

The Metaphors of Corporate Law

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I. Inconsistency

Oliver Wendall Holmes famously said, “the life of the law has not been logic.” This essay is a case study supporting that aphorism, although not necessarily with Holmes’ alternative understanding.

Corporate law, like other systems of human thought, operates within paradigms characterized by metaphors. The metaphors of corporate law are rich, powerful and inconsistent: they cannot be made into a coherent picture. Corporate law thus can serve as a test of and counter-example to Ronald Dworkin’s claim that consistency is a central value of the legal system.

Moreover, the variegated corporate law metaphors, like the metaphors of many areas of the law, reflect disparate and conflicting moral values. The power of the metaphors – and the underlying moral values – lies precisely in the fact that they reflect (or at least draw from) deeply and widely held moral beliefs and world views which are themselves rich, powerful and inconsistent. That is, the inconsistency of corporate law reflects inconsistency in our own, individual, moral views and metaphoric attempts to understand the law.

I suggest, therefore, that an exploration of the metaphors of corporate law will demonstrate that even Dworkin’s Hercules could not reach a Rawlsian reflective equilibrium regarding its content. Corporate law mediates or fails to mediate conflicts that, like William James’ turtles, go all the way down: they are not due to inadequate work by legal thinkers, public choice problems, conflicting political or even cynical appropriation of the legal process by powerful managers taking advantage of the “competition between the states.” Rather, Dworkinian consistency in the law fails because Rawlsian reflective equilibrium fails. Corporate law and the political and moral values it reflects are more like an optical illusion of a cup that suddenly transforms into two faces than boxes separated by a fuzzy boundary.

Corporate imagery has an extraordinary range--from political sovereigns to often-gendered individuals all the way to illusions with no existence at all. Sometimes the firm is a potent medieval citadel erectly withstanding assault from the “barbarians at the gate.”

Then again, it may be the helpless virgin trapped in that tower awaiting rescue from a “white knight” or fearing a “piercing of (her) veil.”

It can be a firm and solid body (with a head at headquarters and arms and legs elsewhere) or an ephemeral moment in the market with no existence other than as a “web” of contractual relationships.

The corporation itself is described as a quasi-autonomous sovereign or estate (in the pre-Revolutionary French sense), and in many early cases, such as *Republic Mtn Silver Mines v Brown*, a legislative body. The East India Co was called a conspiracy,

monopoly oppression, ancient barons. But *Hale v Henkel* calls it a “creature” of the state – not a sovereign but a servant or instrument of the state; and Cardozo in *Diehl* characterizes it as a resident alien that lives within our borders.

It is seen as

an autonomous private individual, as
a powerless tool of market forces; as
an entity with its own ethical independent value.

The images jump from

a contractual relationship reflecting the active will of the contracting partners to
a trust or fiduciary acting in the interests – but without regard to the desires or will – of its beneficiaries.

Sometimes the firm is private property that must be protected to preserve the autonomy of its private owners; sometimes it is, in contrast, seen as a recipient of special public privileges, as a conspiracy against the public order, or as an exemplar of Tocqueville’s intermediate institutions preserving liberty.

Similarly, shareholders are portrayed variously as autonomous and vigorous Minute Men forming Committees of Correspondence, passive widows and orphans in need of fiduciary guidance, or somewhat foolish consumers to be informed and protected by paternal authority.

II. [Lack of] Autonomy

Corporate law lacks a theory of its own.

Although it is the law of a distinctive – and important – set of sociological entities, it lacks an account of those entities and their status. Instead, it borrows from concepts of the more basic, first year, courses and thinks about corporations as if they were something else.

Corporate law’s external metaphors (those used by the law in regulating corporations as entities) historically began by picturing the firm as a **government** and, in the great corporate law shift of the 19th century, largely changed to seeing it as an **individual**, on the private side of the great liberal **public/private** divide.

Strikingly, however, the individual in question is remarkably unstable. Courts and theorists shift rapidly and apparently unconsciously between viewing the firm itself as

a single, unified and consistent person, or
a mere illusion concealing other unified and consistent people who make it up – and who, counter-intuitively, are seen not only as agreeing with themselves but as agreeing with each other.

More specifically, I see three main families of metaphors in the external law of firms, what is usually referred to as “corporate personality”:

Contracts, in a singularly non-legal concept of contracts. More precisely, they are thought of as networks, webs, a nexus of contracts in a **market** – that is, as indistinguishable from a market itself, people bound together by

nothing more than the contracts that link them. But a corporation that is nothing more than a market is a corporation that should not exist.

