

LIKE A FISH NEEDS A BICYCLE: PUBLIC CORPORATIONS AND THEIR SHAREHOLDERS

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INTRODUCTION

There is, perhaps, only one thing left to say on the relationship of publicly held corporations and their shareholders, and it has something to do with fish and bicycles.¹ “Ownership” of the corporation, already debunked by the law and economics movement of the 1980s² and criticized by the progressive law scholars of the 1990s,³ simply is a guiding myth used to give order to large-scale enterprises based on a perceived analogy to closely held businesses. Every function performed by the shareholders of a publicly held corporation could be performed by some other actor in the corporate scenario; every role played by the public shareholder could be reallocated and the shareholder himself or herself would never be missed, except as a symbol of something that perhaps might have been, but never was.

This does not mean that the corporate wheel is on the verge of being reinvented. No sane commentator would believe that the public will could be mustered to revise every corporate charter or to restructure the capital markets, even though actual changes in operation might be slight. Still, it is useful to recognize the mythic power of current corporate structuring, anticipating manipulation of its parameters to serve specific purposes in particular contexts as opportunities arise.

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1. The expression “A woman needs a man like a fish needs a bicycle” is often attributed to Gloria Steinem. The Phrase Finder, Phrases, Sayings and Idioms, <http://www.phrases.org.uk/meanings/414150.html> (last visited Feb. 8, 2006). According to Steinem, however, Irina Dunn, a distinguished Australian educator, journalist, and politician, coined the phrase in 1970. *Id.*

2. See generally Richard A. Posner & Francesco Parisi, *Introduction to I LAW AND ECONOMICS*, at ix-xii (Richard A. Posner & Francesco Parisi eds., 1997) (explaining briefly the origins of the law and economics movement); see also Lawrence E. Mitchell, *Groundwork of the Metaphysics of Corporate Law*, 50 WASH. & LEE L. REV. 1477, 1477-78 (1993) (discussing the decline of the stockholder ownership model and the rise of the contract paradigm).

3. E.g., Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 595-603 (1992) [hereinafter *Theoretical Framework*].

This Article is intended to contribute to the longstanding debate over shareholder primacy—the argument about whether corporate directors should or should not be expected primarily to strive to enhance the profitability of public corporations for the benefit of their shareholders. The first step in its analysis is a brief review of the shareholder primacy debate. The second is the provision of a bit of background on feminist and critical race theory. The third is an application of feminist and critical race theory to the question of shareholder primacy. It is this application that demonstrates that public corporations do not need shareholders, that privileging the interests of shareholders vis-à-vis the interests of other parties interacting with corporations therefore is unnecessary, and that the shareholder primacy doctrine prevents examination of the interests of those not adequately represented in prior corporate law colloquy. It examines the difficulty of opening these secrets to public scrutiny and concludes with specific proposals dealing with the positioning of feminists and critical race theorists in future policy debates.

I. BACKGROUND: THE SHAREHOLDER PRIMACY DEBATE

An astounding—no, make that *astounding*—amount has been written on the subject of corporate purpose,⁴ sometimes alternatively cast as the question of whose interests corporate directors primarily should serve.⁵ Over decades of interest in the subject, approaches to the issue have fallen out more-or-less along the lines described below.

A. *The Contractarians: The Givens and the Goals of Shareholder Primacy*

The law and economics school of legal analysis describes the corporation as a “nexus of contracts” among capital providers, managers, employees, and others, all of whom conduct themselves in a manner that is rationally self-interested.⁶ Adherents to this school, sometimes known as “contractarians,” characterize the “best” or “most efficient” corporate law as providing the “best” or “most efficient” set of default contract rules.⁷ These are the rules that contractarians have deter-

4. See, e.g., Steven M.H. Wallman, *Understanding the Purpose of a Corporation: An Introduction*, 24 J. CORP. L. 807 (1999).

5. *Id.* at 809-12.

6. Michael C. Jensen & William H. Meckling, *The Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310-11 (1976); see also FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 1-39 (1991) (discussing the corporate contract); Henry N. Butler & Larry E. Ribstein, *The Contract Clause and the Corporation*, 55 BROOK. L. REV. 767, 770-74 (1989) (characterizing the corporation as a nexus of contracts).

