

Law and New Institutional Economics Workshop

University of Colorado Law School
June 4-5, 2009

Organized by Victor Fleischer and Phil Weiser

Workshop Faculty

Lee Fennell (Chicago)
Victor Fleischer (Colorado)
Mark Ramseyer (Harvard)
Henry Smith (Harvard)
Eric Talley (Berkeley)
Phil Weiser (Colorado)

Participant Papers

Mitu Gulati (Duke)
Kim Krawiec (North Carolina)
Michael Madison (Pittsburgh)
Fred Tung (Emory)
Molly Van Houweling (Berkeley)
Josh Wright (George Mason)

Sponsored by the Silicon Flatirons Center for Law, Technology and
Entrepreneurship

New Institutional Economics (NIE) is an interdisciplinary methodology that draws on economics, law, organization theory, political science, history, and sociology. It focuses on the study of political, legal, and social institutions and how those institutions shape the behavior of organizations, firms, or individuals. These institutions establish the “rules of the game” – the set of formal and informal laws, rules, and norms of social behavior that shape economic development and growth, innovation, social organizations, and political stability. NIE’s most often-cited proponents are Ronald Coase, Oliver Williamson, and Douglass North.

Workshop topics. The workshop is primarily intended for law professors, and it will include scholarly presentations both by workshop faculty and by several workshop participants. The primary focus is on (1) research that helps us understand the effects of laws and legal institutions on economic development, innovation, and social and political institutions, and (2) legal scholarship that draws on analysis of institutional context and institutional design (rather than, say, legal doctrinal analysis, or economic or social theory standing alone). Substantive legal areas may range widely, but may include such topics as business law and capital markets, trade and antitrust regulation, intellectual property, telecommunications, higher education policy, the legal profession, and tax policy.

Last summer, the University of Colorado Law School hosted a one-day workshop designed to introduce legal scholars from around the country to the basic foundations of New Institutional Economics. This year, we hope to build on last year's program by revisiting some of the key ideas and enjoying the opportunity to hear from some leading scholars who study institutions. In addition, this year's program will include several presentations of recent scholarship and works-in-progress from conference participants, with our expert "workshop faculty" serving as discussants.

The workshop will be held at the University of Colorado Law School, in Boulder. We will provide meals, but participants will be expected to cover their own transportation and lodging expenses. The workshop will begin at 9:00 am on Thursday, June 4, 2009, and will conclude after lunch on Friday, June 5, 2009.

Why attend? For legal scholars, NIE is relevant in at least three different ways. First, legal scholarship can benefit from the lessons of transaction cost economics when we write about legal and political institutions in our research. Congress, judges, executive branch agencies, lawyers, and other legal actors all face information costs, collective action problems, and behavioral challenges, just as private actors do.

Second, when legal scholars make normative claims, we often implicitly assume that our policy proposals would be implemented by perfect political institutions. While an assumption of perfect political institutions is sometimes useful analytically, the normative implications of a paper may change if we instead assume implementation by real world political institutions.

Third, NIE can help us understand how legal, economic, social and political institutions and governance arrangements shape the behavior of firms and individuals. Institutional detail can explain why firms and individuals do not always respond to legal incentives as rational actor models might predict; transaction costs, cognitive limitations, and organizational factors all affect behavior. Understanding these interactions can enrich our legal analysis.

Draft Workshop Schedule as of March 16 [subject to change]

Thursday, June 4

9-9:30 Breakfast and Introductory Remarks

New Institutional Economics and Property Rights

9:30-10:30 Henry Smith

- ✦ Presentation of Harold Demsetz, *Toward a Theory of Property Rights* 57 AMERICAN ECONOMIC REVIEW 347-59 (1967)
- ✦ Lee Fennell, Discussant

10:30-11:15 Molly Van Houweling

- ✦ Presentation of Molly Van Houweling, *Author Autonomy and Atomism in Copyright Law* (work in progress)
- ✦ Henry Smith, Discussant

11:15-11:30 Break

11:30-12:15 Michael Madison

- ✦ Presentation of Michael Madison, Brett Frischmann & Katherine Strandburg, *The University as Constructed Cultural Commons* (work in progress)
- ✦ Lee Fennell, Discussant

12:15–1:30 Lunch [in the law school]

New Institutional Economics and Contract Design

1:30 – 2:15 Mark Ramseyer

- ✦ Presentation of Benjamin Klein, Robert G. Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J. L. ECON. 297 (1978).

