

# ENTREPRENEURS ON HORSEBACK: REFLECTIONS ON THE ORGANIZATION OF LAW

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*“Law and entrepreneurship” is an emerging field of study. Skeptics might wonder whether law and entrepreneurship is a variant of that old canard, the Law of the Horse. In this Essay, we defend law and entrepreneurship against that charge and urge legal scholars to become even more engaged in the wide-ranging scholarly discourse regarding entrepreneurship. In making our case, we argue that research at the intersection of entrepreneurship and law is distinctive. In some instances, legal rules and practices are tailored to the entrepreneurial context, and in other instances, general rules of law find novel expression in the entrepreneurial context. As a result, studying connections between law and entrepreneurship offers unique insights about them both.*

Whenever we confess our interest in “law and entrepreneurship” to a new group of people, someone in the group inevitably makes reference to the now-hackneyed joke about the “Law of the Horse.”<sup>1</sup> Harold Koh describes the standard version of the joke:

When I first came to Yale Law School more than two decades ago to teach International Business Transactions, then-Dean Harry Wellington suggested that international business law is like that famous non-book, The Law of the Horse, which consists of

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1. Attentive readers will have noted our textual pun, referring to The Law of the Horse as “hackneyed.” In addition to its adjective form meaning “trite” or “banal,” the noun “Hackney” refers to an English breed of horses, and “hackney” is a generic term for a trotting horse.

Chapter I: “Contracting for a Horse”; Chapter II: “Owning a Horse”; Chapter III: “Torts by a Horse”; and Chapter IV: “Litigating over a Horse.”<sup>2</sup>

The short of the critique, of course, is that the horse is not a very useful organizing principle for the study of law.

Some might also question the value of organizing a field of legal study around entrepreneurship. In this Essay, we observe that entrepreneurship is an important social and economic phenomenon that has attracted the attention of scholars in many disciplines,<sup>3</sup> including some recent work by legal scholars.<sup>4</sup> We then offer reasons why law and entrepreneurship should be considered a discrete field of legal study, and we urge legal scholars to become even more engaged in the wide-ranging scholarly discourse over entrepreneurship.<sup>5</sup> As applied to law and entrepreneurship, therefore, the Law of the Horse is “a catchy put-down, but with very little substance.”<sup>6</sup>

The Law of the Horse is routinely raised in discussions of new areas of legal study—for example, transnational law,<sup>7</sup> health law,<sup>8</sup> and information law<sup>9</sup>—in large part because of the notoriety brought to the joke by Judge Frank

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2. Harold Hongju Koh, *Is There a “New” New Haven School of International Law?*, 32 YALE J. INT’L L. 559, 572 n.85 (2007). The joke may have originated with Karl Llewellyn. In an “introductory lecture” on the law of sales given at Columbia Law School and later published in the *Harvard Law Review*, Llewellyn argued that the horse played a crucial role in the development of the law of sales. K. N. Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725 (1939). The horse enters Llewellyn’s tale via the English case of *Stuart v. Wilkins*, 99 Eng. Rep. 15 (K.B. 1778), which involved a remedy for breach of implied warranty in connection with the sale of a horse. Llewellyn attempts to “unhorse” the law of sales in a companion essay. K. N. Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873 (1939) [hereinafter Llewellyn, *The First Struggle*].

3. See *infra* notes 53–55 and accompanying text.

4. See *infra* notes 62–65.

5. “Law and entrepreneurship” is quite different in orientation from “law and economics,” “law and sociology,” “law and psychology,” and other interdisciplinary efforts. Rather than applying the tools of another discipline to law, the study of “law and entrepreneurship” examines the influence of law on entrepreneurial behavior and entrepreneurial behavior on law. Thus, one might use economics, sociology, psychology, and other disciplines to study “law and entrepreneurship.”

6. Henry T. Greely, *Some Thoughts on Academic Health Law*, 41 WAKE FOREST L. REV. 391, 406 (2006) (addressing the Law-of-the-Horse critique of health law); cf. Einer R. Elhauge, *Can Health Law Become a Coherent Field of Law?*, 41 WAKE FOREST L. REV. 365, 368 (2006) (confessing to “have always found this analogy more clever than illuminating”).

7. Harold Hongju Koh, *The Globalization of Freedom*, 26 YALE J. INT’L L. 305, 305 (2001).

8. Elhauge, *supra* note 6, at 365; Greely, *supra* note 6, at 404; Mark A. Hall, *The History and Future of Health Care Law: An Essentialist View*, 41 WAKE FOREST L. REV. 347, 355–56 (2006).

9. Jacqueline Lipton, *A Framework for Information Law and Policy*, 82 OR. L. REV. 695, 699 (2003).

Easterbrook's attack on the "Law of Cyberspace."<sup>10</sup> Judge Easterbrook's principal objections to cyberlaw<sup>11</sup> comprised its supposed narrowness ("the best way to learn the law applicable to specialized endeavors is to study general rules")<sup>12</sup> and its lack of depth:

Lots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows. Any effort to collect these strands into a course on "The Law of the Horse" is doomed to be shallow and to miss unifying principles.<sup>13</sup>

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10. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207. Larry Lessig later recounted:

A few years ago, at a conference on the 'Law of Cyberspace' held at the University of Chicago, Judge Frank Easterbrook told the assembled listeners, a room packed with 'cyberlaw' devotees (and worse), that there was no more a 'law of cyberspace' than there was a 'Law of the Horse'; that the effort to speak as if there were such a law would just muddle rather than clarify; and that legal academics ('dilettantes') should just stand aside as judges and lawyers and technologists worked through the quotidian problems that this souped-up telephone would present. 'Go home,' in effect, was Judge Easterbrook's welcome.

Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 501 (1999) (footnote omitted).

11. As to the origins of this term, see Dean Colby & Robert Trager, *Using Communication Theory to Understand Cyberlaw and its Discontents*, 2005 U. ILL. J.L. TECH. & POL'Y 187, 187 n.2 ("The origin of the word 'Cyberlaw' is unclear, but the term was inspired by William Gibson's novel *Neuromancer*, which coined the word 'cyberspace.' Jonathan Rosenoer subsequently published a newsletter called CyberLaw in the early 1990s, and the neologism began to appear in law review articles shortly thereafter." (citations omitted)).

12. Easterbrook, *supra* note 10, at 207. Judge Easterbrook also assailed the effort to create a "law of cyberspace" by leveling a charge of dilettantism:

Instead of offering courses suited to dilettantes, the University of Chicago offered courses in Law and Economics, and Law and Literature, taught by people who could be appointed to the world's top economics and literature departments—even win the Nobel Prize in economics, as Ronald Coase has done.

I regret to report that no one at this Symposium is going to win a Nobel Prize any time soon for advances in computer science. We are at risk of multidisciplinary dilettantism, or, as one of my mentors called it, the cross-sterilization of ideas. Put together two fields about which you know little and get the worst of both worlds.

*Id.* The answer to this objection is so obvious that it hardly bears stating, but in the interests of completeness we offer Henry Greely's response: "Easterbrook is completely right that law professors should not speculate in ignorance about other fields. The right answer is not to withdraw from specific areas, but to learn about them, and to work closely with other people who are specialized in them." Greely, *supra* note 6, at 405.

