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***Delaware Journal of Corporate Law,  
Forthcoming***

**George Mason University Law and Economics  
Research Paper Series**

**10-09**

This paper can be downloaded without charge from the Social Science  
Research Network at [http://ssrn.com/abstract\\_id=1547163](http://ssrn.com/abstract_id=1547163)

Working Paper:  
Draft of January 31, 2010  
Word count: 18,754

**CHOICE, PROGRESSIVE VALUES, AND CORPORATE LAW:  
A REPLY TO GREENFIELD**

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***DELAWARE JOURNAL OF CORPORATE LAW (FORTHCOMING)***

**ABSTRACT**

*In his recent book chapter, CORPORATE LAW AND THE RHETORIC OF CHOICE, Professor Kent Greenfield rejects contractarian justifications for existing corporate governance arrangements. This rejection is propelled by the contention that current governance arrangements entrench existing matrices of social and economic power, thus, disadvantaging corporate stakeholders who are currently excluded from the corporate decision-making process. Greenfield advances this critique on two grounds. First, relying on behavioralist scholars, he accepts the demise of the rational actor model and, accordingly, opposes the contemporary use of choice as a construct that legitimates current corporate governance approaches. Seeking to include additional stakeholders in corporate governance, he disputes the deduction that each person acts to maximize her own welfare through exchanges that make all parties of the deal better off. Second, Greenfield refracts his analysis through the prism of Progressive thought and values. His dependence on the New Deal and Progressive values represents an effort to constrain contractarian extensions of neoclassical economics in the corporate law arena but draws inspiration from the regulatory urge that characterized government experimentation during the 1930s. Arguing that Progressives have been part of modernity's inevitable march toward progress, Greenfield applies Progressive values to the nexus of contract model in order to expand the power of currently excluded stakeholders.*

*Greenfield's approach is disturbing for two reasons. First, he fails to notice that behavioralist scholars often rely on experimental data, while law and economics scholars rely on empirical data. Accordingly, Greenfield does not distinguish between experimental data showing cognitive biases and empirical studies investigating behavioralist claims. Law and economics scholars emphasizing empirical analysis demonstrate that there is little proof "that behavioral law and economics generates greater predictive power than standard price theoretic analysis." Thus, private decision-making, which Greenfield castigates, typically results in better outcomes than the public/regulatory decision-making that Greenfield prefers. Second, Greenfield's reliance on Progressive values is misplaced because in its origins and its consequences, the Progressive Era was both liberal and conservative: liberal in emphasizing economic uplift for some but conservative in concluding that certain people—African Americans, women, immigrants, and others—were defectives in need of social control and exclusion. The evidence shows that Progressive Era labor legislation, often sheltered by social justice rhetoric, succeeded in excluding large numbers of Americans from employment. Much contemporary evidence sustains the observation that the Progressive impulse continues to exclude the disadvantaged from labor markets today.*

*Properly evaluated, Greenfield's critique, offered in the name of the disadvantaged, produces a number of claims that may ultimately advantage those in power. Denouncing existing corporate governance architecture (which is justified by the contractarian claim that people know and*

*protect their interests when they bargain, purchase stocks, and voluntarily enter into an agreement that establish corporations), he ignores special interest groups who protect their own interest by seizing the power of the state. Majoritarian seizure gains traction by invoking social justice rhetoric but allows powerful interest groups to exclude their weaker competitors from labor markets they wish to dominate. Greenfield's effort to diminish respect for choice and liberty of contract correlates with paternalistic efforts to enlarge the power of government. As both the New Deal and the contemporary economic record show, enlarging government's scope predicated on Progressive values risks government failure as well as the subordination of more citizens. This is so because such values, when stripped of the patina of progress, consist of contradiction and coercion that reduces the number of beneficial consensual avenues available to most Americans.*

## I. INTRODUCTION

On one account, law and the social sciences are on the brink of a paradigm shift poised to dismember the rational actor model that has so dominated recent academic discourse.<sup>1</sup> Embraced with evident enthusiasm by behavioralist scholars, this argument proceeds by dismantling the model's simplifying assumptions, which have bracketed distributions of wealth and entitlements, and the related claim that preferences are exogenously determined.<sup>2</sup> Ostensibly, the model has been destabilized by new research suggesting that individuals do not always act to maximize their own self-interest.<sup>3</sup> Relying, in part, on experimental data linked to patients' responses to probes manually inserted into their colons, corporate law commentators argue that the human brain distorts human memory, so that future choices, with reference to a wide variety of issues, are equally distorted.<sup>4</sup> Based on the assumption that colonoscopies yield dependable data about human behavior,<sup>5</sup> and the supposition that people's actual choices are an unreliable basis for economic judgment,<sup>6</sup> this contagious move reaches its inflection point in the

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\* Professor of Law, George Mason University School of Law. For helpful comments on earlier drafts, I am grateful to: Elizabeth McKay, R. Sean Alley, and Ajay Gupta. The usual disclaimer applies. Research support was provided by the Law and Economics Center at George Mason University School of Law. © **Harry G. Hutchison.**

<sup>1</sup> June Carbone and Naomi Cahn, *Behavior Biology, The Rational Actor Model, and the New Feminist Agenda*, in VOLUME 24 RESEARCH IN LAW AND ECONOMICS: A JOURNAL OF POLICY, LAW & ECONOMICS: TOWARD SOCIAL JUSTICE 189, 190 (2009, Dana Gold, ed.).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 190-91.

<sup>4</sup> See e.g. Kent Greenfield, *Corporate Law and the Rhetoric of Choice*, in VOLUME 24 RESEARCH IN LAW AND ECONOMICS: A JOURNAL OF POLICY, LAW & ECONOMICS: TOWARD SOCIAL JUSTICE 61, 77 (2009, Dana Gold, ed.).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 78.

observation that science shaped by behavioral economics, game theory, evolutionary analysis, and behavioral biology has dethroned the rational actor in favor of a more robust theory of human motivation.<sup>7</sup> This behavioralist panegyric, consistent with Woodrow Wilson's early critique of traditional economics,<sup>8</sup> disputes the deduction that the establishment of the scientific enterprise itself rests on certain assumptions about the reliability of the human mind. This viewpoint challenges the foundational notion of rational economic decision-making and its implied norm of wealth or utility maximization despite the fact that (A) rational choice implicates the fulfillment of both pecuniary and nonpecuniary wants,<sup>9</sup> and (B) a complete description of human rationality admits a wide array of explanations for the choices that humans make<sup>10</sup> without necessarily succumbing to J. S. Mill's antinomian individualism.<sup>11</sup> As Amartya Sen claims, rationality as activated in the human actor represents the need to subject one's choices to the demands of reason as well as encompassing more than simply maximizing one's self-interest to the exclusion of other objectives.<sup>12</sup>

In his recent chapter, *Corporate Law and the Rhetoric of Choice*,<sup>13</sup> Professor Kent Greenfield eagerly adopts the demise of the rational actor as a basis for opposing the contemporary use of choice as a construct that legitimates existing corporate governance

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<sup>7</sup> Carbonne and Cahn, *supra* note \_\_\_ at 191.

<sup>8</sup> RONALD J. PESTRITTO, *WOODROW WILSON AND THE ROOTS OF MODERN LIBERALISM* 85 (2005) (stating that Wilson was troubled by traditional economic theories and the notion that human behavior could be abstractly linked to narrow self-interest).

<sup>9</sup> Harry G. Hutchison & R. Sean Alley, *Against Shareholder Participation: A Treatment for McConvill's Psychonomicosis*, 2 *BROOKLYN J. OF CORP., FIN'S & COMM'L L.* 41 (2007) [hereinafter, Hutchison & Alley, *Against Shareholder Participation*]. Evidently economics can be distinguished from other social sciences by the belief that most behavior can be explained by assuming that agents have stable, well-defined preferences and make rational choices consistent with those preferences in markets that eventually clear. This enables men to pursue their private interests, meaning they aim to maximize something. *Id.* at 49. See also, DENNIS C. MUELLER, *PUBLIC CHOICE II*, at 1 (1989).

<sup>10</sup> Harry G. Hutchison, *A Clearing the Forest: Infusing the Labor Union Dues Dispute with First Amendment Values*, 14 *WM & MARY BILL RTS. J.* 1309, 1312 (2006). But see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 7 (1991) (implying that self-interest simply means avaricious greed in a monetary sense as opposed to a broader sense).

<sup>11</sup> Rationality, economics, and self-interest, as such, do not necessarily defend J.S. Mill's claims in *On Liberty*, where . . . flawed conceptions of autonomy and individuality combine with an obsessional enmity to tradition and convention to yield a liberalism in which rationalist hubris, antinomian individualism and a sentimental religion of humanity reinforce and strengthen each other." JOHN GRAY, *POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT* 260 (1996).

<sup>12</sup> AMARTYA SEN, *RATIONALITY AND FREEDOM*, 4 (2004). Complementing Sen's perspective, "Jean-Paul Sartre emphasized the fact that we exist at all times both 'for ourselves' and 'for others.'" GREGG A. TEN ELSHOF, *I TOLD ME SO: SELF-DECEPTION AND THE CHRISTIAN LIFE*, 51 (2009).

<sup>13</sup> Greenfield, *supra* note \_\_\_ at 61-89.

arrangements. He disputes the intuition suggesting each person acts to maximize her own welfare through exchanges that make all parties of the deal better off, and the related claim that voluntary exchanges produce a net social benefit.<sup>14</sup> Evidently intending to leave neoclassical economists in high dudgeon, he insists that stakeholders as participants in a corporation are not necessarily rational because economists determine rationality simply by observing what people actually do, and this determination revolves around a suspect assumption about the notion of choice: what is chosen is by definition rational, because otherwise individuals would have chosen something else.<sup>15</sup> Greenfield stresses that this conception of rationality is insufficiently robust because it does not require an inquiry into the substance of any choice.<sup>16</sup> Accordingly, there is no way of determining when a person is acting irrationally or otherwise making a poor choice.<sup>17</sup> He follows this argument with the assertion that existing corporate law approaches, resting on a foundation comprised of human freedom, preferences, and bargaining, are equally deficient. Hence, the choices that corporate stakeholders make do not deserve our respect because rational choice does not exist.<sup>18</sup> Coherent with this indictment, Greenfield maintains that economics is fundamentally flawed.<sup>19</sup> This lachrymose syllogism is consistent with emerging behavioral literature that permits some scholars to conclude that the presence of cognitive errors favors paternalistic intervention, which leads inevitably to institutional constraint on individuals' freedom of choice.<sup>20</sup> Proceeding along a somewhat different analytical pathway, Sen suggests that rationality and freedom are not, in fact, independent of each other but rather interdependent.<sup>21</sup> If both the behavioralists and Sen are correct, a contentious, yet, vatic allegation surfaces: freedom may be impossible and authoritarianism led by elite hierarchs may be inevitable.<sup>22</sup>

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<sup>14</sup> *Id.* at 75.

<sup>15</sup> *Id.* at 75.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 76.

<sup>19</sup> *Id.* at 75.

<sup>20</sup> Joshua D. Wright, *Behavioral Law and Economics, Paternalism, and Consumer Contracts: An Empirical Perspective*, 2 NYU J. OF L & LIBERTY 470,472 (2007) (discussing but not embracing this move).

<sup>21</sup> SEN, *supra* note \_\_\_\_ at 3.

<sup>22</sup> See, e.g., RICHARD H. PILDES, *The Inherent Authoritarianism in Democratic Regimes*, in OUT OF AND INTO AUTHORITARIANISM 125-151 (Andras Sajó ed., 2002) (confirming that authoritarianism is an inherent structural tendency of modern democratic regimes).

Not content to base his investigation on the collapse of rational actor model alone, and declining to offer his own theory of human motivation or freedom, Greenfield refracts his analysis through the prism of Progressive thought and values. His unremitting dependence on the New Deal and Progressive thought represents an effort to constrain contractarian extensions of neoclassical economics in the corporate law arena and draws considerable inspiration from the regulatory urge that so acutely characterized government experimentation during the 1930s.<sup>23</sup> Viewed through the lens of Progressive thought, the free market is seen as a creature of politics and law, and the marketplace, rather than operating by choice, is dominated by coercion.<sup>24</sup> New Deal insights, in combination with the presumption that individuals are impaired by systematic behavioral biases,<sup>25</sup> signify that economic theory is an illusion, which issues forth in the accusation that the free market favors entrenched economic and social power and disfavors the weak.<sup>26</sup> This budding appraisal, as applied to corporate law, is congruent with a blizzard of academic commentary supporting shareholder or stakeholder empowerment initiatives that continue to proliferate despite evidence showing that the separation of ownership and control justifies the current regime of limited shareholder voting rights and director control as the default rule for publicly-traded corporations.<sup>27</sup> Nonetheless, Greenfield endeavors to reconfigure the existing state of affairs by pillorying corporate law's longstanding reliance on freedom of choice.

Still, just as many Americans have discovered that democracy and radical human autonomy yield less than they promise,<sup>28</sup> Greenfield's pluriform argument promises more than it delivers for three reasons. First, while behaviorist critiques of normative economic analysis retain some validity,<sup>29</sup> attempts to completely undermine the notion of the rational decision-maker must tackle an inescapable endogeneity problem: unless

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<sup>23</sup> Greenfield, *supra* note \_\_\_\_ at 68. For an examination of the exclusionary tendencies of the New Deal, see Harry G. Hutchison, *Employee Free Choice or Employee Forged Choice? Race in the Mirror of Exclusionary Hierarchy*, 15 MICH. J. OF RACE & LAW (forthcoming, 2010) available at <http://ssrn.com/abstract=1459189> at 19-22 & 39-55.

<sup>24</sup> Greenfield, *supra* note \_\_\_\_ at 68.

<sup>25</sup> See e.g., Wright, *supra* note \_\_\_\_ at 471 (discussing this behaviorist assumption, which is grounded in experimental literature).

<sup>26</sup> Greenfield, *supra* note \_\_\_\_ at 63. *But see*, Michael Novak, *An Apology for Democratic Capitalism*, FIRST THINGS, 39, 42 (2009). (disproving this claim).

<sup>27</sup> Hutchison & Alley, *Against Shareholder Participation*, *supra* note \_\_\_\_ at 41, 44-48 (2007).

<sup>28</sup> *Id.* at 48.

