Abstract:

Kent Greenfield’s article starts where David Millon’s stops, namely with the proposition that metaphor plays too strong a role in evaluating the conduct of corporations. Greenfield challenges the notion that shareholders “own” the firm in which they possess shares by suggesting that this interpretation is dependent upon a particular system of corporate law, a system that is not the only conceivable way for corporate law to be organized. Once the view of corporations as property or contracts is demythologized, discussions of corporate rights becomes meaningless because any alternate arrangement of the law can be justified or explained through some system of rights. Instead, Greenfield argues, we need to turn to empirical examinations of the different effects of different legal arrangements as a tool for understanding why we make the choices we do regarding corporate law.

FROM METAPHOR TO REALITY IN CORPORATE LAW

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As David Millon so ably demonstrates, metaphor drives much of the debate within corporate law jurisprudence and corporate law scholarship. It has done so for decades, even centuries. Scholars have used metaphors — corporation as person, corporation as creature of the state, corporation as property, corporation as contract, corporation as community, to name the most prominent — as justifications for the imposition of, or freedom from, legal and ethical requirements. These metaphors are often taken as given or as self-evident. The legal and ethical arguments flow, then, quite naturally. In this essay I will join Millon in his criticism of the way metaphors are used within corporate law scholarship and then offer an alternative for consideration.

I. METAPHOR

While the use of metaphor and syllogism has been a rhetorical practice for many years for many corporate scholars, it certainly seems to be particularly common among those who have dominated corporate law scholarship over the last half century: the

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property theorists and the contractarians. Corporations are property — it has been famously said — and thus any effort to spread the corporate surplus, for example, to workers or the community in a way that reduces corporate profit is spending money that belongs to the shareholders and imposing an illegitimate “tax” on them. Indeed, in this view, corporate governance that takes into account the interests of stakeholders other than shareholders, if such a practice disadvantages shareholders in any way, is an unconstitutional taking or, even more provocatively, “socialism.”

In the alternative, corporations are viewed contracts (or so most law students in 2000 are taught), and thus have no ethical or legal duties other than those specified in the contract. Most shareholders, it is assumed, would contract with the business’s managers to ensure that the managers seek to maximize profit. Therefore, so-called corporate social responsibility activities cannot be allowed, much less required, unless the shareholders expressly agree to contract around the standard contract terms provided by corporate law, thereby allowing the managers to forego profits for such socially responsible reasons. In other words, there can be no responsibility outside of the contract, so unbargained-for responsibility is oxymoronic. Non-shareholders are parties to the contract and deserve only what they bargain for.

These metaphors of property and contract are powerful and seductive. While they may be helpful pedagogically, as Millon suggests we must be careful not to mistake the descriptive power of metaphor for normative prescription. To oppose corporate social responsibility reforms on the basis that it is inconsistent with the property or contractual rights of shareholders is simply unhelpful, since in reality neither pure property nor

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3 See Friedman, *supra* note 1, at 1. This name-calling occurs not only in scholarly works. I recently gave a faculty colloquium arguing for changes in corporate governance that would require corporate management to take into account the interests of workers. One listener referred to my views as “socialism.” For a partial justification for my views that the interests of workers be taken into account within corporate law, see Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283 (1998).

4 See Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1273 (1982) (because corporations are contracts, and thus legal fictions, they are “incapable of having social or moral obligations much in the same way that inanimate objects are incapable of having these obligations”).

5 See Jonathan R. Macey, *An Economic Analysis of the Various Rationale for Making Shareholders the Exclusive Beneficiaries of Corporate Duties*, 21 STETSON L. REV. 23, 36, 42 (1991) (arguing that workers and other non-shareholder constituencies can protect themselves through contract or through the political process); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 23 (1991) (all parties to the corporate “contract” can protect themselves through negotiation); cf. Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 649 (1988) (because contract outcomes depend on preexisting entitlements, bargained for outcomes are just only if preexisting circumstances are fair and just); Greenfield, *supra* note 3, at 283, 322–26 (arguing that market defects make contract between labor and the corporation inefficient, and criticizing the assumption that contract norms should be the basis for public policy since “the ability of parties to bargain is a function of their preexisting entitlements and wealth”).
explicit contract is involved. What is meant, presumably, when one says that a stakeholder statute is contrary to the property and contract rights of shareholders is that such a statute is inconsistent with corporate law as it is now, or is inconsistent with the way corporate law should be. If the former argument is what is meant, such a description is beside the point of a normative debate. That is, in considering whether, say, directors should owe fiduciary duties to workers is in an important sense asking whether shareholders should “own” the firm. One cannot answer this question simply by saying that the shareholders own the firm. If the latter argument is what is intended, then the argument must depend on a detailed description of why corporate law should be based on property or contract principles. It is meaningless to talk about property or contract “rights” without a much thicker normative justification for those rights. To the extent that these metaphors are placeholders for that thicker justification, the debate should take note of that fact and encourage that the justification be brought forward so that the debate can progress on specific normative grounds.

