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Untangling the Mystery of Teaching Business Organizations

Susan Pace Hamill
University of Alabama School of Law, shamill@law.ua.edu

UNTANGLING THE MYSTERY OF TEACHING BUSINESS ORGANIZATIONS

SUSAN PACE HAMILL*

*A teacher affects eternity; he can never tell where his influence stops.***

I. HOW I DISCOVERED BUSINESS ORGANIZATIONS AND THE CHALLENGES TEACHING IT

Twenty years ago in the spring of 1995, as a new Assistant Professor of Law at the University of Alabama, I eagerly started teaching Business Organizations even though at that time my professional reputation and expertise was solely in the tax area, especially partnership tax. The path that led to my teaching Business Organizations started in 1989 when I published a major article on the then brand new limited liability company (LLC)[1] and continued during the first half of the 1990s when I participated in the development of LLCs. I realized that in order to understand the true potential of LLCs I needed to diversify into business law, so I told the appointments

* Professor of Law, University of Alabama School of Law and Honors Professor, University of Alabama Honors College. I acknowledge the support of the University of Alabama Law School Foundation and the staff at the Bounds Law Library at the University of Alabama. I especially thank Dean Mark Brandon at the Law School and Dean Shane Sharpe at the Honors College for their collegial support and fine examples they have shown me as to what a teacher and a mentor should be. Finally I am eternally grateful to my students, numbering over two thousand, for providing me the opportunity to develop as a teacher.

** FAMILIAR QUOTATIONS 535 (John Bartlett & Justin Kaplan eds., 16th ed. 1992) (quoting HENRY BROOKS ADAMS, THE EDUCATION OF HENRY ADAMS (1907)). In the fall of 2000 during my first sabbatical, Dean Timothy George of the Beeson Divinity School, a very prominent figure in evangelical circles who at that time was my teacher, said on the first day of class, “Someday, I will only be remembered as one of your teachers,” and then said Thomas Aquinas, who became one of the world’s most influential theologians, was ridiculed at school. Aquinas’ teacher, who at that time was very influential, proclaimed, “You call him the dumb ox, but in his teaching he will one day produce such a bellowing that it will be heard throughout the world.” ELEONORE STUMP, AQUINAS 3 (2003). I tell my students this story on the first day of class and remind myself that the opportunity to touch their lives is both an awesome privilege and a serious responsibility.

1. *See* Susan Pace Hamill, *The Limited Liability Company: A Possible Choice for Doing Business?*, 41 FLA. L. REV. 721 (1989) [hereinafter Hamill, *A Possible Choice*].

committees when I interviewed for a law professor position that I wanted to teach Business Organizations.[2]

I quickly discovered that a paradox within the law of business organizations created pedagogical issues and made the material more challenging for my students to comprehend. *This quintessential example of interstate commerce is principally a function of state law*. The power of the states to legitimize business organizations has saddled us with fifty state statutes (and decisions from fifty state courts) for multiple business organization forms, the major ones being corporations (which can span the universe of a single shareholder, a closely held group of shareholders, many shareholders, or millions or even billions of publicly traded shares outstanding), partnerships (including LLPs), limited partnerships (including LLLPs), and LLCs. In addition to state law, students must also navigate the federal securities laws, which regulate business in certain situations where state law proved to be ineffective.

In order to improve my performance in the classroom, I dedicated a chunk of my scholarship to discover how and why the states gained the principal power over the law of business organizations and what similarities and differences truly exist among the different statutory forms.[3] In class I use the

2. In my second year of law school I became a dyed-in-the-wool tax convert after earning the highest grade in the basic income tax class. After completing a LL.M in taxation from New York University, I practiced tax law with the New York City law firms of Sullivan & Cromwell and Chadbourne & Parke and published my first law review article. *See* Hamill, *A Possible Choice*, *supra* note 1. I joined the Passthroughs Division in the Office of Chief Counsel of the Internal Revenue Service in 1990. While at the IRS, in addition to advising state drafting committees on how to ensure their LLC statutes complied with the partnership classification regulations in effect at that time, I was the principal author of the partnership tax regulations addressing the allocation of partnership income and losses attributable to nonrecourse debt. *See* Treas. Reg. § 1.704–2 (2009).

3. *See* Mitchel Hampton Boles & Susan Pace Hamill, *Agency Powers and Fiduciary Duties Under the Alabama Limited Liability Company Act: Suggestions for Future Reform*, 48 ALA. L. REV. 143 (1996); Laurel Wheeling Farrar & Susan Pace Hamill, *Dissociation From Alabama Limited Liability Companies in the Post Check-the-Box Era*, 49 ALA. L. REV. 909 (1998); Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81 (1999) [hereinafter Hamill, *From Special Privilege*]; Susan Pace Hamill, *The Limited Liability Company: A Catalyst Exposing the Corporate Integration Question*, 95 MICH. L. REV. 393 (1996); Susan Pace Hamill, *The Origins Behind the Limited Liability Company*, 59 OHIO ST. L.J. 1459 (1998) [hereinafter Hamill, *Origins*]; Susan Pace Hamill, *The Story of LLCs: Combining the Best Features of a Flawed Business Tax Structure*, *in* BUSINESS TAX STORIES 295 (Steven A. Bank & Kirk J. Stark eds., 2005) [hereinafter Hamill, *Story*]; Susan Pace Hamill, *The Taxation of Domestic Limited Liability Companies and Limited Partnerships: A Case for Eliminating the Partnership Classification Regulations*, 73 WASH U. L.Q. 565 (1995) [hereinafter Hamill, *Partnership Classification Regulation*]; Fallany O. Stover & Susan Pace Hamill, *The LLC Versus LLP Conundrum: Advice for Businesses Contemplating the Choice*, 50 ALA. L. REV. 813 (1999).

historical evolution of business organizations as a map to plot the order in which I cover the material. I believe this helps demystify what appears on the surface to be a disorganized mess of random statutes and cases. Also, because the jobs available for students have declined in large law firms that typically represent big business, I more heavily emphasize small business in order to empower students to represent this type of client immediately after graduation.

A. A Word on Books and Materials and Getting Started

I use Charles R.T. O'Kelley and Robert B. Thompson's casebook because the authors cover partnerships, corporations, closely held corporations, and LLCs in different chapters in a way that best fits the order and emphasis I have chosen.[4] I do not use a standard statutory supplement. Instead, I provide students a copy of Alabama's Revised Uniform Partnership Act, Alabama's Business Corporation Act (which is based on the Model Act), and Alabama's Limited Liability Company Law as broadly representing any state's statute. The casebook (either in principal cases or the notes) identifies materially important differences in Delaware's and other states' statutes and common law, rendering it unnecessary to include statutory provisions from multiple states. I also provide students materials containing excerpts of selected law review articles.

I do not give students a reading assignment for the first day of class. Over the years I discovered that for various reasons (some legitimate, some less so) many students failed to complete the assignment, while others joining us late during the add-drop period were disadvantaged. Instead, I use the first day to build trust and rapport with the students. I provide an overview of my background and scholarship in both the business and tax areas. Also, I explain that I am aware of the job market and why I believe developing well-rounded knowledge to competently advise small businesses (which requires them at a minimum to also take the Personal Income Tax and the Business Tax classes) provides them a set of skills to build a client base if they hang out a shingle on their own.

I discuss class preparation. My syllabus has five units, identified by numbers, and each unit has sub-units, identified by alphabetical letters with assigned readings. I bold the most important statutory provisions, and students have told me that they appreciate that. I advise the students to read the entire sub-unit as a unified whole even if it will take me more than one class period to cover it. I also tell them that in many ways the units stand alone, meaning after I have finished the unit they can outline it to prepare for the final exam. I

4. CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: CASES AND MATERIALS (7th ed. 2014).

strongly urge them to outline as we go and not wait until the end of the course to get started.

Finally, on the first day, I illustrate the law school curricula's core classes and where Business Organizations fits in. I include examples of electives only in the core business and tax areas. Many students have told me this presentation helped them retain the material because it put the law of business organizations in a deeper context than merely a set of principles and rules to be memorized. Although business and tax professors sometimes jokingly do not like to admit this, Constitutional Law must be at the top of this chart because it is the foundation of United States law.

CONSTITUTIONAL LAW

Criminal Law & Procedure Torts Civil Procedure Property Contracts

Evidence Personal Income Tax

Business Tax ***Business Organizations***

Employment Law

Advanced Partnership Tax Agency & Partnership

Advanced Corporate Tax Securities Regulation

Corporate Finance

Business Planning & Business and Tax Seminars

I very briefly highlight each core area and do a more extensive review of Contracts. I remind students that absent extreme circumstances (such as fraud, undue influence, unjust enrichment) the law of contracts is very unforgiving. It will not invalidate a contract for inadequate consideration unless the consideration is so small it meets the "peppercorn" test, and it will usually not address areas that are not bargained for or are unclear. This is important to emphasize because in various ways the law of business organizations sometimes does both of those things.

Then I establish this link and remind students of this link throughout the course—*Business Organizations at its core is an extension of the law of contracts*. When economic relationships became too complicated and lengthy, the law of business organizations (both the state statutes and state common law) evolved to fill gaps that the law of contracts by itself could not adequately address.

I ask students to read *DisneyWar*[5] by the time we start Unit Two. This narrative nonfiction book, in a literary fashion, tells the story of the birth, rise, and turmoil of one of the most famous and beloved public corporations, Walt Disney Company, emphasizing the twenty-year tenure of Michael Eisner as

5. *See* JAMES B. STEWART, DISNEYWAR (2005).

Chief Executive Officer and Chairman of the Board.[6] In order to add some picturesque color to the material, when I cover the traditional corporation modeled for big business in Units Two and Three, I assign selected pages of *DisneyWar* and I refer to those parts of the story in class.

B. A Big Picture of the Class

On the second day of class, I start Unit One, "Introduction to the Firm and the General Partnership," and cover the assigned readings for Sub-Unit A, "Economic and Legal Concerns & Overview of the Types of Business Organizations." On the board, I put the diagram pictured below that illustrates a continuum of the major forms of business organizations, which loosely corresponds to their size.

