly know and believe — that a business background may help with understanding the facts but is unlikely to be of much help in knowing the applicable law. That knowledge they typically must get from the course; almost everyone is lacking it at the start of the course. Indeed, I have known students who studied business or related disciplines (e.g., finance, accounting, marketing, economics) as undergraduates who fail to keep up with the reading in my course and underperform.

While my Business Associations course is not required and is not appealing to all students (in addition to the work load, I am considered to be a difficult and exacting instructor, and my mean/median grades do not reflect grade inflation present in some other courses), I am over-enrolled every year at pre-registration and always have a full (but not always capacity) class. We limit enrollment to 72 students (I couldn’t possibly grade more than that with the number of assessments I do and the other course I teach in the fall). Students have to “bid points” to get into the course. Both the formal and informal feedback that I get from students tells me that I am on the right track. They say the course is a lot of work, but that (regardless of the grades they earn) they believe they know the material well at the end of the course if they have put in the required work. I also get many nice notes from students after they take the bar exam, saying that I helped make that part of their studying and exam-taking much easier and less stressful. So, while the course is not perfect, I do believe it is successful in educating a substantial number of students.

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45. *Id.*

46. See Testy, *supra* note 2, at 1033 (“One of the most significant challenges facing the teacher of corporate law is that students come to the course with radically different levels of familiarity with business terms and concepts.”).

47. Carroll, *supra* note 33, at 188.



V. CONCLUSION

My purpose and hope in publishing this essay is to get some ideas out on the table from which faculty members interested in developing or revamping a foundational course on business entity law can design courses that (1) efficiently use available resources, (2) build from individual strengths, (3) meet institutional curricular and degree requirements, and (4) educate our students for the short-term and long-term demands of a business law or other practice in a rapidly changing legal employment and education setting. This piece is truly, in that sense, a conversation-starter. Those of us who teach Business Associations or a similar course do not often take time to discuss with each other the ways in which we teach that course; but this may open up the communication lines — particularly to and for junior colleagues — on important issues regarding the teaching of this important course offering.

This essay also is part of an ongoing exploration for me — one that no doubt (and, again, I hope) will be aided by others. I still do not (and likely never will) know how to solve all or even most of the pedagogical problems created by the burgeoning law of business associations in our very unsettled legal employment and education environment. But perhaps by the end of the fall semester I can tell you more . . . .