13. Easterbrook, *supra* note 10, at 207.

Whether Judge Easterbrook was right about the value of cyberlaw as a separate field of legal study remains a matter of vigorous debate.<sup>14</sup> For present purposes, we are more interested in his method of attack than its target. We begin with some explication of the Law of the Horse, concluding that Judge Easterbrook missed the joke. What makes the Law of the Horse funny is not the narrowness or shallowness of the topic,<sup>15</sup> but rather that the *presence of a horse*—as opposed to “cucumbers, cats, coal, [or] cribs”<sup>16</sup>—is not a legally relevant fact.<sup>17</sup>

Lawyers inevitably classify cases according to specified factual attributes.<sup>18</sup> Did someone make a promise? Did one person touch another person?

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14. See, e.g., Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 2 (2004) (“If we assume that a technological development is important to law only if it creates something utterly new, and we can find analogues in the past—as we always can—we are likely to conclude that because the development is not new, it changes nothing important.”); Lipton, *supra* note 9, at 698 (“[E]ven if there is a potential to explain cyberlaw by reference to a clear theoretical framework, such a framework has arguably not yet emerged in practice, at least in the relevant literature.”); Joseph H. Sommer, *Against Cyberlaw*, 15 BERKELEY TECH. L.J. 1145, 1147 (2001) (“[N]ot only is ‘cyberlaw’ nonexistent, it is dangerous to pretend that it exists.”).

15. As a descriptive matter, it is far from clear that the Law of the Horse would be narrow or shallow. The joke itself hints at the breadth of the imaginary field, touching on contracts, property, torts, and the litigation process. And we presume that any credible study of the subject would explore general principles of law as they apply to cases involving horses. For a discussion of “the law of the horse” that may already exist, see *infra* note 17.

16. Easterbrook, *supra* note 10, at 208.

17. Or is it? A “law of the horse” may already exist. The University of Kentucky College of Law hosts the Annual National Equine Law Conference, sponsors regular continuing legal education programs on equine law, and is home to a student organization called the Equine Law Society. During the 1980s, *Kentucky Law Journal* twice published articles from an “Equine Law Symposium,” and many law review articles focusing on matters of equine law have been published in other scholarly journals, including a spirited defense of the “law of the horse.” See Joan S. Howland, *Let’s Not “Spit the Bit” In Defense of “The Law of the Horse”: The Historical and Legal Development of American Thoroughbred Racing*, 14 MARQ. SPORTS L. REV. 473 (2004).

Beyond Kentucky, the University of Vermont maintains a website on “Equine Law and Horsemanship Safety.” Univ. of Vt., Equine Law and Horsemanship Safety, <http://asci.uvm.edu/equine/law> (last visited Dec. 23, 2007). And attorneys across the U.S. market themselves as experts in “equine law.” See, e.g., Kimberly H. Ashbach, <http://www.ashbachlaw.com/PracticeAreas/Equine-Law.asp> (last visited Dec. 23, 2007) (Pennsylvania attorney representing clients on “myriad of equine legal issues”); Julie I. Fershtman, <http://www.equinelaw.net> (last visited Dec. 23, 2007) (Michigan attorney purporting to be a “national leader in equine law”); Law Office of Mitchell E. Fox, <http://www.foxcommerciallaw.com/PracticeAreas/Equine-Law.asp> (last visited Dec. 23, 2007) (Florida attorneys representing “horse owners, horse breeders, purchasers, sellers, equestrian riding schools, stables, professional trainers, and others”); see also *infra* note 22.

18. Compare Henry Greeley’s suggestion that “many time-honored law school subjects and legal fields are, in their own ways, laws of the horse” because they “all are courses and fields about the law as it is applied in specific settings, not about generalized law as some kind of ‘brooding omnipresence in the sky.’” Greeley, *supra* note 6, at 405–06.

Whether in Roman law,<sup>19</sup> in the English common law,<sup>20</sup> or in the modern American legal system, legal taxonomies are structured around the underlying factual attributes of transactions.<sup>21</sup> And “transactions involving horses” do not merit separate consideration.<sup>22</sup>

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19. The great divisions of Roman law were “persons,” “things,” and “actions.” These divisions have been discussed at great length by scholars of Roman law, *see, e.g.*, H.F. JOLOWICZ, *ROMAN FOUNDATIONS OF MODERN LAW* 61–81 (1978), and any attempt here to summarize those discussions would necessarily be woefully incomplete. Nevertheless, we can easily illustrate the connection between the organization of Roman law and the underlying factual attributes of the persons, things, or actions.

Perhaps most obviously, “persons” (*persona*) referred only to humans, not juristic persons, like municipalities or corporations. J.A.C. THOMAS, *TEXTBOOK OF ROMAN LAW* 389 (1976). “Things” (*res*) was a vast category, but within that category were myriad subdivisions, including a distinction between movable things (*res mobiles*) and immovable things (*res immobiles*). *Id.* at 130–31. “Actions” (*actio*) were largely procedural, but they had a substantive component through their close connection to “obligations.” *Id.* at 213. And the nature of obligations depended on the underlying factual attributes of transactions. *Id.* at 221 (“[T]he principal classification, adopted by Gaius and followed in Justinian’s Institutes, is according to the source of the obligation, i.e., the legal fact or transaction from which the obligation arises.”).

20. As with Roman law, the English common law is too vast a subject to describe in a single footnote, but it exhibits the same characteristic of classifying legal rules by the underlying factual attributes of transactions. To use an example that we employed above, material things are divided into “movables” and “immovables.” *See* 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 2 (1895).

The English courts developed an elaborate writ system that regulated the types of claims that could be brought before the courts. Each writ had particular factual predicates. For example,

The trespass writs . . . belong to a group of writs used to make claims for civil wrongs. The specific phrase used in a particular trespass writ described the wrong, which in turn usually entailed proof of specific elements, and delimited damages recoverable for the wrong. For example, while trespass *de bonis asportatis* sought damages for the carrying away of goods, which could include their value, trespass *per quod servitium amisit* (“whereby he lost the service” [of his servant]) was a writ used by a master to claim damages for the loss of a servant’s services, but could not be used to claim damages for injuries suffered by the servant.

George Van Cleve, *Somerset’s Case and Its Antecedents in Imperial Perspective*, 24 *LAW & HIST. REV.* 601, 616 n.73 (2006) (alteration in original).

21. Llewellyn describes this aspect of legal reasoning: “Our fields of law, our patterns of legal thinking, our legal concepts, have grown up each one around some ‘type’ of occurrence or transaction, *felt* as a typical something, *seen* in due course as a legally significant type, and, as a type-picture, made a standard and a norm for judging.” Llewellyn, *The First Struggle*, *supra* note 2, at 880.

22. For purposes of this Essay, we play along with the joke and assume that the presence of a horse is not a legally relevant fact, despite some evidence to the contrary. *See supra* note 17. In addition, we observe that the irrelevance of the horse depends on the fact that, under current law, animals are for the most part treated like any other personal property. One of us, however, has argued rather strongly that this should not be the case.

These observations raise an obvious question: which features of human interaction provide a distinctive basis for legal analysis? In our view, a new field of legal study is justified when a discrete factual setting generates the need for distinctive legal solutions. This distinctiveness may manifest itself in the creation of a unique set of legal rules or legal practices,<sup>23</sup> in the unique expression or interaction of more generally applicable legal rules,<sup>24</sup> or in unique insights about law.<sup>25</sup> Under this standard, we will argue that “law and entrepreneurship” merits consideration as a separate field of legal study. Before turning to that argument, however, we examine Judge Easterbrook’s claims in relation to the Law of the Horse to demonstrate the importance of *distinctiveness* in organizing law.