2:15 – 3:00 Josh Wright

- ✦ Presentation of Benjamin Klein & Joshua Wright, *The Economics of Slotting Contracts*, 50 J. L. ECON. 421 (2007).
- ✦ Phil Weiser, Discussant

3:00 – 3:15 Break

Using NIE in the Classroom

- 3:15 – 4:15 Victor Fleischer
- ✦ Presentation of Michael Lewis, *The End*, PORTFOLIO (Dec. 2008)
 - ✦ Application of NIE to the Lewis article
 - ✦ The “Deals” Template
 - ✦ Eric Talley, Discussant
- 4:15 - 5:15 Discussion of NIE and the Financial Crisis
- ✦ Eric Talley
 - ✦ Victor Fleischer
 - ✦ Phil Weiser
 - ✦ Mark Ramseyer
- 7:30 pm Conference Dinner

Friday, June 5

New Institutional Economics and Behavioral Finance

- 9:00 – 9:45 Fred Tung
- ✦ Presentation of Fred Tung, *Leverage in the Board Room: The Unsung Influence of Private Lenders in Corporate Governance* (work in progress)
 - ✦ Eric Talley, Discussant
- 9:45 – 10:30 Mitu Gulati
- ✦ Presentation of Mitu Gulati & Robert Scott, *Sticky Contracts* (work in progress)
 - ✦ Victor Fleischer, Discussant
- 10:30 – 10:45 Break
- 10:45 – 11:30 Kim Krawiec
- ✦ Presentation of Kim Krawiec, *The Return of the Rogue*, AZ. L. REV. (forthcoming 2009)
 - ✦ Eric Talley, Discussant
- 11:30 – 12:00 Wrap-up and Feedback (Vic and Phil)
- End of Program
- 12:30 – 1:30 pm Informal Lunch (optional)
- Friday afternoon – Cycling or Hiking (optional)

Reading Assignments (to be circulated electronically in May)

1. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AMER. ECON. REV. 347 (1967).
2. Mitu Gulati & Robert Scott, *Sticky Contracts* (work in progress)
3. Benjamin Klein, Robert G. Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J. L. ECON. 297 (1978).
4. Benjamin Klein & Joshua Wright, *The Economics of Slotting Contracts*, 50 J. L. Econ. 421 (2007).
5. Kim Krawiec, *The Return of the Rogue*, Az. L. Rev. (forthcoming 2009).
6. Michael Lewis, *The End*, PORTFOLIO (Dec. 2008).
7. Michael Madison, Brett Frischmann & Katherine Strandburg, *The University as Constructed Cultural Commons* (work in progress)
8. Fred Tung, *Leverage in the Board Room: The Unsung Influence of Private Lenders in Corporate Governance* (work in progress)
9. Molly Van Houweling, *Author Autonomy and Atomism in Copyright Law* (work in progress)

References

The “Canon”: Some Classic Articles

1. Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AMER. ECON. REV. 777 (1972).
2. Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).
3. Steven N. S. Cheung. *The Fable of the Bees: An Economic Investigation*, 16 J. L. ECON. 11 (1973).
4. Ronald H. Coase, *The Lighthouse in Economics*, 17 J. L. ECON. 357 (1974).
5. Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. ECON. 1 (1960).
6. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AMER. ECON. REV. 347 (1967).
7. Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L. J. 239 (1984).
8. Benjamin Klein, Robert G. Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J. L. ECON. 297 (1978).
9. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AMER. SOC. REV. 55 (1963).
10. Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutional Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803 (1989).

Meta: Scholarship About Methods

1. Ronald H. Coase, *The New Institutional Economics*, 88 AMER. ECON. REV. 72 (1998)
2. Douglass C. North, *Institutions*, 5 J. ECON. PERSP. 97 (1991)
3. Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. Econ. Lit 595 (2000)
4. Oliver E. Williamson, *Why Law, Economics and Organization?* 1 Ann. Rev. L. Soc. Sci. 369 (2005)

Workshop Faculty

Lee Fennell (Chicago) received her J.D. magna cum laude from Georgetown University Law Center in 1990. She came to the Law School as a Bigelow Fellow and Lecturer in Law in 1999, after practicing at Pettit & Martin, the State and Local Legal Center, and the Virginia School Boards Association. In 2001, she became an assistant professor at the University of Texas School of Law, and in 2004, an associate professor at the University of Illinois College of Law. She was promoted to professor at Illinois in 2006 and returned to the Chicago faculty as a professor in 2007. She has held visiting positions at Yale Law School (fall 2005), NYU School of Law (spring 2006), and the University of Virginia School of Law (fall 2006). Her teaching and research interests include property, torts, land use, housing, social welfare law, state and local government law, and public finance.

Victor Fleischer (Colorado) is an Associate Professor at the University of Colorado Law School. His primary areas of research are federal income tax, venture capital and private equity, and the structuring of corporate transactions. Professor Fleischer has also taught as an Associate Professor of Law at the University of Illinois (2007-09), Visiting Professor of Law at Georgetown (2005) and Acting Professor of Law (tenure-track) at UCLA (2003-06) and served as the Research Fellow in Transactional Studies at Columbia Law School (2001-03). He earned his B.A. in American History from Columbia College in 1993 and his J.D. from the Columbia University School of Law in 1996.

