

## **Trends in Business Law Scholarship – What’s Next?**

*Donald C. Langevoort*  
*Georgetown University Law Center*

Corporate and securities law scholarship is by now thoroughly interdisciplinary, and has in many respects led the way in embracing not only ideas but methodological tools from other disciplines—the empirical turn toward event studies and regressions being the most notable. In reflecting on trends in scholarship in our field, it strikes me that the “elite” research has settled into a pattern that suggests some staleness of the dominant paradigm, with hope for some kind of forthcoming shift. But to where?

Corporate law had its methodological revolution in the late 70’s through the 80’s, and most of the field’s recognized stars became such by participating in it. The law and economics approach to corporate and securities law—drawing from the efficient markets research in finance and the basic microeconomic insights of optimal contracts—radically changed thinking. Gradually, a minor civil war developed within this genre about the relative merits of competitive market solutions versus regulatory intervention (compare Roberta Romano with Lucian Bebchuk), but even this assumed a common set of first principles and methodological tools and assumptions. Newer scholars have had to find their place within this domain. The safest choice has been to accept the dominant paradigm and either try to find new subject areas to explore or—more likely—contribute by trying to find data that supports one side of the skirmish or the other. There was a wave of innovation in the 1990’s as what was heretofore a U.S.-centric study of corporate and securities law went global (the extraordinary contributions of people like Ron Gilson, Bernie Black, Mark Roe, etc.). But today even this seems somewhat picked over.

The alternative has been to adopt a critical stance to this methodology and the resulting assumptions, which has not been entirely successful because of a lack of an alternative behavioral model from which to derive strong normative claims or empirical predictions. I have been drawn to behavioral economics and behavioral finance but there are well-recognized limits to the lessons. Scholars who take this route often write articles that report at length on findings from other disciplines—all of which is interesting and relevant, though often tentative or contingent—but then struggle to find anything more than a soft, mushy legal or normative recommendation. We do need more experimental work devoted specifically to the corporate context (see Guttentag et al. for an interesting recent example).

The current economic crisis may suggest we are ready for a shift. The lessons will readily show the dangers of too little regulation or legal intervention, but leave open the question of whether regulation truly has the capacity to succeed—when, why and how will it overcome its familiar pathologies? I suspect that corporate law scholarship should turn more to two disciplines that certainly have had some impact over the last twenty years, but maybe not enough: political science and sociology. To address the promise of a new regulatory paradigm, we need to go beyond the too-easy reference to public choice, median voter, etc., to a richer account of how law is made and implemented in the face of uncertainty and complexity (Henry Hu’s work on the capacity problem in financial regulation is brilliant and highly instructive; Roberta Romano has an interesting work in progress using content analysis in examining the rethinking of Sarbanes-Oxley). And there is interesting work on the sociology of knowledge that speaks to how actors “make sense” of uncertainty and complexity in ways that might be more adaptive than accurate, and naturally limit regulation’s

capacity to induce compliance. (I wish there was more good ethnographic work on the SEC, the Delaware judiciary, etc., corporate lawyers—see some of John Coates’ studies on the latter; sometimes you can just ask and get interesting results, see Barnard). The “new governance” research is promising along these lines, but yet to gain much traction and sometimes stumbles over its jargon (for an effort that largely avoids this, see Ford). But thinking hard, and constructively, about institutional competency in corporate law strikes me as where our field should be headed.

## References

- Barnard, *Corporate Therapeutics at the Securities and Exchange Commission*, 2008 Colum. Bus. L. Rev. 793
- Coates, *Explaining Variation in Takeover Defenses: Blame the Lawyers*, 89 Cal. L. Rev. 1301 (2001)
- Ford, *New Governance, Compliance and Principles-based Securities Regulation*, 45 Am. Bus. L.J. 1 (2008)
- Guttentag et al., *Brandeis’ Policeman: Results from a Laboratory Experiment on How to Prevent Corporate Fraud*, 5 J. Emp. Leg. Studies 239 (2008)
- Hu, *Misunderstood Derivatives: The Causes of Informational Failure and the Promise of Regulatory Incrementalism*, 102 Yale L.J. 1457 (1993)
- Langevoort, *The SEC, Retail Investors and the Institutionalization of the Securities Markets* (forthcoming, Va. L. Rev., 2009)
- Langevoort, *The SEC as a Lawmaker: Choices About Investor Protection in the Face of Uncertainty*, 84 Wash. U.L. Rev. 1591 (2006)
- Romano, *The Uncertain Future of the Sarbanes-Oxley Act* (forthcoming, Yale J. Reg., 2009)