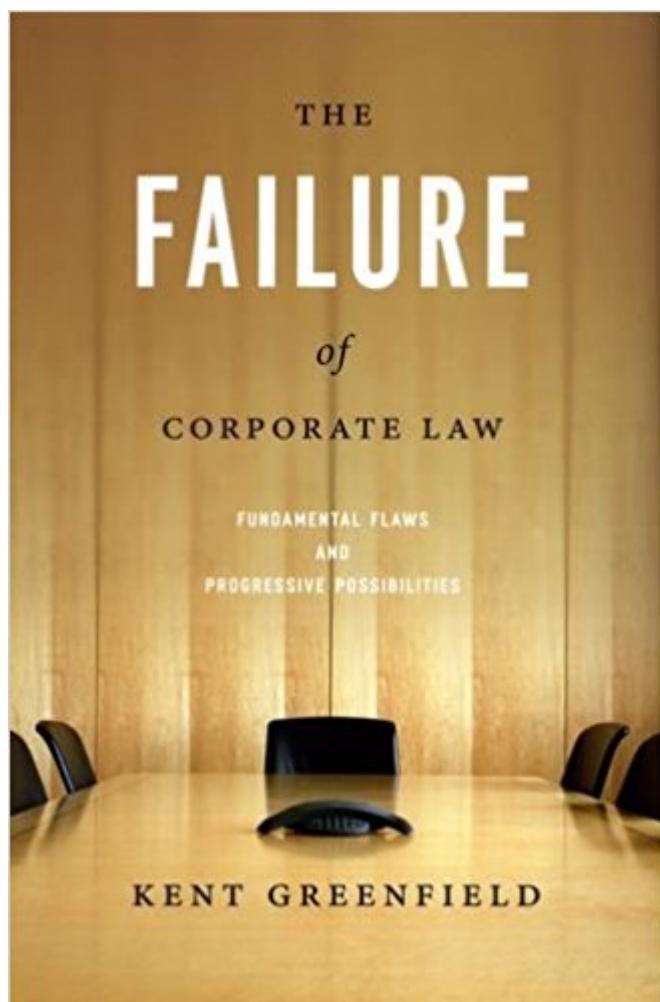


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The Failure Of Corporate Law: Fundamental Flaws And Progressive Possibilities



Synopsis

When used in conjunction with corporations, the term “public” is misleading. Anyone can purchase shares of stock, but public corporations themselves are uninhibited by a sense of societal obligation or strict public oversight. In fact, managers of most large firms are prohibited by law from taking into account the interests of the public in decision making, if doing so hurts shareholders. But this has not always been the case, as until the beginning of the twentieth century, public corporations were deemed to have important civic responsibilities. With *The Failure of Corporate Law*, Kent Greenfield hopes to return corporate law to a system in which the public has a greater say in how firms are governed. Greenfield maintains that the laws controlling firms should be much more protective of the public interest and of the corporation’s various stakeholders, such as employees. Only when the law of corporations is evaluated as a branch of public law—as with constitutional law or environmental law—will it be clear what types of changes can be made in corporate governance to improve the common good. Greenfield proposes changes in corporate governance that would enable corporations to meet the progressive goal of creating wealth for society as a whole rather than merely for shareholders and executives.

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Customer Reviews

Kent Greenfield takes us into fertile and promising territory that has been generally neglected by both politics and social reform—the corporation as a potential engine of progress. His critique is grounded in the extraordinary fallacies and failures of corporate law,