Another problem with the use of metaphors is that they do not inexorably lead to the conclusions that one supposes. Even if corporations are best seen as contracts, that decides little in itself since contract law includes a wide range of common law and statutory exceptions to contractual obligations. A contract for murder or for blackmail is unenforceable. A court would require an employer to pay an employee the minimum wage, even if the employee had entered into a contract to work for only $2 an hour. In many jurisdictions, a duty of good faith is injected, as an act of law, into the terms of every contract. Some states prohibit firms from terminating employees for reasons that are contrary to the public interest, even when the agreement between the employee and employer provides for “at will” employment. These are only a few of the “exceptions” in the law of contract, and the contract metaphor cannot be applied to corporate law without an exploration of why any number of “exceptions” should not be applied as well.

Similarly, to say that the shareholders “own” the company is unhelpful without a description of why certain aspects of property law are relevant and others are not. Notwithstanding the “illusion of absoluteness” that accompanies much property-rights rhetoric, property has always been subject to reasonable regulation. The broad principle that one should not use one’s property to inflict harm on others has been “routinely

6 Greenfield, supra note 3, at 290; see also Margaret M. Blair, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY 224 (1995) (asserting that the argument that shareholders own the corporation and should thus be able to control it “is simply circular logic”); Singer, supra note 5, at 637-38 (“To assume that we can know who property owners are, and to assume that once we have identified them their rights follow as a matter of course, is to assume what needs to be decided.”).

7 See Restatement (Second), Contracts ′ 205 (1979).


9 See, e.g., Sternamen v. Metropolitan Life Ins. Co., 62 N.E. 763, 764 (1902) (“The power to contract is not unlimited. While, as a general rule, there is the utmost freedom of action in this regard, some restrictions are placed upon the right by legislation, by public policy and by the nature of things. Parties cannot make a binding contract in violation of law or of public policy.”).

applied” in U.S. courts since the nation’s beginning. The Supreme Court recognized over 150 years ago that “[w]hile the rights of private property are sacredly guarded, we must not forget[,] that the community also have [sic] rights.” A property owner cannot burn noxious trash in her backyard so as to cause a nuisance to her neighbors, for example, and a factory owner may not operate a factory that is unreasonably dangerous to the employees working there. To use the metaphors of property or contract as a normative argument therefore is unhelpful without an explanation of why some aspects of the metaphor are excluded and others included. Unfortunately, however, these metaphors are so powerful that they are taken not as placeholders but as arguments themselves, thus not only describing the law but shaping it as well.

It is no coincidence that those who oppose more socially responsible corporate governance choose metaphors from the common law. Common law “rights” have long had significant rhetorical power. Much of this persuasiveness is based on the fact that they are seen as neutral, pre-political, and pre-legal — witness Daniel Fischel’s assertion that reformers should not disturb the nexus of contracts imbedded in corporate governance but should focus instead on imposing political restrictions from outside the corporation. Consider also Milton Friedman’s assertion that requiring corporate managers to weigh societal concerns makes those managers into unelected public servants instead of agents of the shareholders. Both views rely implicitly on the notion that corporate governance is, as presently constructed, neutral and insulated from politics.

This takes one back to *Lochner v. New York*. There, in striking down New York’s law establishing maximum work hours for bakers, the Supreme Court interpreted the U.S. Constitution’s Fourteenth Amendment to create a category of impermissible legislative ends and used a laissez-faire conception of government as its theoretical basis. What was seen as liberty and laissez-faire, however, was the framework of common law rights. The common law was seen as private and non-coercive, as “resistant to the dangers of political influence.” The market was viewed as a “self-executing system that justly distributed rewards through voluntary agreement among individuals.” Under this conception of liberty and government neutrality, the Court struck down the New York law restricting the work hours of bakers as a violation of the right of “free

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11 *Id.* at 25.
13 Fischel, *supra* note 4, at 1271 (those who are concerned with corporate misdeeds should “seek redress through the political process and [should] not attempt to disrupt the voluntary arrangements that private parties have entered into in forming corporations”).
14 See Friedman, *supra* note 1, at 3.
15 198 U.S. 45 (1905).
18 *Id.* at 33.
The institution of contract was seen as “the legal expression of free market principles, and every interference with the contract . . . was treated as an attack on the very idea of the market as a natural and neutral institution for distributing awards.”