<sup>29</sup> See e.g., Wright, *supra* note \_\_\_\_ at 471-75.

behavioralist commentators come from a different gene pool than the rest of us, or materialize as magically transformed cenobites, they are likewise constrained by the possibilities associated with their own behavioral hypothesis.<sup>30</sup> Lurking in the shadows of behavioralist claims, is the probability that behavioralist analysts are impaired by the presence of their own bounded rationality and irreducible complexity, thus precluding a suitably sturdy conception of choice that operates consistently with the parameters of their approach. Moreover, rationality presupposes the capacity of individual choice, indicating that if rationality and noesis vanish for all of us, including behavioralists, then the elusive notion of choice may be compelled to recede<sup>31</sup> in a wide variety of contexts extending beyond the corporate domain.<sup>32</sup> Second, Greenfield declines to develop a principled theory of power entrenchment. This blinds him to the likelihood that his chosen metaphor—Progressive thought in the mirror of social justice—constitutes a wobbly foundation on which to construct a plausible critique of entrenched power in the corporate or in any other setting. Voluminous evidence shows that the instantiation of Progressive values has served to ingrain existing social and economic power advantages while disadvantaging the weak.<sup>33</sup> Finally, unlike law and economics scholars, Greenfield refrains from distinguishing between experimental data showing cognitive biases and empirical studies investigating behavioralist claims. Although neoclassicists and behavioral economists might share a common interest in predictive power and empiricism relating to behavioral models,<sup>34</sup> Greenfield evades this possibility. On the other hand, Joshua Wright, providing an empirical investigation of alleged firm exploitation of consumer biases, shows that there is little proof “that behavioral law and economics generates greater predictive power than standard price theoretic analysis.”<sup>35</sup> The emerging evidence supplied by law and economics scholars confirms that the private decision-making that Greenfield castigates typically results in better outcomes than the

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<sup>30</sup> Hutchison & Alley, *Against Shareholder Participation*, *supra* note \_\_\_\_ at 50.

<sup>31</sup> Sandra J. Peart & David M. Levy, *Attitudes Towards Race, Hierarchy and Transformation in the 19<sup>th</sup> Century*, 47 HIST. ECON. THOUGHT 15, 18 (2005) (stating that classical economics implies humans can be defined and human capability can be measured by the concept of rationality).

<sup>32</sup> This development may envelop the use of choice rhetoric within a number of contexts. Choice, for example, is an important component of the justification for abortion rights. The demise of choice may delegitimize Greenfield’s apparent support for abortion rights.

<sup>33</sup> *See infra* Part IV.

<sup>34</sup> *See e. g.* Wright, *supra* note \_\_\_\_ at 474.

<sup>35</sup> *Id.* at 474-75.

public/regulatory decision-making that Greenfield prefers.<sup>36</sup> Thus understood, Greenfield's critique of corporate law is dwarfed by evidence suggesting that subtle examination of gaps in contract theory might enrich contractarianism in nuanced ways<sup>37</sup> but yet provide analytical insight that is consistent with the literature indicating that corporations arose from a determined effort to minimize transaction costs and risk.<sup>38</sup>

This Reply Essay examines the numerous difficulties that plague Greenfield's analysis, including his reliance on experimental as opposed to empirical data as well as his failure to examine Progressive values skeptically. This essay raises doubts about Greenfield's approach and concludes that his analysis cannot withstand careful analysis. Part II offers background, which exemplifies the defensibility of the nexus of contracts perspective, and which has crucial implications for how courts and legislatures can best structure a corporate law regime.<sup>39</sup> Part II also adverts to the actual diversity within the contractarian school of thought. Part III considers the core of Professor Greenfield's critique. Part IV offers an assessment of *Corporate Law and the Rhetoric of Choice* that explains the three reasons why Greenfield's analysis is unsustainable: (1) because he fails to offer a theory of the firm that defends diffused authority and fragmented decision-making based on his conclusion that choice is unreliable, (2) because he declines to adequately consider the crucial role of incentives in the development of contractarian oriented corporate law and in other arenas that depend on individual or group decision-making, and (3) because he unfailingly relies on Progressive thought to both appraise the viability of choice and demonstrate the putative benefits of regulation. These errors combine to show that his choice architecture is insufficiently robust for purposes of reforming either the market or corporate law and his attempt to substitute consent for the notion of choice constitutes a distinction without a difference.

## II: PROLEGOMENA: UNDERSTANDING THE ORIGINS OF THE FIRM

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<sup>36</sup> Edward L. Glaeser, *Paternalism and Psychology*, 73 U. CHI. L. REV. 133 (2006).

<sup>37</sup> Michael D. Klausner, *The Contractarian Theory of Corporate Law: A Generation Later*, 31 IOWA J. OF CORP. L. 779-787 (2006). One nuanced way of modifying contractarian explanations of corporate law may be by invoking the notion of trust. Trust with its moral underpinnings, provides non-pecuniary benefits and implicates richer normative values than simple monetary wealth-maximization. See e.g., Victor Brudney, *Contract and Fiduciary Duty in Corporate Law* 38 B. C. L. REV. 595, 604 (1997).

<sup>38</sup> See *infra* Part II.

<sup>39</sup> J. Mark Ramseyer, *Corporate Law in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW*, 503, 504 (2002, Peter Newman ed.).



This section sketches the origins of the corporate form and hints at the diversity of thought among contractarian scholars. This examination shows why Greenfield's approach has difficulty in fully capturing the diverse and conflicting concerns of corporate stakeholders that are currently resolved through the coordinating powers of the board of directors as restricted by their fiduciary duties. While not all commentators are convinced of the appropriateness of the director primacy view that is tied to contractarian insights,<sup>40</sup> the modern corporation, which is replete with conflicting and diverse demands, was not always society's concern. After all, "a few centuries ago, the privately owned, for-profit business corporation did not exist. At the beginning of the nineteenth century, most business and commerce was conducted by proprietorships and partnerships."<sup>41</sup> Today, in contrast, as result of countless choices<sup>42</sup> by numerous individuals and groups,<sup>42</sup> the corporation has become the dominant form of business organization over all other alternative business arrangements available.<sup>43</sup>

More than seventy years ago Ronald Coase presented his pioneering contribution to our understanding of origin of the firm explaining how the firm operates outside the often maligned but actually nonexistent world of zero transaction costs<sup>44</sup> as a voluntary arrangement that is designed to reduce transaction costs. Indeed, without the prevalence of such costs there is simply no economic basis for this form of economic organization.<sup>45</sup> Armen Alchian and Harold Demsetz rejected Coase's argument that the power of direction was the factor distinguishing firms from markets, and thus, Coase may well have erred in treating the firm as a nonmarket institution in which prices and contracts are

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<sup>40</sup> See e.g., MARGARET M. BLAIR, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY 26-27(1995) (suggesting that the prevailing view with respect to corporate governance is that shareholders, as residual claimants, own the corporation).

<sup>41</sup> ROBERT CLARK, CORPORATE LAW 1 (1986).

<sup>42</sup> As used here "choice" refers to Sen's claim that rationality depends on freedom in that, without some freedom of choice, the idea of rational choice would be vacuous and the claim that the concept of rationality must accommodate the diversity of reasons that may sensibly motivate choice. See SEN, *supra* note \_\_ at 5-6.

<sup>43</sup> CLARK, *supra* note \_\_ at 1.

<sup>44</sup> R. H. COASE, THE FIRM, THE MARKET AND THE LAW 174 (1988) [hereinafter, COASE, THE FIRM, THE MARKET AND THE LAW].

<sup>45</sup> COASE, THE FIRM, THE MARKET AND THE LAW *supra* note \_\_ at 14 (citing his earlier article, *The Nature of the Firm*, ECONOMICA 4 (November 1937) (reprinted in R. H. COASE, THE FIRM, THE MARKET AND THE LAW at 33-55) (without transaction costs there is no economic basis for the firm)).

of relatively little consequence.<sup>46</sup> However, Stephen Bainbridge reconciles these two models showing that there is no necessary contradiction between a theory of the firm characterized by command-and-control decision-making and the contractarian model.<sup>47</sup> Given the presence of uncertainty, complexity, and incomplete contracts, both approaches are consistent with the necessity of a central decision-maker.<sup>48</sup> “It is thus possible to harmonize the Coasean and contractarian models without having to reject a theory of the firm in which management has the power to direct its workers or in which the corporation is characterized by bureaucratic hierarchies.”<sup>49</sup> As thus appreciated, the firm’s employees and its investors voluntarily enter into a relationship in which employees agree to obey managerial commands while reserving the right to disassociate from the firm,<sup>50</sup> and investors agree to keep their economic interests in the firm until they exercise their right of exit.

The persistence of transaction costs and the determined effort by individuals pursuing their private interests to minimize them,<sup>51</sup> gives rise to firms, which operate under the authority and the direction of an entrepreneur, or in the case of large publicly traded firms, under the authority a board of directors.<sup>52</sup> On Robert Clark’s account, corporations through contracts provide investors with limited liability, and limited liability produces a net gain for three reasons. First, the limited liability feature shifts risk from investor-shareholders to specialized risk bearers, such as banks and other large creditors who are better equipped to assess risk, and this process produces gains from trade.<sup>53</sup> Second, limited liability eliminates the possible incurrence of huge transaction

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<sup>46</sup> STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS, 35 (2002) [hereinafter, BAINBRIDGE, CORPORATION LAW AND ECONOMICS].

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> On this point, *see* MUELLER, *supra* note \_\_\_ at 1. There are numerous examples of how firms lessen transaction costs. One way in which large corporations lessen such costs is by creating a market that facilitates transfer of the shareholders’ ownership stakes. In the absence of contrary agreement or charter provision, the rights of common stock include free transferability of the whole bundle of rights, negotiability, and fungibility enabled by an organized, efficient trading market and such rights can be sold as a unit and without the consent of the other shareholders or the directors and officers of the corporation. *See* CLARK, *supra* note \_\_\_ at 13-14.

<sup>52</sup> COASE, THE FIRM, THE MARKET AND THE LAW, *supra* note \_\_\_ at 40-42 (drawing attention to the entrepreneurial effort to minimize marketing costs).

<sup>53</sup> CLARK, *supra* note \_\_\_ at 8 (comparing risk within a partnership setting with risk within the corporate realm and concluding that for some investors, the possible lower rate of return to a corporate investment is

costs, which enables a creditor to bring a collection suit against one firm rather than 50,000 geographically scattered investors.<sup>54</sup> Third, the firm by contracting against individual liability provides insulation that protects shareholders' personal assets, which means that this device may prevent investors from paying the full cost of the enterprise's external effects.<sup>55</sup> Evidently, it is normally more expeditious to have the legal system create a general presumption, or form contract, wherein everyone, (meaning investors, lenders, and businesspersons) dealing with businesses of a certain type—corporations—must expect that limited liability is the rule and plan their affairs accordingly.<sup>56</sup>

Arguably, the core innovation of the contractual theory of the firm was to conceptualize the relationship between management and shareholders of a public company as one of contract, in which joint wealth would be maximized as result of atomistic market-mediated actions.<sup>57</sup> Within this framework, investors own an economic interest in the firm while boards of directors retain power pursuant to a corporate governance approach that allows contracting parties to agree in advance via the corporate charter to permit the board to entrench itself.<sup>58</sup> After taking into account other options for their time and money,<sup>59</sup> and after responding to incentives, investors bind themselves, “ex ante . . . to improve their collective position ex post.”<sup>60</sup> This process of specialization is summarized by stating that:

Contractarians model the firm not as an entity, but as an aggregate of various inputs acting together to produce goods or services. Employees provide labor. Creditors provide debt capital. Shareholders initially

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offset by the lower risk that arises because shareholders are able to shield personal assets from contract debt).

<sup>54</sup> *Id.* at 8-9.

<sup>55</sup> *Id.* at 9.

<sup>56</sup> *Id.* (Notably, throughout the history of the modern corporation, very few large incorporated firms have failed because of overwhelming tort liability as opposed to contractual liabilities).

<sup>57</sup> Klausner, *supra* note \_\_\_ at 779-780 (citing FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 1-39 (1991)).

<sup>58</sup> Harry G. Hutchison, *Director Primacy and Corporate Governance: Shareholder Voting Rights Captured by the Accountability/Authority Paradigm*, 36 *LOY. U. CHI. L. J.* 1111, 1201 (2005) [hereinafter, Hutchison, *Director Primacy*].

<sup>59</sup> This conception of options is arguably consistent with the opportunity aspect of freedom which concentrates on the alternatives a person has reason to value or want. As used here, “options” may or may not be seen in a narrower sense than Sen understands. See SEN, *supra* note \_\_\_ at 5.

<sup>60</sup> Marcel Kahan & Edward B. Rock, *Precommitment and Managerial Incentives: Corporate Constitutionalism: Antitakeover charter Provisions as Precommitment*, 152 *U. PA. L. REV.* 473, 522 (2003).

provide equity capital and subsequently bear the risk of losses and monitor the performance of management. Management monitors the performance of employees and coordinates the activities of all the firm's inputs. The firm is a legal fiction representing the complex set of contractual relationships between these inputs. In other words, the firm is not a thing, but rather a nexus or web of explicit and implicit contracts establishing rights and obligations among the various inputs making up the firm.<sup>61</sup>

Although Robert Clark apparently rejects contractarian theory with respect to both the nature of the firm and as a basis for specifying the proper role of corporate law in favor of a regulatory regime,<sup>62</sup> it is possible to agree with his statement that “[t]he corporate contract consists of the terms of a corporation’s charter and the corporate law the firm selects by virtue of incorporating in a particular state.”<sup>63</sup> “In the nexus of contracts model, corporations, statutes, and judicial opinions can be thought of as a standard form contract voluntarily adopted—perhaps with modification—by the parties. The point of a standard form contract, of course, is to reduce bargaining costs.”<sup>64</sup> This skeleton enables corporate law to supply a set of default rules that the firm’s managers may or may not adopt.<sup>65</sup> Providing rules under this hypothetical-bargain methodology aimed at minimizing transaction costs facilitates private ordering,<sup>66</sup> conducing to tailored

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<sup>61</sup> BAINBRIDGE, CORPORATION LAW AND ECONOMICS, *supra* note \_\_\_ at 27.

<sup>62</sup> Klausner, *supra* note \_\_\_ at 780 (citing ROBERT C. CLARK, CORPORATION LAW (1986)) (“One of Clark’s central themes is that the law governing the duty of loyalty is ill-suited to public corporations, and that the law evolved to this suboptimal point as result of courts applying a single set of loyalty rules to both public corporations and close corporations. Clark argues, for example, that the corporate opportunity rule as it has evolved through court decisions has a degree of permissiveness and open-endedness that is well suited to close corporations, but poorly suited to public corporations, whose managers should instead be subject to a categorical prohibition on taking any business opportunities. He argues that states should enact rules that impose such a restriction on mangers of public companies.”).