and he demonstrates with remarkable clarity how a series of essential changes in the premises and obligations of the corporation can turn the nature of the beast in very positive directions. (William Greider, author of *The Soul of Capitalism: Opening Paths to a Moral Economy* 2006-10-31) "With relentless logic and impeccable evidence, Kent Greenfield presents a stunning critique of the shareholder supremacy theory of corporate law, complete with practical and progressive law reform proposals designed to get so-called public corporations back into the business of promoting the public interest. He challenges conventional wisdom to show how corporations can be managed to promote the interests of all stakeholders, including shareholders, workers, creditors, and the communities in which corporations operate, while promoting both profits and social welfare. Arguing for a broad definition of costs and benefits, this book persuasively lays out new principles for corporate law designed to serve the interests of society as a whole, while promoting both efficiency and justice." --Joseph William Singer, Bussey Professor of Law, Harvard Law School (Joseph William Singer 2006-10-31) "Kent Greenfield has emerged as the most creative thinker in the contrarian school of progressive corporate law. At the heart of this progressive vision is the notion that corporate law matters. His version of the progressive argument that corporate law is shareholder-centric and needs to expand its borders to include employees and other nonshareholder constituencies is creative and should provoke lively debate between traditional and progressive corporate law scholars for years to come." --Gordon Smith, University of Wisconsin Law School (Gordon Smith 2006-10-31) "Kent Greenfield makes a compelling case for progressive corporate law reform in *The Failure of Corporate Law*. Through careful deconstruction of a traditional and yet fundamentally failed body of law, Greenfield offers an impressive reconstruction that hinges on a simple but truly profound claim: corporate law is vitally important. With so many fundamental questions about the role of corporations left largely unattended, at a time of dramatic socioeconomic change that crosses all borders, Greenfield offers a rich and thoughtful prescription for some of the most important and powerful institutions of our time. *The Failure of Corporate Law* is an exacting and challenging contribution to the study of corporate law and corporate governance." --William S. Laufer, author of *Corporate Bodies, Guilty Minds* (William S. Laufer 2006-10-31) "A stunning critique of the shareholder supremacy theory of corporate law, complete with practical and progressive law reform proposals designed to get so-called 'public' corporations back into the business of promoting the public interest. . . . Arguing for a broad definition of costs and benefits, Greenfield persuasively lays out new principles for corporate law designed to serve the interests of society as a whole, while promoting both efficiency and justice. . . . Simply the best and most well-reasoned progressive critique of

corporate law yet written." (Joseph Singer Ethical Corporation 2006-11-08) "Greenfield commences with a reconsideration of the basic and generally accepted purposes and norms of law. The result is as startling as it is enlightening. . . . A seminal piece of writing that evidences dominance of a vast range of ideas, research, and critical thinking, and puts it into a coherent, well argued, accessible whole in a mere 243 pages. It merits a place alongside Berle and Means, Easterbrook and Fischel, and indeed, one can but hope that it becomes the touchstone for further corporate law reform globally." (Benedict Sheehy Law & Politics Book Review 2007-08-01) "For the sympathetic reader, Professor Greenfield's book is heartening. For the unsympathetic reader, it offers a worthy target." (Harvard Law Review)

Kent Greenfield is professor of law at Boston College Law School and served as a law clerk under Supreme Court Justice David H. Souter.

I came across the author of this book on a law school blog while teaching a unit on "corporate free speech" in a business law class, and then found this particular book cited in a law review article on how to address the environmental effects of the BP oil spill. The book itself is a rejection of the last twenty or thirty years of "law and economics" misreading of the history and nature of corporations law and makes the argument that corporations are not simply bundles of private contracts, but as I have always and continuously argued in my classes, public entities chartered by the state to serve a public purpose (providing jobs, paying taxes, helping build up this country) so that excuses for not regulating excessive executive pay and bonuses or for hiding taxable corporate income abroad simply do not wash. Anyone who wants to understand how we got to this place where corporate "persons" have more rights than real persons, and why the law is so out of joint we need OWS to reclaim America should read this book. And also read Sandy Levinson's *Our Undemocratic Constitution*. And then get active. I am requiring this book in my spring term course in business law, which is ironic since with cuts in public funding for public universities, we are out there seeking corporate donations to train the next generation of cogs in the corporate machine...

Great book. Well-argued response to corporate excesses.

Kent Greenfield posits that corporation law shouldn't be thought of as "private" law, which governs the relationships of individuals, but as a branch of "public" law, such as constitutional, tax, or environmental law. Corporations are sanctioned by the state and our goals for them should include