Much of the rights-based discourse in present-day corporate law hearkens back to *Lochnerian* justifications. Corporate law is private law (whether the law of property or contract), defined by common law principles, and therefore neutral. To change it is impermissible. *Lochner*, though, came at the Supreme Court’s “nadir of competence” and has since been repudiated. One of the mistakes of the *Lochner*-era Court was to believe that the marketplace was neutral, existing outside the realm of politics and law.

Even the so-called laissez-faire marketplace is shot through with government, and even the most basic common law entitlements are functions of legal rules. “[T]he market status quo [is] itself a product of government choices,” and had long been so even at the time of *Lochner*. Morton Horwitz tells us that as contract law had become more formalized and generalized after the Civil War, “the legal rules came to bear a more and more tenuous relationship to the actual intent of the parties.” Instead, judgments in common law courts came to “depend upon the notions of the court as to policy, welfare, justice, [and] right and wrong.” As Cass Sunstein explains, it was the law that “created property and contract rights, and . . . imposed various limits on those rights.” The so-called “free market” was a creation of law, not of nature, and “[t]he common law could not be regarded as a natural or unchosen baseline.” Thus *Lochner*’s defense of the common law as private law was indefensible, and eventually came to be recognized as

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19 198 U.S. at 54.

20 Horwitz, supra note 17, at 33. As history rarely falls into neat categories, it is important to note here that, while *Lochner* is often invoked to characterize turn-of-the-century jurisprudence, the Supreme Court was quite inconsistent in its adherence to freedom of contract even during the “*Lochner* era.” See Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism, United States Supreme Court, 1888-1921*, 5 *LAW & HISTORY REV.* 249, 250 n. 4 (1987).


22 See id. (Souter, J., dissenting) (“It was the characteristic of the *Lochner* era, and its characteristic vice, that the Court treated the common law background (in those days, common-law property rights and contractual autonomy) as paramount, while regarding congressional legislation to abrogate the common law on these economic matters as constitutionally suspect.”).


24 Sunstein, supra note 16, at 1697.

25 Horwitz, supra note 17, at 35.

26 Horwitz, supra note 17, at 35 (citing Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 *YALE L. J.* 169, 206 (1917)). See also Oliver W. Holmes, Jr., *The Path of the Law*, 10 *HARV. L. REV.* 457, 466 (1897) (“Why do you imply [a condition in a contract]? It is because of some belief that as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions.”).

27 CASS SUNSTEIN, THE PARTIAL CONSTITUTION 50.

28 Id.
such. Contract and property law are no more neutral, private, or pre-legal than statutory law.

My point is not that a legal regime should not include a bundle of common law entitlements. The point here, rather, is that these rights are not best perceived as natural, pre-legal, or non-political, but rather should be recognized as tools to be utilized for the furtherance of social good, however defined. This language of rights as neutral arbiters may be used as a descriptive matter, but such language is out of place in a normative discussion. One cannot justify the present make-up of corporate law as non-political or pre-legal because it is based on common law principles any more than *Lochner* could justify common law itself as non-political or pre-legal. The corporate law scholars who make this mistake are thus subject to Roscoe Pound’s criticism of *Lochner* and its progeny — they “exaggerate the importance of property and contract . . . [and] exaggerate private right at the expense of public interest.”

II. Reality

If, as Millon proposes, corporate law scholars were willing to “jettison our obsession” with the various rights-based metaphors used to understand and explain the corporate form, how should we move forward? In other words, how should we engage in a conversation about possible changes in corporate governance if the language of rights is temporarily off limits?

Let me suggest that one useful way to think of these issues is to look at corporate law as regulation. Instead of being seen as a set of statutory and common law rules contained within itself, corporate law should be subject to the same analysis as environmental law, labor law, tax law, communications law, and the like. There are a number of ways to characterize what this analysis should be, of course, and there are many grounds for vigorous disagreement about what “counts” in regulatory theory. But at a high level of generality, behind all the complexity, the analysis with regard to corporate law rules should be the same as the analysis for other kinds of statutes and regulations. That is, one should ask what we want our society to look like. Then, we should seek to craft a bundle of legal rules and regulatory programs that are likely to move us in that direction.