<sup>63</sup> *Id.* at 780 (citing Clark).

<sup>64</sup> BAINBRIDGE, CORPORATION LAW AND ECONOMICS, *supra* note \_\_\_ at 29. “If transaction costs are zero, the default rules—whether contained in a statute or a private standard form contract—do not matter very much. In the face of positive transaction costs, however, the default rule begins to matter very much. . . . [I]ndeed, if transaction costs are very high bargaining around the rule becomes wholly impractical, forcing the parties to live with an inefficient rule.”) *Id.*

<sup>65</sup> Klausner, *supra* note \_\_\_ at 780.

<sup>66</sup> BAINBRIDGE, CORPORATION LAW AND ECONOMICS, *supra* note \_\_\_ at 30.

default rules that are patrolled by fiduciary obligations, which are stated not as bright-line rules but as rather vague standards.<sup>67</sup>

Here it is possible to borrow a behavioralist's assertion offered by Cass Sunstein and Richard Thaler: default rules are inevitable because private institutions and the legal system cannot avoid them.<sup>68</sup> Within the corporate arena and within much of life, as Sunstein and Thaler imply, humans may prefer (choose) to be bound by a good default rule rather than be required to make an active decision.<sup>69</sup> Whether default rules are inevitable or not, Daniel Fischel argues that the corporation emerges as a particular type of firm formed by individuals acting voluntarily for their mutual benefit, and thus, it can be reasonably viewed as the product of private contracts rather than as a creature of the state.<sup>70</sup> Enabling incorporators to choose among the possibilities, America's system of competitive federalism allows states to compete with one another to attract incorporation by providing corporate law that offers value-enhancing default rules.<sup>71</sup> Corporations locate in states where corporate law offers adequate accountability for managers, which leads to favorable borrowing conditions.<sup>72</sup> While federalism is not necessarily a perfect system, it produces a situation where limited participation is the most popular default rule among states, which means that limited investor participation is more efficient.<sup>73</sup> It can be argued, and Bainbridge concedes, corporations are often formed without formal bargaining. "Contractarians concede . . . that actual bargaining over corporate law rules is precluded by transaction costs barriers, but contend that this is precisely why corporate statutes provide a set of off-the-rack rules amounting to standard-form contract. Put another way, legal rules function as a substitute for private bargaining."<sup>74</sup>

Reflecting the force of this analysis, the agreement of the parties to enter into the relationship legitimates a complex set of constraints and behaviors that shape *ex post*

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<sup>67</sup> *Id.* at 31 (suggesting that tailored as opposed to majoritarian defaults are the preferred solution).

<sup>68</sup> RICHARD H. THALER AND CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS* 86 (2008).

<sup>69</sup> THALER AND SUNSTEIN, *supra* note \_\_ at 86-87.

<sup>70</sup> Greenfield, *supra* note \_\_ at 72 (quoting Fischel).

<sup>71</sup> Hutchison & Alley, *The High Costs of Shareholder Participation*, 11 *UNIV. OF PA. J. OF BUS. L.* 941, 961 (2009) (footnotes omitted) [hereinafter, Hutchison & Alley, *The High Cost of Shareholder Participation*].

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> BAINBRIDGE, *CORPORATION LAW AND ECONOMICS*, *supra* note \_\_ at 33.

bargaining over what Luigi Zingales describes as the quasi-rents or surplus generated in the course of corporate relationships.<sup>75</sup> Initial corporate contracts aim to constrain transaction costs, but such contracts are incomplete, leaving room for voluntary bargaining to emerge.<sup>76</sup> Corporate law furnishes “off-the-rack” rules that are primarily enabling rather than prescriptive and that allow the parties to easily negotiate around them.<sup>77</sup> Within the domain of large publicly traded firms, corporate law facilitates the placement of authority in the hands of the directors. “When directors make decisions that ostensibly benefit the firm and create shareholder wealth, they engage in trade-offs that are protected by the business judgment rule. However, corporate managers and the board often discover their interests are not completely aligned with shareholders’, which raises the specter of agency costs.”<sup>78</sup> Board “[e]mpowerment has a cost—it risks entrenchment and self-interested behavior, which may reduce shareholder wealth. Hence, courts and shareholders are properly concerned about accountability.”<sup>79</sup> Within this framework, agency costs are a category of costs that can be minimized but cannot be eliminated. Investors who are dissatisfied with corporate performance can exercise their exit option by selling their shares in the market. This move may depress the share price of the firm and provide incentives for managers to improve performance or face the prospect of a takeover.

This law and economics view generates tension because voluntary exchange, as a general matter, does not yield distributive results that are universally agreed upon.<sup>80</sup> This does not mean that the distribution of wealth and income in society is necessarily and irretrievably worsened through voluntary exchange, but it is true that free market exchange may not improve the situation unless and until a system of voluntary exchange

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<sup>75</sup> Luigi Zingales, *Corporate Governance*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW, 497, 497 (2002, Peter Newman ed.) (suggesting the importance of contracts but also asserting that such contracts will be incomplete, meaning that they will not fully specify the division of surplus in every possible contingency because this might be too costly or outright impossible). The surplus may reflect the advantages of specialization enabling firms to benefit from a comparative advantage in comparison with other forms of economic organization. I am indebted to R. Sean Alley for this observation. R. Sean Alley, January 27, 2010, Email on file with the author.

<sup>76</sup> Zingales, *supra* note \_\_\_ at 497.

<sup>77</sup> Greenfield, *supra* note \_\_ at 72 (citing Easterbrook & Fischel).

<sup>78</sup> Lynn Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1200 (2002).

<sup>79</sup> Hutchison, *Director Primacy*, *supra* note \_\_\_ at 1201.

<sup>80</sup> Hutchison & Alley, *Against Shareholder Participation*, *supra* note \_\_\_ at 47.

is offered as a substitute for markets that are controlled by government. The growth of “the corporate form has been aided by the fact that the distribution of wealth, [in society] although by no means equal, was not extremely lopsided. This meant, and continues to mean, that the large amounts of money capital needed to launch and sustain large business enterprises must be collected and aggregated into usable pools.”<sup>81</sup> A corporation “must solicit investors on a mass scale, not merely by private negotiations with a handful of very rich people.”<sup>82</sup> Moreover, capital aggregations, whether a result of private accumulation or produced by government fiat are essential for the formation of a large business entity. A large entity, given its size, will produce asymmetry in knowledge and power, and consequently, may yield uneven distributions of wealth and income. In privately-owned firms like government owned entities, the number of the investors (or citizens) inevitably signifies that many investors (or citizens) are likely to have little knowledge about and power over the actual running of such large enterprises.<sup>83</sup> Israel Kirzner explains that because knowledge is widely and unevenly dispersed, societies and economic entities, however they are organized, must confront the fact that neither knowledge nor the proper utilization of knowledge is given to anyone<sup>84</sup> including directors or government bureaucrats, in totality. In both types of enterprises—government or privately owned—an effort to coordinate, where parties/stakeholders have unequal access to dispersed knowledge, generates unequal power distributions and unequal incomes based on the interaction of incentives, risk, and agency costs.

To repeat, agency costs arise because self-interested managers retain discretionary power. This conduces to a familiar problem for all organizations including corporations, labor unions, and government regulatory agencies.<sup>85</sup> Although the existence of markets and the price system can sharply constrain agency costs within the corporate sector, discretionary power can corrupt, thus preventing managers from acting in the best interest of their constituency.<sup>86</sup> Depending on the type of institution at issue, these developments are further compounded by risk-aversion differentials among and between investors and

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<sup>81</sup> CLARK, *supra* note \_\_\_ at 3.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* (referencing privately owned firms).

<sup>84</sup> See e.g., ISRAEL M. KIRZNER, *THE MEANING OF MARKET PROCESS: ESSAYS IN THE DEVELOPMENT OF MODERN AUSTRIAN ECONOMICS*, 139 (1992, 1993).

<sup>85</sup> See CLARK, *supra* note \_\_\_ at 33.

<sup>86</sup> *Id.*

managers, rank and file union members and union hierarchs, and citizens and bureaucrats. Inside the boundary of corporate law as applied to large publicly-traded firms, all the above-referenced developments, including the division of the surplus, the solicitation and retention of capital, the presence of risk differentials, and the specter of agency costs, are outgrowths of the interaction of contractarianism and incentives that are coincident with uneven income and wealth distributions.<sup>87</sup> This is not to say, of course, that the evisceration of the privately owned corporate form will, a fortiori equalize income and wealth. Indeed, one should expect quite the opposite. Where alternatives to contractarianism exists, namely through efforts to increase the size and scope of government control, large disparities in the distributions of wealth and income arise, and such disparities are often permanent. Evidence from the both the Progressive era<sup>88</sup> and contemporary American economic history is consistent with this claim.<sup>89</sup>

### **III. GREENFIELD'S CORE CRITIQUE: LINKING CHOICE, PROGRESSIVE VALUES AND CORPORATE LAW**

It is likely that the existence of powerful product markets, capital markets, and managerial labor markets restricts the options available to corporate decision-makers.<sup>90</sup> Thus understood, markets often thwart attempts by policymakers to materially alter the substance of corporate actions.<sup>91</sup> Nonetheless, Greenfield endeavors to dismantle the contractarian foundations of corporate law by linking the presumed demise of the rational actor model and the corresponding assumption that choice is an unreliable construct. This move is provoked by the contention that current corporate governance arrangements entrench matrices of economic and social power that Progressives claim to oppose. In this view, once freed from the shackles of entrenchment, society is at liberty to pursue and

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<sup>87</sup> Hutchison & Alley, *Against Shareholder Participation*, *supra* note \_\_\_\_ at 48 (describing this possibility).

<sup>88</sup> *See infra*, Part IV.

<sup>89</sup> Matt Woolsey, *America's Richest Counties*, FORBES.COM, January 22, 2008, available at [http://www.forbes.com/2008/01/22/counties-rich-income-forbeslife-cx\\_mw\\_0122realestate\\_slide\\_12.html?thisSpeed=15000](http://www.forbes.com/2008/01/22/counties-rich-income-forbeslife-cx_mw_0122realestate_slide_12.html?thisSpeed=15000) (Showing that the persistent rise in government power and its corollary, wealth redistribution favoring the already well-off, can be illustrated by data showing that today, five of America's ten richest counties are located just outside of Washington, DC.). *See also, infra* Part IV.

<sup>90</sup> D. Gordon Smith, *Saving the World with Corporate Law? Response: The Dystopian Potential of Corporate Law*, 57 EMORY L. J. 985, 989 (2008).

<sup>91</sup> *Id.*



enforce social justice in the name of progress.<sup>92</sup> Resting on the lynchpin provided by social justice and progress, Greenfield's analysis is impelled by the contention that a dedication to liberty defined as respect for individuals' rights to make choices for themselves in a wide variety of contexts has often been a central component of the Progressive impulse.<sup>93</sup>

Greenfield argues that the notion of choice coincides with progress,<sup>94</sup> giving examples such as the progressive battle to defend abortion rights, eradicate poverty, and end discrimination based on sex or sexual orientation premised on the notion of human autonomy.<sup>95</sup> Because abortion laws shelter women's right to choose, because greater financial capability provides the poor with more economic opportunities, and because discrimination on the basis of race, gender and sexual orientation limits the choices of its victims, the focus on enlarging human choice has improved the lives of many.<sup>96</sup> Progress with its evolving respect for human dignity and autonomy,<sup>97</sup> he avers, has taken a prominent role as part of history's march from feudalism's dependence on status to modernity's dependence on contract.<sup>98</sup> Greenfield's description of modernity's march mirrors the claims of early Progressives who subscribed to a belief in an organic progress that would lead inevitably to a specific end for all of human history.<sup>99</sup>

Greenfield observes that modernity's march, has also contributed to a corporate law doctrine that has been buttressed by neoclassical economics.<sup>100</sup> On this view, existing corporate doctrine, has attained an undeserved pedigree because of its attachment to progressive language and discourse. Although Greenfield appears to endorse the expansion of choice in certain arenas of human life premised on the apparent view that individuals who operate in such arenas are rational actors capable of intentionality, he opposes extending respect for choice to the corporate law framework because it precludes

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<sup>92</sup> See Greenfield, *supra* note \_\_\_ at 68 (describing the demise of laissez-faire and the *Lochner* era).

<sup>93</sup> See e.g., *id.* 62.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 68-69 (describing the move to make so-called "real" choice available).

<sup>96</sup> *Id.* at 68-69.

<sup>97</sup> *Id.* at 62.

<sup>98</sup> *Id.*

<sup>99</sup> PESTRITTO, *supra* note \_\_\_ at 14. See also Greenfield, *supra* note \_\_\_ at 62 (describing modernity's march).

<sup>100</sup> Greenfield, *supra* note \_\_\_ at 62-3

effective reform of current power relationships within the firm.<sup>101</sup> Signifying that parties to voluntary agreements in the economic sphere suffer from a disabling ecological fragility, Greenfield concludes that reifying choice, protects the powerful while excluding the weak (stakeholders traditionally left out of the corporate power structure) from corporate decision-making.<sup>102</sup> After supplying an exposition of the role of choice during the past century, Greenfield canvasses the *Lochner* era in order to provide evidence of the misuse of choice rhetoric. While the actual historical data relating to the *Lochner* era defies most of his conclusions,<sup>103</sup> Greenfield relies on “progressive” ideals that have catalyzed the modern march of history toward progress in order to dispute dominant forms of legal scholarship that depend on contractarian conceptions of corporations. Based on this highly contingent reading of choice, Greenfield posits that choice cannot be America’s touchstone within the corporate arena.<sup>104</sup> Taken as a whole this analysis suggests that the current corporate governance paradigm represents an evolutionary outlier in history’s inexorable march toward progress. As such, this doctrine is a candidate for expurgation.

While Greenfield’s examination of the use of the language of choice in a number of legal and political debates appears highly selective,<sup>105</sup> and although the connection between issues such as abortion, public school desegregation, and corporate law suffers from chronic obscurity, he links these various concerns rhetorically. Reflecting an attempt to connect disparate modes of analysis and diverse subjects, Greenfield’s paradigm mirrors a blastula of cells undergoing mitosis that constantly proliferates new divisions and differentiations but in the end constitutes the reshuffling of old decks.<sup>106</sup>

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<sup>101</sup> *Id.* at 61-62.

<sup>102</sup> *Id.* at 63.