<u>Closely Held Corporations</u>	<u>Widely-Held Corporations</u>	<u>Publicly Traded Corporations</u>
TAXED AS A C CORPORATION OR A SMALL BUSINESS CORPORATION UNDER SUBCHAPTER S		*TAXED AS A CORPORATION UNDER SUBCHAPTER C*
		<u>Publicly Traded Limited Partnerships & LLLPs</u>
		<u>Publicly Traded LLCs</u>

<u>General Partnerships</u>		<u>Limited Partnerships</u>
<u>LLPs</u>	<u>LLCs</u>	<u>LLLPs</u>

TAXED AS A PARTNERSHIP UNDER SUBCHAPTER K

All of the business organizations on this chart, except for general partnerships, require a formal filing with the particular state the owners choose to organize in.[7] Once such a filing is made, the state statute for the particular business organization chosen outlines the legal relationships.[8] I tell the students that these business organizations offer limited liability protection, meaning the debts of the business are not automatically attributed to the owners. The general partnership, which I call "the granddaddy" of business organizations

6. *Id.* at 1–4. *See also id.* at 521–23 (describing Eisner being deposed as chairman and preparing to resign as chief executive officer after nearly twenty years at Disney). *See also* Kenneth M. Rosen, *Mickey, Can You Spare a Dime?* DisneyWar, *Executive Compensation, Corporate Governance, and Business Law Pedagogy*, 105 MICH. L. REV. 1151, 1152 (2007) ("*DisneyWar* tells the story of the corporation during the long tenure of the company's former chairman and chief executive officer, Michael Eisner.").

7. *See* REVISED UNIF. P'SHIP ACT § 202(b) (1997) (associations formed under other statutes are not partnerships).

8. *See, e.g.*, ALA. CODE § 10A-2-1.01(b) (2010) (corporate statute applies if entity is incorporated under procedures); *id.* § 10A-5A-1.01 (2010) (effective Jan. 1, 2015) (LLC statute applies for entities formed as LLCs).

because it is the oldest and simplest form, automatically deems all general partners jointly and severally personally liable for the debts of the business.[9]

I then introduce the concept of default and immutable statutory provisions. Default provisions define the owners' legal relationship if they fail to spell it out in a contract, but the owners have flexibility to contract around the default provisions (for example, defining how they will share profits).[10] For immutable provisions (of which there are very few), the law of business organizations trumps a contractual agreement that otherwise would be enforceable if only the law of contracts applied.[11] I use a "Ginger Rogers and Fred Astaire" dancing metaphor to describe how the law of contracts and the law of business organizations operate together. Usually the contract will prevail (Fred dancing forward). But, if no contract exists then the default provisions apply, and in immutable situations the law of business organizations overrules any contrary contractual agreement (Ginger dancing backwards in high heels).

At this juncture I point out the significance of the line separating incorporated from most unincorporated business organizations. The line in the middle of my picture delineates the significant tax differences between corporations and unincorporated business organizations. Corporations, whether they are very small with only one or a few shareholders or are publicly traded, are taxed as a separate entity resulting in the same income being taxed twice: once to the corporation and a second time to the shareholders if they receive a return on their investment in the form of dividends.[12]

Many smaller corporations can and do elect subchapter S, which largely mitigates the double tax but contains certain significant limitations.[13] Unincorporated business organizations (any business organization that has not been organized as a state-law corporation) are taxed as partnerships unless they are publicly traded.[14] I describe the partnership tax rules as one level of tax at the owner level without the limitations of subchapter S—the fair-haired child of the business tax world.

Without getting into any more detail (they have to take Business Tax for that), I believe it is important to briefly highlight the basic tax distinctions and

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9. In this introduction, I tell the students I will cover the unincorporated business organizations, which are not general partnerships, in Unit Five.

10. *See* O'KELLEY & THOMPSON, *supra* note 4, at 49–50.

11. *Id.*

12. *See* Hamill, *Story*, *supra* note 3, at 295–96.

13. *Id.* at 295.

14. *See id.* at 312–13 (describing 1987 legislation taxing all publicly traded partnerships as corporations, thereby preventing LLCs from eroding the corporate tax paid by publicly traded corporations); Hamill, *Origins*, *supra* note 3, at 1483 (describing regulations, dubbed the "Check-the-Box" regulations, finalized in 1996 that automatically tax all non-publicly-traded unincorporated business organizations as partnerships unless the owners elect for the entity to be taxed as a corporation).

return to them in key parts of the course where they are relevant. The students cannot understand how and why LLCs (and a few years later LLPs and LLLPs) came into existence without being sensitive to the cursory tax distinctions. I conclude with a walk-through of the syllabus and briefly touch on what we will cover the entire semester. This Article provides a more expanded discussion of the introduction of each unit and their sub-units.

C. The Rest of Unit One: The General Partnership

For years I toyed with the order I should cover the rest of this unit. Initially, I started by defining what caused a general partnership to materialize and then moved on to the law of agency and the automatic agency relationship between the partners. I decided to reverse this order because the law of agency applies to many more legal relationships beyond general partners and introduces the anchor concept of fiduciary duty. Also, starting with the law of agency offers the students familiar material that helps ease them into the course. Agency law, having been first developed under common law and subsequently codified in the *Restatement of Agency*, resembles the evolution of general partnership law, which was also first developed under common law and subsequently codified by the Uniform Partnership Act.[15] Moreover, many students encountered Restatements in their first year contracts class.

For Sub-Unit B, "The Law of Agency & the Agency Relationship of Partners," I start with the common example of a real estate agent selling a house to make the point that in many situations contracts establish and define the principal/agent relationship. I point out that under employment law, employees are automatically agents of their employers within the scope of their employment. I then move on to section 301 of the Revised Uniform Partnership Act (RUPA), which deems each general partner an agent of the partnership within the scope of its business, thus broadly making general partners principals and agents of each other.[16]

To introduce the fiduciary duty of loyalty, I discuss two cases, one where an employee breached his duty of loyalty for lining up business for himself before severing the employment relationship and another difficult-to-distinguish case where the court found insufficient evidence to support a duty

15. *See* O'KELLEY & THOMPSON, *supra* note 4, at 49 (noting that "partnership rules are an amalgam of well-developed common law and equitable doctrines, now largely codified," and referring to the first statute as the Uniform Partnership Act (UPA 1914) and the second as the Uniform Partnership Act (UPA 1997)).

16. *See id.* at 20–21, 131–32 (noting that RUPA § 301 makes it unnecessary to analyze each partner's agency relationship).

of loyalty breach.[17] Covering multiple cases at the same time that are difficult to meaningfully distinguish forces students to think more critically about the material. I emphasize that the fiduciary duty of loyalty is owed even though the principal did not bargain for it and point out that contracts that expand this fiduciary duty through broad non-compete clauses have a stricter standard of review than ordinary contracts.[18] I introduce the student to the major lenses interpreting the duty of loyalty (and every other aspect of the law of business organizations)—the "fairness" approach, which requires the parties to refrain from self-interested behavior not specifically allowed by a contract and the "law and economics" approach, which approximates what they would bargain for if they could dicker without cost.[19]

After highlighting the termination of the agency relationship in the context of the at-will employment doctrine, I cover the power of the agent to bind the principal using two cases where an agent of an investment brokerage house defrauded the plaintiff.[20] I pull this into the realm of general partnerships by asking the students to assume that the rogue agent was a general partner rather than an employee. Either way, the doctrine of apparent authority will force the principal or partnership to bear the loss only if the plaintiff reasonably believed the rogue agent had authority.[21]

Sub-Unit C, "Defining a General Partnership, Sharing Profits and Losses & Fiduciary Duties" takes me three class sessions to complete.[22] I use two cases to illustrate that a general partnership materializes when sole proprietors *by course of conduct, not through their formal intent*, act as co-proprietors.[23] Once they have legally crossed over to a general partnership, in addition to acquiring agency power and being jointly and severally liable for the debts of the partnership, the partners will be subject to a number of other provisions in

17. *See id.* at 20–28 (covering Cmty. Counselling Serv., Inc. v. Reilly, 317 F.2d 239 (4 th Cir. 1963) and Hamburger v. Hamburger, No. 93-3359-E, 1995 WL 579679 (Mass. Super. Ct. Sept. 29, 1995)).

18. *See id.* at 28 (covering Robbins v. Finlay, 645 P.2d 623 (Utah 1982)).

19. *See id.* at 20–28 (covering Cmty. Counselling Serv., Inc. v. Reilly, 317 F.2d 239 (4th Cir. 1963) and Hamburger v. Hamburger, No. 93-3359-E, 1995 WL 579679 (Mass. Super. Ct. Sept. 29, 1995)).

20. *See* O'KELLEY & THOMPSON, *supra* note 4, at 29–48 (covering Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988); Blackburn v. Witter, 19 Cal. Rptr. 842 (Cal. Ct. App. 1962); and Sennott v. Rodman & Renshaw, 474 F.2d 32 (7th Cir. 1973)).

21. *See id.* I conclude this sub-unit with a case illustrating that a partner who exceeds his actual authority is liable for breach of contract to the other partners. *Id.* at 136–37 (covering Haymond v. Lundy, No. 99-5048, 2002 WL 1972101 (E.D. Pa. Aug. 23, 2002)).

22. Our curriculum allocates only three hours to Business Organizations. My class meets twice a week for seventy-five minutes rather than three times a week for fifty minutes.