Mark Ramseyer (Harvard) is the Mitsubishi Professor of Law at Harvard Law School. Mark Ramseyer spent most of his childhood in provincial towns and cities in southern Japan, attending Japanese schools for K-6. He returned to the U.S. for college. Before attending law school, he studied Japanese history in graduate school. Ramseyer graduated from HLS in 1982. He clerked for the Hon. Stephen Breyer (then on the First Circuit), worked for two years at Sidley & Austin (in corporate tax), and studied as a Fulbright student at the University of Tokyo. After teaching at UCLA and the University of Chicago, he came to Harvard in 1998. He has also taught or co-taught courses at several Japanese universities (in Japanese). In his research, Ramseyer primarily studies Japanese law, and primarily from a law & economics perspective. In addition to a variety of Japanese law courses, he teaches the basic Corporations course. With Professors Klein and Bainbridge, he co-edits a Foundation Press casebook in the field.

Henry Smith (Harvard) joined the faculty of Harvard Law School in 2009. Until 2009, Smith was the Fred A. Johnston Professor of Property and Environmental Law at Yale Law School, where he taught in the areas of property, intellectual property, natural resources, and taxation. After law school he clerked for the Hon. Ralph K. Winter, United States Court of Appeals for the Second Circuit, and has taught at the Northwestern University School of Law. He has also been a visiting professor at the University of Chicago Law School, and was the William K. Jacobs, Jr. Visiting Professor of Law at Harvard Law School in the spring of 2006. In 2003 he was awarded a Berlin Prize Fellowship by the American Academy in

Berlin. Professor Smith has written primarily on the law and economics of property and intellectual property, including *Intellectual Property as Property: Delineating Entitlements in Information, Self-Help and the Nature of Property, Exclusion and Property Rules in the Law of Nuisance*, and *The Language of Property: Form, Context, and Audience*. He holds an A.B. from Harvard, a Ph.D. in Linguistics from Stanford, and a J.D. from Yale.

Eric Talley (Berkeley) is a Professor of Law at the University of California at Berkeley and Co-Director of the Berkeley Center for Law, Business, and the Economy, where his teaching and research focus on corporate law and law and economics. Talley was previously a Visiting Professor at Harvard Law School (2008-09), and a Professor of Law at the University of Southern California Law School (1995-2005). Talley has also taught both law and economics classes at Georgetown Law Center, the California Institute of Technology, the RAND Graduate School and Stanford University. Among Talley's notable recent publications are: "*On Public versus Private Provision of Corporate Law*" (with Hadfield) in the JOURNAL OF LAW ECONOMICS & ORGANIZATION (2006); "*Unregulable Defenses and the Perils of Stockholder Choice*" (with Arlen) in the UNIVERSITY OF PENNSYLVANIA LAW REVIEW (2003); "*Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine*" in the YALE LAW JOURNAL (1998); "*Endowment Effects Within Corporate Agency Relationships*" (with Arlen and Spitzer) in the JOURNAL OF LEGAL STUDIES (2001); and "*A Theory of Legal Presumptions*" (with Bernardo and Welch) in the JOURNAL OF LAW, ECONOMICS AND ORGANIZATION (2000).

Phil Weiser (Colorado) is a professor of law and telecommunications at the University of Colorado. At CU, he has worked to establish a national center of excellence in telecommunications and technology law, founding the Journal on Telecommunications & High Technology Law and the Silicon Flatirons Center for Law, Technology, and Entrepreneurship as well as writing and teaching in the areas of competition policy, innovation policy, and Internet policy. Over the last ten years, Weiser has co-authored two books (*Digital Crossroads: American Telecommunications Policy in the Internet Age* (MIT Press 2005) and *Telecommunications Law and Policy* (Carolina Academic Press 2006)), numerous articles (in both law journals and publications such as the Washington Post and Foreign Affairs), and has testified before both houses of Congress. He currently serves as a co-Chair of the Colorado Innovation Council and served as the lead agency reviewer for the Federal Trade Commission as part of the 2008 Presidential Transition. Prior to joining the CU faculty, Professor Weiser served as senior counsel to the Assistant Attorney General in charge of the Antitrust Division at the United States Department of Justice, advising him primarily on telecommunications matters. Before his appointment at the Justice Department, Weiser served as a law clerk to Justices Byron R. White and Ruth Bader Ginsburg at the United States Supreme Court and to Judge David Ebel at the Tenth Circuit Court of Appeals. Weiser graduated with high honors from both the New York University School of Law and Swarthmore College.