<sup>103</sup> Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 294, 295 (1913) (showing that during the period between 1887 to 1911 inclusive, the United States Supreme Court rendered over 560 decisions based the due process and equal protection clauses of the Fourteenth Amendment involving the validity of state statutes or other forms of state Action, and in only two cases other than *Lochner* itself, did the Court invalidate any state law involving a social or economic question of the kind included under the phrase “social justice” legislation). *See also*, DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICAN, LABOR REGULATIONS, & THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 2 (2001) (“*Lochnerism* was never consistently practice. Even at the height of the *Lochner* era, from 1923-1934, federal and state courts upheld the vast majority of challenged regulations.”).

<sup>104</sup> Greenfield, *supra* note \_\_\_ at 82.

<sup>105</sup> *Id.* at 63 (examining such issues as school vouchers, pornography, abortion, regulation, and civil rights).

<sup>106</sup> PETER H. SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE, 3 (2003).

Greenfield's perspective is linked to a constellation of statist beliefs that surfaced more than 120 years ago, which were influenced by German ideas dating back to Otto von Bismarck.<sup>107</sup> This viewpoint snubs both the wisdom and the leadership potential of the common citizen. Instead of permitting common citizens to sit at the table, this view is imbued with the questionable supposition that experts in the form of a highly educated, unelected, and unaccountable bureaucracy<sup>108</sup> ought to mold society like clay.<sup>109</sup> Equally controversial, this perspective is infected by the presumption that liberty is not found in freedom from state action but rather in one's obedience to the laws of the administrative state.<sup>110</sup> This standpoint is made manifest by the rejection of individualism and the installation of hierarchs who, as trusted members of the philosophic phalanx, are given power to steer the nation through transformation.<sup>111</sup> Despite the difficulty of reconciling current conceptions of radical human autonomy with the original understanding of the Progressive outlook,<sup>112</sup> the Progressive position in contemporary times has been reconfigured to reflect a stronger commitment to personal autonomy and freedom in arenas such as abortion and civil rights while remaining true to Progressives' ongoing insistence on greater government control and regulation within the economic sphere. The latter urge has arguably been aided by the postmodern inference that human freedom in the economic arena is simply another form of coercion permitting weak stakeholders to languish under the contested umbrella of choice.<sup>113</sup>

Greenfield contrasts the reliance of Progressives and the political left on choice as a vehicle to advance their agenda in the past<sup>114</sup> with the proposition that the political right

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<sup>107</sup> JONAH GOLDBERG, *LIBERAL FASCISM: THE SECRET HISTORY OF THE AMERICAN LEFT: FROM MUSSOLINI TO THE POLITICS OF MEANING* 94-95 (2007).

<sup>108</sup> See PESTRITTO, *supra* note \_\_\_\_ at 72 (describing Wilsonian and Hegelian conceptions of the modern progressive state).

<sup>109</sup> GOLDBERG, *supra* note \_\_\_\_ at 95.

<sup>110</sup> PESTRITTO, *supra* note \_\_\_\_ at 55 (describing this Wilsonian conception of the progressive state).

<sup>111</sup> See e.g., GOLDBERG, *supra* note \_\_\_\_ at 86-91 & 104 (2007) (discussing the leader of the progressive movement, Woodrow Wilson's "Great man" thesis and his attempt to convert the Democratic Party into a progressive party and make it the engine for the transformation of America).

<sup>112</sup> PESTRITTO, *supra* note \_\_\_\_ at 46 (describing Wilson's critique of individualism).

<sup>113</sup> This maneuver is arguably consistent with the conclusion that postmodern commentators are profoundly disillusioned with the capacity of the mind's reasoning ability to operate as a force for the good. Thus appreciated, the possibility of human freedom linked to humans' reasoning ability is disparaged by claiming that the exercise of human freedom through choice is tainted by incapacity. Hence, commentators accepting this view may claim that human freedom operationalized through choice is an illusion. See generally, TEN ELSHOF, *supra* note \_\_\_\_ at 68-69.

<sup>114</sup> Greenfield, *supra* note \_\_\_\_ at 68-69.

has now captured this idea.<sup>115</sup> He argues that the latter move has been used to illegitimately defend the status quo.<sup>116</sup> Referring back to his rumination on the status of *Lochnerian* jurisprudence,<sup>117</sup> he maintains that the *Lochner* decision with its dependence on freedom contract suppositions is the paradigmatic illustration of how courts, politicians, and policy makers have used “freedom of economic choice” as a principle in order to force workers to endure unsafe conditions.<sup>118</sup> He claims that the *Lochner* Court’s conception of choice was not very robust because it disregarded the constraints facing workers in the contracting process.<sup>119</sup> Conversely, he seems to ignore constraints that highly deficient public schools impose on the education of poor and minority children<sup>120</sup> by proffering the thin claim that choice exacerbates existing educational disparity.<sup>121</sup> Despite presenting various claims supporting choice outside the corporate arena and opposing it within the domain of corporate law, Greenfield, throughout his article provides analysis that is devoid of any criterion or principle for resolving choice conflicts among disparate parties within and outside the corporate setting.<sup>122</sup> Exhibiting no discomfiture with his failure to address such an obvious analytical gap, he persistently revisits the following theme: the notion of choice as a representation of individual preferences and as defended by neoclassical economics tends to safeguard and uphold existing matrices of economic and social power.<sup>123</sup> Greenfield, accordingly, issues the following charge: the domain of corporate law has become unjustifiably defended by its dependence on the view that a corporation represents rational participation by actors who freely enter into voluntary agreements. Still, drawing inspiration from Charles Warren’s tussle with the Progressive Era, it should be acknowledged that there “is a grave danger

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<sup>115</sup> *Id.* at 65 (discussing such issues as the privatization of social security and gay rights).

<sup>116</sup> *Id.* at 66-76.

<sup>117</sup> *Id.* at 66-68 (offering *Lochner v. New York* as case study in the use of choice to protect the status quo).

<sup>118</sup> *Id.* at 67-68.

<sup>119</sup> Greenfield, *supra* note \_\_ at 67.

<sup>120</sup> See e.g., ABIGAIL THERNSTROM AND STEPHAN THERNSTROM, NO EXCUSES: CLOSING THE RACIAL GAP IN LEARNING, 11-23 (2004) (describing America’s public education crisis tied to deficient schools and explaining how the crisis disproportionately and adversely effects African American students).

<sup>121</sup> Greenfield, *supra* note \_\_ at 78.

<sup>122</sup> See *infra* Part IV (discussing school choice and school desegregation and other issues).

<sup>123</sup> Greenfield, *supra* note \_\_\_\_ at 62-63.

that through constant iteration the truth of this charge will be assumed, and the discussion will be confined to the form of the remedy needed.”<sup>124</sup>

Greenfield’s charge and his chosen remedy emulate the views of corporate law scholar James McConvill, who counsels that society ought to move away from the self-referential world of economics and embrace a more robust kind of rationality that is more enlightened and more considered as the axiomatic forces of neoclassicalism are placed on the run.<sup>125</sup> McConvill offers a new paradigm of rationality wherein decisions are not rational simply because an economist thinks they are, but because the decisions are in the best interest of the decision-maker.<sup>126</sup> Whereas McConvill’s approach is primarily aimed at expanding shareholder participation as an end in itself,<sup>127</sup> Greenfield’s analysis appears to adopt McConvill’s skepticism toward rationality but seeks to broaden the category of decision-makers within the firm beyond the limits specified by McConvill by including all corporate stakeholders that have been traditionally left out of the corporate power structure.<sup>128</sup> Hypothetically, this move would empower the weak and diminish the influence of the strong.<sup>129</sup> As evidenced by his previous scholarly writings, Greenfield desires to reform corporate law by eliminating its current shareholder-centric/director-primacy focus<sup>130</sup> and instead refocus corporate governance on improving labor relations, saving the environment, and protecting human rights.<sup>131</sup>

Finally, without endeavoring to plumb the depths of this issue, Greenfield reasons that society should move beyond “mere” choice by offering consent as a substitute because society needs something else.<sup>132</sup> This approach implies that society through regulation ought to superintend economic decision-making. This Pigouvian/public

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<sup>124</sup> Warren, *supra* note \_\_\_ at 294.

<sup>125</sup> James McConvill, *Shareholder Empowerment As an end in Itself: a New Perspective on Allocation of Power in the Modern Corporation*, 33 OHIO N. U. L. REV. 1013, 1058 (2007).

<sup>126</sup> *Id.*

<sup>127</sup> See generally, *id* at 1013-1059.

<sup>128</sup> Greenfield, *supra* note \_\_\_ at 61-62.

<sup>129</sup> *Id.* at 63 (describing how choice protects the powerful and implying that eliminating choice will benefit the weak).

<sup>130</sup> See e.g., KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* (2007). See also, Smith, *supra* note \_\_\_ at 985-1010.

<sup>131</sup> Smith, *supra* note \_\_\_ at 994.

<sup>132</sup> Greenfield, *supra* note \_\_\_ at 80.

interest maneuver<sup>133</sup> would represent a turn toward paternalism supplied by an expansive conception of the state. Although it is far from clear that government, however large, is capable of collecting and using all of the information needed to identify and correct for market failures, and while public choice analysis has identified the failings of an idealized view of regulation,<sup>134</sup> Greenfield's dependence on regulation follows Woodrow Wilson's pioneering claim that the regulatory power of the state is not a threat to individual freedom because the state is a compliant organ of the will of the people.<sup>135</sup> Offering an analogy tied to discussions of formal neutrality in the fields of constitutional law and political philosophy, and asserting that the emphasis on the concept of formal equality has now been transmuted into something else because neutrality replicates existing power relationships, Greenfield endeavors to fashion a parallel transformation in the arena of corporate law.<sup>136</sup> This gives rise to a question of what he really offers instead of choice? Putatively, Greenfield presents the notion of consent (perhaps supervised by the government?) on grounds that consent is more robust than choice because it implicates one's capacity to make decisions after having considered alternatives.<sup>137</sup>

It is not clear how he reaches this position because he asserts but fails to prove the predicate claim that choice cannot explain or excuse anything because it explains nothing.<sup>138</sup> Equally clear, he cannot demonstrate that the firm's stakeholders, including shareholders—who have voluntarily entered into arrangements with the corporation—have failed to consider their alternatives. His emphasis on regulating economic affairs follows an early progressive opinion suggesting that citizens should not be permitted to “choose” their own way to evolve, adapt, or agree but instead, they should be subject to the common will embodied in the administrative state mandating the “correct” outcome

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<sup>133</sup> Arthur Cecil Pigou suggested that market failure occurs when private parties fail to fully internalize the costs of their behavior, and this development requires government intervention (regulation) to ensure full costs internalization. Building on this view, the public interest model of government assumes that government can identify various deficiencies in private market orderings in order to encourage private actors to account for the divergence between private costs and total costs, thus promoting socially beneficial outcomes. *See e.g.*, MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 44-45 (2009)

<sup>134</sup> *Id.* at 45.

<sup>135</sup> PESTRITTO, *supra* note \_\_\_ at 77.

<sup>136</sup> Greenfield, *supra* note \_\_\_ at 81.

<sup>137</sup> *Id.* at 81-82.

<sup>138</sup> *Id.* at 82.

in economic matters.<sup>139</sup> On the other hand, with respect to selected noneconomic matters, Greenfield asserts that the rhetoric of choice legitimates progressive preferences favoring abortion rights and civil rights. This obvious discrepancy implies that where the outcome is perceived to be “correct,” from a progressive standpoint, no paternalistic intervention is required. Returning to the corporate law arena, the question becomes: Have investors considered alternatives before placing their funds in a corporation? Do investors have the capacity to make such decisions and which investors lack such capacity? Have workers considered other available employment options before agreeing to place their human capital in the firm? And if choice is a coercive illusion that should not be taken seriously as Greenfield suggests,<sup>140</sup> will the notion of consent yield a different result?

Throughout his article, Greenfield relies on issues that are attenuated from corporate law, but as the next section illustrates, whatever the merits of his approach, it is destabilized by a number of problems. Problems arise for two reasons: (A) his reliance on Progressive thought and values and (B) his over-reliance on behaviorist analysis. Complexity also emerges because it is difficult to see how Greenfield’s consent architecture differs from the notion of choice, which represents the revealed preferences of participants in a wide variety of settings outside the domain of corporate law.

#### **IV. ASSESSING GREENFIELD’S APPROACH**

##### **A. THE UNRELIABILITY OF CHOICE IN THE MIRROR OF BROADENED PARTICIPATION**

Although he aims to broaden corporate participation, impenetrability attends much of Greenfield’s analysis because he does not fully articulate who ought to be the ultimate decision-maker or the precise circumstances under which stakeholder decisions ought to be respected. More curiously, Greenfield fails to specify how stakeholders, currently excluded from the corporate power structure, will participate in a newly constituted governance structure that meets his preferences. In connection with this quandary, consider the following set of questions: Will excluded stakeholders be allowed to participate if they choose? Will they be required to participate because they cannot reliably refrain from participating? Will their participation constrain the participation of

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<sup>139</sup> PESTRITTO, *supra* note \_\_\_ at 83 (describing Wilson’s viewpoint).

<sup>140</sup> Greenfield, *supra* note \_\_\_ at 82.

those who are currently participating, mandating a reconfiguration of existing contract rights, economic returns, and the division of the corporate surplus? All of these questions are reinforced by Greenfield's foundational assertion that "people's actual choices are hardly a reliable method by which to make economic judgments."<sup>141</sup> If that claim accurately describes all human actors, then it ought to apply to newly empowered stakeholders, meaning their choices may be suspect unless robustness can be added to their preferences and their decision-making prowess. On this basis, Greenfield's approach begins to unravel.

It is worth noting that unlike Robert Clark, who discards contractarian theory in favor of regulatory regime<sup>142</sup> concentrating on the legal system's attempt to control managerial discretion with reference to unfair-self-dealing,<sup>143</sup> Greenfield disagrees with the nexus of contracts view largely on grounds that the doctrine of choice yields an ostensibly deficient outcome. He disputes the claim offered by contractarians that because shareholders can learn about companies from information freely available and can sell stock in a fluid securities market, their implicit, if not explicit, choice adequately defends the consequences of their shareholding.<sup>144</sup> Since Greenfield declines to supply a criterion, an infeasible principle, or even a rationally contestable claim for deciding when choice rhetoric is legitimate, his analysis is tenebrous. He seems willing to defend choice in outcomes he prefers, such as abortion, while contesting the use of choice when it conduces to outcomes he disfavors. His selective approach is outcome-dependent and appears to rest on nothing more compelling than his preferences.