### I. THE LAW OF THE HORSE

Judge Easterbrook deployed the Law of the Horse to make a claim about the proper organization of law, and we take this claim as our point of departure:

Far better for most students—better, even, for those who plan to go into the horse trade—to take courses in property, torts, commercial transactions, and the like, adding to the diet of horse cases a smattering of transactions in cucumbers, cats, coal, and cribs. Only by putting the law of the horse in the context of broader rules about commercial endeavors could one really understand the law about horses.<sup>26</sup>

Judge Easterbrook’s preference for “property, torts, commercial transactions, and the like” as organizational constructs is not completely developed in his essay, but he mentions the breadth of those fields as an advantage over the

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*See generally* Darian M. Ibrahim, *A Return to Descartes: Property, Profit, and the Corporate Ownership of Animals*, 70 *LAW & CONTEMP. PROBS.* 87 (2007); Darian M. Ibrahim, *Reduce, Refine, Replace: The Failure of the Three R’s and the Future of Animal Experimentation*, 2006 *U. CHI. LEGAL F.* 195 (2006); Darian M. Ibrahim, *The Anticruelty Statute: A Study in Animal Welfare*, 1 *J. ANIMAL L. & ETHICS* 175 (2006).

23. When a particular factual setting inspires a distinctive legal rule, we typically call that rule a “doctrine,” and we fold that doctrine into an existing collection of doctrines that comprise a more-or-less coherent field of study. For example, once legislatures and courts recognized that minority shareholders in closely held corporations were vulnerable to opportunistic behavior on the part of majority shareholders, both legislatures and courts developed the doctrine of minority oppression. *See* *Galler v. Galler*, 203 N.E.2d 577 (Ill. 1964); *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505 (Mass. 1975); F. Hodge O’Neal, *Close Corporations: Existing Legislation and Recommended Reform*, 33 *BUS. LAW.* 873, 873–75 (1978) (discussing the development of statutes addressing the special needs of shareholders in closely held corporations). On the other hand, when a particular factual setting inspires a set of distinctive legal rules, we begin to recognize that factual setting as worthy of separate study. All of our modern categories of law—administrative law, family law, corporate law, etc.—illustrate this principle.

24. *See infra* notes 76–77 and accompanying text (applying this idea to law and entrepreneurship).

25. This last tack was taken by Larry Lessig in his response to Judge Easterbrook. *See* Lessig, *supra* note 10, at 502 (“We see something when we think about the regulation of cyberspace that other areas would not show us.”); *see also infra* notes 89–98 (applying this idea to law and entrepreneurship).

26. Easterbrook, *supra* note 10, at 208.

Law of the Horse. In the law of torts, for example, students encounter cases in an infinite variety of contexts, but liability arises from one of three justifications: intentional misconduct, negligence, or strict liability.<sup>27</sup> Each of these categories includes various sub-categories. For example, intentional torts include battery, assault, false imprisonment, infliction of mental distress, trespass, and conversion.<sup>28</sup> At each level of analysis, classification of cases depends on some feature of the underlying factual realities (e.g., whether one person touched another person).<sup>29</sup>

The Law of the Horse would attempt to organize fact scenarios by focusing on alternative attributes of the transactions. Rather than asking whether one person touched another person, for example, we would ask whether the interaction between two people involved a horse. In most instances, classifying cases based on the presence of a horse—as opposed to a chicken or a bicycle—is utterly nonsensical because the mere presence of a horse reveals nothing distinctive that would assist us in resolving actual or potential conflicts among the participants in these transactions.<sup>30</sup>

When we classify the universe of human interactions, therefore, some facts are legally relevant (whether one person touched another person), while other facts are not legally relevant (whether the interaction involved a horse).<sup>31</sup> Judge Easterbrook's invocation of the Law of the Horse at the "Law of Cyberspace" conference, therefore, might be read most sympathetically as nothing more than an amusing method of asserting that "cyberspace" is not a legally relevant fact.

This assertion causes us to reflect on the grounds for elevating certain facts above others when classifying cases or transactions. We discern various

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27. W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS 31–32 (5th ed. 1984) ("The fundamental basis of tort liability may first be divided into three parts . . ."); cf. RESTATEMENT (SECOND) OF TORTS (1965) (following this organizational scheme). The American Law Institute ("ALI") is in the process of replacing parts of the *Restatement (Second) of Torts* with the *Restatement (Third) of Torts*. To date, the ALI has adopted two of the three installments that will comprise the *Restatement (Third) of Torts*: Products Liability (1998) and Apportionment of Liability (2000). The third installment, Liability for Physical and Emotional Harm, is currently available in draft form. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (Tentative Draft No. 5, 2007).

28. KEETON ET AL., *supra* note 27, at 39–107.

29. Our emphasis on the importance of facts to understanding the organization of law is not new. Brian Leiter has described the "Core Claim" of the Legal Realists as follows: "judges respond primarily to the stimulus of the facts." Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 275 (1997). This insight allowed Realists to advance "a descriptive theory about the nature of judicial decision, according to which . . . judicial decisions fall into (sociologically) determined patterns, in which . . . judges reach results based on a (generally shared) response to the underlying facts of the case, which . . . they then rationalize after-the-fact with appropriate legal rules and reasons." *Id.* at 285.

30. *But see supra* notes 17 and 22 and accompanying text.

31. In her recent study of the use of language in law schools, Elizabeth Mertz highlights the importance of the process by which relevant facts are selected. ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* 66–74 (2007).

circumstances in which legal scholars might be interested in organizing the real world along factual dimensions that do not correspond with traditional doctrinal categories, though not all such circumstances would justify the creation of a new field of legal study. For example, empirical legal scholars may select a sample of cases or transactions to gain insights about a theoretical issue,<sup>32</sup> or doctrinal legal scholars may organize cases around various factual contexts to discern subtle differences in the expression of general legal standards.<sup>33</sup> Some projects of the latter type gain enough momentum to generate freestanding courses, casebooks,

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32. Studies of ranchers in California's Shasta County, ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991), jewelers in midtown Manhattan, Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992), and tuna merchants in Tokyo, Eric A. Feldman, *The Tuna Court: Laws and Norms in the World's Premier Fish Market*, 94 CAL. L. REV. 313 (2006), might all reveal something interesting about the interplay of formal legal rules and procedures, on the one hand, and social norms, on the other. But we do not distinguish legally between boundary disputes among ranchers and boundary disputes among urban apartment owners or contracts among jewelers and contracts among fish merchants.

33. For example, prominent realist scholar Leon Green used this approach in organizing his "heretical casebook," *THE JUDICIAL PROCESS IN TORT CASES*, first published in 1931. See Jay M. Feinman, *Teaching Economic Torts*, 95 KY. L.J. 893, 898 (2006–2007). In the first edition of that casebook, Green included chapters on, among other things, "Threats, Insults, Blows, Attacks, Wounds, Fights, Restraints, etc." and "Surgical Operations; Treatment, Control, etc., of Sick, Disabled and Irresponsible Persons." In a review of the casebook, James Gifford tried to make sense of the idiosyncratic organization:

Courts must dispose of cases. For this purpose many devices are available. With a variety of devices at their command, it is not as important to determine how judges dispose of problems as why. The real reasons are rarely, if ever, explicit. May we not discover an explanation as to why courts decide as they do by gathering the cases under fact categories rather than under categories of legal concepts? This, in my opinion, is worth trying.