Property, as if the firm were a thing – precisely the opposite of the vanishing gossamer of the contracts image – that someone owns in the way one owns a pencil or real estate, managed by an **agent** on behalf of an owner. But public firms, at least, have no owners in the property sense of the word.

Citizens, as if the firm were a person in its own right, a end in itself instead of a tool to the ends of citizens, or as if we could reduce the firm to the people (or some of them) who compose it in some unproblematic method. But no liberal democratic society should accept the claim that a governance institution has the same value – or values – as its citizens. The very basis of our system of limited government is the assumption that governments often act in ways not reducible to the General Will (and that the citizenry usually doesn't have a general will).

These metaphors vary deeply – but one thing they all share is a simplification,

individualization, ignoring the groupness and institutionality of the firm – only a lawyer could say that our great corporations are illusions, mere fictions, really people;

collapse of the corporation onto the private side of the great **public private** divide in liberal thought;

suppression of the **diversity** of its subjects: GM is the same as the incorporated sole proprietorship; and

valuation. Firms in general are portrayed with the autonomy, consistency of purpose, and inherent value given to persons in the most rationalizing of philosophic traditions.

In short, the law of corporate personality constructs the corporation, from the outside, in a series of inconsistent metaphors sharing little but

The suppression of groupness, and
Its replacement with individuals.

III. Internal corporate law.

Much of corporate law, however, deals with internal governance problems: deciding who may decide for the corporation and within which limits.

Here one might imagine that conflict would be central: conflict is, of course, a prerequisite to governance issues. However, corporate law metaphors and rules alike appear to focus attention away from conflict – even at the expense of conceptual coherence. Just as the external metaphors disagree on everything except denial of the corporation's institutional existence, the internal metaphors disagree on everything, but all conceal the internal value conflicts and power struggles.

Shareholder/manager relations are variously viewed as based on concepts of property, contract, agency, politics, fiduciary law or arms-length market

disinterestedness: the metaphors and the legal rules they invoke can not be made consistent.

In a classic **agency** metaphor, **managers** are required to set aside their own interests to work only for those of the firm, or its shareholders, which interests are imagined to be simple and determinable without consultation with the actual humans involved, because the shareholders themselves are fictionalized into singleminded rationalistic maximizers. Unlike real agency, here there is no principal to give the orders; the managers are slaves to a purely fictionalized master.

Simultaneously, in a **market** metaphor, managers are seen as self-interested arms-length free market competitors with the firm and its other human constituencies.

Similarly, they are expected to simultaneously see their fellow employees as team members and as the opposing sides.

Shareholders are simultaneously analogized to all-powerful puppet-masters – the principals of an imaginary agency relationship -- and to impotent consumers of a market product, securities, in the consumer protection law we call the Exchange Act -- as both **autonomous** and as **automatons**.

Even profit is variously understood – under the influence of black box economic theories as just the return that an efficient organization must earn to survive, under the influence of accounting conventions as the residual earnings left for shareholders after all other corporate constituencies have taken their due or share, under the influence of ownership metaphors as something to be maximized for shareholders; under the influence of corporate finance imagery as free cash flow (free before or after what?).

IV. General Part

Corporate law is based on the elucidation of these contradictory metaphors. Not in the manner of logic but more in the manner of poetry.

It **cannot** be understood as even an approximation of an internally consistent logical structure,

but is rather an impressionistic (or, more precisely, Cubistic) representation of underlying conflicts.

Each of the images is in fact true to some extent, from some perspective; each is a partial representation of a real aspect of economic and political life.

Similarly, each takes its power from widely shared political and ethical beliefs:

- that in a free society, individuals may place their own good ahead of that of others,
- that good people work for the good of others;
- that fairness requires openness,
- that privacy is a prime value;
- that team members should place the victory of the team above their own private interests;
- that we are all in this together,
- that the marketplace is a Hobbesian struggle of all against all.

The intellectual struggle is not to denounce some metaphors as false and replace them with others, not to “penetrate the mists of metaphor”, but rather to demonstrate the

different perspectives and viewpoints at work, to make the unconscious conscious and the invisible visible.

These mixed metaphors are a symptom of the inevitable disunity of moral, political and economic life.

But they are also a substitute for more sophisticated theories of corporations (or different types of corporations) as sociological entities, political-economic actors, and loci of power struggle. Most of the metaphors elide the “group” aspects of the corporation:

the fact that any firm is multifarious, conflicted and diverse,
that corporate governance is not only about the generation of economic goods but also about their division, and
that corporations are a key site of value dispute in our society.

Our metaphors and the law that follows them tend to conceal the value choices that corporations make, creating a facade of unity and agreement covering an underlying reality of controversy and difficult choices made without conscious thought or collective debate.