23. *See* O'KELLEY & THOMPSON, *supra* note 4, at 54–63 (covering Byker v. Mannes, 641 N.W.2d 210 (Mich. 2002) and Hynansky v. Vietri, No. 14645-NC, 2003 WL 21976031 (Del. Ch. Aug. 7, 2003)).

the statute that automatically apply unless they agree otherwise, which can be an oral agreement.[24]

Under the default provision, unless they agree otherwise, they share profits equally and the profit share constitutes the sole compensation for partners who primarily contribute services.[25] If the partners fail to agree on how they bear losses the statutory default provides that they bear losses in the same ratio they share profits.[26] That can result in inequitable consequences if some partners contribute mostly services while others contribute mostly capital. I identify *Kovacik v. Reed*, in which the California Supreme Court reversed a lower court's order that the service contributor bear half of the capital contributor's losses, as an example of a "fairness" interpretation of the law.[27]

I identify another case in the notes as well as the comments in the RUPA that do not recognize the equitable remedy articulated in *Kovacik* as examples of a "law and economics" interpretation of the law.[28] While recognizing that "[i]t may seem unfair that the contributor of services, who contributes little or no capital, should be obligated to contribute toward the capital loss of the large contributor who contributed no services," the comments insist that partners desiring a different result should "take advantage of their power to vary by agreement the allocation of capital losses."[29] Such an agreement would require the capital contributor to bear all losses but also must require income to first restore those losses before being split according to the profit share.[30]

I launch a discussion of the fiduciary duty of loyalty general partners owe each other with *Meinhard v. Salmon*, one of Judge Cardozo's most famous opinions.[31] I juxtapose Cardozo's majority opinion as "fairness" leaning with Judge Andrews's dissent as "law and economics" leaning before moving on to

24. REVISED UNIF. P'SHIP ACT § 101(7) (1997) (stating explicitly that oral agreements are effective). I also tell the students it is always bad business planning to rely on oral agreements and that closely held corporations require agreements to be in writing, which we will explore in Unit Four.

25. *See* O'KELLEY & THOMPSON, *supra* note 4, at 69–72 (covering Shamloo v. Ladd, No. B154201, 2003 WL 68054 (Cal. Ct. App. 2003)).

26. REVISED UNIF. P'SHIP ACT § 401(b).

27. *See* O'KELLEY & THOMPSON, *supra* note 4, at 67–68 (covering Kovacik v. Reed, 315 P.2d 314 (Cal. 1957)).

28. *Id.* at 72; REVISED UNIF. P'SHIP ACT § 401 cmt. 3.

29. REVISED UNIF. P'SHIP ACT § 401 cmt. 3. *See also* ALA. CODE § 10A-8-4.01(b) (2010). Given the informal nature of general partnerships I ask the students whether it is reasonable to assume many general partners would think to enter into such an agreement.

30. *See* REVISED UNIF. P'SHIP ACT § 401(b) cmt. 3 (discussing ways in which the income and losses must be distributed among the partners, even when the partners have entered into an agreement).

31. Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928).

other cases exploring the contours of fiduciary duties among general partners.[32] I walk through the statute defining the limited ability to contract around fiduciary duties, and refer to a case where a court refused to enforce a contractual agreement giving a committee absolute discretion to allocate profits among all the partners when they inequitably divided the profits.[33]

Most students find the material of Sub-Unit D, "Dissociation, Dissolution & Expulsion" to be the most difficult in this unit. I begin by providing a summary of the highly dissolvable nature of partnerships governed by the Uniform Partnership Act and then point out that the RUPA default still triggers automatic dissolution if a partner withdraws from an at-will partnership, the scenario that accounts for a large amount of the litigated cases.[34] I also strongly emphasize that the power to dissociate is immutable—it cannot be eliminated by contract.[35] Then I cover the split in jurisdictions as to whether dissolutions that are not wrongful must result in cash liquidations or if a court is empowered to order a division of the assets.

The subjects of wrongful dissociation and dissolution pose perplexing questions. Cases such as *Page v. Page*, decided under the Uniform Partnership Act, recognize that it is possible for a partner to use his power to withdraw from an at-will partnership in a manner that amounts to a wrongful dissolution, although there are contrary decisions.[36] The RUPA did not resolve this split.

32. *See* O'KELLEY & THOMPSON, *supra* note 4, at 73–88 (covering Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928); Vigneau v. Storch Eng'rs, No. CV-890700122S, 1995 WL 767984 (Conn. Super. Ct. Dec. 4, 1995); and Covalt v. High, 675 P.2d 999 (N.M. Ct. App. 1983)). I also point out that some Uniform Partnership Act jurisdictions impose no duty of care among general partners. *Id.* at 92–95 (covering Ferguson v. Williams, 670 S.W.2d 327 (Tex. Ct. App. 1984)). However, the RUPA imposes a duty of care to refrain from grossly negligent conduct, which cannot be unreasonably reduced by an agreement. *See* ALA. CODE §§ 10A-8-1.04(b)(4), -4.04(c).

33. O'KELLEY & THOMPSON, *supra* note 4, at 88–92 (covering Starr v. Fordham, 648 N.E.2d 1261 (Mass. 1995)). I ask the students to consider whether the strict enforcement of the contract in *Haymond v. Lundy* can be meaningfully distinguished. In that case, Lundy was forced to subtract from his share of a contingent fee, which totaled almost $1 million, $140,000 of the $150,000 referral fee because the partnership agreement only authorized expenditures up to $10,000. Haymond v. Lundy, No. 99-5048, 2002 WL1972101, at *5 (E.D. Pa. Aug. 23, 2002). Docking Lundy for most of the referral fee rather than docking the partners equally meant Lundy was deprived of an equal share of the profit from this case even though he did all the work to bring it in. *See id.* Arguably strict enforcement of this contract inappropriately eliminates the duty of loyalty as it did in *Starr*. I speculate that perhaps Lundy's lawyer did not argue that enforcing the contract under these facts inappropriately eliminated the duty of loyalty.

34. *See* Farrar & Hamill, *supra* note 3, at 915–22.

35. REVISED UNIF. P'SHIP ACT § 104(b)(6).

36. O'KELLEY & THOMPSON, *supra* note 4, at 106–15 (covering Drashner v. Sorenson, 63 N.W.2d 255 (S.D. 1954); McCormick v. Brevig, 96 P.3d 697 (Mont. 2004); Page v. Page, 359 P.2d 41 (Cal. 1961); and Cude v. Couch, 588 S.W.2d 554 (Tenn. 1979)).

Both the "fairness" and "law and economics" camps on the drafting committee preserved their arguments in the statute.[37]

The expulsion of partners pursuant to a contract raises the issue as to what degree the duty of loyalty will overturn an otherwise enforceable contract. An important case, *Bohatch v. Butler & Binion*, recognizes that a contractual expulsion will not be enforced if it was invoked to usurp a partner's rightful economic share of the partnership, but it refuses to recognize wrongful expulsions outside the economic arena.[38]

D. Unit Two: The Corporation and the Shareholders

In Unit Two, I shift to the other side of my continuum with the "grandmamma" corporation, the traditional corporation not involving special law created for close corporations, and focus on the law addressing the issues faced by shareholders.[39] In Sub-Unit A, "Historical Development of the Corporation & Basic Corporate Characteristics," I explain how state legislatures rather than Congress acquired the power to issue special corporate charters, which subsequently resulted in general incorporation laws being created by the states.[40] Those state laws evolved in a manner that empowered shareholders to elect the board of directors and authorize extraordinary events while vesting control of the corporation's business with the board and appointed officers.[41]

I then move on to Sub-Unit B, "Election/Removal of Directors, Basic Corporate Governance and Rights to Corporate Information." Due to time constraints I streamline this material's vast detail in summary fashion. I emphasize only the big picture of straight and cumulative voting and the process of removing directors, and I contrast Delaware's entrenchment leaning

37. *See* Farrar & Hamill, *supra* note 3, at 921–22.

38. O'KELLEY & THOMPSON, *supra* note 4, at 116–22 (covering Bohatch v. Butler & Binion, 977 S.W.2d 543 (Tex. 1998) (holding that an expulsion retaliating against a partner for fulfilling her ethical obligation as a member of the Bar to report a partner suspected of overbilling a client is nevertheless valid)). The dissent in *Bohatch* argued that such expulsions should not be valid because the fiduciary duties imposed by the Code of Professional Responsibility should outweigh the contract, thus requiring the partnership to pay damages. *See id.* I also cover the fiduciary duties withdrawing partners owe when competing for clients. *Id.* at 122–31 (covering Meehan v. Shaughnessy, 535 N.E.2d 1255 (Mass. 1989)).

39. Over the years as LLCs joined the mainstream of business organizations, I cut coverage in this unit so I could expand Unit Five. The numbing details of the nuances of corporate governance, which are very important in corporate departments of large law firms and in-house counsel representing big business, are not as important for lawyers representing small businesses.

40. *See* Hamill, *From Special Privilege*, *supra* note 3, at 88, 122.

41. *See* O'KELLEY & THOMPSON, *supra* note 4, at 149–62 (summarizing characteristics of traditional corporations and procedures for incorporation).

policies with the model act.[42] *DisneyWar* adds color to this otherwise dry material. The removal of Roy Disney, the nephew of Walt Disney and one of the largest shareholders at that time, from Disney's board inspired a shareholder revolt that led to both the board stripping Michael Eisner of his position as Chairman of the Board and Eisner ultimately resigning as Chief Executive Officer.[43]

I start Sub-Unit C, "The Role of Federal Law," with the tale of Delaware winning the "race-to-the-bottom," the failed movement to federalize corporate law in the early twentieth century, and the stock market crash of 1929, all of which led to the birth of the 1933 and 1934 federal securities laws.[44] I cover a Supreme Court case that defines when an investment meets the definition of a "security," briefly describe the disclosure requirements reporting companies and public offerings must follow, and highlight major additions to the securities laws in the early twenty-first century.[45] I also summarize the regulations reporting companies must follow for proxy solicitations. Most students enjoy the material addressing whether the board can exclude certain shareholder precatory proposals or if those must be included in the proxy.[46]

E. Unit Three: The Corporation and the Directors

In Sub-Unit A, "Overview of Directors' Fiduciary Duties & the Business Judgment Rule," I discuss *Shlensky v. Wrigley* and *Dodge v. Ford Motor*

42. *Id.* at 162–207, 250–52 (covering Conservative Caucus v. Chevron Corp., 525 A.2d 569 (Del. Ch. 1987)). I require the students to only skim most of this material.

43. *See* STEWART, *supra* note 5, at 1–4, 465–73, 491–511. *See also* Laura M. Holson, *A Quiet Departure for Eisner at Disney*, N.Y. TIMES, Sept. 26, 2005, at C6 (noting that several Disney executives described Eisner as "leaving a job he loves before he is ready to" and the situation where there was "no grand send-off or congratulatory party" as "an awkward time for him").