This construction could be at such a high level of abstraction as to be unhelpful, but it is worth noting that this conversation starts quite differently than how the discussion about corporate governance usually begins. Instead of looking at the outset to common law principles and notions of property and contract (or, for that matter, the

29 See GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 739 (1986) (*Lochner* “turned on an indefensible distinction between the ‘public’ and ‘private’ spheres, defined in terms of common law categories.”).


rights of people in some kind of community), we are forced to state, at the very least, our assumptions about the purposes of law and our vision for society. Thus David Engel is correct in his claim that the issues of corporate social responsibility “cannot be debated except against the background of a general political theory.”32 The project, then, of constructing corporate law ought to depend on a broader, and ongoing, project that asks what our society should look like and analyzes the capacity of law — including corporate law — to get us closer to that ideal.

One can illustrate the ways this would change the debate within corporate law by pointing to the way debates about other public policy choices affecting business enterprises take place. The minimum wage provides a good example. Several years ago, the U.S. Congress increased the minimum wage from $4.25 to something over $5 per hour. Note the similarities with a proposal to have corporations balance the needs and interests of non-shareholder constituencies in making corporate decisions. Both proposals impose costs on the corporation that might result in a decrease in shareholder return.33 Both proposals restrict the internal decisionmaking of the corporation -- the minimum wage statute by disallowing labor contracts offering wages below the statutory minimum, the stakeholder statute by disallowing agreements between management and shareholders that include a promise by management to maximize returns without concern for other constituencies. Both proposals impose mandates on the corporation that were not necessarily assumed by the shareholders when they purchased their shares.

In the debate about the minimum wage, however, an argument that the minimum wage is impermissible because the shareholders “own the corporation” would seem incongruous and unresponsive, or a throw-back to 
\textit{Lochner}. People seem to understand that the debate about an increase in the minimum wage turns on, and should turn on, the effect of such an increase on workers, companies, and the economy as a whole. Few serious commentators would argue that raising the minimum wage is impermissible because it forces managers to give away money that “belongs” to the shareholders, and no one would find it persuasive (after the New Deal) that increasing the minimum wage violates a “contract” between managers and shareholders. The “rights” of the shareholders are simply beside the point in the debate. In contrast, when a proposal is made to change the rules of corporate governance, rights-based arguments become a common part of the discourse.

Of course, if we were to move away from rights-based arguments toward more hard-nosed empirical judgments about the effects of corporate governance on public policy goals, we would not expect much initial consensus about either the goals or the value of corporate law to help meet them. But this is the debate we need to have. Perhaps there is reason to believe that corporate law should remain focused primarily on shareholder profit. Shareholders might belong on the pinnacle of corporate law in order to facilitate raising capital and to maximize the incentives for profitmaking.34 Perhaps social utility is maximized when profits are maximized.


33 How much of a loss will depend in large part on how much of the costs can be passed on to consumers or suppliers of capital and labor. This will in turn depend on the elasticity of supply and demand in the various markets.

34 See Easterbrook & Fischel, \textit{supra} note 5, at 6–7.
But once we move corporate law from the realm of metaphor and rights-based debate to the terrain of regulatory theory, reasons to doubt this simple, profit-oriented utilitarian argument abound. It cannot seriously be claimed that societal utility will be maximized if corporations are unrestrained by law. Even if one assumes that a maximization of utility should be the end goal, it is routine to note that government intervention is often necessary to repair market “defects” and thereby to maximize utility. Externalities, collective action problems, “prisoners’ dilemmas,” inadequate information, tragedies of the common, and natural monopolies may all result from market forces and each can make the satisfaction of legitimate desires impossible. They all thus require government intervention in order to maximize utility. In addition, if we expand our view of the permissible grounds for regulation to include public-regarding reasons not based in utilitarianism, the presumption in favor of “laissez-faire” government falls further away.  

That is, perhaps we would want non-utilitarian values of equality or human dignity to influence and inform corporate law just as they inform and influence other areas of the law.

The implications of this point for corporate social responsibility and corporate governance may not be immediately obvious. Critics of the corporate social responsibility movement will admit the occasional need for regulation to correct market defects, and some may even allow for other regulatory rationales as well, but they would almost certainly argue that such regulation should be external to the corporate form (such as regulations requiring plant closing notification), rather than internal to it (such as a requirement that employees have a representative on companies’ boards of directors). Yet if this is the argument, it cannot be based on a general presumption against government regulation, which relies in turn on the notion that the absence of government regulation will bring about maximization of utility. Rather, the argument that government should not encourage corporate social responsibility by regulating internal corporate governance must be based on arguments about how “internal” interventions are less beneficial in ameliorating market defects than “external” requirements.