James P. Gifford, *The Judicial Process In Tort Cases*, 41 YALE L.J. 1264, 1266 (1932) (book review).

In a series of law review articles and in later editions of the casebook, Green refined his approach, which he referred to as the "relational-interests" approach to tort law. See Leon Green, *Relational Interests*, 29 ILL. L. REV. 460 (1934); Leon Green, *Relational Interests*, 29 ILL. L. REV. 1041 (1935) (trade relations); Leon Green, *Relational Interests*, 30 ILL. L. REV. 1 (1935) (commercial relations); Leon Green, *Relational Interests*, 30 ILL. L. REV. 314 (1935) (professional and political relations); Leon Green, *Relational Interests*, 31 ILL. L. REV. 35 (1936) (general social relations); Leon Green, *Basic Concepts: Persons, Property, Relations*, 24 A.B.A. J. 65 (1938). Though never widely adopted by torts scholars, the "relational-interests" approach to tort law survives in PETER B. KUTNER & OSBORNE M. REYNOLDS, JR., *ADVANCED TORTS: CASES AND MATERIALS* 3–8 (3d ed. 2006). As with the empirical studies mentioned above, Green's decision to organize tort cases according to subsidiary facts is not an attempt to create a new field of law but rather to illuminate the field of tort law.



treatises, articles, and other materials, but are later assimilated into more general categories of law or marginalized.<sup>34</sup>

The more ambitious motive for organizing cases around factual attributes other than those captured by the great headings of the common law is that the new system of organization may reveal a set of circumstances deserving more tailored attention. Larry Lessig employed this approach in defending cyberlaw from Judge Easterbrook's horse attack. According to Lessig, the distinctive feature of cyberspace is "code, or the software and hardware that make cyberspace the way it is."<sup>35</sup> Lessig argued that by understanding how code affects behavior in cyberspace—and how law affects code—we could gain unique insights on the "limits of law as a regulator."<sup>36</sup>

A similar search for distinctiveness was staged by several commentators in a recent symposium on health law held at Wake Forest University School of Law. For example, Mark Hall attempted to identify "the essential features of health care delivery that distinguish its legal issues from those of other related fields."<sup>37</sup> Likewise, Einer Elhauge was motivated by the question: "do we gain insights from thinking as a group about the set of legal materials grouped under this rubric?"<sup>38</sup>

Environmental law also has undergone this sort of examination. Richard Lazarus, for example, has argued that environmental law presents "special challenges" for lawmaking because ecological injury is distinctive.<sup>39</sup> Jay Wexler responded, "[r]esolution of environmental law disputes frequently calls for nothing more than application of general principles of law that themselves are derived without much or any consideration of the remarkable features of ecological injury."<sup>40</sup>

We could multiply the examples,<sup>41</sup> but the pattern is clear: for (nearly) every participant in these debates,<sup>42</sup> the argument regarding the value of creating or maintaining a field of legal study turns on the *distinctiveness* of the factual context. In the following section, we argue that entrepreneurship meets this standard of distinctiveness, despite well-known difficulties in defining its boundaries.

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34. See A. Dan Tarlock, *Is There a There There in Environmental Law?*, 19 J. LAND USE & ENVTL. L. 213, 229–30 (2004) (referring to "lens courses" such as Poverty Law).

35. Lessig, *supra* note 10, at 509.

36. *Id.* at 502.

37. Hall, *supra* note 8, at 358.

38. Elhauge, *supra* note 6, at 370.

39. Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 745 (2000).

40. Jay D. Wexler, *The (Non)Uniqueness of Environmental Law*, 74 GEO. WASH. L. REV. 260, 315 (2006).

41. See, e.g., Koh, *supra* note 7, at 306 ("As time moves on, and commerce, telecommunications, culture and transport become increasingly globalized, a growing body of law and norms will emerge that is, on the one hand, universally recognized, but on the other, neither wholly domestic nor wholly international in its character or origin.")

42. A notable exception is Henry Greely, who has argued, "the study of health law is both important and fascinating. And that is more than enough to justify spending a career on it." Greely, *supra* note 6, at 408.

## II. ENTREPRENEURSHIP THROUGH THE LENS OF LAW

Entrepreneurship is a real-world phenomenon of great importance. At the dot.com market's peak, entrepreneurial start-up companies backed by venture capital accounted for approximately \$1.1 trillion in sales or roughly eleven percent of our gross domestic product.<sup>43</sup> These same companies directly employed over 12.5 million people.<sup>44</sup> If the traditional small businesses and innovative activity that occurs within established firms (so-called "intrapreneurship")<sup>45</sup> are also defined as entrepreneurial (we address the definitional question below),<sup>46</sup> the number of entrepreneurs and amount of entrepreneurial activity in society balloons.<sup>47</sup> At a time when globalization has resulted in the outsourcing of

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43. Robert E. Grady, Managing Dir., the Carlyle Group & Lecturer in Pub. Mgmt., Stanford Graduate Sch. of Bus., Testimony Before the U.S. House of Representatives Committee on Education and the Work Force, at 2 (March 11, 2004) (citing study conducted by Wharton Econometrics/Decision Resources, Inc.).

44. *Id.*; see also Ronald J. Mann, *Do Patents Facilitate Financing in the Software Industry?*, 83 TEX. L. REV. 961 (2005). Professor Mann stated:

The U.S. software industry is characterized by astonishing levels of growth, innovative activity, and competition. Some argue that innovation in software and related industries has driven much of the innovation in other industries in recent decades. Federal government statistics suggest that it is one of the few information technology sectors that consistently shows a large trade surplus, and as the pressures of globalization dilute the comparative advantage of American employees in many sectors, it is worth noting the remarkable level of employment growth in the software industry over the last decade, from 854,000 jobs in 1992 to more than 2.1 million jobs in 2000 (a 12% annual growth rate).

*Id.* at 963 (footnotes omitted).

45. *But see* D. Gordon Smith & Masako Ueda, *Law and Entrepreneurship: Do Courts Matter?*, 1 ENTREPRENEURIAL BUS. L.J. 353, 356 (2006) (excluding intrapreneurship from discussion of "getting novel things done" because intrapreneurship presents different issues than start-ups, such as circumventing organizational inertia).

46. *See infra* notes 69–75 and accompanying text.

47. We observe that Professor Greely, in justifying a field of health law, similarly took note of "the sheer size of health care." Greely, *supra* note 6, at 396. He observed that in the year 2006 alone:

[N]early one dollar out of every six spent on goods and services [in the United States] will be spent on health care—more than \$ 2 trillion in all. This sum is noticeably smaller than the GDP of only the United States, Japan, and Germany. It is about the same as the GDP of France or the United Kingdom. It is clearly larger than the GDP of every other country in the world. The health care system will spend about \$7,000 this year for each man, woman, and child in the United States, affecting the pay checks, tax bills, and bank accounts of every American, as well as the expenses—and profits—of almost all American businesses.