Although leading corporate law scholars such as Lucian Bebchuk are engaged in efforts that are designed to increase shareholder power and wealth facilitated by placing constraints on board entrenchment and correlative agency costs,<sup>145</sup> Greenfield prescinds from such a focus. Declining to concentrate on improving corporate performance or improving efficiency in order to maximize shareholder returns, Greenfield's agenda is driven by a broad but not fully specified concern for the weak. That is individuals and

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<sup>141</sup> *Id.* at 78.

<sup>142</sup> Klausner, *supra* note \_\_\_ at 780 (citing ROBERT C. CLARK, *CORPORATE LAW* 29, 34 (1986)).

<sup>143</sup> CLARK, *supra* note \_\_\_ at xxiii, 33-34 & 157 (supporting categorical rules that limit managerial discretion with reference to self-dealing, even when shareholders expect it).

<sup>144</sup> Greenfield, *supra* note \_\_\_ at 72-73.

<sup>145</sup> *See e.g.*, Lucian Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 835, 847-50 (2005) (raising a number of proposals that might increase the power of shareholders).



groups, he imagines, are disadvantaged by the rhetoric of choice. But if Coasean analysis is correct, attempts to disperse corporate decision-making in ways that Greenfield favors are likely to undermine the firm by disrupting the very mechanism that makes the public corporation practicable.<sup>146</sup> Additionally, Greenfield's paradigm will plausibly increase agency and other costs, which will decrease shareholder returns.<sup>147</sup> Equally problematic, dispersed decision-making gives rise to collective action problems that are likely to envelop shareholders and employees as well as other individuals and groups that Greenfield wishes to include in his calculus of decision-making.<sup>148</sup>

Although it seems clear that Greenfield's focus on corporate decision-making extends beyond shareholders to non-shareholders constituencies,<sup>149</sup> consider the problems that will be inherent in the collective decision-making process of shareholders. In order to make value enhancing decisions, widely dispersed or atomized shareholders will have to cultivate some process enabling collective rationality in order to resolve their often conflicting interests. If behavioralist scholars are correct with respect to the unreliability of choice, then collective rationality and choice may be just as untrustworthy as individual choice. Additional difficulties surface reflecting the possibility of strategic behavior because of the promise of "empty voting" by hedge funds and because labor unions and other self-interested activist shareholders may not fully internalize the costs of their participation.<sup>150</sup> These costs will be placed on other shareholders, directors and other institutions,<sup>151</sup> requiring courts to reconfigure or invent fiduciary duties in order to

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<sup>146</sup> Stephen M. Bainbridge, *Is 'Say on Pay' Justified?*, REGULATION 42,46 (Spring, 2009) [hereinafter, Bainbridge, 'Say on Pay'] (suggesting that additional shareholder involvement in decision making seems likely to disrupt the practicality associated with the vesting of authoritative control in the board of directors) Ajay Gupta reinforces this claim by showing that while technological improvements such as collaborative web portals and web voting may mitigate the logistical nightmare of dispersed decision-making, such innovations will not reduce the cost of collective decision-making. Statement of Ajay Gupta, January 17, 2010, Email on file with the author.

<sup>147</sup> See e.g., Hutchison & Alley, *The High Cost of Shareholder Participation*, *supra* note at 948-6.

<sup>148</sup> See e.g., Hutchison & Alley, *Against Shareholder Participation*, *supra* note \_\_\_ at 58 (discussing collective action difficulties).

<sup>149</sup> Smith, *supra* note \_\_\_ 95-996 (describing Greenfield concern for non-shareholder decision-making).

<sup>150</sup> See Henry T. C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811, 814-23 (showing that when hedge-fund operators participate, they may not fully internalize the costs of their participation).

<sup>151</sup> Hutchison & Alley, *The High Costs of Shareholder Participation*, *supra* note \_\_\_ at 961 (shareholder participation by some investors would likely require the participation of shareholders that are disinclined to participate because they would have to evaluate the risks that others' participation would have an adverse effect on the value of potential investments available within the market).

constrain such behavior.<sup>152</sup> For instance, broadening shareholder and stakeholder participation may disempower corporate managers, thus providing them with financial incentives to engage in erratic and deceptive insider behavior.<sup>153</sup> As R. Sean Alley and I have argued elsewhere, the unavoidable presence of incentives triggers persistent problems for efforts aimed at broadening participation. For instance:

Divorcing control from [managers'] internal knowledge may . . . ensure that management does not bear the full brunt of managers' misbehavior. Corporate managers would have the opportunity to deflect attention from their errors by concentrating on the errors of participatory shareholders. Fraudulent behavior is likely to follow, as weak managers must try to influence strong yet uninformed shareholders. The inclusion of additional and highly divergent interests [within the calculus of decision-making] may permit managers, for example, to pursue their own interest by pitting employees and shareholders against one another. This gives rise to a perplexing paradox wherein the implementation of shareholder participation as a component of shareholder sovereignty conduces toward less, not more, managerial accountability.<sup>154</sup>

Broadened corporate participation may not be in the best interest of the firm because it creates opportunities for all sorts of self-interested behavior by investors, creditors, and rank and file employees as well as managers. Since self-interested managers, for example, might maximize their economic returns by sheltering their interest through selective disclosure of information to shareholders,<sup>155</sup> the board of directors may then be called upon to create ways of curbing such managerial misbehavior. This effort will likely increase agency costs. Recall Kirzner's luminous insight and its implication: since knowledge is widely and unevenly dispersed, it follows that its diffusion will generate

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<sup>152</sup> *Id.* at 961-62.

<sup>153</sup> *Id.* at 967.

<sup>154</sup> *Id.* at 957.

<sup>155</sup> *See e.g., id.* at 957.

unequal power distributions and unequal incomes based on the interaction of incentives, risk, and agency costs.

Appropriately appreciated, Greenfield's proposal envisions a further dispersal of decision-making, but unleashes powerful incentives among agents, who could shelter their misbehavior from the reach of existing fiduciary obligations by claiming their self-interested disclosures were mandated by the need to improve the flow of information to poorly informed participating stakeholders. To be clear, the claim that expanded stakeholder governance leads to diminished accountability of corporate managers is not new. "This so-called 'two-masters problem' has been thoroughly advanced in the existing literature and proponents of stakeholder governance have answered the charge."<sup>156</sup> Nevertheless, broadened participation, normatively considered, should require that the newly empowered participants, whether employees, investors, or other stakeholders, take responsibility and share both the blame and the costs for corporate underperformance. This is so because even in a world without self-dealing or other forms of agency costs, it is likely that corporate underperformance would be required by the adoption of Greenfield's utopian vision.<sup>157</sup> In order to accommodate Greenfield's approach, corporate boards would have to make decisions that frequently sacrifice "shareholder value in favor of value for non-shareholder constituencies."<sup>158</sup> This means that opportunities for opportunism by those who are included in current corporate governance arrangements would be transmuted into the problem of opportunism by excluded stakeholders.<sup>159</sup> Nor is that the only problem because the problem of opportunism may be compounded by impracticality, the impracticality of incorporating broadened participation in firm governance. Indeed, Ralph Nader argues that "[i]t seems impossible to design a general 'interest group' formula which will assure that all affected constituencies of large industrial corporations will be represented and that all constituencies will be given appropriate weight."<sup>160</sup> The impracticality hypothesis is advanced by inspecting ongoing efforts to change corporate decision-making as a way to improve firm performance.<sup>161</sup>

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<sup>156</sup> Smith, *supra* note \_\_\_\_ at 1007-1008.

<sup>157</sup> *Id.* at 1008.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 996.

<sup>161</sup> *Id.* at 999.

For example, investigations of the connection between proposals to create independent boards of directors and corporate performance indicate that such proposals, when implemented, suffer from a lack empirical support.<sup>162</sup>

Further, Greenfield's line of attack does not account for the diversity of contractarian views. Greenfield appears to target Daniel Fischel and Frank Easterbrook but fails to address the nuanced views of Stephen Bainbridge.<sup>163</sup> Bainbridge's work adopts many of Fischel and Easterbrook's conclusions but modifies their work by including bounded rationality as an explanatory norm for human behavior. For instance, Bainbridge accepts the notion of bounded rationality and argues that vesting authority within the board of directors is an adaptive response to this problem.<sup>164</sup> Bounded rationality reflects the probability that limited cognitive ability constrains human problem-solving and acknowledges the fact that people sometimes make choices that are not in their long-term interest as well as the fact that humans are often willing to sacrifice their own interest to help others.<sup>165</sup> Such analysis reveals that individual preferences are decisive in the formation of policy and the allocation of resources<sup>166</sup> and indicates that within the domain of corporate law bounded rationality pulls commentators toward some version of contractarianism based on respect for individual autonomy and choice. The presence of bounded rationality does not prevent Bainbridge from deducing that an effort to achieve optimal trade-offs between authority and accountability within the firm mandates that the board of directors retain essentially unreviewable authority.<sup>167</sup> This perspective is complemented by Frank Knight's observation that the existence of uncertainty leads inevitably to the centralization of decision-making authority.<sup>168</sup>

Greenfield opposes the supposition that the present state of affairs results simply from uncoerced decisions by individuals that determine their current situation. Echoing

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<sup>162</sup> *Id.*

<sup>163</sup> BAINBRIDGE, CORPORATION LAW AND ECONOMICS, *supra* note \_\_\_ at 27-33.

<sup>164</sup> *See e.g., id* at 25-26 & 209-210.

<sup>165</sup> Hutchison & Alley, *Against Shareholder Participation*, *supra* note \_\_\_ at 50.

<sup>166</sup> *Id.* at 51.

<sup>167</sup> STEPHEN BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE (2008). For a critique of Bainbridge's approach, see Brett H. McDonnell, *Professor Bainbridge and the Arrowian Moment: A Review of the New Corporate Governance in Theory and Practice*, 34 DEL. J. OF CORP. LAW 139-190 (2009) (contending among other things that Bainbridge's use of Kenneth Arrow's analysis is largely misplaced).

<sup>168</sup> COASE, THE FIRM, THE MARKET AND THE LAW, *supra* note \_\_\_ at 49 (quoting Knight).

the Progressives' early contention that the inevitable destination of history requires the regulation of human freedom,<sup>169</sup> Greenfield implies the necessity of societal constraint on liberty because human freedom in the form of choice undermines "progressive" efforts to change power relationships. Hence, he remains unmoved by analysis showing that existing levels of managerial discretion are tempered by three things: (1) the prospect that investors will discount the price of equity, (2) the likelihood that creditors will demand a risk premium, and (3) that states are deterred from adopting excessively pro-management governance arrangements by competition among states.<sup>170</sup> Evidently, Greenfield remains unpersuaded by Bainbridge's embrace of shareholder weakness despite the fact that such a move reflects the vitality of default rules for investors,<sup>171</sup> which arise in a world of uncertainty and bounded rationality. Correctly appreciated, bounded rationality supports rather than detracts from contractarianism based on voluntary agreements that exclude many stakeholders from corporate decision-making. This remains true despite the observation that a substantial experimental literature documents that human actors are subject to bounded rationality, errors in judgment and non-standard preferences.<sup>172</sup> This is so because law and economics scholars searching for predictive power and testable hypotheses,<sup>173</sup> have little difficulty integrating useful findings of psychologists and behavioralists<sup>174</sup> while disputing behavioralist claims when they rest on experimental as opposed to empirical observations.<sup>175</sup>

Returning to the now familiar problem of incentives, it is noticeable that Greenfield fails to articulate how incentives affect people's decisions to invest in a firm or work for a corporation or how incentives will effect decision-making, when and if his objective of broadened participation is achieved. Nor does this failing stand in isolation. Part IV C

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<sup>169</sup> PESTRITTO, *supra* note \_\_\_ at 77-79 (quoting Wilson as supporting a rise in the discretionary power of the modern state).

<sup>170</sup> See e.g., Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 199 HARV. L. REV. 1, 3-4 (2006) [hereinafter, Bainbridge, *Director Primacy*] (suggesting that competition among firms and among states leads to a race to the top hypothesis thus enabling shareholders, if they wish, to obtain more control and concluding that the evidence implies that shareholders do not value an expansion of the shareholder franchise, Bainbridge concludes that existing governance arrangements reflect investors' preference for existing arrangements).

<sup>171</sup> Bainbridge, *Director Primacy*, *supra* note \_\_\_ at 2.

<sup>172</sup> Wright, *supra* note \_\_\_ at 471.

<sup>173</sup> *Id.* at 474-75 (showing that behavioral claims do not generate greater predictive power than standard neoclassical price theoretic analysis).

<sup>174</sup> *Id.* at 472 n. 4 (citing Henry Manne).

<sup>175</sup> *Id.* at 474-475.

shows that Greenfield ignores incentives in his peroration on Progressive values and the usefulness of regulation. This failure is striking because after all, incentives affect all humans regardless if they suffer from bounded rationality or not, including labor unionists, government officials, or investors. Incentives, for example, appear to explain why public school teachers' unions oppose school vouchers and school choice in the form of chartered public schools. Reclaiming our focus on the firm, all stakeholders, including directors, officers, mid-level and lower-level employees, creditors, and other suppliers of capital (shareholders) are affected by incentives as leading behavioralists, Sunstein and Thaler, suggest in their conception of choice architecture.<sup>176</sup> They conclude choice architects must think about incentives when they design a system and hope to provide the right incentives for the right people<sup>177</sup> to avoid, if possible, incentive conflicts.<sup>178</sup>

Sunstein and Thaler argue the most important modification that must be made to a standard analysis of incentives is salience.<sup>179</sup> But assuming *arguendo* the validity of this contention, over a period of time investors, creditors, and employees—impaired by bounded memories and the possibility of error—can judge whether they are adequately rewarded for the risks they take, which reinforces the claim that a legal regime validating voluntary arrangements can be adequately defended on grounds of choice. Whether this analysis is completely correct or not, Greenfield appears to ignore the possibility that the domain of corporate law and its concomitant choice rationale rest on more than irrationality. Nor does he offer a workable alternative that fully accommodates his foundational claim that choice is inherently unreliable.

#### **B. HUMAN CHOICE IN THE MIRROR OF GREENFIELD'S PREFERENCES?**

Additional complications emerge because the persuasive force of Greenfield's foundational claim depends on a wide variety of issues that seem unrelated to corporate law, wherein he insists that certain types of choices are not in the best interest of the decision-maker. For example, returning to the school choice debate, Greenfield suggests that parents from disadvantaged groups who opt to enroll their children in private schools

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<sup>176</sup> THALER AND SUNSTEIN, *supra* note \_\_\_ at 97-100.

<sup>177</sup> *Id.* at 97.

<sup>178</sup> *Id.* at 98.

