



FOUNDATIONS OF BUSINESS LAW  
LGST 921

SPRING 2018

Prof. Vince Buccola

Legal Studies & Business Ethics Department  
Jon M. Huntsman Hall 649  
tel: 215.573.4864  
e-mail: [buccola@wharton.upenn.edu](mailto:buccola@wharton.upenn.edu)

**Class Meetings**      Tuesdays, 3:00 – 6:00, HUNTSMAN HALL 658  
**Office Hours**        Drop-in or by e-mail

### Description

This course introduces key ideas concerning the place of business in society that have defined and occupied the legal academy. Topics will include a general overview of the genealogy of American legal scholarship; approaches to studying the law of contract, torts, and property; and nature and regulation of business firms, including corporate law, antitrust, crime, and bankruptcy.

### Requirements

Participation (50%)—leading discussion of one piece each week, being an active reader and discussant of the rest.

Final Paper (50%)—8000 to 15,000 words; due May 8.

### Readings

Asterisk indicates that the text need not be read for the day's discussion, but may be helpful extension of, or commentary on, the day's central readings—and ought to be consulted before the comprehensive exam. Dagger indicates that the text is being read primarily for its exposition or illustration of a *method*; the text's *substance* will not be a focus of attention.

#### 1. HISTORY OF LEGAL SCHOLARSHIP I: IS LAW A DISTINCTIVE SCIENCE?

*Readings*      † Schofield, *Christopher Columbus Langdell*, 55 *American Law Register* 273 (1907)  
                     Holmes, *The Path of the Law*, 10 *Harvard Law Review* 457 (1897)

Oliphant, *A Return to Stare Decisis*, 14 American Bar Association Journal 71 (1928)

Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Columbia Law Review 809 (1935)

† Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harvard Law Review 1 (1959)

\* Pound, *Mechanical Jurisprudence*, 8 Columbia Law Review 605 (1908)

\* Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 Harvard Law Review 1222 (1931)

\* Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 Vanderbilt Law Review 395 (1949)

\* Leiter, *American Legal Realism* [ssrn.com/abstract=339562]

\* Eskridge & Frickey, *The Making of Legal Process*, 107 Harvard Law Review 2031 (1993)

## 2. HISTORY OF LEGAL SCHOLARSHIP II: LAW AND ECONOMICS

*Readings* Coase, *The Problem of Social Cost*, 3 Journal of Law and Economics 1 (1960)

Posner, *The Economic Approach to Law*, 53 Texas Law Review 757 (1975)

Ellickson, *Of Coase and Cattle: Dispute Resolution among Neighbors in Shasta County*, 38 Stanford Law Review 623 (1986)

Jolls, Sunstein & Thaler, *A Behavioral Approach to Law and Economics*, 50 Stanford Law Review 1471 (1998)

\* Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale Law Journal 499 (1961)

\* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral* 85 Harvard Law Review 1089 (1972)

\* Kaplow & Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 Journal of Legal Studies 667 (1994)

\* McCloskey, *The Good Old Coase Theorem and the Good Old Chicago School* (1997) [available on McCloskey's web site]

\* Posner, *The Decline of Law As an Autonomous Discipline: 1962–1987*, 100 Harvard Law Review 761 (1987)

\* Dworkin, *Is Wealth a Value?*, 9 Journal of Legal Studies 191 (1980)

3. HISTORY OF LEGAL SCHOLARSHIP III: CRITICAL APPROACHES, NEO-FORMALISM

- Readings* Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harvard Law Review 1685 (1976)
- MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 Signs 635 (1983)
- Radin, *Market-Inalienability*, 100 Harvard Law Review 1849 (1987)
- † Baude, *Is Qualified Immunity Unlawful?*, 106 California Law Review \_\_ (2018) [available on SSRN]
- \* Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 Virginia Law Review 451 (1974)
- \* Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Michigan Law Review 2411 (1989)
- \* Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stanford Law Review 581 (1990)

4. CONTRACTS I: THREE (OR FOUR) AGES OF CONTRACTS SCHOLARSHIP

- Readings* Williston, *The Risk of Loss after an Executory Contract of Sale in the Common Law*, 9 Harvard Law Review 106 (1895)
- Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 Cornell Law Review 161 (1965)
- Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 University of Pennsylvania Law Review 485 (1967)
- Gilmore, *The Death of Contract* (1974)
- \* Baird, *Reconstructing Contracts* [introduction]

5. CONTRACTS II: LAW-AND-ETC. METHODS

- Readings* Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 American Sociological Review 55 (1963)
- Ayres & Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale Law Journal 87 (1989)
- Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 Journal of Legal Studies 115 (1992)
- Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 Michigan Law Review 633 (2010)
- \* Shffrin, *The Divergence of Contract and Promise*, 120 Harvard Law Review 708 (2007)