*Id.* at 396–97. He went on to remark that "[t]hat big of an industry generates a lot of law and a lot of business for lawyers. Lawyers need to be trained to provide relevant services; academics can provide useful analysis and commentary on the laws governing health care." *Id.* at 397.

manufacturing and service jobs,<sup>48</sup> and United States financial markets are experiencing strong competition from foreign rivals,<sup>49</sup> some have argued that entrepreneurship provides the competitive advantage for the United States moving forward.<sup>50</sup> Moreover, entrepreneurship offers psychic benefits for those who wish to be their own boss or take great risk in the hopes of great reward.<sup>51</sup> The entrepreneur has a certain mythological importance in the pursuit of the American dream.<sup>52</sup>

Scholars working in numerous fields have recognized the importance of entrepreneurship and have set out to explore it through their own particular lenses. According to Scott Shane, “any effort to provide a conceptual framework for entrepreneurship seems to require an interdisciplinary approach. The domains of psychology, sociology and economics all seem to provide insight into a piece of the puzzle, but none seem to explain the phenomenon completely.”<sup>53</sup> For instance, the field of economics, and specifically the literature on vertical integration and the boundaries of the firm, informs the means by which entrepreneurs choose to exploit opportunities for profit—whether through start-ups, established firms, or market transactions.<sup>54</sup> Similarly, the notion of entrepreneurs as risk-takers draws from the psychology literature and peers into “the entrepreneurial mind.”<sup>55</sup>

Though academic economists, psychologists, sociologists, and scholars from other disciplines have made greater contributions to the entrepreneurship literature than legal scholars, the development of “law and entrepreneurship” as a field may be inevitable. After all, the effect of law on entrepreneurship is important to both policy makers seeking to promote entrepreneurial activities<sup>56</sup> and

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48. See THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 282 (2005).

49. See Aaron Lucchetti, *NYSE, via Euronext, Aims to Regain Its Appeal for International Listings*, WALL ST. J., June 30, 2006, at C1 (noting that 11 of the top 25 foreign IPOs were listed on the major U.S. stock exchanges in 2000, but that this figure dropped significantly after the passage of the Sarbanes-Oxley Act of 2002, down to three of the 25 largest foreign IPOs in 2004 and none of the 25 largest foreign IPOs in 2005).

50. See generally CARL J. SCHRAMM, *THE ENTREPRENEURIAL IMPERATIVE* (2006).

51. See *infra* note 55 and accompanying text (on entrepreneurs as risk-takers).

52. See Joseph Bankman & Ronald J. Gilson, *Why Start-ups?*, 51 STAN. L. REV. 289, 289–90 (1999) (observing that the entrepreneurial myth holds a particular allure in Silicon Valley).

53. SCOTT SHANE, *A GENERAL THEORY OF ENTREPRENEURSHIP: THE INDIVIDUAL-OPPORTUNITY NEXUS* 10 (2003).

54. See OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* (1975); OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* (1985); R.H. Coase, *The Nature of The Firm*, 4 *ECONOMICA* 386 (1937).

55. See generally Robert H. Brockhaus, Sr., *The Psychology of the Entrepreneur*, in *ENCYCLOPEDIA OF ENTREPRENEURSHIP* 39–71 (Calvin A. Kent et al. eds., 1982).

56. Some policy makers, for example, have sought to use tax laws to entice more funding for early stage start-ups. See Colleen DeBaise, *On Angels' Wings*, WALL ST. J., Mar. 19, 2007, at R6 (discussing proposed “Access to Capital for Entrepreneurs Act of 2006,” which would have provided a 25% tax credit for angel investing). Laws that would provide tax incentives for start-up investment might enable more start-ups to receive

lawyers counseling clients involved in them. Lawyers, for instance, must be able to advise when it is safe for entrepreneurial employees to leave their current employers and go it alone without violating a non-competition agreement, a confidentiality agreement, trade secret law, and the corporate opportunity doctrine,<sup>57</sup> they must counsel start-ups on how to raise funds from angel investors and venture capitalists without violating securities laws,<sup>58</sup> and they must counsel entrepreneurs and financiers on investment contract design.<sup>59</sup>

Connections between law and entrepreneurship have attracted interest from non-legal scholars. Gordon Smith and Masako Ueda observe, for example, that “the study of law and entrepreneurship has flourished among economists.”<sup>60</sup> In particular, they point to the interest among economists in laws protecting intellectual property and laws protecting investors.<sup>61</sup> But there have been notable attempts by legal scholars to add a “law matters” component to the entrepreneurship discussion. An important example is found in Ronald Gilson’s explanation for Silicon Valley’s comparative success over Boston’s Route 128.<sup>62</sup> While AnnaLee Saxenian first explored the issue and attributed Silicon Valley’s advantage to its progressive cultural norms,<sup>63</sup> Professor Gilson offered a legal explanation: California refused to enforce non-competition agreements but Massachusetts did not.<sup>64</sup> Professor Gilson argued that California’s law allowed for unfettered mobility among Silicon Valley’s entrepreneurial employees, which in turn led to robust start-up activity and knowledge spillover, while Massachusetts’ law had the opposite effect.

Professor Gilson’s contribution and others like it<sup>65</sup> begin to help us understand connections between law and entrepreneurship. But we believe that

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funding, but might also increase moral hazard by enticing investment in companies that would not be funded absent the subsidy.

57. See *infra* notes 62–64 and 90–91 and accompanying text.

58. This advice includes finding an exemption from public registration of the offering and complying with the SEC’s ban on general solicitation in exempt offerings.

59. See Ronald J. Gilson, *Engineering a Venture Capital Market: Lessons from the American Experience*, 55 STAN. L. REV. 1067, 1078–85 (2003) (describing the five common features of venture capital investment contracts); Darian M. Ibrahim, *The (Not So) Puzzling Behavior of Angel Investors*, 61 VAND. L. REV. (forthcoming 2008) (on angel investment contract design).

60. Smith & Ueda, *supra* note 45, at 357.

61. *Id.* at 358–63.

62. See generally Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575 (1999).

63. See generally ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128 (1994).

64. Gilson, *supra* note 62, at 578.

65. See, e.g., Michael Abramowicz, *The Danger of Underdeveloped Patent Prospects*, 92 CORNELL L. REV. 1065 (2007) (exploring the potential danger of patent underdevelopment for inventions in their earliest stages); John R. Allison et al., *Software Patents, Incumbents, and Entry*, 85 TEX. L. REV. 1579 (2007) (examining the relationship between patents and the different business models used in the software industry); Kenneth Ayotte, *Bankruptcy and Entrepreneurship: The Value of a Fresh Start*, 23 J.L. ECON. & ORG. 161 (2007) (arguing that bankrupt entrepreneurial firms are a better fit for the “fresh

much more remains to be learned about entrepreneurship when viewed through the lens of law, and we hope that more legal scholars will pursue the study of these connections. Next we turn to what we might learn about the law when it is viewed through the lens of entrepreneurship.