44. *See* Hamill, *From Special Privilege*, *supra* note 3, at 118–20, 171–72. Delaware liberalized powers accorded the board and officers and became the favorite state for big business after Woodrow Wilson, then the governor of New Jersey, tightened New Jersey's general incorporation law in 1913 to curtail antitrust activities. *Id.* That inspired state legislatures all over the country to follow suit. *Id.* at 118–19. Blistering criticism of these liberal general incorporation laws led to proposals, all of which ultimately failed, by four presidential administrations (Roosevelt, Taft, Wilson, and Franklin D. Roosevelt) to remove corporate law from state jurisdiction. *Id.* at 119. *See also id.* at 121–23, 169, 172 (linking the need for the 1933 and 1934 securities laws to the inability of the states to effectively regulate big business and concluding that "[t]he two-tier state and federal approach distinctive of U.S. corporation law, resulted directly from the states, rather than Congress, securing primary control over the corporation during the nineteenth century").

45. *See* O'KELLEY & THOMPSON, *supra* note 4, at 207–49 (covering Sec. & Exch. Comm'n v. Edwards, 540 U.S. 389 (2004); Sec. & Exch. Comm'n v. Ralston Purina Co., 346 U.S. 119 (1953); and Lovenheim v. Iroquois Brands, Ltd., 618 F. Supp. 554 (D.D.C. 1985)).

46. *Id.*

Company at the same time.[47] In both cases seemingly "crackpot" decisions (keep the lights off at Wrigley Field and lower the price of the cars at a time when cars were individually crafted as toys for the rich and demand far exceeded supply) were immune to challenge by disgruntled shareholders because of the business judgment rule.[48]

The first decision turned out to be unwise and eventually lights were installed on the field. However with a nationwide network of superhighways and mass production of cars in a distant future that nobody in the early twentieth century could have predicted, the decision to lower the price of the cars turned out to be brilliant. In order to make sense of the rest of this unit, which explores the strength of the business judgment rule and when it will be rebutted, students must first see the reason for it—to provide directors the freedom to make risky visionary decisions, many of which will flop but a few of which will not only result in enormous profits but will also change the course of history.

I move from this broad overview to situations in which the director will never enjoy the business judgment rule because he or she has inappropriately benefitted financially at the expense of the corporation. I kick off Sub-Unit B, "Fiduciary Duty of Loyalty, the Corporate Opportunity Doctrine & Conflicts of Interest," with two cases illustrating the corporate opportunity doctrine. One imposes a stronger duty of loyalty recommended by the American Law Institute and the other illustrates Delaware law's more narrow interpretation.[49] I emphasize that the policy behind ALI-leaning states forces directors to disclose and offer all opportunities connected to the corporation's business to the full board, while Delaware's policy grants far more deference to directors, thus allowing them more economic freedom.[50]

I start my coverage of transactions involving a conflict of interest between one or more board members and the corporation with some historical background. I think it is important for the students to see that at one time these transactions were not eligible to receive the business judgment rule presumption. Initially, they were always void or voidable even if the fairness-

47. *See id.* at 263–80 (covering Shlensky v. Wrigley, 237 N.E.2d 776 (Ill. App. Ct. 1968) and Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919)).

48. *Id.*

49. *Id.* at 281–304 (covering Ne. Harbor Gulf Club, Inc. v. Harris, 661 A.2d 1146 (Me. 1995) and Broz v. Cellular Info. Sys., Inc., 673 A.2d 148 (Del. 1996)).

50. O'KELLEY & THOMPSON, *supra* note 4, at 281–304. Because a rejection of a corporate opportunity that amounts to a "waste of corporate assets" cannot be fair to the corporation and can never enjoy the business judgment rule, I introduce the students to corporate waste but save more detailed coverage for when I discuss the duty to act in good faith and the *Disney* cases. *See id.* at 288–89. *See also infra* note 61 and accompanying text.

to-the-corporation standard was met, and later they were allowed to legally stand only if that standard was met.[51]

I then refer to the statutory provisions of the model act (which Alabama follows) defining a conflict of interest and the process of ratification, which restores the business judgment rule. I especially focus on ratification by a committee of "qualified" directors.[52] I conclude with a discussion as to whether certain members of Disney Corporation's board should have received the business judgment rule presumption when they approved Michael Eisner's compensation package.[53]

I finish this sub-unit with an anchor case, *Sinclair Oil Corp. v. Levien*, which articulates the standard of review when a corporate parent engages in transactions with its controlled subsidiary.[54] I point out to the students that this area is related to but not governed by the conflict of interest statute. In order for the business judgment rule to be rebutted, thus requiring the parent to prove fairness to the subsidiary, the parent must engage in "self-dealing," meaning the transaction must benefit the parent to the detriment of the minority shareholders of the subsidiary.[55]

I cover Sub-Unit C, "Fiduciary Duty of Care, Statutory Exculpation & Good Faith," from an evolutionary perspective, starting with *Smith v. Van*

51. *See id.* at 304–08 (covering Globe Woolen Co. v. Utica Gas & Elec. Co., 121 N.E. 378 (N.Y. 1918)). Because Henry Ford may have been trying to thwart the Dodge brothers from competing with him when he refused to authorize dividends, arguably this decision could have been overturned on the grounds of a conflict of interest. *See supra* note 47 and accompanying text.

52. ALA. CODE §§ 10A-2-8.60 to .63 (2010). In order to be "qualified" a director must lack "a familial, financial, professional, or employment relationship" with the conflicted director. *Id.* § 10A-2-8.62(d).

53. Directors that claimed to be independent because they did not work for Disney were still conflicted because they had a close relationship with Eisner in other capacities. Irwin Russell, who chaired the compensation committee and was also Eisner's personal lawyer, was "[t]he most egregious example." *See* STEWART, *supra* note 5, at 279–80. Robert Stern, Eisner's personal architect, Reveta Bowers, the principal of an early education school Eisner's sons and children of other Disney executives attended, Leo O'Donovan, President of Georgetown, the school from which Eisner's son graduated and the recipient of substantial donations from Disney, and George Mitchell, who individually and through his law firm earned substantial fees from Disney, "[w]hile less egregious . . . had obvious conflicts." *Id.*

54. *See* O'KELLEY & THOMPSON, *supra* note 4, at 309–13 (covering Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971)).

55. *Id.* Although draining Sinven's cash through extraordinary dividends rendered Sinven unable to engage in further business development, it still was not considered "self-dealing" because Sinven's minority shareholders received a pro rata share of the dividends. *Id.* If the conflict of interest statute technically applied, this decision would have needed to meet a fairness review because Sinven's directors could not have been considered qualified or independent and shareholder ratification would not have been possible because only the minority shareholders of Sinven could have been considered disinterested.

Gorkom, the seminal Delaware Supreme Court case in which the business judgment rule was rebutted on the grounds that the directors engaged in a grossly negligent process (failed to perform minimal due diligence) before making their decision.[56] I emphasize that the merits of the underlying business decision, recommending a proposed merger financed by a leveraged buy-out, were no worse than the decisions to keep the lights off the field or lower the price of the cars.[57]

As a direct result of this decision, the Delaware legislature (followed by other states) amended its corporate code to allow for exculpation clauses in the corporation's articles, which eliminate duty of care breaches on grounds of gross negligence, leaving directors only potentially liable for duty of loyalty breaches, bad faith decisions, and conduct that intentionally harms the corporation.[58] I discuss the effect of an exculpatory clause using *Malpiede v. Townson* that had facts very similar to *Van Gorkom* but rather than facing liability those directors were shielded by the corporation's exculpatory clause.[59] I then move on to *In re Caremark*, which clarified the affirmative duty of directors to monitor and oversee the conduct of corporate employees deep within the hierarchy of the organizations, even if no suspicion exists that those employees are breaking the law or jeopardizing the corporation's profits.[60]

I allocate two class sessions to cover the *Disney* cases, which explore the boundaries defining when board members have acted in good faith.[61] The proliferation of exculpation clauses in many public companies has caused the duty to act in good faith to effectively emerge as the minimal standard of fiduciary duty owed by directors. Rather than discuss the cases sequentially, I use key parts of *DisneyWar* as a guide to cover the cases at the same time. I believe that the story greatly helps students understand the law.

I start off by summarizing the problem. Despite having no experience running a publicly traded diversified corporation, the board hired Michael Ovitz as president of the company.[62] Ovitz had a stormy fourteen-month tenure

56. *Id.* at 330–51.

57. *See id.*

58. *See id.* at 349–51.

59. O'KELLEY & THOMPSON, *supra* note 4, at 352–60.

60. *See id.* at 352–78 (covering Malpiede v. Townson, 780 A.2d 1075 (Del. 2001) and *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996)).

61. *See id.* at 379–95 (covering Brehm v. Eisner, 746 A.2d 244 (Del. 2000); *In re* Walt Disney Company Derivative Litig., 825 A.2d 275 (Del. Ch. 2003); *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693 (Del. Ch. 2005); and *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27 (Del. 2006)).

62. *See* STEWART, *supra* note 5, at 173 ("Coming from the world of agencies, Ovitz was unfamiliar with corporate hierarchies."); *id.* at 200, 210 (noting that board members doubted whether Ovitz could adapt to corporate culture, one of them deeming Ovitz "unqualified").

that ultimately failed; he was fired without cause, triggering a severance package that cost Disney's shareholders $140 million.[63] I highlight the circumstances revealed in the story surrounding the hiring of Ovitz, which shows that the board met the minimum standard for acting in good faith and therefore was entitled to the business judgment rule.[64] Then I focus on the question whether the board acted in bad faith when they failed to fire Ovitz for cause. Again the story is tremendously helpful. Key parts illustrate that despite initially supporting the hiring of Ovitz, Eisner thwarted Ovitz at every turn, which deprived the board of any argument that Ovitz could be fired for cause.[65]

Then I ask the class if the board failed to act in good faith or was guilty of wasting corporate assets when it approved Ovitz's employment agreement with the no-fault termination provisions without informing themselves of the magnitude of the payout if Ovitz was fired without cause. The story illustrates how hasty the deal was put together—over a weekend—and how little the board did.[66] Most of the committee members did not even know about the Ovitz deal until it was already done.[67] I explain that the Delaware Supreme Court found good faith by imputing knowledge to the board as to the magnitude of the payout from two sources—the value of benchmark options previously granted to Eisner and another Disney executive and backend options granted to Eisner instead of a $50 million upfront bonus.[68]

63. *Id.* at 260–76.