6. THE CORPORATION: TO WHAT END?

- Readings* Berle, *Corporate Powers and Powers in Trust*, 44 Harvard Law Review 1049 (1931)
- Dodd, *For Whom Are Corporate Managers Trustees?*, 45 Harvard Law Review 1145 (1932)
- Berle, *For Whom Corporate Managers Are Trustees: A Note*, 45 Harvard Law Review 1365 (1932)
- Coase, *The Nature of the Firm*, 4 *Economica* 386 (1937)
- March, *The Business Firm as a Political Coalition*, 24 *Journal of Politics* 662 (1962)
- \* Berle & Means, *The Modern Corporation and Private Property* (1932)
- \* Hansmann, *The Role of Nonprofit Enterprise*, 89 *Yale Law Journal* 835 (1980)

7. CORPORATE LAW: IF A RACE, THEN TO WHERE?

- Readings* Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 *Yale Law Journal* 663 (1974)
- Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 *Journal of Legal Studies* 251 (1977)
- Macey & Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 *Texas Law Review* 469 (1987)
- Roe, *Delaware's Competition*, 117 *Harvard Law Review* 588 (2003)
- \* Romano, *The Genius of American Corporate Law* (1993)

8. CORPORATE LAW: THE LAW OF WHAT?

- Readings* Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *Journal of Financial Economics* 305 (1976)
- Easterbrook & Fischel, *The Corporate Contract*, 89 *Columbia Law Review* 1416 (1989)
- Bratton, *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 *Stanford Law Review* 1471 (1989)
- Black, *Is Corporate Law Trivial? A Political and Economic Analysis*, 84 *Northwestern University Law Review* 542 (1990)
- \* Lipton, *Takeover Bids in the Target's Boardroom*, 35 *Business Lawyer* 101 (1979)
- \* Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 *Harvard Law Review* 1161 (1981)

9. CORPORATE LAW: SOMETHING TO DO AFTER ALL?

- Readings* Blair & Stout, *A Team Production Theory of Corporate Law*, 85 Virginia Law Review 247 (1999)
- Hansmann & Kraakman, *The Essential Role of Organizational Law*, 110 Yale Law Journal 387 (2000)
- Hansmann & Kraakman, *The End of History in Corporate Law*, 89 Georgetown Law Journal 439 (2000)
- \* Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 Northwestern University Law Review 547 (2003)
- \* Bebchuk, *The Case for Increasing Shareholder Power*, 118 Harvard Law Review 833 (2005)

10. CORPORATE LAW IN COMPLEX SYSTEMS

- Readings* Orts, *Shirking and Sharking: A Legal Theory of the Firm*, 17 Yale Law & Policy Review 265 (1998)
- Gilson, *From Corporate Law to Corporate Governance* (2016) [book chapter]
- Bratton & Sepe, *Shareholder Power and Incomplete Markets* (working paper)
- \* Buccola, *Opportunism and Internal Affairs* (working paper)

11. CRIME

- Readings* Laufer, *Corporate Bodies and Guilty Minds*, 43 Emory Law Journal 647 (1994)
- Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 Harvard Law Review 1477 (1996)
- Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 Iowa Law Review \_ (2018)

12. ANTITRUST

- Readings* Dewey, *The Common-Law Background of Antitrust Policy*, 41 Virginia Law Review 759 (1955)
- Hovenkamp, *Antitrust Policy after Chicago*, 84 Michigan Law Review 213 (1985)
- Khan, *Amazon's Antitrust Paradox*, 126 Yale Law Journal 710 (2017)

13. BANKRUPTCY

- Readings* Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 Yale Law Journal 857 (1982)

Carlson, *Philosophy in Bankruptcy*, 85 Michigan Law Review 1341 (1987)  
Warren, *Bankruptcy Policy*, 54 University of Chicago Law Review 775 (1987)  
Baird, *Bankruptcy's Uncontested Axioms*, 108 Yale Law Journal 573 (1998)  
\* Baird, *The Uneasy Case for Corporate Reorganizations*, 15 Journal of Legal Studies 127 (1986)  
\* LoPucki, *A Team Production Theory of Bankruptcy Reorganization*, 57 Vanderbilt Law Review 741 (2004)

**14. THE FIRM IN THE FUTURE**

*Readings* Baird & Rasmussen, *The End of Bankruptcy*, 55 Stanford Law Review 751 (2002)  
Gilson & Gordon, *The Agency Costs of Agency Capitalism*, 113 Columbia Law Review 863 (2011)  
Elhauge, *Horizontal Shareholding*, 129 Harvard Law Review 1267 (2016)  
[Something TBD on Uber-ification]