

Fundamental themes in business law education: building the basic course around intra-firm relations

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The basic Business Associations course can be approached with the premise that the entire course can and should be built around the theme of the interaction among the various groups that form the business enterprise. In the eyes of American corporate law, those groups are typically shareholders, directors and management, while other important actors with an interest in corporate performance, such as non-management employees, the community at large, creditors, consumers and the like, are essentially treated as outsiders to the business enterprise. This treatment has been the subject of much criticism in recent years and a review of this criticism can form an integral part of the basic course.

One approach to teaching the basic course is through the use of a simple model that focuses on the separation of ownership from control (or, sometimes, the lack of such separation) in business enterprises, and the related agency costs. It provides a simple and understandable framework that allows students to grasp the materials more easily. With only small variations, this framework can incorporate some or all of the other models that de-emphasise the role of shareholders as owners of the enterprise.

The author describes a case study involving a two-person firm in which the owner (the 'principal') contributes all of the capital needed to start a business enterprise but does little or no work, and the employee (the 'agent') contributes no capital, but performs most or all of the work. This hypothetical thus serves as a framework for providing a general introduction to the course.

The next step is to highlight for the students in simple and familiar

terminology how this separation of ownership from control immediately gives rise to possibilities for 'shirking' by the agent and to demonstrate that the principal's attempts to eliminate this shirking can lead to substantial costs. Students are advised that these are referred to as 'agency costs' and it is explained that many of the corporate law principles to be studied during the semester are easily understood as attempts by the law to reduce the agency costs inherent in any organisation where ownership is separated from control.

The students are asked to consider why business enterprises in which ownership is separated from control exist, given all of these associated agency costs. Students should recognise two primary benefits that flow from organisations in which ownership and control are separated. The first is specialisation. The second potential benefit to the separation of ownership from control is diversification. This provides an opportunity to introduce students to the concept of systematic and unsystematic risks and the idea of reducing unsystematic risk through portfolio diversification.

This simple two-person firm example is then extended to the large publicly-held corporation by demonstrating that the owner of the firm is equivalent to the shareholders, again the 'principal,' and that the employee, the 'agent,' is equivalent to management. Although shareholders are the residual owners of the corporation, like our hypothetical owner, they are often passive and inactive, relying primarily on their agents to run the daily business of the corporation. The students should also recognise that managers, like the employee in our example, are responsible for running the daily activities of the corporation and, consequently, have great control over the corporation and the finances of the owners.

Personal monitoring of management in the public corporation context

is further complicated by the fact that the separation of ownership from control is even more severe than in our simple two-person firm. This, as all corporate law professors know but most law students do not, is due primarily to two factors. First, corporate law removes most decisions regarding the operation of the firm from shareholder control. Second, shareholders in a public corporation rarely play a meaningful role in monitoring and replacing management. This presents an opportunity to introduce students to collective action problems and the proxy process.

This analysis of shareholder monitoring is concluded with a discussion of institutional investors. Many commentators argue that institutional investors provide the hope of breaking the traditional cycle of shareholder apathy. Still other observers argue that, even assuming that institutional investors have the capacity and desire to exercise more control in public corporations, institutional activism could have potentially negative consequences.

The third device to constrain management shirking is an employment contract that specifies *ex ante* the agent's duties and the sanctions to be imposed if he fails to perform. While employment contracts are, of course, frequently used in connection with management, the problems of expense, uncertainty and effectiveness indicate that contracts (like all of the monitoring devices, including legal rules) may be a less than perfect means of aligning management and shareholder interests.

Corporate law attempts to alleviate some of the costs associated with such contracting through the use of enabling rules that act as a standard-form contract, establishing default rules that will govern the terms of the parties' relationship in the absence of an agreement to the contrary. Students are encouraged to analyse many corporate law provisions, including the duty of

care and duty of loyalty, as standard form contract provisions that attempt to deal with the vexing problem of specifying in advance the extent of the agent's duties. Given the obvious difficulties associated with specifically stipulating management's duties, shareholders may seek to employ an incentive-based contract that shifts some of the risk of loss to the agent. However, incentive-based contracts are not problem-free.

Finally, students are introduced to the idea that the parties in a firm may wish to rely on reputational considerations as a means of regulating agent behavior. In the public corporation setting, this is equivalent to the proposition that market forces and, in particular, the markets for corporate control and managerial labour may operate as effective constraints on management misbehavior. One of the central debates in corporate law is the extent to which market forces effectively constrain management misbehavior and the extent to which the law must intervene, and this point in the hypothetical exercise represents a good opportunity to introduce students to this debate.

Business organisations control an immense amount of wealth and power. Understanding how the participants in those organisations interact with each other and with the rest of society enables students to function as more able lawyers, voters and community members long after their knowledge of such minutiae as the Delaware code's approach to written shareholder consents has faded.

Designing learning strategies for competition law — finding a place for context and problem based learning

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Competition Law, the role of which has been rapidly expanding over the past decade, has become a popular subject in most law schools' curricula.

However, unlike Consumer Protection Law or Criminal Law, students come to this subject with little notion of what it entails. Nevertheless, like those other subjects, Competition Law has been the site of significant theoretical and empirical analysis. This paper examines the manner in which two teaching strategies, namely teaching in context and problem based learning, can be used together in teaching Competition Law.

Competition Law is not an easy subject to teach. There are two main barriers that must be addressed in teaching this, and probably a number of other commercially oriented subjects, such as Corporations Law or Taxation Law. The most significant complaint from students, which is expressed in the teaching evaluations, points to the extent to which they are required to know economics and the manner in which such theoretical knowledge can be translated to a real life event. The second main problem encountered, particularly in the early weeks of the semester, is that students find it difficult to engage with the subject matter because it is not relevant to their lives.

In considering the design of any subject attention must firstly be directed to the composition of the student body. Whereas there is a greater degree of uniformity among the postgraduate student population undertaking the Competition Law subjects, this is not so at the undergraduate levels. First there are the business oriented students, who include mature-age students, part-time students and students who have completed their first degrees. Often these students have some knowledge of business and current affairs, having undertaken a number of business subjects in their business degrees.

The second student category is the non-business student, as well as the straight law students. They generally have little or no knowledge of business and are not well versed with the

guiding economic rationale of the current regulatory framework or the terminology of Competition Law, which is presumed by the standard texts and the statute. They usually require greater guidance with these matters. However, they are also much more critical of the economic rationale and are open to a wider range of alternative theories in assessing competition law principles and practice. Engaging the students with this subject matter and allowing their concerns to be voiced within an informed theoretical framework is the challenge posed by these students.

Context has been used in numerous ways and has influenced legal education for well over two decades. The use of context contributes to the development of analytical skills in a student and goes toward achieving the second objective discussed earlier, namely that law teaching should encourage a critical questioning of the values inherent in laws. It allows students to consider how lawyers think. Being able to do so can allow the learner to appreciate the voices or values that are not considered in Competition Law.

There is no doubt that students in this subject need a good grounding in neo-classical economic analysis. However, how much economics is enough to understand the legislation and the case law is a difficult question to answer. Part of the reason why neo-classical economics has had a significant influence is that it appears to be scientific and promises to be value-free. But it is not value free and it does not offer solutions to all problems. It is in getting this message across and assisting students to develop a critical understanding of law and economics that context can be of assistance.

Teaching law using problem based learning can consist of case studies and individually directed learning as distinct from other modes of training, such as small group exercises. It can include giving students a fact situation