<sup>179</sup> *Id.* at 98 (suggesting that the question of whether choosers actually notice the incentives they face should be modified, and the answer, in free markets, is generally yes).

funded through vouchers could not reliably prefer school choice to existing educational arrangements<sup>180</sup> despite ample evidence showing that existing public school options confer advantages on the rich while disfavoring the poor. Although the public school monopoly constitutes a powerful vehicle granting exceptional economic advantages to the rich, Greenfield's analysis implies that society could not dependably accept the conclusion that poor parents in the city of Detroit or Washington, D.C. prefer to leave public schools that currently operate as dropout factories<sup>181</sup> and instead opt to place their children in private schools. If Greenfield is correct, then the choice of minority parents to use vouchers should not be respected, and instead, they ought to be coerced into placing their children in highly deficient public schools and submit to the reigning tenets of liberal hegemony.<sup>182</sup> But if Greenfield's analysis is defensible with respect to school choice, how can society decide that a poor woman's decision to choose an abortion (an outcome that comports with Progressive values) is reliable and worthy of society's respect either? It is difficult to see how clarity emerges from the ambiguity Greenfield offers as a basis for disrespecting the choices that individuals and groups make in American society. Nor, as the next subsection demonstrates, does clarity emerge from his surrender to Progressive values.

### **C. THE PROGRESSIVE ERA AS A PARAGON OF PROGRESS OR ENTRENCHED POWER?**

Greenfield tenaciously adverts to the progressive imagination in order to bolster his analysis, but some background may be useful in understanding his approach. The Progressive Era surfaced at the federal level during President Theodore Roosevelt's administration in response to the Gilded Age and became reified by the New Deal. Progressive ideals infused with Herbert Spencer's thinking, were essentially a variant of

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<sup>180</sup> Greenfield, *supra* note \_\_ at 78 (contesting the value of school choice and claiming that this initiative worsens the educational environment). *But see*, JAY GREENE, EDUCATION MYTHS: WHAT SPECIAL INTEREST GROUPS WANT YOU TO BELIEVE ABOUT OUR SCHOOLS---AND WHY IT ISN'T SO 147-216 (2005) (showing that the highest quality research consistently shows that vouchers have positive effects for students who receive them, notwithstanding the fact that private schools receive less money per-child and are more racially integrated than the public system, which taken together, tends to improve public schools because they face competition).

<sup>181</sup> *Michigan Stung by study's dropout list: 78 high schools called 'dropout factories by college report; state officials reject claims*, THE DETROIT NEWS, October 30, 2007 available at <http://www.detroitnews.com/apps/pbcs.dll/article?AID=/20071030/SCHOOLS/710300376/1409/METRO> (describing the results of a Johns Hopkins University study showing that approximately 75% of Detroit high schools are dropout factories).

<sup>182</sup> *See generally*, Harry G. Hutchison, *Liberal Hegemony? School Vouchers and the Future of Race*, 68 MISSOURI L. REV., 559 (2003).

English utilitarianism with a more developed argument on progress through evolution.<sup>183</sup> To be fair to Progressives, Darwinian thought as exemplified by Spencer could be taken in both a laissez-faire and statist direction.<sup>184</sup> Rejecting the notion of a republic founded on the natural rights tradition in favor of a living constitution,<sup>185</sup> and pursuing hegemony in virtually every aspect of the nation's life, Progressives ultimately succumbed to the fiction that progress required the supervision of an educated class trained for leadership.<sup>186</sup> As part of this fiction, no fundamental change in the human nature was necessary. Instead, all that was required was a fundamental change in the structure of society, an evolution from the free market to a statist economy that would "open a golden future to humanity."<sup>187</sup> On Greenfield's account, progress toward this golden future necessitated the deployment of Progressive values and the concomitant surrender to regulation as a vital counterweight to the liberty of contract jurisprudence which surfaced during the *Lochner* era commencing in the early part of the 20<sup>th</sup> century.<sup>188</sup> Although, liberty of contract dogma was never absolute<sup>189</sup> and although Greenfield concedes that choice rhetoric can be a potent force in politics and law<sup>190</sup> supporting or undermining the status quo,<sup>191</sup> it is doubtful that Professor Greenfield's dependence on behaviorist analysis and social justice rhetoric fashions a useful attack on entrenched power. A more evenhanded inspection of the origins of ingrained power emphasizing the particular arenas of employment and modern corporate law, or alternatively the realm of the modern nation-state, finds Progressives themselves frequently defending accumulations

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<sup>183</sup> PESTRITTO, *supra* note \_\_\_ at 11.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* (describing Wilson's affinity for Burke and his skepticism for natural rights).

<sup>186</sup> *Id.* at 11-12.

<sup>187</sup> Smith, *supra* note \_\_\_ at 987-988 (describing the statist dream leading to a golden future).

<sup>188</sup> Among the most heavily criticized decisions of the *Lochner* era were, *Locher v. New York*, 189 U.S. 45 (1905) (striking down state law regulating bakers' hours because it interfered with the liberty of contract protected by the 14<sup>th</sup> Amendment's due process clause); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down the Keating Owen Child Labor Act); *Bailey v. Drexel Furniture*, 259 U.S. 20 (1922) (striking down a Federal effort to use Congress's taxing power to deter the employment of children).

<sup>189</sup> Warren, *supra* note \_\_\_ at 296-297 (essentially showing that the liberty of contract rationale did not prevent the Supreme Court from upholding a significant number of state laws that regulated wages, including hours of work).

<sup>190</sup> Greenfield, *supra* note \_\_ at 62.

<sup>191</sup> *Id.* at 63 & 66 (arguing that the use of choice rhetoric can be contradictory depending on the context).



of power that comport with their inclinations. This move coincides with the onset of authoritarianism that plagues modern democracies.<sup>192</sup>

Attending to this issue both broadly and perceptively, philosopher John Gray intuits that existing matrices of social and economic power in Western democracies have been more than adequately defended by private interest-groups in the name of the public interest.<sup>193</sup> Insofar as it is possible to achieve private aims and objectives through government processes more efficiently than by relying on market processes,<sup>194</sup> many groups and oligarchs endeavor to seize government power in order to attain private gain at the expense of others. Gray's incisive contribution to our understanding of modern mass democracies concludes that modern states overwhelmingly fail to promote the public interest.<sup>195</sup> Against the classical conception of the state as the provider of public goods—goods, that is to say, which in virtue of their indivisibility and non-excludability must be provided to all or none—*modern states have become suppliers of private goods*.<sup>196</sup> Given the enriching possibilities associated with capture, John Gray shows that interest groups such as trade unions and other largely autonomous institutions, which populate the West, have an incentive to become tools of political advantage for various economic and ideological interests.<sup>197</sup> Mounting evidence indicates that the mission of the modern state is “to satisfy the private preferences of collusive interest groups,”<sup>198</sup> “whether or not the pursuit of such aims is cloaked in language implying some pure public purpose or alternatively infused with the language of market failure.”<sup>199</sup> Given the intuitive appeal of Gray's analysis, it is far from clear that Progressives have escaped this modern impulse.

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<sup>192</sup> See e.g., Pildes, *supra* note \_\_\_ at 125-151.

<sup>193</sup> GRAY, *supra* note \_\_\_ at 11 (Rather than provide the pure public good of civil peace, the mission of the modern state is to satisfy the private preferences of collusive interest groups).

<sup>194</sup> WILLIAM C. MITCHELL & RANDY T. SIMONS, *BEYOND POLITICS: MARKET, WELFARE AND THE FAILURE OF BUREAUCRACY* 108 (1994).

<sup>195</sup> GRAY, *supra* note \_\_\_ at 11.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 12.

<sup>198</sup> *Id.* at 11-12.

<sup>199</sup> Hutchison, *Liberty, Liberalism and Neutrality*, *supra* note \_\_\_ at 144 (footnote omitted).

Ponder the Progressive Era itself. Scholars David Bernstein and Thomas Leonard demonstrate that in its origins the Progressive Era was both conservative and liberal.<sup>200</sup> Liberal in its focus on uplifting the disadvantaged and conservative in its conclusion that certain people—women, blacks and immigrants—were unworthy of uplift,<sup>201</sup> meaning that Progressives wished to increase the choices available to Caucasian American males, while constraining the opportunities of women and minorities. Emphasizing society’s need to control the unfit,<sup>202</sup> and judging an impressive array of human groups to be unworthy of work,<sup>203</sup> progressive intellectuals turned New Dealers, refrained from concentrating on the public interest.<sup>204</sup> Instead, they focused almost exclusively on the beneficiaries of their programs<sup>205</sup> without considering the adverse effects that their policies had on parties excluded from the market.<sup>206</sup> No group suffered as much as African Americans.<sup>207</sup>

Racial exclusion imposed by New Deal Progressives reflects an intriguing history. The origins and development of progressive economic ideology favored, indeed demanded, the exclusion of various groups from the American labor market.<sup>208</sup> “Xenophobia, race prejudice, and sexism certainly were not new to the United States in the Progressive Era. What *was* new was, first, the idea that protecting deserving workers requires the social control of underserving workers, enough so that labor-legislation advocates defended the exclusion of unfit workers not as an ostensibly necessary evil, but as a positive social benefit.”<sup>209</sup> Complementing this supposition, “the exclusion of undesirables acquired a new scientific legitimacy: the Progressive Era marked not only the advent of the welfare state but also an extraordinary vogue for race thinking and for eugenics, the social control of human breeding.”<sup>210</sup> During the apotheosis of the

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<sup>200</sup> David E. Bernstein and Thomas C. Leonard, *Excluding Unfit Workers: Social Control Versus Social Justice in the Age of Economic Reform* 72 *Law and Contemporary Problems*, 176, 179 (2009).

<sup>201</sup> *Id.* at 180. (Progressives advocated for women’s rights while attempting to reduce opportunities for “mothers of the race”).

<sup>202</sup> *Id.* at 179-181

<sup>203</sup> *Id.* at 180.

<sup>204</sup> RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION*, 72 (2007).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> See *infra* Part IV C at \_\_\_\_\_

<sup>208</sup> Bernstein & Leonard, *supra* note \_\_\_\_ at 177.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

Progressive Era, many Progressives were real social Darwinists who presumed that the state could through planning and pressure create a pure race, a society of new men.<sup>211</sup> Emblematic of this view, leading Progressives like Woodrow Wilson claimed that progress in history “is based upon the advance of certain races.”<sup>212</sup> Apparently influenced by Hegel’s prolific imagination, Wilson “explained that superior races have a modern spirit and hence the best form of government for them is modern democracy. Inferior races are mired further back in the process of history, and so the spirit of an inferior race may be a perfect match for an autocracy.”<sup>213</sup> In the Hegelian model of historical progress: humans advance through clashes “between major peoples or races, with the superior people defeating the inferior.”<sup>214</sup> Seen from this decidedly progressive viewpoint, Aryan, Semitic, and Turanian races were superior and most able to advance history,<sup>215</sup> whereas inferior races and females<sup>216</sup> as members of groups, which were characterized by debility, became prime candidates for subordination.

During the period commencing with the latter part of the 19<sup>th</sup> century<sup>217</sup> through the first third of the 20<sup>th</sup> century, American Progressives, by and large, absorbed the foregoing suppositions, while operating under the deduction that government must submit to the Darwinian theory of organic life.<sup>218</sup> Government was seen as a living thing freighted by irresistible impulses requiring ever expanding power and size as part of natural evolutionary processes.<sup>219</sup> Coherent with the theme of governmental experimentation and evolutionary adaptation,<sup>220</sup> Wilson advocated progressive imperialism in order to subjugate and thereby, elevate lesser races.<sup>221</sup> He approved the annexation of Puerto Rico and the Philippines,<sup>222</sup> while maintaining that giving blacks the

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<sup>211</sup> GOLDBERG, *supra* note \_\_\_ at 81.

<sup>212</sup> PESTRITTO, *supra* note \_\_\_ at 42.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 44.

<sup>215</sup> *Id.* at 43.

<sup>216</sup> *See e.g.*, EPSTEIN, *supra* note \_\_\_ at 90-91 (describing progressive efforts to limit the hours of work for women and their occupational choice based on the assumption that they were inferior to men).

<sup>217</sup> Warren, *supra* note \_\_\_ at 294 (stating that the years 1887 to 1911 inclusive have constituted the period most productive of progressive and liberal social and economic legislation in the United States).

<sup>218</sup> GOLDBERG, *supra* note \_\_\_ at 86.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 83.

<sup>222</sup> *Id.*

right to vote was the foundation of every evil in this country.<sup>223</sup> At the same time, Progressives led the effort to limit the hours and occupational choices available to women.<sup>224</sup> Given this background, Greenfield's analysis of corporate law and other issues, relying on progressivism for its persuasive force, becomes a disturbing proposition.

Greenfield's wide-ranging claims concerning the march of history, the promise of progressivism, and the capacity of government to intervene successfully are suspect for a number of reasons. First, it is striking that Progressives such as Greenfield, who collectively and individually, have championed initiatives such as wage and hour and child labor restrictions as devices to reduce the "horrors" of the market<sup>225</sup> have no explanation as to why the percentage of children in the workforce declined consistently throughout the period before federal regulation of child labor<sup>226</sup> or that statutes limiting the hours of work for women were successfully defended by Progressives on grounds of innate female inferiority.<sup>227</sup> Second, contemporary Progressives prefer to ignore or minimize the commitment of many Progressives to racism, which was based on the collectivist and eugenic thought that underlay the Progressive Era.<sup>228</sup> Labor unions and employer cartels took full advantage of the New Deal's regulatory impulse to further entrench their power by excluding African Americans from employment.<sup>229</sup> Despite this

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<sup>223</sup> *Id.* at 84.

<sup>224</sup> EPSTEIN, *supra* note \_\_\_ at 90 (citing Louis Brandeis's defense of the exclusion of women on sociological grounds).

<sup>225</sup> Greenfield, *supra* note \_\_\_ at 68.

<sup>226</sup> EPSTEIN, *supra* note \_\_\_ at 62.

<sup>227</sup> *Id.* at 90 (citing *Muller v. Oregon* and the writings of leading progressives such as Louis Brandeis).

<sup>228</sup> Hutchison, *Employee Free Choice*, *supra* note \_\_\_ at 45-46.