### III. THE DISTINCTIVENESS OF ENTREPRENEURSHIP FOR LEGAL STUDY

Earlier we argued that a new field of legal study is justified when a discrete factual setting generates the need for distinctive legal solutions, whether

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start” provided by Chapter 13 than the absolute priority rule provided by Chapter 11); Douglas G. Baird & Edward R. Morrison, *Serial Entrepreneurs and Small Business Bankruptcies*, 105 COLUM. L. REV. 2310 (2005) (critiquing Chapter 11’s focus on businesses rather than entrepreneurs as providing incentives for serial entrepreneurs to stay with failing businesses rather than start new ones); Bankman & Gilson, *supra* note 52 (explaining why employees leave employers and form start-ups despite employers’ seeming tax, information, and scope advantages for keeping ideas in-house); Victor Fleischer, *The Rational Exuberance of Structuring Venture Capital Start-ups*, 57 TAX L. REV. 137 (2003) (explaining why venture-backed firms are structured as corporations rather than pass-through entities); Jesse M. Fried & Mira Ganor, *Agency Costs of Venture Capitalist Control in Startups*, 81 N.Y.U. L. REV. 967 (2006) (revealing that venture capital investment in start-ups in exchange for preferred stock creates a unique corporate governance structure and the risk of preferred shareholder opportunism); George S. Geis, *Business Outsourcing and the Agency Cost Problem*, 82 NOTRE DAME L. REV. 955 (2007) (contending that business outsourcing poses an agency cost problem but has thrived in recent years in part because outsourcing firms have learned to mitigate agency costs through the use of staged contractual commitment, redundant agents, incentive-compatible compensation, exit rights, and other techniques); Gilson, *supra* note 59 (claiming that the three necessary factors to a successful venture capital market are entrepreneurs, capital, and specialized financial intermediaries); Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000) (contending that affirmative asset partitioning, the reverse of limited liability, prevents an individual’s creditors from going after firm assets and thus entices creditors to contract with firms); Robert M. Lawless, *Small Business and the 2005 Bankruptcy Law: Should Mom and Apple Pie Be Worried?*, 31 S. ILL. U. L.J. 585 (2007) (showing that the 2005 bankruptcy law reforms disadvantaged small businesses); Leandra Lederman, *The Entrepreneurship Effect: An Accidental Externality in the Federal Income Tax*, 65 OHIO ST. L.J. 1401 (2004) (arguing that the federal income tax system provides a subsidy for entrepreneurship over passive investment activity); Amir N. Licht, *The Entrepreneurial Spirit and What the Law Can Do About It*, 28 COMP. LAB. L. & POL’Y J. 817 (2007) (examining ways in which law might be used to promote entrepreneurial activity); Mann, *supra* note 44 (considering the pros and cons of patents in the software industry, including the role of patents in attracting venture capital funding); Robert P. Merges, *A Transactional View of Property Rights*, 20 BERKELEY TECH. L.J. 1477 (2005) (detailing the ways in which property rights facilitate contracting); Larry E. Ribstein, *The Important Role of Non-Organization Law*, 40 WAKE FOREST L. REV. 751, 789 (2005) (arguing that business organization laws have been relatively unimportant in shaping business associations compared to tax, bankruptcy, and other non-organizational laws); James C. Spindler, *IPO Liability and Entrepreneurial Response*, 155 U. PA. L. REV. 1187 (2007) (contending that the liability regime created by the Securities Act of 1933 inefficiently allocates risk to entrepreneurs rather than IPO investors, who could diversify that risk, with the result being that entrepreneurs distort their behavior in non-wealth enhancing ways).

manifested in the creation of a unique set of legal rules or legal practices, in the unique expression or interaction of more generally applicable legal rules, or in unique insights about law.<sup>66</sup> We now contend that entrepreneurship is distinctive in precisely this way. Here, we revisit Professor Lessig's argument in favor of cyberlaw: "I am not defending the law of the horse. My claim is specific to cyberspace. We see something when we think about the regulation of cyberspace that other areas would not show us."<sup>67</sup> While Lessig's particular answer for cyberspace—that it reveals law's limits as a regulator<sup>68</sup>—is not our own answer, we propose the study of law and entrepreneurship for the same general reason: because entrepreneurship is not only an interesting fact, but a *legally relevant* one.

Why might this be so? For starters, entrepreneurship reveals how the law deals with *novelty*. Joseph Schumpeter has argued that novelty is the distinguishing attribute of entrepreneurship.<sup>69</sup> Entrepreneurship involves new products or services, new ways of organizing, or new geographic markets.<sup>70</sup> Conversely, improvements in existing processes or within existing "means-ends frameworks" do not constitute entrepreneurship because they do not exhibit novelty.<sup>71</sup> But other fields also show us how law deals with novelty. Patent law, for example, embraces "novelty" as one of the core elements of patentability.<sup>72</sup> Entrepreneurship finds its true distinctiveness, then, not in novelty alone, but in novelty as applied to *opportunities*.

In fact, entrepreneurship is often defined as the discovery, evaluation, and exploitation of opportunities,<sup>73</sup> and novelty is implicit in the notion of *entrepreneurial opportunities*.<sup>74</sup> Entrepreneurial opportunities may be novel in a

66. See *supra* notes 23–25 and accompanying text.

67. Lessig, *supra* note 10, at 502.

68. *Id.* ("[G]eneral point is about the limits on law as a regulator and about the techniques for escaping those limits.").

69. Smith & Ueda, *supra* note 45, at 354 (citing JOSEPH A. SCHUMPETER, *THE THEORY OF ECONOMIC DEVELOPMENT: AN INQUIRY INTO PROFITS, CAPITAL, CREDIT, INTEREST, AND THE BUSINESS CYCLE* 76 (Redvers Opie trans., 3d prtg., Harvard Univ. Press 1949) (1934)).

70. SCHUMPETER, *supra* note 69, at 66.

71. See Jonathan T. Eckhardt & Scott A. Shane, *Opportunities and Entrepreneurship*, 29 J. MGMT. 333, 336 (2003) (contending that the entrepreneur constructs a new means-end framework).

72. 35 U.S.C. § 102 (2000); see also John F. Duffy, *Inventing Invention: A Case Study of Legal Innovation*, 86 TEX. L. REV. 1, 9 (2007) ("[P]atent law has always required novelty as a substantial element of the creative standard that must be met.").

73. See SHANE, *supra* note 53, at 4 ("Entrepreneurship is an activity that involves the discovery, evaluation, and exploitation of opportunities to introduce new goods and services, ways of organizing, markets, processes, and raw materials through organizing efforts that previously had not existed."); Eckhardt & Shane, *supra* note 71, at 336 ("[W]e define entrepreneurship as the discovery, evaluation, and exploitation of future goods and services. This definition suggests that, as a scholarly field, entrepreneurship involves the study of opportunities." (citation omitted)); Scott Shane & S. Venkataraman, *The Promise of Entrepreneurship as a Field of Research*, 25 ACAD. MGMT. REV. 217, 218–19 (2000) (resisting a narrower definition of entrepreneurship that focuses only on the creation of new firms or the individual traits of entrepreneurs such as risk-taking).

74. See *supra* note 69.

strong sense, which typically implies a technological breakthrough backed by venture capital financing, or they may be novel in a weak sense, such as opening a new restaurant in a vacant building.<sup>75</sup> As the novelty of the opportunity increases, so does the unique challenge it might present the legal system, which in turn can lead to the greater need for distinctive legal rules or legal practices to govern that opportunity.

We are now in a position to ask two further questions about the distinctiveness of entrepreneurship for purposes of legal analysis. First, is a distinct set of legal rules or legal practices implicated in connection with entrepreneurial opportunities? Second, if so, does clustering those rules or practices and thinking about them as a collective unit, apart from any current doctrinal confines, offer unique insights about law? The remainder of this Essay will offer preliminary answers to both of these questions.