64. *Id.* at 171 (noting that Ovitz was successful in several other capacities and was labeled "the most powerful individual in Hollywood" by *The Wall Street Journal*). *See also id.* at 173, 199–200, 210–13 (explaining that although some board members had reservations, Eisner aggressively recruited Ovitz). I ask the students how the decision to hire Ovitz might have worked out if Eisner had not been in charge of Disney. *See supra* note 43.

65. *See* STEWART, *supra* note 5, at 216–19 (explaining that Eisner betrayed and undermined Ovitz at his first meeting with senior executives); *id.* at 224–25 (noting that Eisner undermined Ovitz behind his back); *id.* at 227–29 (noting that Eisner thwarted Ovitz's efforts to bring creative talent to Disney); *id.* at 234–35 (explaining that Ovitz prevented animators and the star of "Home Improvement" from quitting); *id.* at 237–40, 328 (finding that Ovitz's efforts to settle a contractual dispute with Jeffrey Katzenberg, a former Disney executive, for $90 million was thwarted by Eisner, resulting in a lawsuit, negative publicity, and Disney being ordered to pay Katzenberg $280 million).

66. *See id.* at 213 (discussing formation of the deal).

67. *Id.* at 213–14 (finding that contrary to Disney's by-laws, neither the compensation committee nor the full Disney board reviewed the agreement over that weekend); *id.* at 222 (noting that only three board members knew any details concerning Ovitz's deal before it was approved and no board member asked any relevant questions).

68. *See* O'KELLEY & THOMPSON, *supra* note 4, at 390–94 (covering *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27 (Del. 2006)) The standard for waste of corporate assets is whether "what the corporation has received is so inadequate in value that no person of ordinary, sound business judgment would deem it worth that which the corporation has paid." *Id.* at 378 (internal

I ask the students if the facts in the story justify imputing this knowledge to the board.[69] I conclude with a question not posed by the cases that ran throughout the story—did the board breach its duty to act in good faith by continuing to allow Eisner to remain Chairman of the Board and Chief Executive Officer despite his many blunders and his deplorable leadership? In addition to significant losses the company incurred because of the Ovitz debacle, the story documents the horrors of the Eisner period at Disney, including the following: many disastrous business decisions and lost opportunities directly caused by Eisner, three of which amounted to a more than $1 billion mistake; Eisner's management failures of monumental proportions which led to talented executives and creative artists leaving Disney; and, finally, "Eisner's most glaring defect," reckless dishonesty that left "a trail of deeply embittered former colleagues" all of which "had direct and costly business consequences for Disney."[70]

Due to time constraints I cover Sub-Unit D, "Indemnification and Insurance," in a summary fashion. I go back through the cases already covered and ask whether indemnification is required, allowed, or not permitted. The

quotation marks omitted). I ask the students to ponder whether they are convinced the magnitude of Ovitz's payout avoids the threshold for amounting to corporate waste.

69. If the board was so ill informed about Ovitz, is it reasonable to assume it exercised any degree of due diligence and good faith regarding Eisner's compensation, especially given the conflicts of interest and that most of them refused to stand up to Eisner? *See* STEWART, *supra* note 5, at 409–24 (describing governance reforms thwarted by Eisner and the removal from key committees and ouster of board members willing to stand up to Eisner as "leaving Eisner loyalists in charge of all key board positions").

70. *Id.* at 533. *See also id.* at 529–34 (summarizing Eisner's most significant business blunders and character flaws and noting that Eisner's success occurred mostly in the early years of his tenure, which began in 1984, and the weak performance of Disney since 1995); *id.* at 126–35 (noting staggering financial losses from the Euro Disney project that Eisner could have avoided had he paid attention to key advisors about the challenges of doing business abroad); *id.* at 192, 321–28 (explaining that Eisner's position that Katzenberg was not entitled to bonus was untenable, yet Eisner stubbornly refused to settle the case, resulting in costly and embarrassing litigation and damages of $280 million, which could have been settled for as little as $60 million); *id.* at 376–79 (explaining that the ill-conceived acquisition of the Family channel was financially disastrous); *id.* at 161–62 (describing how Eisner flattered Katzenberg and then trashed him behind his back); *id.* at 134, 159, 161, 172, 199, 210, 214, 224, 235, 248, 256, 258, 261–62, 326, 417–18 (noting examples of Eisner's lies); *id.* at 239–40, 242 (describing how Eisner praised Ovitz while secretly planning to fire him); *id.* at 359 (finding that Eisner pitted two executives against each other); *id.* at 395–96 (describing how the Pixar deal with Steve Jobs failed because of Eisner's dishonesty); *id.* at 366–67 (explaining that a consultant concluded Disney executives were highly dysfunctional and that none trusted Eisner); *id.* at 494–95 (noting that Institutional Shareholder Services recommended that shareholders vote "withhold" for Eisner) ("At the end of the day, all roads lead back to Eisner. For 20 years Disney's revolving door for board members and management has had one constant—Mr. Eisner. The boardroom battles, and management departures, which pre-date the Disney/Gold campaign, are disappointing, expensive, distracting, and not in the best interest of shareholders.").

corporation must indemnify the directors for their expenses if after going through the entire litigation process they were successful on the merits.[71] Directors and Officers insurance, if a policy exists, would cover these expenses. On the other side, if the director is adjudged liable, indemnification is not permitted and insurance policies will exclude the expenses and the liability from coverage.[72] I briefly summarize how the issue of allowable indemnification pursuant to the corporation's by-laws and insurance coverage, both which generally require the director to act in good faith, gets complicated when the case settles, requiring liability of some amount without the director acknowledging wrongdoing.

F. Unit Four: Closely Held Corporations

I start Sub Unit A, "Minority Shareholders Using Contracts, Special Fiduciary Duties & Statutory Remedies," with the historical development of closely held corporations. In the first few decades of the twentieth century, individuals who acted like general partners incorporated in order to obtain limited liability protection from the debts of the business.[73] Savvy business planners recognized that the majority control statutory provisions in the corporate statutes left minority shareholders vulnerable and created shareholder agreements to protect their interests.[74] Although courts were initially hostile towards eliminating majority control, such shareholder agreements and voting agreements subsequently were recognized as enforceable contracts.[75]

To illustrate the plight of minority shareholders who are not protected by a contract, I cover a case where the business judgment rule upheld the board's decision to pay only modest dividends even though most of the profits were being paid out as salaries and the minority shareholder had resigned from a salaried position due to disagreements.[76] I also point out that this scenario does not occur in partnerships because of the immutable right to dissociate and the default rule that requires unanimity to pay salaries outside of the partners' profit shares.

In order to emphasize that the common law recognizing special fiduciary duties among shareholders of closely held corporations is a significant departure from traditional corporate law, I ask the students to first to analyze the seminal cases of *Donahue v. Rodd Electrotype Co.* and *Wilkes v.*

71. ALA. CODE § 10A-2-8.52 (2010).

72. *Id.* § 10A-2-8.51(d)(1).

73. *See* O'KELLEY & THOMPSON, *supra* note 4, at 451–54.

74. *Id.* at 452–54.

75. *Id.* at 454–70 (covering Zion v. Kurtz, 405 N.E.2d 681 (N.Y. 1980) and Ramos v. Estrada, 10 Cal. Rptr. 2d 833 (Cal. Ct. App. 1992)).

76. *Id.* at 470–76 (covering Zidell v. Zidell, 560 P.2d 1086 (Or. 1977)).

Springside Nursing Home, Inc. under traditional corporate law, which would have denied the minority shareholder relief in both cases.[77] I discuss the common law special fiduciary duties among closely held corporate shareholders created in both those cases, which thematically lines up with "fairness" thinkers among corporate scholars; then, I contrast Delaware's law as articulated in *Nixon v. Blackwell*, which refused to create special fiduciary duties and lines up with the "law and economics" thinkers among corporate scholars.[78] I then shift to the statutory remedy for oppression offered in model-act-leaning states and their differences with common law judicial remedies, the main difference being defendants have the option to buy out plaintiffs that invoke the statutory remedy.[79]

I finish Sub-Unit A with a problem that explores the downside of shareholder agreements. Each person owns one third of the shares, they agree in writing that unanimity is required for all business actions, and they are each entitled to one third of the profits paid in the form of salaries. Two shareholders work hard and one materially slacks off and alienates the clients of the business. I ask the students to contemplate what remedies the two majority hard-working shareholders have.[80] From there I transition to Sub-Unit B, "Share Repurchase Agreements as a Tool to Provide Liquidity," because

77. *Id.* at 476–501 (covering Donahue v. Rodd Electrotype Co., 328 N.E.2d 505 (Mass. 1975); Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657 (Mass. 1976); and Nixon v. Blackwell, 626 A.2d 1366 (Del. 1993)).

78. O'KELLEY & THOMPSON, *supra* note 4, at 476–501. Even if the decisions to buy back Mr. Rodd's shares, not offer the same terms to Mrs. Donahue, and terminate Mr. Wilkes from a paid salary position and continue to not pay dividends involved a conflict of interest, those decisions would usually be considered fair *to the corporation*. Fairness to the corporation is the only relevant inquiry under traditional corporate law because all fiduciary duties are owed by the directors *to the corporation—not to individual shareholders*. In order to address fairness *to minority shareholders*, many states by common law created fiduciary duties among shareholders of closely held corporations. The particular strength of that fiduciary duty (even Massachusetts in *Wilkes* backed off from recognizing the same level of fiduciary duties general partners owe each other) will vary from state-to-state. *See* Farrar & Hamill, *supra* note 3, at 923–25 & nn.61–65 (discussing cases in several states and noting that Alabama requires minority shareholders to show a higher level of bad faith than Massachusetts).

79. *See* O'KELLEY & THOMPSON, *supra* note 4, at 501–15 (covering *In re* Kemp & Beatley, Inc., 473 N.E.2d 1173 (N.Y. 1984) and Gimpel v. Bolstein, 477 N.Y.S.2d 1014 (N.Y. Sup. Ct. 1984)).