<sup>229</sup> *Id.* at 42 ("Taking advantage of the monopoly power granted by the NIRA, trade unions . . . [displaced] disfavored workers and [reified] economic and social stratification. Enacted in 1933, the NIRA codified wage differentials in such a way that even when a black employee performed more important tasks than a white employee, he would frequently have a lower job classification and hence a lower wage than his white counterpart. According to one estimate, the minimum wage provisions of the NIRA destroyed the jobs of half a million blacks. Building on this grim record, the Fair Labor Standards Act, passed in 1938, mirrored results from a similarly disastrous policy in apartheid-era South Africa. According to the U.S. Labor Department, enforcement of the minimum wage provisions of the Fair Labor Standards Act (FLSA) caused between 30,000 and 50,000 workers, mostly Southern blacks to lose their jobs within two weeks. Evidence surfaces showing that the architects of both the NIRA and the FLSA knew the laws would create disproportionate unemployment among southern African Americans. But most advocates of these laws saw the resulting unemployment, at worst, as an unfortunate necessity, and in many cases as a positive feature.").

indefensible record,<sup>230</sup> federal interventionism during the New Deal has been portrayed as part of an encouraging pursuit of social equality that set the stage for later civil rights measures.<sup>231</sup> In contrast to such claims, the evidence shows that the purported search for social equality during the 1930s resulted in government behavior that produced more inequality.<sup>232</sup> David Bernstein verifies this judgment by showing:

Few of the Progressives who dominated left-wing politics before the New Deal evinced sympathy for civil rights, and many were hostile to African Americans. Indeed, many of the same regulatory impulses that inspired the New Deal motivated supporters of segregation laws earlier in the century. The most statist post-bellum presidential administration before FDR's, Woodrow Wilson's was extremely hostile to African Americans. The Hoover administration, dominated by Progressive Republicans, including Hoover himself, also treated African Americans poorly. . . . [Based on bi-partisan enthusiasm for Progressive values and the exclusionary consequences of the New Deal in 1936,] T. Arnold Hill of the National Urban League wrote that '[i]f the present trend continues, there is slight question that the Negro will be gradually forced into a condition of economic peonage, every bit as devastating as plantation slavery ever was.'<sup>233</sup>

While Greenfield posits that the New Deal regulatory impulse was a welcome change from the *Lochner* era because regulation was necessary to improve the lot of citizens most in need,<sup>234</sup> government intervention, sometimes by intent and sometimes by effect, harmed the choices available to African Americans, and thus, they would have fared better if such legislation had been invalidated by the courts under *Lochnerian* principles.<sup>235</sup> Because legislation tends to entrench those with political power at the expense of those who lack it,<sup>236</sup> large corporations and large labor unions, unsurprisingly, used government statutory and regulatory power in order to shield themselves from

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<sup>230</sup> RICHARD K. VEDDER & LOWELL E. GALLAWAY, *OUT OF WORK: UNEMPLOYMENT AND GOVERNMENT IN TWENTIETH-CENTURY AMERICA* 272-79 (1993) (showing that racial differences in terms of unemployment rates were essentially nonexistent between 1890-1930, but during the 1930s, the federal government's initiatives in the legislative and regulatory environment that were aimed at raising the wages for workers actually widened the unemployment gap between black and white workers and contributed to increased income inequality). Nonwhite unemployment rose from an average of 5.9 percent during the 1890-1930 period to 9 percent by 1950, whereas the unemployment rate for whites fell from 5.8 percent to 4.9 percent during the same period. *Id.* at 272. This racial gap in unemployment remains with us today. *Id.*

<sup>231</sup> BERNSTEIN, *supra* note \_\_\_ at 106 (quoting Bruce Ackerman).

<sup>232</sup> Hutchison, *Employee Free Choice*, *supra* note \_\_\_ at 47.

<sup>233</sup> BERNSTEIN, *supra* note \_\_\_ at 107-07.

<sup>234</sup> Greenfield, *supra* note \_\_\_ at 68.

<sup>235</sup> *Id.* at 1-7 (introducing this thesis).

<sup>236</sup> BERNSTEIN, *supra* note \_\_\_ at 111.

unwanted competition.<sup>237</sup> Finally, despite their willingness to champion the eradication of poverty, contemporary Progressives have disregarded evidence showing that the largest drop in black poverty rates took place during the two decades before the Great Society.<sup>238</sup> Indeed during the 1970s, when the impact of Great Society programs was fully realized, the trend of black economic improvement had stopped almost entirely.<sup>239</sup> The inability of the Great Society to deliver on promised benefits, in comparison with market outcomes, vitiates Greenfield's claim that progressive policies improved the lot of those most in need. The entire Progressive record suggests that the commitment of New Deal renovators to regulation, frequently facilitated by turning a blind eye to subordination, often succeeded in excluding "immigrants, women and African Americans"<sup>240</sup> from the workforce. As such, it is difficult to believe that progressive innovators, beyond fairly obvious rhetorical flourishes, were invested in shrinking the matrices of entrenched power.

Given the consequences to woman and minorities associated with historical progressivism, it is important to return to the wisdom of John Stuart Mill in order to place these consequences in proper context. Although Mill's commitment to social Darwinism, a precursor to progressivism, wrongly impelled him to favor the exclusion of all members of the "inferior class of labourers,"<sup>241</sup> he rightly observed that modern liberal democracy is insufficient to protect disfavored subgroups and individuals from the coercive power that is authorized by a majority.<sup>242</sup> Greenfield's approach (unintentionally, one hopes) vindicates Mill's exclusionary objectives and analysis. Although Greenfield denounces existing corporate governance architecture (which is justified by the contractarian assertion that people know and protect their interests when they bargain, purchase stocks,

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<sup>237</sup> See Jason E. Taylor, *The Output Effects of Government Sponsored Cartels During the New Deal*, Vol. L J. OF INDUSTRIAL ECON. 1, 2-3 (March 2002) (under the National Industrial Recovery Act of 1933, approximately 700 industrial codes were put into effect complete with barriers to entry, production quotas, and pricing restrictions, and in exchange for exemption from antitrust legislation, cartel participants agreed to raise wage rates across the board). Thomas J. DiLorenzo, *The New Deal Debunked (again)*, MISES DAILY, available at <http://mises.org/story/1623> (discussing how UCLA economist, Harold L. Cole and Lee E. Ohanian have confirmed that the so-called First New Deal (1933-34) was one giant cartel scheme).

<sup>238</sup> GOLDBERG, *supra* note \_\_ at 269-70.

<sup>239</sup> *Id.* at 270.

<sup>240</sup> Bernstein and Leonard, *supra* note \_\_ at 180.

<sup>241</sup> W. H. HUTT, *THE THEORY OF COLLECTIVE BARGAINING: 1930-1975* 10 (1980, 1975).

<sup>242</sup> See PHILLIP E. JOHNSON, *THE RIGHT QUESTIONS: TRUTH, MEANING & PUBLIC DEBATE* 149 (2002) (discussing John Stuart Mill).

and voluntarily enter into an agreement that establish corporations and their embedded governance arrangements),<sup>243</sup> he ignores special interest groups who protect their own interest by seizing the power of the state. Majoritarian seizure gains traction by invoking social justice rhetoric but effectively allows powerful interest groups to statutorily or consequentially exclude their weaker competitors—African Americans, immigrants, women, and others who are seen as defective—from markets they wish to dominate and control. Progressive values, far from sustaining freedom of contract based on consent, or freedom of choice among alternatives, gave rise to predatory regulation exposing so-called defectives to increasing vulnerability. The commitment of New Deal Progressives to unfettered regulation, instantiated a substantial reduction of African American employment<sup>244</sup> and materialized as a distressing illustration of government failure.<sup>245</sup> Nor did progressivism and its progeny operate in the best interest of women who were either excluded from certain jobs or limited in their hours of work through the passage of progressive statutes. Concurrently, New Deal Progressives provided special favors for “Big Business” and others.<sup>246</sup> Unhindered by constitutional restraint, the progressive move toward a centralized, regulatory-administrative state glossed over the corrupting tendency of power, exposing many lives to oppression<sup>247</sup> that coercively constrained and continues to constrain the notion of consent.

Taken together, this examination exposes Greenfield’s failure to develop a principled (rational) theory of power entrenchment, which prevents him from noticing that his approach, inadvertently or deliberately, defends powerful interests. Greenfield’s devotion to Progressive values permits him to evade evidence showing that the New Deal materialized as a calculated regulatory effort that prevented marginalized groups and

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<sup>243</sup> Greenfield, *supra* note \_\_\_ at 72.

<sup>244</sup> VEDDER & GALLAWAY, *supra* note \_\_\_ at 272-79 (showing how New Deal legislation contributed to a racial gap in unemployment that remains with us today).

<sup>245</sup> See e.g., CLIFFORD WINSTON, GOVERNMENT FAILURE VERSUS MARKET FAILURE: MICROECONOMICS POLICY RESEARCH AND GOVERNMENT PERFORMANCE 4 (2006) (Government failure is explainable by the self-correcting nature of some market failures, which makes government intervention unnecessary because of the short-sightedness, inflexibility, and conflicting policies of government agencies; and by political forces that allow well-defined interest groups to influence elected and unelected officials to initiate and maintain inefficient policies that enable interest groups to accrue economic rents.)

<sup>246</sup> Jonah Goldberg, *The Raw Deal*, Vol. VIII CLAREMONT REVIEW OF BOOKS, 16, 16 (2007/2008) (quoting Amity Shlaes).

<sup>247</sup> See e.g., Johnathan O’Neill, *Constitutional Maintenance and Religious Sensibility in the 1920s: Rethinking the Constitutionalist Response to Progressivism*, 51 J. OF CHURCH & STATE 24, 44-45 (2009) (discussing these issues).

individuals from engaging in value maximizing exchange. This evasion, consistent with Jean-Paul Sartre's description of self-deception<sup>248</sup> often precludes Progressives from including African Americans and others in the nation's social calculus, despite ample evidence verifying that blacks and others suffered at the hands of government coercion and subordination far more than from the free market. This deduction reinforces another tied to Frederic Bastiat's analysis.

Within economic spheres dominated by government-sponsored cartels, the suppression of the interests of marginalized Americans operates congruently with Bastiat's early claim that people, when they can, wish to live and prosper at the expense of others.<sup>249</sup> But as public choice analysis forecasts, rent-seeking inclinations do not depend on whether or not Progressives lead or follow this trend. Equally true, public choice theory suggests that one should not be surprised to see the rhetoric of choice deployed by either Progressives or others when such use advances their ideological pre-commitments and their economic self-interests. In contradistinction to this perspective, the expansive parameters of Greenfield's analysis refrain from acknowledging the propensity of modern democracies to favor collusion, which is frequently facilitated by cloaking private interests in the mantel of public interest. Acting as a myrmidon of the Progressive Era's regulatory impulse, perhaps blindsided by his search for justice, or impaired by bounded rationality, Greenfield's evasions may be understandable. But without some rational explanation or the provision of some new justification for his approach, Greenfield's defense of progressivism and regulation as well as his insistent critique of free market contractarianism founders.

Whether Greenfield's critique of corporate governance offers an accidental or intentional misreading of the Progressive Era's record or not, the empirical evidence contradicts Greenfield's contention that the free market constitutes a form of coercion that damages the most marginalized among us.<sup>250</sup> Greenfield has overlooked what he is strongly committed to oppose: the transmutation of any doctrine, including progressivism, into a form of coercion, which entrenches the matrices of social and

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<sup>248</sup> TEN ELSHOF, *supra* note \_\_\_ at, 27 ("According to Sartre, to be self-deceived is to avoid using rational standards for evidence whenever it suits our purposes.").

<sup>249</sup> FREDERIC BASTIAT, *THE LAW*, 9 (1853, 1990, Foundation for Economic Education).

<sup>250</sup> Greenfield, *supra* note \_\_\_ at 68.



economic power. The evidence shows that the coercive organs of the state controlled by progressive hierarchs marginalize because marginalized Americans unlike shareholders in large publicly traded corporations lacked and frequently continue to lack the opportunity to redeploy their human capital in value maximizing ways. Nor is the New Deal regulatory impulse and its consequent power to reduce beneficial choice for disfavored groups limited to the 1930s and 1940s. In contemporary times, the marginalizing force of progressive ideas can be seen in several arenas. Three examples suffice. First, America's existing public school system operating within the framework of progressivism, frequently prevents African Americans and others from exercising the power of choice allowing them to suffer from educational malpractice on a massive scale.<sup>251</sup> Even though no evidence can be adduced suggesting that he consciously favors the disastrous results of America's public school system,<sup>252</sup> he embraces public schools despite their subordinating effects.<sup>253</sup> Second, the adverse effects of the regulatory impulse come into view through the persistent effects of Pennsylvania's prevailing wage law and other similar statutes. Whether this law contains a deliberate commitment to racism or not, it reflects the fears and presumptions associated with Edward A. Ross' "race suicide" thesis.<sup>254</sup> This thesis posits that inferior races might better adapt to the conditions of industrial capitalism and outbreed the superior Anglo-Saxon race.<sup>255</sup> Such fears gave rise to the need to impose social control on members of inferior groups. Consistent with the requirements of social control and fashioned after the federal Davis-Bacon Act, Pennsylvania's prevailing wage law was enacted in 1961.<sup>256</sup> Honoring the progressive legacy of Robert Bacon, co-author of the Davis-Bacon Act, who denied anti-African American animus but made clear his discomfort with "defective" workers taking jobs that "belonged" to white union men,<sup>257</sup> Pennsylvania's prevailing wage statute is

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<sup>251</sup> See e.g., Harry G. Hutchison, *Moving Forward? Diversity as a Paradox? A Critical Race View*, 57 CATH. U. L. REV. 1059, 1067-68 (describing how public schools fail African Americans and others).

<sup>252</sup> THERNSTROM & THERNSTROM, *supra* note \_\_\_ at 12 ("By twelfth grade, on average black students are four years behind those who are white or Asian. Hispanics don't do much better.").

<sup>253</sup> Greenfield, *supra* note \_\_\_ at 78 (expressing his disdain for school choice).

<sup>254</sup> See e.g., Bernstein and Leonard, *supra* note \_\_\_ at 182 (describing this thesis).

<sup>255</sup> *Id.*

<sup>256</sup> Christopher Dodds, *Unions use a racist law on projects: Prevailing-wage measures discriminate against minorities and increase costs*, PHILLY.COM, April 23, 2009 available at <http://www.printhis.clickability.com/pt/cpt?action=cpt&title=Unions+use+a+racist+law+...>

<sup>257</sup> Bernstein and Leonard, *supra* note \_\_\_ at 192.

currently the root cause behind the limited number of black workers on city funded construction projects.<sup>258</sup> Third, contemporary evidence shows minimum wage regimes, an outgrowth of the Fair Labor Standards Act enacted during the New Deal, to advance the interest of disenfranchised workers, currently disfavor the poor by increasing the number and percentage of unemployed workers coming from lower-class families, while disproportionately supplying benefits (higher wages) to young people living in middle-to-upper-class families.<sup>259</sup> This inversion favoring the rich emphasizes the continuing effect of exclusionary labor policies.<sup>260</sup> Countless other examples demonstrate America's ongoing process of subjugation and exclusion, which is frequently defended in the name of progress but is actually incentivized by the naked self-interest of powerful interest groups. Sheltered by the patter of progressive values and social justice rhetoric, this process resembles a masquerade.