Transactions relating to entrepreneurial opportunities often require something other than the routine application of general principles of tort, contract, or property law. In some instances, general rules of law find novel expression in the entrepreneurial context. In other instances, legal rules and practices are tailored to the entrepreneurial context. While explicating the full body of “entrepreneurship law” is beyond the scope of this Essay, we offer several illustrative examples from recent legal scholarship. These examples concern both legal rules and legal practices.

Consider again Professor Gilson’s work on the mobility of entrepreneurial employees. Professor Gilson observed that California’s refusal to enforce non-competition agreements was accompanied by the concern that trade secret law—in particular a line of cases on “inevitable disclosure”—might serve as the basis for a backdoor constraint on competition.<sup>76</sup> What is most interesting about this analysis, for our purposes, is Professor Gilson’s decision to combine two legal rules from different doctrinal categories—the rules governing non-competition agreements from employment law and the rules governing trade secrets from intellectual property law—to illuminate the effect of law on the mobility of entrepreneurial employees.<sup>77</sup> The interplay of such generally applicable rules forms a distinctive slice of entrepreneurship law. Thus, the act of compiling a body of entrepreneurship law can entail reshuffling the deck, extracting laws from their current doctrinal categories and creating a new category.

In Professor Gilson’s work, the general rules governing non-competition agreements and trade secrets find novel expression in the entrepreneurial context. But legal rules may also be tailored to fit the entrepreneurial context. Some prominent examples are found in the Securities and Exchange Commission (“SEC”) rules that allow companies to raise capital in private offerings. These

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75. See D. Gordon Smith & Darian M. Ibrahim, *Law and Entrepreneurial Opportunities* (working paper, on file with authors) (expanding on these ideas of entrepreneurial opportunities in both the strong and weak senses, both of which may be considered entrepreneurial in nature).

76. Gilson, *supra* note 62, at 622–26.

77. See also Charles Tait Graves & James A. DiBoise, *Do Strict Trade Secret Laws and Non-Competition Laws Obstruct Innovation?*, 1 *ENTREP. BUS. L.J.* 323 (2006).

rules include, in particular, the exemptions from public registration contained in Regulation D, which allow entrepreneurs to avoid the expensive and cumbersome public offering process when seeking initial funding.<sup>78</sup> On the other hand, critics argue that the SEC could do even more to facilitate start-up funding, including relaxing the ban on general solicitation in certain Regulation D offerings<sup>79</sup> and excepting smaller companies from some of the more onerous requirements of the Sarbanes-Oxley Act of 2002.<sup>80</sup> These arguments implicitly recognize entrepreneurship as an important organizational category.

The foregoing examples concern legal rules, but we must also be mindful of legal practices. Our references to “legal practices” in this Essay are intended to convey the idea that the study of law and entrepreneurship need not be limited to consideration of legal doctrine.<sup>81</sup> For example, a substantial literature on the structure of venture capital relationships has developed over the past few decades. Work by sociologists<sup>82</sup> and economists<sup>83</sup> laid the foundation for later work by legal

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78. Most notably, Regulation D contains Rules 504, 505, and 506 which provide safe harbors for offerings that meet certain parameters. For an economic analysis of public offering exemptions, see C. Steven Bradford, *Transaction Exemptions in the Securities Act of 1933: An Economic Analysis*, 45 EMORY L.J. 591 (1996) (noting that such exemptions are efficient on the whole, although parts are problematic).

79. See, e.g., Mark A. Sargent, *The New Regulation D: Deregulation, Federalism and the Dynamics of Regulatory Reform*, 68 WASH. U. L.Q. 225, 299–302 (1990) (questioning the need for the ban on general solicitation); William K. Sjostrom, Jr., *Relaxing the Ban: It's Time to Allow General Solicitation and Advertising in Exempt Offerings*, 32 FLA. ST. U. L. REV. 1, 3–4 (2004) (arguing that the SEC should allow general solicitation in private offerings).

80. See HENRY N. BUTLER & LARRY E. RIBSTEIN, *THE SARBANES-OXLEY DEBACLE: WHAT WE'VE LEARNED; HOW TO FIX IT* 91–92 (2006) (arguing that Congress should amend Sarbanes-Oxley to exempt small firms or to allow them to opt into or out of the Act's provisions); Joseph A. Castelluccio III, Note, *Sarbanes-Oxley and Small Business: Section 404 and the Case for a Small Business Exemption*, 71 BROOK. L. REV. 429 (2005) (arguing in favor of a small business exemption from Sarbanes-Oxley Section 404, the costly internal controls provision).

81. For a discussion of the empirical study of contracts, including contracts in an entrepreneurial setting, see D. Gordon Smith & Brayden G. King, *Contracts as Organizations* (Univ. of Wis. Legal Studies Research Paper No. 1037, 2007), available at <http://ssrn.com/abstract=969816>.

82. See, e.g., Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOCIOLOGY 479 (1997); Mark C. Suchman & Mia L. Cahill, *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 L. & SOC. INQUIRY 679, 694–96 (1996); Mark C. Suchman, Daniel J. Steward & Clifford A. Westfall, *The Legal Environment of Entrepreneurship*, in THE ENTREPRENEURSHIP DYNAMIC 349 (Claudia Bird Schoonhoven & Elaine Romanelli eds., 2001); Mark C. Suchman, *On Advice of Counsel: Law Firms and Venture Capital Funds as Information Intermediaries in the Structuration of Silicon Valley* (February 1994) (unpublished Ph.D. dissertation, Stanford University) (on file with authors).

83. See, e.g., Steven Kaplan & Per Strömberg, *Financial Contracting Theory Meets the Real World: An Empirical Analysis of Venture Capital Contracts*, 70 REV. ECON. STUD. 281 (2003); see also Erik Berglöf, *A Control Theory of Venture Capital Finance*, 10 J.L. ECON. & ORG. 247 (1994); Paul A. Gompers, *Optimal Investment, Monitoring, and the Staging of Venture Capital*, 50 J. FIN. 1461 (1995); Thomas Hellman, *The Allocation of*



scholars.<sup>84</sup> While the study of venture capital relationships may hold lessons for other economic and social relationships, the unique attributes of venture capital contracting stem from the unique problems that arise in the pursuit of entrepreneurial opportunities.

Victor Fleischer provides another example of legal practices driven by the entrepreneurial context: the choice-of-entity decision for entrepreneurial firms backed by venture capital.<sup>85</sup> Traditional choice-of-entity analysis dictates a pass-through entity for the entrepreneurial firm. A pass-through entity, such as a limited liability company, allows founders to avoid double taxation on firm gains and offset firm losses against taxable income from other sources.<sup>86</sup> Professor Fleischer shows, however, that venture capitalists prefer the corporate structure for entrepreneurial firms for several reasons, most notably because firm losses are not as valuable to venture fund investors as they might first appear.<sup>87</sup> Also, while firm gains are unlikely in the early years of most venture-backed firms (where any revenue is likely expended in the development of the firm and its products), Professor Fleischer observes that the corporate structure also offers some tax advantages for gains.<sup>88</sup> In sum, Professor Fleischer's effort reveals that legal practices concerning choice of entity in the entrepreneurial context are driven by the unique nature of venture capital. In our view, all of this work belongs to the genre of law and entrepreneurship and also begins to develop its contours.