80. *Id.* at 516 (Problem 5–4). Removal of the lazy shareholder through a judicial proceeding will be difficult because they have to show "fraudulent or dishonest conduct, or gross abuse of authority or discretion." *See* ALA. CODE § 10A-2-8.09 (2010). The unanimity requirement effectively creates deadlock so the majority could file for statutory oppression, but that would trigger buy-out rights for the lazy shareholder. It is possible to argue that the unanimity is being used in a manner that breaches a fiduciary duty, but that will be an uphill climb. *See supra* note 78. I make a strong point to the students that unanimity requirements created by a shareholder agreement can be abused and corporate law does not adequately remedy the situation.

any buy-out rights for individual shareholders must be defined in a contract. I cover two cases where a specifically enforced share repurchase agreement forced a shareholder to sell back his shares at a price significantly below fair market value as examples illustrating that these contracts can easily be badly drafted.[81] I emphasize that courts are reluctant to impose a fiduciary duty of loyalty when interpreting such contracts and that this materially differs from partnership law, which refuses to enforce expulsion contracts if invoked to deprive a partner of his or her economic share of the partnership.[82]

Sub-Unit C, "Piercing the Corporate Veil," which explores the extent to which third party creditors can force shareholders to pay debts technically owed by the corporation, completes this unit. I streamline the seemingly inconsistent cases involving individual shareholders by illustrating that the shareholder must control the corporation either outright or in collusion with others *in his capacity as a shareholder* and use that control in some fashion to abuse the privilege of limited liability protection.[83] This is why piercing the corporate veil is a close corporation phenomena—corporate board members and officers of large corporations who commit acts that not only raise issues of liability to shareholders per a derivative suit but also arguably abuse the corporate veil cannot be held personally liable to a third party creditor because their control over the corporation typically comes from entrenchment under the corporate governance rules, not from their position as a shareholder.[84]

I then show that it is extremely difficult to pierce the veil of a subsidiary and hold a corporate parent personally liable because the parent's control of the subsidiary must encompass much more than owning most or all of the subsidiary's shares and having common board members and officers for both corporations. The Supreme Court states that the actions and decisions by the parent's board abusing the subsidiary's veil must be done in its capacity as acting for the parent.[85]

81. O'KELLEY & THOMPSON, *supra* note 4, at 516–30 (covering Concord Auto Auction, Inc. v. Rustin, 627 F. Supp. 1526 (D. Mass. 1986); Gallagher v. Lambert, 549 N.E.2d 136 (N.Y. 1989); and Pedro v. Pedro, 489 N.W.2d 798 (Minn. Ct. App. 1992)).

82. *See id.*

83. *Id.*

84. *See id.* at 606–32 (covering Consumer's Co-op v. Olsen, 419 N.W.2d 211 (Wis. 1988); K.C. Roofing Ctr. v. On Top Roofing, Inc., 807 S.W.2d 545 (Mo. Ct. App. 1991); W. Rock Co. v. Davis, 432 S.W.2d 555 (Tex. Civ. App. 1968); and Baatz v. Arrow Bar, 452 N.W.2d 138 (S.D. 1990)).

85. *See id.* at 632–49 (covering Craig v. Lake Asbestos, 843 F.2d 145 (3d Cir. 1988) and United States v. Bestfoods, 524 U.S. 51 (1988)). Although the Supreme Court's opinion does not "recite the ways . . . [that] could show that dual officers or directors were in fact acting on behalf of the parent," it does indicate control of the subsidiary will be established if the action is "plainly contrary to the interests of the subsidiary yet nonetheless advantageous to the parent." *Id.* at 643 & n.13. I tell the students to apply the standards for "self-dealing" as articulated in *Sinclair*. *See supra* note 54 and accompanying text.

G. Unit Five: Unincorporated Business Organizations Offering Limited Liability

Unit Five, "Unincorporated Business Organizations Offering Limited Liability," the grand finale of the course, features limited liability companies (LLCs), the fastest growing entity chosen for businesses that are not publicly traded. Sub-Unit A, "The Limited Partnership and the Emergence of LLCs, LLPs and LLLPs," focuses on the stories that explain how and why the business landscape ended up with this confusing array of multiple unincorporated business organizations. I start with the limited partnership, which was invented in the nineteenth century as an alternative to special corporate charters but did not emerge as a significant business entity until the second half of the twentieth century.[86] Limited partnerships vested control of the business with the general partner, who was also personally liable for the business's debts. Limited partners had no statutory management rights and enjoyed limited liability protection as long as they remained passive investors. I tell the students that general partners can be viewed as performing the functions of both the board and officers of a corporation merged into one role and limited partners can be loosely compared to corporate shareholders.[87]

I transition to the story of LLCs by first painting the business landscape in 1977—the year the Wyoming legislature passed the first LLC statute, which created for the first time an unincorporated domestic business organization that provided direct limited liability protection to all owners even if they controlled the business.[88] At that time, limited partnerships were in their heyday, being widely used for real estate and other development projects.[89] Limited partnerships achieved substantive limited liability by incorporating the general

86. Hamill, *From Special Privilege*, *supra* note 3, at 172–73.

87. *See id.* at 172–74 & nn.327–32, app. D (noting that the first limited partnership statute was passed by New York in 1822 and by 1875 most states had limited partnership statutes). Limited partnerships were not a viable choice for business until the early 20th century. *Id.* at 174–75 & nn.333 & 335 (discussing 19th century cases refusing to recognize limited partnerships and the intent of the drafters of the Uniform Partnership Act (1916) to address these difficulties). Primarily due to uncertainty in the statute (although UPA–16 §7 states limited partners are not liable unless they took part in the control of the business, it did not define control) and difficulty being classified as a partnership for tax purposes, the limited partnership did not emerge as a frequently used business organization until after 1960. *See* Hamill, *Origins*, *supra* note 3, at 1504–08.

88. Hamill, *A Possible Choice*, *supra* note 1, at 721–23; Hamill, *Origins*, *supra* note 3, at 1460.

89. *See* Hamill, *Partnership Classification Regulation*, *supra* note 3, at 574–78 (explaining that limited partnerships formed as syndicated tax shelters proliferated in the 1970s and early 1980s and were not curtailed until the passive activity loss restrictions were enacted as part of the Tax Reform Act of 1986); Hamill, *Origins*, *supra* note 3, at 1512–17 (describing the limited partnership as emerging as the preferred choice of business for oil and gas exploration and other syndicated business ventures); Hamill, *Story*, *supra* note 3, at 306–08.

partner, and the statutes provided safe harbors allowing limited partners to be involved in the business without losing their limited partner status.[90] Closely held corporations were the business entity of choice for many small businesses that would otherwise operate as general partnerships.

After first reminding the class that this would not have been possible if the early twentieth century movement to move corporations from state to congressional control had been successful, I highlight the colorful story behind a group of independent oil explorers inventing the first LLC statute in the 1970s and their frustrating fight to have LLCs taxed as partnerships.[91] After partnership taxation was finally recognized in 1988, states slowly started to pass LLC statutes.[92]

In 1991, Texas invented the first limited liability partnership (LLP) as an option for professionals to avoid draconian personal liability for their partners' negligence.[93] Unlike LLCs, which have their own statute, LLPs merely offer a registration procedure for general partnerships, which erects the corporate veil around all the general partners.[94] Stated more plainly, I emphasize to the students that because LLPs are nothing more than general partnerships with the corporate veil, LLPs are identical to general partnerships when dealing with business issues unrelated to liability exposure for the business' debts.[95]

For the rest of the 1990s, LLCs and LLPs swept across the country. By 1996 and 1999, respectively, all fifty states had passed LLC statutes and allowed for LLP registrations. The limited liability limited partnership (LLLP), a registration procedure in the limited partnership statute erecting the corporate veil around the general partner, also joined this hodgepodge of unincorporated business organizations.[96] I describe the LLC movement both in the 1970s and the 1990s as "showing a high degree of intensity and commitment normally found only in movements for social change," and then I conclude that because

90. *Supra* note 87 and accompanying text.

91. Hamill, *Origins*, *supra* note 3, at 1463–69; Hamill, *Story*, *supra* note 3, at 298–99.

92. Hamill, *Origins*, *supra* note 3, at 1469–76; Hamill, *Story*, *supra* note 3, at 296–97.

93. *See* Robert W. Hamilton, *Registered Limited Liability Partnerships: Present at the Birth (Nearly)*, 66 U. COLO. L. REV. 1065, 1073–74 (1995); *see also* O'KELLEY & THOMPSON, *supra* note 4, at 139–47 (covering Dow v. Jones, 311 F. Supp. 2d 461 (D. Md. 2004) (finding that provisions applicable to general partnerships regarding agency law and dissolutions apply to a law firm organized as a LLP)).

94. O'KELLEY & THOMPSON, *supra* note 4, at 139–47.

95. *Id.*

96. *See* UNIF. LTD. P'SHIP ACT prefatory note (2001) (noting that amendments to the limited partnership statute provide an option for LLLP registration and confer a limited liability shield for limited partners regardless of the degree they control the business and whether an LLLP registration has been made); Hamill, *Origins*, *supra* note 3, at 1475–78; Stover & Hamill, *supra* note 3, at 815–16.

the well-developed limited partnership could have easily been used, "the rise of the LLC resulted from sparks of unpredictable human creativity."[97]

My goal in Sub-Unit B, "Business Characteristics of LLCs Compared to Partnerships and Corporations," is to get the students comfortable with the legal structure behind the statutory provisions of LLCs. Basically, LLCs are a hybrid between corporations and partnerships. The balance between corporate and partnership characteristics in LLCs varies substantially among the states. I tell the students that the key to understanding LLCs is recognizing the particular statutory provision or business law analysis necessary to resolve the issue as either corporate or partnership in nature. I emphasize that this sub-unit merely provides contours of this big picture—LLC statutes are not uniform, and the law surrounding LLCs is evolving more rapidly than that of corporations and partnerships.