7. EASTERBROOK & FISCHER, *supra* note 6, at 36.

mined the parties would negotiate for themselves most frequently (but which still may be negotiated around).⁸

The rules generally endorsed by contractarians reflect the assumption that managers are agents for shareholders.⁹ Limiting the duties of the board of directors to serving shareholder interests is thought to be the single best method of limiting managerial opportunism and shirking, owing to the relative efficiency of monitoring by a single class of beneficiaries.¹⁰ The board therefore is regarded as responsible for maximizing the residual value of the firm remaining after nonshareholder claimants are satisfied.¹¹ This easily translates to the twin assertions that the goal of the corporation is to make money for its shareholders¹² and that the interests of shareholders are to be preferred over those of others with interests in the firm.¹³ The resulting template for corporate law thus is known as the “shareholder primacy” model.¹⁴

B. *The Progressives*

During the 1990s, a group of corporate law scholars possessing communitarian values launched an attack on the neoclassical economic analysis just described.¹⁵ The attack focused on the relationship between management and shareholders and quickly rejected the notion of shareholder primacy.¹⁶ Corporate progressives generally endorse an expansion of the goals of the corporation and the duties of management to include responsibility to other constituents,¹⁷ frequently arguing for the recognition of enforceable fiduciary duties

8. *Id.* at 17.

9. *Id.* at 91.

10. *Id.* at 35-39.

11. Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1193 (2002).

12. EASTERBROOK & FISCHER, *supra* note 6, at 35-39.

13. *Id.* at 90-93.

14. David Millon, *New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law*, 86 VA. L. REV. 1001, 1001, 1005-09 (2000).

15. David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, in PROGRESSIVE CORPORATE LAW 1, 16-22 (Lawrence E. Mitchell ed., 1995) [hereinafter respectively *Communitarianism* and PROGRESSIVE CORPORATE LAW].

16. See Jensen & Meckling, *supra* note 6, at 306-07 (arguing for shareholder primacy); Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970 (same). But see Lyman Johnson, *New Approaches to Corporate Law*, 50 WASH. & LEE L. REV. 1713, 1714 (1993) (contending that the number of people that view shareholder primacy as the default norm is decreasing); *Communitarianism*, *supra* note 15, at 9-13 (arguing against shareholder primacy).

17. See, e.g., Wai Shun Wilson Leung, *The Inadequacy of Shareholder Primacy: A Proposed Corporate Regime That Recognizes Non-Shareholder Interests*, 30 COLUM. J.L. & SOC. PROBS. 587 (1997); *Communitarianism*, *supra* note 15, at 11.

running from directors to groups such as creditors and employees.¹⁸ As an alternative or supplemental approach, progressives also have proposed methods of increasing the board's discretion to recognize nonshareholder interests.¹⁹ These methods include extending the terms for which members of the board are elected and adopting statutory safe harbors for consideration of the interests of nonshareholder constituencies.²⁰

C. *The Team Production Model*

The "team production" approach²¹ speaks the language of neo-classical economics, but makes somewhat different starting assumptions.²² The consequence is a set of conclusions that often resonate with corporate progressives.²³ Team production scholars characterize the board of directors as an independent "hierarch" mediating among all those with "team-specific" inputs to the corporation.²⁴ In this view, the proper function of the board is to employ the inputs of financiers, workers, communities, and others in order to maximize the value of the firm.²⁵ Not incidentally, this requires the board to allocate corporate profits fairly among all inputting groups.²⁶ Shareholders are permitted, as a matter of convenience, to elect directors and to bring derivative actions on behalf of the corporation.²⁷

As part of their analysis, team production scholars have relied upon an "options" theory²⁸ introduced by economists in 1973.²⁹ Ac-

18. See Lawrence E. Mitchell, *The Fairness Rights of Corporate Bondholders*, 65 N.Y.U. L. REV. 1165 (1990); Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189 (1991).

19. See *Theoretical Framework*, *supra* note 3, at 581-82 (questioning the stockholder-ownership paradigm).

20. LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY 104-19 (2001) [hereinafter CORPORATE IRRESPONSIBILITY].

21. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999) [hereinafter *Team Production*]. Note, however, that the adherents of this model specifically disavow identification as progressives. *Id.* at 253-54.

22. *Id.* at 249-50.

23. *Id.* at 253.

24. *Id.* at 249-50.

25. *Id.* at 250-51.

26. *Id.* at 251 & n.7.

27. *Id.* at 313-15.

28. See, e.g., Margaret M. Blair & Lynn A. Stout, *Director Accountability and the Mediating Role of the Corporate Board*, 79 WASH. U. L.Q. 403, 411-14 (2001) [hereinafter *Director Accountability*] (explaining how options theory undermines the principal-agent model); Stout, *supra* note 11, at 1191-92 (discussing the options theory in the context of ownership of the corporation).