There are legitimate arguments to be made to support such a distinction. To give corporate managers more than one legal duty may increase the agency costs of their supervision: it is less costly to monitor the performance of an agent if the agent has one task than if the agent has two, especially if the second is as seemingly abstract and unmeasurable as the pursuit of corporate citizenship. Perhaps managers have no expertise with regard to social concerns, so giving them more power in that regard is unlikely to have a significant positive effect and will provide a deadweight cost on the corporation and its shareholders. Perhaps a loosening of management’s fiduciary duty

36 See EASTERBROOK & FISCHEL, supra note 5, at 37–39.
37 See ABA Committee on Corporate Laws, Other Constituencies Statutes: Potential for Confusion, 45 BUS. LAW. 2253, 2269–70 (1990); ROBERT CLARK, CORPORATE LAW 20 (1986); but see Macey, supra note 5, at 33 (arguing that the “too many masters” argument is overstated, since corporate managers have long had to balance sometimes conflicting fiduciary duties to holders of different classes of stock).
38 See Fischel, supra note 4, at 1268–69.
to shareholders will make shareholders less likely to invest, because they will lose some of their legal power to monitor and constrain management. Moreover, perhaps these corporate social responsibility reforms will be pointless, because shareholders will simply invest their capital in companies organized in states and countries that still require profit maximization.

These points may end up being persuasive. If they are, however, it will not be because of the use of the language of rights and duties. Rather, the success of such arguments turns on relative costs and benefits, effectiveness, the existence of other options, and similar analyses. In other words, the discussion depends not on rights and duties but on regulatory theory.

Once regulatory theory becomes the battleground, however, the victor is not so obvious. There are also reasons to believe that changes in corporate law should be part of the bundle of legal responses to market defects. Indeed, corporate law may have comparative advantages over other legal processes in addressing certain kinds of concerns.\textsuperscript{39} Corporate managers may in fact have expertise in areas that government bureaucrats do not. Corporate managers may have a great deal more information about certain matters than a government official charged with monitoring corporate behavior.\textsuperscript{40} There may be economies of scale and other efficiencies in a corporate setting that do not exist in a governmental setting. A problem may be better addressed by an “internal” solution rather than by an “external” one. External regulations to reach certain ends may require greater ongoing enforcement costs than would changes in internal governance procedures intended to move toward the same ends. Changes in corporate governance and expansion of legal duties to include more than profit maximization may allow corporations to be proactive in addressing issues of societal concern, which in turn might be more efficient than relying on the mostly reactive power of government regulation. Reforms within the corporation might create more trust among the various stakeholders, thereby encouraging reciprocal actions (for example, workers being more productive because they feel they are being fairly treated) so as to reduce the costs of the regulatory initiative. Finally, reforms within corporate law would follow the corporation wherever it goes, whereas regulatory reforms largely stop at the border.

There is reason to think hard about the possibility of using corporate law as a regulatory tool. Indeed, there are major public policy problems that otherwise seem intractable,\textsuperscript{41} and reforms in corporate governance may prove to be powerful and efficient.

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\textsuperscript{40} See id. at 160–70.

\textsuperscript{41} I am referring here to the fact that wages for working people in the United States are stagnant or falling and that income inequality is at historically high levels. Indeed, hourly wages fell for the bottom 80% of workers over the last 10 years and in constant dollars were less in 1997 than in 1973. LAWRENCE MISHEL, JARED BERNSTEIN, AND JOHN SCHMITT, \textit{STATE OF WORKING AMERICA} 1998–99 5, 127, 131 (1999). Income inequality is at its highest level since the Census Bureau began tracking these data in 1947. Economic Policy Institute, “Income Picture” (Sept. 30, 1999) \textit{(available at http://epinet.org/webfeatures/econindicators/income.html)}; see also Census Bureau, “Current Population Reports” (June 1996), available at www.census.gov/ftp/pub/hhes/www/img/p60-191.pdf. For a more detailed exploration of these issues and their relation to corporate law scholarship and pedagogy, see Kent Greenfield, \textit{There’s a Forest in Those Trees: Teaching About the Role of Corporations in Society}, 34 \textit{Ga. L. Rev.} 1011 (2000).
mechanisms to address them. We cannot begin this task, though, until, as Millon suggests, we put our “obsession” with metaphor behind us.