I start with the simplest picture of the LLC's management structure and the typical fiduciary duties set forth in statutory defaults. If the parties fail to appoint managers or otherwise confine management power in a group that does not include all the members, the LLC is member-managed, with the members usually treated like general partners as far as agency powers and fiduciary duties. On the surface, from this perspective, which I call an "airplane view," simple and relatively informal member-managed LLCs deceptively resemble LLPs. If managers are appointed and members are passive investors, management is centralized, similar to a traditional limited partnership or corporation; only the managers have agency powers and owe fiduciary duties.[98] In order to introduce the endless varieties of governance structures that can be fashioned in the operating agreement between these two extremes, I present a hypothetical of a closely held and a widely held LLC and discuss how management authority created by the operating agreement affects the power to bind under agency law and the scope of fiduciary duties.[99]

97. Hamill, *Story*, *supra* note 3, at 300, 309.

98. *See* O'KELLEY & THOMPSON, *supra* note 4, at 531–34, 584–89 (covering VGS, Inc. v. Castiel, No. 17995, 2000 WL 1277372 (Del. Ch. Aug. 31, 2000), *aff'd*, 781 A.2d 696 (Del. 2001) (finding that two managers of a Delaware LLC breached their duty of loyalty when they secretly merged the LLC into a Delaware corporation under facts that stripped the third member/manager from his control of the LLC)). *See also* ALA. CODE §§ 10A-5A-4.07, 10A-5A-4.08 (2010) (effective Jan. 1, 2015) (noting that fiduciary duties of loyalty and care are owed by those who manage the LLC).

99. *See* Boles & Hamill, *supra* note 3, at 154–71 (contrasting Mom and Pop Grocery Store LLC that has five members, two of which are managers, and John Doe's Cattle Farm LLC that has fifty members, two of which are managers). The discussion in this article exploring the degree to which a member granted authority by the operating agreement becomes a general or special agent, while owing more expansive or limited fiduciary duties, is still helpful even though in 1996 when this article was published, managers had to be identified in the articles and the statute did not address fiduciary duties. *See* ALA. CODE §§ 10A-5-3.03 (repealed 2014), 10A-5A-4.07 (effective Jan. 1, 2015), 10A-5A-4.08 (effective Jan. 1, 2015) (power to bind LLC is determined

I then examine the effects of the liability shield in LLCs and LLPs more closely. The standard for piercing the "corporate veil" of LLCs as well as LLPs is no different than the standard applicable to corporations.[100] The liability shield of LLCs, as well as LLPs, limits potential losses to the contributions made, thereby protecting service contributors from having to bear a portion of a capital contributor's loss.[101] I tell the students that although the default rule for sharing profits and distributions in LLCs varies across the states, if the LLC statute adopts the partnership route and recognizes oral agreements, the need to use the default is rare because even informal business participants almost always discuss how they will share profits and distributions.[102] However, service contributors relying on oral agreements face a bad result if the LLC statute requires the agreement to be in writing and if the default provision allocates profits based on unreturned capital.[103]

I move into a closer examination of fiduciary duties, more specifically the circumstances they can be eliminated in a LLC. Unlike partnership statutes, which put the greatest restrictions on limiting the duties of loyalty and care, and corporate statutes, which carve the duty of loyalty and good faith outside the reach of exculpatory provisions, LLCs are evolving to permit almost

by the law of agency; the operating agreement determines who directs and oversees the LLC and they owe fiduciary duties; if the operating agreement fails to spell out who directs and oversees the LLC, the members assume such powers and owe fiduciary duties).

100. *See* O'KELLEY & THOMPSON, *supra* note 4, at 650–55 (covering Kaycee Land and Livestock v. Flahive, 46 P.3d 323 (Wy. 2002)). Although LLP statutes often state that partners are liable for their own negligence and the negligence of those they supervise and control, especially in the professional setting, this does not expand personal liability exposure to be any greater than what it would be in a LLC or professional corporation. *Id.* at 655 n.2. *See also* ALA. CODE § 10A-5A-8.01 (effective Jan. 1, 2015) (providing that there are special rules for LLCs that render professional services and providing that liability for negligence is the same as it would be for a sole proprietor).

101. *See* ALA. CODE §§ 10A-5A-3.01, -9-3.03 (effective Jan. 1, 2015). *See* Hamill, *Story*, *supra* note 3, at 314 (noting that some jurisdictions, including Alabama, apply the default provision for sharing losses strictly in general partnerships that are not LLPs and force service contributors to bear part of the capital contributor's loss).

102. *See* ALA. CODE §§ 10A-5A-1.02(k), -4.05(a) (effective Jan. 1, 2015) (allowing for oral or implied agreements in most situations, including profit and distribution ratio and providing that if they fail to agree, the statutory default mandates they share distributions equally).

103. *See* Stover & Hamill, *supra* note 3, at 834–38, 841–44 (describing the peril of service contributors under Alabama's LLC law before the 2014 amendments, which had a default profit sharing ratio reflecting unreturned capital and required written agreements). The combination of the default, following unreturned capital (which will show little or no amount until services are performed and profits are allocated) and the writing requirement, arguably allocates little or no profits to service contributors relying on oral agreements. Although this trap has been eliminated from Alabama LLCs, I point this out to the students because the same trap probably exists in other states.

unlimited freedom of contract in this area.[104] Alabama's 2014 amendments to its LLC law expresses a policy "to give maximum effect to the principles of freedom of contract" and explicitly allows for the elimination of fiduciary duties by written agreement, but it also forbids elimination of the implied contractual covenant of good faith and fair dealing.[105]

Delaware expresses similar contract-favored policy and allows for the elimination of fiduciary duties as long as the agreement is clear.[106] If the agreement is clear, Delaware LLCs have a greater ability to limit the scope of fiduciary duties than Delaware corporations. That creates an incongruous situation—managers in the small but growing number of publicly traded LLCs enjoy even less scrutiny than directors of publicly traded Delaware corporations.[107]

I complete Sub-Unit B with dissociation, dissolution, and buyouts in LLCs. Primarily to comply with the partnership classification regulations, the first generation LLC statutes provided dissociation rights and dissolution triggers that mirrored the Uniform Partnership Act, causing LLCs to strongly resemble partnerships.[108] Once those regulations were repealed, most LLC statutes were amended to eliminate both dissolution triggers by voluntary withdrawal and rights to dissociate and be bought out, thus causing LLCs to strongly resemble corporations.[109] LLC members seeking to plan for exit rights in advance through buy-sell agreements face the same risk as shareholders in

104. *See, e.g.*, O'KELLEY & THOMPSON, *supra* note 4, at 568 nn.3–4.

105. ALA. CODE §§ 10A-5A-1.06(a), -1.08(b)(1)-(2), (c)(5) (effective Jan. 1, 2015).

106. *See* O'KELLEY & THOMPSON, *supra* note 4, at 531–34 (covering Elf Actochem N. Am., Inc., v. Jaffari, 727 A.2d 286 (Del. 1999) (demonstrating that Delaware's LLC policy is to maximize freedom of contract)); *id.* at 552–67 (covering Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC, No. 3658-VCS, 2009 WL 1124451 (Del. Ch. Apr. 20, 2009) and Kahn v. Portnoy, No. 3515-CC, 2008 WL 5197164 (Del. Ch. Dec. 11, 2008) (finding that litigation claiming fiduciary duty breaches was allowed to go forward because an ambiguous agreement did not clearly eliminate fiduciary duties)).

107. *Id.* at 567 n.2 (noting that an exculpatory clause of a corporation providing that interested directors were to be treated as disinterested for purposes of finding the conflict of interest provisions was void under Delaware corporate law but would be permissible under the Delaware limited liability company act); *id.* at 568 nn.3–4 (noting that an exculpatory provision of a Delaware LLC eliminated all fiduciary duties "except in the case of fraudulent or illegal conduct" and resulted in dismissal of a complaint alleging related party transactions and misuse of funds (quoting Wood v. Buam, 953 A.2d 136 (Del. 2007))).

108. *See* Hamill, *Origins*, *supra* note 3, at 1469–84; Hamill, *Partnership Classification Regulation*, *supra* note 3, at 589–98; Hamill, *Story*, *supra* note 3, at 299–303.

109. *See* Hamill, *A Possible Choice*, *supra* note 1, at 724–40 (noting that Wyoming and Florida LLC statutes ensured that LLCs lacked free transferability of interests and continuity of life and ensured they were to be taxed as partnerships). *See also* Farrar & Hamill, *supra* note 3, at 934–38 (finding that after partnership taxation became automatic, states in mass eliminated dissociation rights in the LLC statute primarily to make LLCs more attractive for estate and gift tax planning).

corporations: a poorly drafted agreement will force a buy-out at less than fair market value.[110]

If there is no buy-sell agreement, disgruntled LLC members must seek judicial dissolution or argue some form of common law breach of fiduciary duty applicable to closely held corporations.[111] Some states provide LLC members a judicial dissolution remedy on grounds of oppression, similar to model-act-leaning corporations; others, including Delaware and Alabama, provide more limited grounds, requiring the disgruntled member to show that it is not reasonably practical to carry on the business under the operating agreement.[112] In Delaware, the right to seek judicial dissolution on grounds that it is not reasonably practical to carry on the business can be contractually eliminated.[113] Other states, including Alabama, do not permit such waivers in LLCs, and model-act-leaning states do not permit such waivers in corporations.[114]

In Sub-Unit C, "Policy Issues Revealed by the Rise in LLCs," I conclude by highlighting areas where the business organization law contains material differences for substantively similar businesses. I start by returning to the publicly traded corporation. Delaware corporate law forbids exculpating duty of loyalty breaches, yet Delaware LLCs can render conflicts of interests and other conduct that stops short of being fraudulent or illegal immune to challenge.[115] Especially given the developments after *Smith v. Van Gorkom* and the facts of the *Disney* cases, reasonable minds can disagree as to whether Delaware's fiduciary duty law has become too permissive for corporations.

110. *See* O'KELLEY & THOMPSON, *supra* note 4, at 542–52 (covering Olson v. Halvorsen, No. 1884-VCL, 2009 WL 1317148 (Del. Ch. May 13, 2009) (holding that a buy-out agreement of a Delaware LLC that limited price to accrued compensation and balance of capital account was to be specifically enforced and thus deprived a founding member of his fair market value equity interest in the LLC after he was forced out)).

111. *See supra* notes 75–78 and accompanying text. LLC members arguing a closely held corporation style breach of fiduciary duty will face an uphill climb. This remedy will be denied if fiduciary duties have been validly waived by the operating agreement. Even absent this waiver, such a remedy must exist under that state's law for close corporations and the court must be willing to apply that remedy to LLCs.