more than just maximizing profits for shareowners. Corporate laws determine the rules for some of the largest most powerful entities in the world and America is exporting our model abroad. I've warned audiences around the world not to adopt our regulatory scheme wholesale. While my advice has been vindicated by the latest financial meltdown, it is good to see an extraordinary legal scholar pushing for thoughtful change. "Our nation could choose, and should choose," writes Greenfield, "to require that democratic values govern corporations, rather than having corporate values govern democracy." Some functions are just too important to be left to for-profit companies. Airline security is one. Another would be ensuring an economy that meets our collective goals, not just the goals of shareowners, as modeled by a law-and-economic view. Greenfield's discussions are well argued. I found his critique of "enablingism" and the role of corporate law limited to establishing default rules parties would choose if they actually negotiated them, to be enlightening. As he points out, it simply reinforces status quo market power, rather than ameliorates it. In this trickle-down theory of law, we get only the rights we can pay for. It's a theory based on the premise that "what is good for shareholders is good for corporations, and what is good for corporations is good for society." Yet, income inequality in America is worse than in any other developed nation and is the worst since WWII. What is good for the workers may be a better placeholder for society as a whole than what is good for shareholders. Workers have every incentive to keep their firms alive, whereas shareowners are generally willing to take greater risks because they are more diversified. Our present legal conception is not inherent in capitalism but was inherited from the laissez-fare politics of the Gilded Age. Corporate law, like labor law, tax law, and environmental law should be predicated on collective political decisions about social goals and ideals. Non-utilitarian values such as equality and human dignity should inform corporate law, just as they inform other areas of law. A central tenet of the book is that internal governance procedures can lower external enforcement costs. Plus they follow the corporation outside the boundaries of states and countries. Greenfield critiques the law-and-economics paradigm, arguing that shareowners aren't the only ones entitled to ownership claims. Even though a stakeholder approach should be more efficient overall, he argues it is reasonable for society to forgo the possibility of very high corporate profits to avoid disproportionate harm to workers and communities. This is especially so, given that only a small portion of affluent shareowners stand to reap the gains from high profits, since 1% own 34% of all shares and 10% own 77%. Greenfield formulates five principles for those developing public policies in the area of corporate governance:

1. The ultimate purpose of corporations should be to serve the interests of society as a whole.
2. Corporations are distinctively able to contribute to the societal good by creating financial prosperity.
3. Corporate law should further principles 1 and 2, reminding us "there is

no such thing as a limited liability society."4. A corporation's wealth should be shared fairly among those who contribute to the creation of that wealth.5. Democratic corporate governance is the best way to ensure the sustainable creation and equitable distribution of corporate wealth. I like Greenfield's values. He backs up his arguments with research on real behavior, not just with economic theory. For example, "an individual's decision about whether or no to comply with rules is 'more strongly influenced by legitimacy than by estimates of the gain or loss associated with that behavior.'" Monitoring costs are "deadweight losses." The more we can reduce them by involving workers, the more productive our corporations will be. Recommendations include:^{*} Enlarging board fiduciary duties to include workers and other stakeholders. Relaxation of profit maximization norm and support for stakeholder statutes.^{*} A federal law that protects workers from fraud, similar to SEC Rule 10b-5 that protects investors. More efficient labor markets will allocate labor to where it will be most productive.^{*} Ending Delaware's dominance. Federal chartering... short of that, states should exert their prerogative of regulating the internal affairs of companies. In other areas of law, the state with greatest interest typically prevails. Corporate law should be no different.

Corporate law in the U.S. is centered on the relationship between shareholders and corporations. Shareholders elect the board. In turn, the corporation strives to maximize the value of shares. Relations between the corporation and other stakeholders (such as workers) are governed by contract law or state and federal statutes, not corporate law. "The Failure of Corporate Law" challenges this paradigm, arguing that workers, too, should have a say in corporate governance. The arguments are strong. Workers have a stake in the stability of firms, whereas investors with diversified portfolios may push firms to take on socially inefficient risks. A corporate duty to workers would boost morale, lower monitoring costs, and give workers an incentive to develop firm-specific skills, thus contributing to overall economic productivity. And any fantasy that workers' interests are properly "priced" in the labor market is belied by the realities of everyday life. The book is filled with acute observations about the role a new corporate law could play in promoting efficiency and humane values. The argument is meticulous and lucid. Not every point is persuasive -- for example, it isn't clear how boards would balance fiduciary duties to stakeholders with opposing interests. However, the book does a great job of posing new ideas and of rethinking corporate law from the ground up. It is also thankfully free of the unrealistic assumptions that inform conservative "law and economics" thinking on the subject. Six stars.

Greenfield's book is important. While its subject is the potentially dry one of corporate law, he

compels us to understand why that body of law matters so much not only to the economic future of our nation but as well to the issues of social and economic justice that are so vital in our society. As much a work of political theory as it is of law, Greenfield shows us how legal doctrine has dramatic and determinative implications for a much broader set of issues. He does so with literary flair, and a creative and original analysis of issues that have been so often discussed that one would have found it hard to imagine that anything new could be said. That would be a failure of imagination, as Greenfield directs our imaginations to reconceptualize an institution that most of us take for granted. This book taught me a great deal, even as it gave me new ideas about my own field of expertise.

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