This analysis of entrepreneurship as distinctive leads to our second question: does our focus on legal rules and legal practices related to entrepreneurship reveal something unique about law? In Lessig's terms, does entrepreneurship show us something about law that we would otherwise overlook?<sup>89</sup> On one level, the study of entrepreneurship law allows us to focus on the interplay between disparate rules and practices, adopted for other reasons and in other contexts, and ask whether *as a whole* they produce the optimal effect on entrepreneurial activity. For instance, if California's refusal to enforce non-competition covenants is encouraging knowledge spillover and has contributed to the success of Silicon Valley, policymakers may be wary of allowing trade secret law to hamper that process. On another level, the study of entrepreneurship law

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*Control Rights in Venture Capital Contracts*, 29 RAND J. ECON. 57 (1998); William A. Sahlman, *The Structure and Governance of Venture-Capital Organizations*, 27 J. FIN. ECON. 473 (1990).

84. See, e.g., Robert P. Bartlett, III, *Venture Capital, Agency Costs, and the False Dichotomy of the Corporation*, 54 UCLA L. REV. 37 (2006); William W. Bratton, *Venture Capital on the Downside: Preferred Stock and Corporate Control*, 100 MICH. L. REV. 891 (2002); Ronald J. Gilson & David M. Schizer, *Understanding Venture Capital Structure: A Tax Explanation for Convertible Preferred Stock*, 116 HARV. L. REV. 874 (2003); D. Gordon Smith, *The Exit Structure of Venture Capital*, 53 UCLA L. REV. 315 (2005).

85. See *supra* notes 43–47 and accompanying text (entrepreneurial firms might include both venture-backed start-ups and traditional small businesses depending on how broadly entrepreneurship is defined).

86. Fleischer, *supra* note 65, at 143–47.

87. *Id.* at 151–63.

88. *Id.* at 163–67.

89. Lessig, *supra* note 10, at 502.

shows us how legal rules and practices address a particular type of novelty—entrepreneurial opportunities. What precisely it shows us is a more complicated question that we do not seek to fully answer in this Essay. We do contend, however, that at the very least the study of law and entrepreneurship reveals how legal rules and practices *shape* entrepreneurial opportunities and how legal rules and practices *adapt* to entrepreneurial opportunities.

In a working paper, we address how legal doctrine *shapes* entrepreneurial opportunities.<sup>90</sup> The thrust of our argument is that law allocates the right to exploit opportunities between competing, would-be entrepreneurs through the granting of “property rights” (in an economic sense) and, in doing so, shapes the very form of the opportunities we see exploited. An entrepreneur may want to exploit Opportunity X, but because another’s property rights include this opportunity, he exploits Opportunity Y instead. We also illustrate the law’s shaping function with a detailed examination of various legal doctrines, including the “corporate opportunity doctrine,” which allocates the right to exploit entrepreneurial opportunities between corporate fiduciaries (officers and directors) and the corporations they work for. Because the law deems certain opportunities, perhaps those related to the corporation’s current business, off limits to the fiduciary, that individual will shape the “opportunity” he exploits to fall outside of the corporation’s current business. For example, an executive for the LA Fitness health club corporation may wish to independently open a health club in a vacant building, but because health clubs are his corporation’s business, he may be forced to open a sporting goods or nutrition store instead.<sup>91</sup>

In another paper, Gordon Smith and Masako Ueda use the vehicle of entrepreneurship to suggest how the law *adapts* to entrepreneurial opportunities.<sup>92</sup> While the law is often slow to respond to novelty,<sup>93</sup> Smith and Ueda suggest ways in which law might accommodate novel businesses. Their argument begins with courts, which “may have an important influence over the level of entrepreneurship in a given region or country.”<sup>94</sup> They recognize that courts “may facilitate the evolution of legal rules to address novel issues raised by entrepreneurial firms,”

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90. Smith & Ibrahim, *supra* note 75.

91. Notice that these ideas can be added to Professor Gilson’s to further define the distinctive body of entrepreneurship law concerning the rights and obligations of entrepreneurial employees with respect to their current and former employers. That body of law consists, at a minimum, of the law governing non-competition agreements, trade secret law, patent law, and the corporate opportunity doctrine. Of course, not all of these laws will be implicated in each case of employee mobility. For instance, the corporate opportunity doctrine will not usually apply to employees other than officers and directors, and patent law will not apply absent a patentable innovation.

92. Smith & Ueda, *supra* note 45.

93. See, e.g., Jay P. Kesan & Thomas S. Ulen, *Foreword: Intellectual Property Challenges in the Next Century*, 2001 U. ILL. L. REV. 57, 57 (noting that law has been slow to respond to changes brought about by the modern information age); Maria Pellegrino, *Murder In A Petri Dish? The Wrath Of Illinois’ Miller v. American Infertility Group: A Push For Legislative Action*, 13 BUFF. WOMEN’S L.J. 137, 140 (2004–2005) (“As with many other areas of the law, science has rapidly progressed in the area of reproductive technology while our laws have been slow to change or respond.”).

94. Smith & Ueda, *supra* note 45, at 364.

which they dub the “adaptability hypothesis.”<sup>95</sup> In common law countries, courts might adapt to novelty through either interpretation or innovation.<sup>96</sup> In other words, courts might interpret laws differently for purposes of “keeping pace with the changes incited by entrepreneurial firms.”<sup>97</sup> They might also innovate by creating new laws to apply to novel behavior, although this is a more drastic step and will probably be less common.<sup>98</sup>

In each of these ways, then, we see something important about how legal rules and practices address entrepreneurial opportunities. Interesting questions remain, including: in what other ways do legal rules and practices mold and respond to entrepreneurial opportunities, and is legal doctrine having more of an effect on entrepreneurship or is entrepreneurship having more of an effect on legal doctrine?<sup>99</sup> But the critical point is that entrepreneurship is distinctive, in ways that are legally relevant, and as a result, entrepreneurship is worthy of separate legal analysis.

### CONCLUSION

“Law and entrepreneurship” is an emerging field of study. Skeptics might wonder whether law and entrepreneurship is a variant of that old canard, the Law of the Horse. In this Essay, we defend law and entrepreneurship against that charge and urge legal scholars to become even more engaged in the wide-ranging scholarly discourse regarding entrepreneurship. In making our case, we argue that research at the intersection of entrepreneurship and law is distinctive. In some instances, legal rules and practices are tailored to the entrepreneurial context, and in other instances, general rules of law find novel expression in the entrepreneurial context. As a result, studying connections between law and entrepreneurship offers unique insights about them both.

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95. *Id.*

96. *Id.* at 366.

97. *Id.*

98. *Id.* at 368.

99. Here we raise, but do not answer, an interesting question of causation. Certainly some important legal rules that affect entrepreneurial activity were not designed for that purpose. *See* Gilson, *supra* note 62, at 613–19 (California’s prohibition of non-competition laws was a historical anomaly that had nothing to do with promoting entrepreneurship). In these instances, law is affecting entrepreneurship rather than vice versa. On the other hand, the entrepreneurial setting has resulted in distinct changes in legal practice. *See supra* notes 85–88 and accompanying text on choice of entity for venture-backed firms. In these instances, entrepreneurship is affecting law.