112. *See* O'KELLEY & THOMPSON, *supra* note 4, at 568–76 (covering Fisk Ventures, LLC v. Segal, No. 3017-CC, 2009 WL 73957 (Del. Ch. Jan. 13, 2009) (ordering a judicial dissolution of a Delaware LLC because deadlock made carrying on the business not reasonably practical)).

113. *See id.*

114. *Id.* at 576–84 (covering R&R Capital, LLC v. Buck & Doe Run Valley Farms, LLC, No. 3803-CC, 2008 WL 3846318 (Del. Ch. Aug. 19, 2008) (specifically enforcing contractual waiver of judicial dissolution rights)). *See also* ALA. CODE § 10A-5A-1.08(c)(11) (2010) (effective Jan. 1, 2015) (providing that an operating agreement cannot eliminate the right to petition for judicial dissolution on grounds that it is not reasonably practical to carry on the business); *id.* § 10A-2-8.31 (forbidding the removal of remedies for oppression from jurisdiction of the courts).

115. *See* O'KELLEY & THOMPSON, *supra* note 4, at 576–84.

However, it makes no sense to allow publicly traded LLCs to enjoy wider latitude in their exculpatory clauses than corporations. The substantive characteristics and concerns surrounding publicly traded entities are the same regardless of whether the business organization is a corporation or an LLC. Consequently, the law defining the minimum fiduciary duties should also be the same.[116]

I then show the students that the distinctions between business organization forms and the pitfalls faced by smaller, less formal businesses, whose participants either cannot afford, or for other reasons do not seek, expensive sophisticated advice, is especially insidious. By keeping dissociation rights immutably in the statute and limiting the ability to contractually reduce fiduciary duties, I have argued that partnerships registering to be LLPs offer the best alternative for these types of businesses, especially if automatic dissolution caused by a voluntary withdrawal is eliminated in the partnership agreement.[117]

If the business incorporates, participants finding themselves trapped in a minority position must either rely on a buy-sell agreement, which is difficult to properly draft without spending substantial time and effort, or rely on judicial dissolution remedies or common law fiduciary duties, which cannot be eliminated by a contract or by an exculpatory clause. Moreover, the participants will have to deal with the less desirable and sometimes extremely detrimental tax treatment of corporations and shareholders.[118]

If the participants form an LLC, which has become the most frequently chosen business organization, they receive partnership taxation but at a steep price. They not only face all the perils of close corporations, as far as no statutory dissociation rights, but, depending on the state, they have less fiduciary duty protections and judicial dissolution remedies than would be present in the corporate form.[119] For example, Alabama corporations grant judicial dissolution remedies for oppression, which focuses on the plight of the minority shareholder; Alabama LLCs, however, limit such remedy to not being able to reasonably carry on the business, which focuses on the ability to make business decisions and therefore is arguably only available in cases of

116. *See supra* note 107 and accompanying text.

117. *See* Farrar & Hamill, *supra* note 3, at 929–34 (arguing for partnership model in LLC defaults); Stover & Hamill, *supra* note 3, at 841 (noting that LLPs are better practical choice for smaller, less formal businesses); *id.* at 830–31 (finding that the dissolution trigger for voluntary withdrawals in at-will general partners is preserved in the default to foster cutting off personal liability exposure; because LLPs erect the corporate veil the dissolution trigger should be eliminated in the partnership agreement, thereby only allowing the dissociating member buy-out rights, which will prevent partners from abusing the power to dissolve).

118. *See supra* notes 78–81 and accompanying text.

119. Stover & Hamill, *supra* note 3, at 831–32.

deadlock.[120] There is no good policy argument for according minority members of LLCs weaker remedies than minority shareholders of corporations.[121]

For years, commentators have criticized the morass of business organization choices as being confusing and inefficient and have proposed various forms of unified business organization laws that streamline all these choices.[122] I assign students selected reading from an article published in 2004.[123] In addition to proposing that essential provisions for all business organizations be harmonized as the "hub," while maintaining necessary distinctive elements in "spoke" sections, it summarizes earlier articles, especially two in the 1990s, which floated other proposals.[124]

I make sure the students understand that the rise of the LLC did not cause this mess—it only illuminates it. Years before the LLC was invented, commentators were grousing about this less than optimal situation.[125] When I contributed "The Story of LLCs: Combining the Best Feature of a Flawed Business Structure" to *Business Tax Stories* in 2005, after confessing that for many years I enthusiastically endorsed LLCs because they allowed small informal businesses a more cost-effective route to achieve limited liability and partnership taxation, I concluded that "the business and tax worlds are no better off but are also no worse off as a result of LLCs joining the mainstream of business organization choices."[126] That was before Delaware led the charge towards granting LLCs the ability to totally eliminate fiduciary duties and rights to judicial dissolution. Since then, the world of business law has evolved to be more arbitrary and therefore even more treacherous for those who cannot afford or for other reasons do not seek expensive legal advice.

Although it would be easy to blame LLCs, especially Delaware LLCs, for this latest evolution of business law, doing so ultimately represents a simplistic

120. *Id.* at 832.

121. *See supra* notes 98–101 and accompanying text. *See also* ALA. CODE § 10A-2-14.30(2)(ii) (2010) (effective Jan. 1, 2015) (providing that grounds for judicial dissolution of corporations includes oppression); *id.* § 10A-5A-7.01(d) (effective Jan. 1, 2015) (providing that grounds for judicial dissolution of LLCs must show it is not reasonably practical to carry on the LLC's business).

122. Harry J. Haynsworth, *The Unified Business Organization Code: The Next Generation*, 29 DEL. J. CORP. L. 83 (2004).

123. *Id.*

124. *Id. See also* John H. Matheson & Brent A. Olsen, *A Call for a Unified Business Organization Law*, 65 GEO. WASH. L. REV. 1, 4 (1996); Dale A. Oesterle & Wayne M. Gazur, *What's in a Name?: An Argument for a Small Business "Limited Liability Entity" Statute (With Three Subsets of Default Rules)*, 32 WAKE FOREST L. REV. 101, 104 (1997).

125. *See* Harry J. Haynsworth, *The Need for a Unified Small Business Legal Structure*, 33 BUS. LAW. 849, 849, 854 (1978); Robert A. Kessler, *With Limited Liability for All: Why Not a Partnership Corporation?*, 36 FORDHAM L. REV. 235, 237 (1967).

126. *See* Hamill, *Story*, *supra* note 3, at 314–15.

view which avoids the root of the problem. I conclude the course with the observation I started with—business organizations, despite being a quintessential example of interstate commerce at its foundation, are creatures of state law. Not only did this historical development saddle us with the complexity of state and federal law occupying separate spheres, it fostered the messy cross-currents of multiple business organizations and inconsistent law produced by the creativity of fifty state legislatures and the committees of business lawyers advising them. Whether or not business organizations law would be better or worse off if it conformed to other areas of interstate commerce and was only a matter of federal law is a matter of personal opinion and ultimately a futile academic exercise. No serious movement to federalize the law of business organizations has occurred since the early twentieth century, probably because it would fail. States' rights and all the consequences flowing from it has prevailed and dominates the law of business organizations.

H. Final Comments on the Joy of Teaching Business Organizations

In addition to Business Organizations, I also teach Personal Income Tax, Business Tax, and a seminar in the Honors College for undergraduate seniors. I have taught in the past a seminar in business ethics, an advanced course focusing on special business and tax problems with LLCs, State and Local Tax, Corporate Finance, and Securities Regulation. Especially over the past ten years, I have often taught Business Organizations and Personal Income Tax in the same semester and joke that, although I love both classes and would never want to give either of them up, covering them at the same time is kind of like having chocolate and butterscotch for dessert.

Sometimes, when I interview candidates for faculty appointments, I ask them which class is their favorite to teach. Over the years when contemplating that question for myself, I vacillated between Personal Income Tax, which I affectionately nickname "Baby Tax" because that is what my tax teacher, Professor Bob Peroni (now at Texas, then at Tulane) called it, and Business Organizations. Although it is close call, I can say with certainty that my favorite law school class is Business Organizations.

Despite all the challenges posed from dealing with multiple state laws, which are not present in a federal income tax class, at its core, business law is about fostering the creation of new wealth. If the laws are equitable, while allowing for risk and innovation, more wealth will be created, which will ultimately uplift everyone, especially those who are among the least in our society. In my tax scholarship, which I highlight at end of my Personal Income Tax class, I vigorously take the position on moral grounds that fair taxation, which requires the burden to be apportioned under a moderately progressive model and adequate revenues raised to support the reasonable opportunity of every person to reach his or her potential, is an integral part of making sure everyone has a chance to participate in the grand pursuit of creating new wealth.[127] Without the companion of these attributes of morally sound fair taxation, the future potential of creating new wealth will be jeopardized no matter how sound the business organizations laws are. For that reason, when identifying my favorite scholarship, I gravitate to the tax side. In the end though, what makes or breaks the experience in the classroom for the students, and also for the professor, is not the professor's scholarship but good stories. When it comes to producing good stories, Business Organizations trumps Personal Income Tax hands down.

127. *See* Susan Pace Hamill, *A Moral Perspective on "Big Business'" Fair Share of America's Tax Burden*, 1 U. ST. THOMAS L.J. 857, 858 (2004); Susan Pace Hamill, *A Moral Perspective on the Role of Education in Sustaining the Middle Class*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 309, 310–11 (2010); Susan Pace Hamill, *An Argument for Tax Reform Based on Judeo-Christian Ethics*, 54 ALA. L. REV. 1, 4 (2002); Susan Pace Hamill, *An Evaluation of Federal Tax Policy Based on Judeo-Christian Ethics*, 25 VA. TAX REV. 671, 674 (2006); Susan Pace Hamill, *Tax Policy Inside the Two Kingdoms*, 14 J. ACCT, ETHICS & PUB. POL'Y 1, 3–4 (2013); Susan Pace Hamill, *The Potential of Applying Judeo-Christian Ethics to Tax Policy in Foreign Countries*, 34 J. ED. FIN. 139, 139 (2008); Susan Pace Hamill, *The Vast Injustice Perpetuated by State and Local Tax Policy*, 37 HOFSTRA L. REV. 117, 119 (2008).