To be clear, this article does not suggest that Greenfield or other contemporary Progressives are committed to intentional racism, which has sadly animated much of the Progressive Era. Good intentions, however, do not prevent the subordinating consequences of progressive policies from continuing. Progressives, just like members of other groups, may suffer from groupthink. Believing passionately in the inherent morality of their cause, they may choose to ignore the ethical and moral dimensions of their policies.<sup>261</sup> Still the consequences remain. These consequences have complex implications for anyone wishing to import progressive values into corporate law on

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<sup>258</sup> Dodds, *supra* note \_\_\_ at

<http://www.printhis.clickability.com/pt/cpt?action=cpt&title=Unions+use+a+racist+law+...>

Pennsylvania's statute was initially designed to limit opportunities for out-of-state black workers, but this process has now been inverted. Hutchison, *Employee Free Choice*, *supra* note \_\_\_ at 65. Instead of preventing black workers in other states from taking construction jobs in Philadelphia, this law allows unions to ship mostly white workers from other states to the city in order to prevent Pennsylvania's black laborers from working on prevailing wage projects. *Id.* at 65-66 (quoting Dodds). Reflecting the indubitable effects of incentives, this prevailing wage paradigm imagines blacks as "undeserving" workers who "wrongly" lower the wages and employment prospects of members of racially superior groups. Bernstein and Leonard, *supra* note \_\_\_ at 178 & 191-93. Consequently, blacks were and are deprived of the opportunity (choice) to work in their native city, which elevates the job prospects for members of the "superior" group.

<sup>259</sup> STEVEN L. WILLBORN, STEWART J. SCHWAB, JOHN F. BURTON, JR., & GILLIAN L. L. LESTER, *EMPLOYMENT LAW: CASES AND MATERIALS*, 577 (2007) (showing that although the minimum wage continues to enjoy wide-spread support, only 17% of low-wage workers in the United States were living in poor households in 2003, and thus, the people who are generally favored by this type of intervention in the market are not poor).

<sup>260</sup> Hutchison, *Employee Free Choice*, *supra* note \_\_\_ at 39.

<sup>261</sup> TEN ELSHOF, *supra* note \_\_\_\_ at 87 (citing Irving Janis).

grounds of fairness and social justice because the historical reality of progressive policies invalidates such claims. In contradistinction to Greenfield's argument for paternalism, it is impossible to ignore data showing the participation of Progressives in persistent efforts to suppress "defective workers" and disfavor business enterprises.<sup>262</sup> Such evidence is consistent with an emerging consensus among scholars who have inspected behavioralist claims empirically as opposed to experimentally.<sup>263</sup> This consensus rightly specifies that a careful analysis of the long-run costs and benefits of paternalistic regulations implies that the economic interests of minorities are better served by a much more limited role for government intervention even in a world of bounded rationality and cognitive biases.<sup>264</sup>

The moral force of this conclusion is strengthened by concentrating on this question: Why were Americans prepared to give up their liberty in exchange for an expansion of government power during the 1930s? One answer suggests that New Deal regulatory reforms reflected the willingness of individuals to accept expanded governmental authority because of fear, in this case, fear sparked by the Great Crash of 1929.<sup>265</sup> While there is little reason to believe that an increase in government is the panacea for economic woes, there is every reason to believe that fears and crises lead to dependency.<sup>266</sup> As public choice shows, politicians and others aware of this epiphenomenon,<sup>267</sup> were, and are, prepared to take advantage of this human tendency. Seen from a long-term perspective, regulatory intrusion by the administrative state advanced despite the probability that government regulation frequently represents an irrational reaction to the presence of fear and crisis. This conduced to reforms that were permanent and irreversible.<sup>268</sup> Unconstrained by market forces, acting in the name of the

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<sup>262</sup> AMITY SHLAES, *THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION* 239-245 (2007) (discussing *Schechter Poultry Corp. v. United States* which represented the conflict between a small business and the progressives need to centralize everything in ways that recalled Hitler and Mussolini)

<sup>263</sup> See e.g., Jonathan Klick & Gregory Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 *Minn. L. Rev.* 1620, 1654 (2006) (describing behavioralist literature as generally "proceed[ing] from little more than an identification of a cognitive bias that may explain a patten of seemingly inefficient choices").

<sup>264</sup> Wright, *supra* note \_\_\_ at 473.

<sup>265</sup> Donald J. Kochan, *Black Tuesday and the Graying of the Legitimacy of Governmental Intervention: When Tomorrow is Just a Future Yesterday*, 15 *NEXUS L. J.* \_\_\_ (forthcoming 2009) available at <http://ssrn.com/abstract=1423981> at 3.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

forgotten man at the bottom of the economic pyramid,<sup>269</sup> and promising freedom from fear and instability, progressive policies succeeded in worsening America's economic conditions.<sup>270</sup> Worsening economic conditions took center stage in 1937, eight years after Hoover's progressive reforms and five years after Roosevelt assumed office—unemployment rose sharply, stock prices fell swiftly, and the 1929 panic repeated itself—all because the changes brought by the New Deal meant that America was a less reliable society.<sup>271</sup> Government intervention, far from turning out to be a panacea, prompted a depression within a depression.<sup>272</sup> In other words, modernity's march produced greater governmental dependency, while facilitating disastrous modes of New Deal interventionism<sup>273</sup> that intensified the entrenchment of powerful interests. Evidence from the 1930s reinforced by the contemporary record substantiates public choice economics' insight that government is not higher than the private sector but rather a coequal combatant for society's resources.<sup>274</sup>

Greenfield's embrace of the progressive imagination propelled by his doubtful conception of choice provides an unlikely ground to reform the market because he ignores both the likelihood of government failure and the human costs of imposing progressive values. An examination of the period between 2008 and 2010 generates additional evidence mirroring New Deal outcomes. During this recent period, federal government intervention was energized by the proposition that size and political clout matter. While large and possibly corrupt institutions exposed during America's recent financial implosion remain propped up by government power grounded on the dubious

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<sup>269</sup> SHLAES, *supra* note \_\_\_ at 12 (quoting Franklin Roosevelt).

<sup>270</sup> *Id.* at 2-3 (describing the economy's worsening condition five years after Franklin Roosevelt took office)

<sup>271</sup> *Id.* at 336-37.

<sup>272</sup> *Id.* at 3 (suggesting that several years' worth of sustained government planning had merely created a depression with a Depression).

<sup>273</sup> Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WILL. AND MARY L. REV. 595, 650 (2003) (showing that FDR's attempt to supply centrally-planned price controls and production limits apparently caused a "massive six to eleven percent decline in the United States' Gross National Product (GNP) in an already depressed economy.").

<sup>274</sup> SHLAES, *supra* note \_\_\_ at 10. In reality, of course, it is far worse than that because the state has moved from being simply an umpire, who enforces the rules of the game of voluntary civil association. Instead "the state has become the *most* potent weapon in an incessant political conflict for resources." GRAY, *supra* note \_\_\_ at 12 (emphasis added).

premise that they were too big to fail,<sup>275</sup> small firms received and continue to receive little or no assistance. Coincident with this trend, the federal government ignored the claims of teachers and police officers, and other small marginalized investors in Chrysler Corporation's bankruptcy proceedings in favor of upholding institutions with vast amounts of economic, social, and political capital.<sup>276</sup> Just as the governmental response and public acceptance of increased governmental control were stimulated by the events in 1929, the current financial crisis is being used to justify a significant expansion in governmental power via-à-vis the market.<sup>277</sup> Anecdotal information from the current crisis suggests such an expansion has already worked to the disadvantage of many corporate stakeholders.<sup>278</sup> Such information in combination with empirical observations drawn from the New Deal and its progeny, forecast that current forms of government intervention based on progressive assumptions will ensure that the nation treads "treacherous waters" for the foreseeable future.<sup>279</sup> Equally clear, the current bureaucratic process of selecting economic winners and losers in the contest for bailouts or bankruptcy proceedings confirm that from the government's perspective, some people and institutions are more equal than others because government-backed authoritarians have both the capacity and the will to institutionalize inequality. On the other hand, analysis that gives attention to the effect of incentives shows that policy making and adjudication emphasizing the validity of contracts freely entered into by private parties consistently

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<sup>275</sup> Peter S. Goodman, *Too Big to Fail?*, THE NEW YORK TIMES, July 20, 2008 available at [http://www.nytimes.com/2008/07/20/weekinreview/20goodman.html?\\_r=1&fta=y&pagew](http://www.nytimes.com/2008/07/20/weekinreview/20goodman.html?_r=1&fta=y&pagew) (explaining how many officials assert that some institutions (mostly large and entrenched) are too big to fail).

<sup>276</sup> See e.g., Lee Ross, *Foes of Chrysler Deal Await Supreme Court Decision*, FOXNEWS.COM, June 8, 2009 available at <http://www.foxnews.com/politics/ci.Foes+of+Chrysler+Deal+await> (quoting Senator Shelby: "The bondholders have been sacrificed. The unions have carried the day."). See also, Larry P. Vellequette, *Analysis: Indiana Pension funds' loss tiny compared with Chrysler's*, TOLEDOBLADE.COM, available at <http://www.toledoblade.com/apps/pbcs.dll/article?Date=20090610&Category=Business>, August 13, 2009 (explaining how three Indiana pension funds lost out to Chrysler, a large, politically well-connected entity, thus entrenching the firm and its union's economic and political power).

<sup>277</sup> Kochan, *supra* note \_\_\_ at 5.

<sup>278</sup> David Cho and Tomoeh Murakami Tse, *U.S. Forced Bank Board to Carry Out Merrill Deal: In Inquiry into Merger, Cuomo Details Pressure on Bank of America*, THE WASHINGTON POST, April 24, 2009, at A1 & A14 (stating that Bank of America's chief executive, Kenneth Lewis, wanted to stop the merger to avoid devastating losses at Merrill, which would be detrimental to his company, as well, as the effectiveness of government threats in preventing Mr. Lewis from bailing out of the deal or informing stockholders).

<sup>279</sup> Kochan, *supra* note \_\_\_ at 5.

thwarts further extensions of inequality,<sup>280</sup> and such analysis is applicable to corporate law and virtually all forms of life. Properly appreciated, the empirical data predicts that a market driven by voluntary exchange and human freedom acts to constrain subordination while a market dictated by government intervention demonstrates the opposite.

Taken as a whole, the application of progressive thought to corporations is likely to generate adverse implications for many stakeholders in the firm as well as others within the larger society. Greenfield's study, offered in the name of the disadvantaged, generates a number of claims that conflates choice with coercion but may ultimately advantage those in power. Sceptically evaluated, Greenfield's proposals provide an incentive for exit by investors and other corporate stakeholders and supply additional opportunities for corporate agents to engage in opportunistic behavior. Responding to the enforcement of Greenfield's proposals through government regulatory power, corporations would have reason to flee American jurisdictions and incorporate elsewhere.<sup>281</sup> Indeed, the current response to the Public Company Accounting Reform and Investor Protection Act of 2002 (Sarbanes-Oxley) suggests that the tipping point for incorporation may not be far away.<sup>282</sup> Greenfield's determined effort to diminish respect for choice and liberty of contract by human agents operating within the economic sphere correlates with paternalistic efforts to enlarge the power of government. Enlarging government's size and scope predicated on progressive values risks government failure as well as the subordination of more citizens because such values, stripped of the patina of progress, are infected with contradiction and coercion that reduces the number of beneficial consensual avenues available to most Americans. Sadly, such an outcome ought to be expected in a world where political liberalism of the progressive variety may be nothing more than an unprincipled *modus Vivendi*,<sup>283</sup> wherein individuals committed to Progressive values are devoid of the courage to face discomfiting facts. Although, Greenfield's progressive dream still lives, individuals who are rightly concerned about improving the lot of those most in need, ought to resist his preference for paternalism.

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<sup>280</sup> See e.g., BERNSTEIN, *supra* note \_\_\_ at 1-94 (cataloguing court decisions that barred interference with the rights of minorities, particularly African Americans, to enter into contracts of employment thus thwarting state and federal government policies that favored inequality).

<sup>281</sup> Smith, *supra* note \_\_\_ at 1009.

<sup>282</sup> *Id.*

<sup>283</sup> Larry Alexander, *Illiberalism All the Way Down: Illiberal Groups and Two Conceptions of Liberalism*, 12 J. OF CONTEMP. LEG. ISSUES, 625, 625 (2002).

## V. CONCLUSION

Greenfield offers a dialectic on choice that disputes the conclusion that a corporation can be best understood as a voluntary agreement among the various stakeholders of the firm. Choice, as thus specified, is the antipode of progress because it defends the status quo. Prescinding from an architectonic conception of the corporate form that might withstand an investigation tied to rational standards, Greenfield endeavors to separate prevailing modes of progressive thought from society's fascination with and commitment to progressive discourse. His objective is to preclude the legitimating force of such discourse within the domain of corporate law. Declining to specify a defensible and workable choice architecture that builds on available empirical data and retains predictive power, refusing to offer a single infrangible principle that divides defective from defensible choices, and drawing a perimeter around an individual's right to make choices that excludes economic decisions, Greenfield, fails to see that corporations originate as part of an often highly centralized but largely private attempt to minimize transaction costs. Much of history shows that entrepreneurial efforts are often hindered by government power propelled by individuals and groups pursuing economic rents at the expense of the firm or others. The pursuit of such rents is systematically aided by the inherent authoritarian tendency of modern liberal states.<sup>284</sup> Once the levers of power are seized, political and ideological elites mandate that the government take sides in support of their platforms.<sup>285</sup> But, in order to attain power, they often offer a populist agenda that favors existing holders of economic and political power. Taken together, the ever-ramifying implications of the pursuit of economic rents, symptomatic of the symbiotic relationship between the arrogation of power and the deployment of social justice rhetoric, entrench existing matrices of social and economic power much more securely than voluntary agreements and freely chosen courses of action ever could. Greenfield's approach, far from vanquishing imbalances in power relationships, appears to coincide with the opposite.

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<sup>284</sup> See e.g., Pildes, *supra* note \_\_\_\_ at 125-151.

<sup>285</sup> Hutchison, *Liberty, Liberalism, and Neutrality*, *supra* note \_\_\_\_ at 810.