

***“Market-Based Solutions: Perspectives from Business Law
and Law & Economics”***

A Clinical Course at Yale Law School

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This paper represents a course plan for a course currently being taught at Yale Law School that is called the “Capital Markets and Financial Instruments Regulation.” This clinic fits in well with the research and scholarship being done by the professors who organized and taught the course (Jonathan Macey and Alan Schwartz). It teaches law students about how law and policy are made and about the unintended consequences of regulation and the importance of free and unfettered capital markets. The goal of the clinic is to have a broad, national impact on policy. We also seek to introduce empirical research methods and modern corporate financial theory into debates about the content of regulation and public policy.

These points of view are, in our view, painfully absent, particularly in the government’s rulemaking process at present. Our idea is to organize a clinic in which students and faculty would collaboratively generate actual comment letters as well as publishable academic research regarding proposed regulation by institutions such as the SEC, the Fed, the FDA, the Comptroller of the Currency, etc. This work would be fully cognizant of the value of markets and designed to improve the quality of public decision-making in areas related to the regulation of corporate governance and capital markets. After a year of planning and selecting administrators to assist us in the supervision of the students and administration of the program, the actual clinic began in 2008-2009.

Several concrete results can be expected from this Clinic. First would be creating a small network of junior faculty affiliates exchanging intellectual capital with one another and with the YLS faculty. These affiliates will go on to produce cutting-edge

scholarship in the area of market-based solutions to social problems at top-rate law schools, spreading their approaches to a new generation of law students and future leaders.

A second tangible result of this project will be the generation of comment letters, amicus briefs and oral and written testimony regarding proposed regulation through the proposed Clinic as well as traditional published articles. Not only are the papers ends in themselves, but the JD students who write them will someday be in policy roles (quite possibly in those administrative agencies they write about as students) and the Clinic will educate them as much or more than any other learning experience they could have.

Third, the production of scholarly papers and books in the five areas of research that we outlined in the section on our senior faculty will, we believe, strongly influence the nature of the public policy discourse in law and economics and business law.

In order for Yale Law School to increase its commitment to the study of law and economics from an empirical perspective, we have found a sharply increased need to turn to outside support to carry on our research. Finally, we believe that the advocacy methods taught in this course will not only improve students' writing, advocacy and research skills, it also will provide valuable insight into the "holistic" nature of modern, complex, high stakes commercial litigation. In such litigation, public relations, media relations, web-page management, blog management, and handling constituencies such as professors, journalists and amicus counsel play an important role in the outcome of the litigation. Perhaps the archetypal example of the modern, multi-pronged approach to litigation is the U.S. Supreme Court decision in *Stoneridge Investment Partners v. Scientific-Atlanta*, decided on January 15, 2008 by a 5-3 margin. In this case, the Court rejected "scheme liability" and held that private rights of action under Section 10(b) of the Securities Act do not reach third-party actions where shareholders did not rely upon the third party's actions or statements. Justice Kennedy wrote the opinion for the Court.

Justice Stevens dissented, joined by Justices Ginsburg and Souter. Justice Breyer did not take part in the decision. The opinion was preceded by massive blogging efforts on both sides, dozens of briefs *amicus curiae*, many signed by corporate law academics, singly or in groups, as well as massive public relations efforts on both sides. This new approach to complex, high stakes litigation should be the subject of close attention by the legal academy.

