Administrative Law and the Corporate Governance Obsession

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Mariana Pargendler, The Corporate Governance Obsession, 470 Stanford Law and Economics Olin Working Paper (2014).

The recent paper that has most provoked my thinking about administrative law is not a paper about administrative law at all, it is a paper about corporate governance. *The Corporate Governance Obsession*, by Mariana Pargendler is an account and a critique of the turn to corporate governance as a means of addressing social and economic issues that were once predominantly the concern of government regulation. By "corporate governance" Pargendler means the internal decision-making processes of corporations—in particular, the balance of power among shareholders, boards of directors, and managers. The article makes the case that internal corporate governance structures increasingly provide both the explanation for and a one-size-fits-all solution to pressing issues in policy arenas as diverse as systemic financial risk, income inequality, gender discrimination, labor rights, and environmental protection.

Why should administrative lawyers care? Because, she argues, corporate governance approaches to these issues are cannibalizing regulatory approaches that externally impose rules to influence the substance and outcomes of corporate conduct. Policy debate on the central social and economic issues of the day is no longer (or at least no longer exclusively) about how regulators should design and implement rules to shape the substance of corporate conduct in the public interest, but rather about how corporations should organize their own internal decision-making processes to address issues of public concern. This means that while we administrative lawyers occupy ourselves with our own obsessions—for instance the finer points of deference doctrine and regulatory review—the corporate governance obsession is chipping away at the substantive regulatory policies that made these issues relevant in the first place.

Pargendler provides several examples of this phenomenon. For instance, in the aftermath of the global financial crisis, legislators and commentators could not agree on the role that financial deregulation had played in causing the crash (had it gone too far? not far enough?), but a broad consensus emerged blaming corporate governance arrangements like options-driven compensation and lack of board oversight. The policy result: a regulatory regime that encourages compensation disclosures and board independence, but that places few substantive constraints on how financial institutions do business. Similarly, debate about an issue as fundamental to the nation's social and economic fabric as rising income inequality has focused not on how tax and transfer policies affect income distribution, but rather on the ill effects of excessive executive compensation. This diagnosis of the problem has generated policy prescriptions like greater independence for board compensation committees and "say on pay" initiatives to give shareholders a voice on executive pay—entirely ignoring the inconvenient fact that the majority of Americans (and the overwhelming majority of poor Americans) own no stock. Gender inequality has become another unlikely object of the corporate governance obsession. As courts continue to narrow anti-discrimination law at the behest of corporate defendants, regulators have turned to corporate governance solutions to promote gender equity by encouraging companies to place more women on boards of directors (where they currently hold less than 20% of the seats).

Pargendler explains these developments largely as a function of deregulation and rising distrust in government. In this political climate, she says, corporate governance solutions enjoy wide support because they speak simultaneously to the reformist impulse of progressives and the conservative impulse to leave problem-solving to the private sector. For their part, corporations have enthusiastically embraced their role as shadow governments, both as a means of evading unwanted government regulation and as a means of legitimizing their increasing power in society. As one prominent Fortune 500 executive put it, companies take their obligations to govern very seriously, because when they fail to do so passably, "the terms of debate shift from how companies can best govern themselves to how regulators should govern them." Further, by adopting institutional roles and organizational structures typically associated with democratic governments and demonstrating their attention to issues of public concern, corporations have created a sense of accountability that has legitimized their broad influence over social and economic life.

This corporate legitimation project echoes administrative law's own longstanding legitimation project. Administrative agencies, with their questionable constitutional pedigree and their consolidation of broad governmental powers in the absence of any direct accountability to the electorate, have been variously justified based on their expertise, their control by the judiciary, and their relationship to the democratically-elected branches of government. In recent years, a consensus has emerged that agencies are sufficiently entwined with, similar to, or controlled by the elected branches (particularly the president) to drink from the font of democratic legitimacy. Unfortunately, this account utterly failed to anticipate what might happen if that font ran dry. While tethering agencies to the elected branches might have given them a measure of legitimacy as a matter of administrative law doctrine and constitutional theory, this strategy did little to politically legitimize the work that agencies do and the crucial role they play in governing.

Ironically, corporations have laid claim to the New Deal reformers' original justification for agencies: that they are efficient and effective vehicles for governing a complex society through the application of practical experience and technical expertise to policy problems. The curious insight of *The Corporate Governance Obsession* is that like agencies before them, corporations too feel compelled to justify themselves not merely as useful and competent, but as democratically legitimate. This raises a host of questions about what legitimate governance means as corporations take on increasingly prominent roles in governing. These are paradigm-shifting questions that administrative law will be called upon to answer. To do so, we may need to abandon some of our own disciplinary obsessions and start thinking more broadly and deeply about how the corporate governance obsession is changing the very foundations of the administrative state.

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