29. Fischer Black & Myron Scholes, *The Pricing of Options and Corporate Liabilities*, 81 J. POL. ECON. 637 (1973).

ording to this theory, once a firm has issued debt, debtholders and holders of equity both share contingent control and bear residual risk.³⁰ Thus, it might be said either that the debtholders “own” the firm and have sold a call option to the shareholders or that the shareholders “own” the firm and have bought a put option from the debtholders.³¹ “Ownership” rights thus are no more and no less than whatever rights are possessed by those denominated as “owners.”

D. Responses to Corporate Progressives and the Team Production Model

The late years of the last century and the early years of this one have seen efforts to respond to progressive³² and team production analyses.³³ Some portion of these responses have comprised a reiteration of some of law and economics’ basic assumptions in the context of an examination of the precise claims of the newer schools, generating statements along the lines of the following: “By vesting shareholders with an exclusive right to a corporation’s residual, then, the principal-agent model facilitates adoption of the sort of mechanisms that can reduce the risk of opportunism and thus minimize the transaction costs associated with inducing team-specific investment.”³⁴ This is, of course, a reassertion of the norm of shareholder primacy in a slightly louder voice for those who did not get it the first time around, indicating that the debate is alive, well, and unlikely to be resolved as a matter of logical persuasion.

The extended exchanges among contractarians, progressives, and team production scholars have showcased, however, at least two real-life points worthy of mention. One is that state legislatures indeed have, in large numbers, adopted safe-harbor statutes (known as “constituency statutes”) permitting, but not requiring, boards of directors to consider nonshareholder interests without fear of personal liability.³⁵ The other is that there is an impressive array of extralegal forces nonetheless prompting corporate boards to observe a shareholder pri-

30. *Id.* at 648-49.

31. *Id.* at 649.

32. See, e.g., Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856 (1997) (reviewing PROGRESSIVE CORPORATE LAW, *supra* note 15); Franklin A. Gevurtz, *Getting Real About Corporate Social Responsibility: A Reply to Professor Greenfield*, 35 U.C. DAVIS L. REV. 645 (2002) (responding to progressive views by analyzing their practical impact).

33. See, e.g., Alan J. Meese, *The Team Production Theory of Corporate Law: A Critical Assessment*, 43 WM. & MARY L. REV. 1629 (2002); Millon, *supra* note 14.

34. Meese, *supra* note 33, at 1671.

35. See, e.g., Am. Bar Ass’n Comm. on Corporate Laws, *Other Constituencies Statutes: Potential for Confusion*, 45 BUS. LAW. 2253 (1990); Gevurtz, *supra* note 32, at 647-48.

macy norm.³⁶ These include competitive market pressures to keep labor costs down lest product price rise, fear of relative disadvantage in capital-raising, perceived susceptibility to hostile takeover, and psychological acculturation.³⁷ In retrospect, it seems fairly clear that the drive for profit maximization by public corporations has in no way declined subsequent to the popular adoption of constituency statutes, which suggests that the extralegal forces described have been sufficiently powerful to counterbalance the latitude state legislatures ostensibly intended to confer.³⁸

II. BACKGROUND: FEMINISM AND CRITICAL RACE THEORY

A. *Feminism and Corporate Law*

The multiple concerns of feminists³⁹ share a common overlay of focus on the position of women in a patriarchal society and a common goal of expunging the perceived inequalities of that position.⁴⁰ The applications of feminist analysis to corporate law have been somewhat scarce,⁴¹ although feminist descriptions of the effects of capitalism and neoclassical economic ordering have existed for years.⁴²

In recognizing the relevance of feminist analysis to corporate law, the critical first step is to acknowledge the various guises of inequality. It easily is discerned lurking behind overtly discriminatory laws, few of which exist in the field of corporate law.⁴³ Inequality also inheres, however, in subjugation to regimes developed on the basis of princi-

36. Gevurtz, *supra* note 32, at 651-53.

37. *Id.* at 651.

38. See Ryan J. York, Comment, *Visages of Janus: The Heavy Burden of Other Constituency Anti-Takeover Statutes on Shareholders and the Efficient Market for Corporate Control*, 38 WILLAMETTE L. REV. 187, 189-90 (2002) (noting the abundance of other constituency statutes).

39. See SANDRA HARDING, *THE SCIENCE QUESTION IN FEMINISM* 244 (1986) (arguing that feminism is and should be analytically unstable); NEW FRENCH FEMINISMS, at ix (Elaine Marks & Isabelle de Courtivron eds., 1981) (describing a split within feminism); Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 753 n.11 (1989) (book review) (discussing how pluralizing feminism may cause it to fail at its common aims).

40. Linda J. Lacey, *Introducing Feminist Jurisprudence: An Analysis of Oklahoma's Seduction Statute*, 25 TULSA L.J. 775, 780 (1990); Deborah L. Rhode, *Gender and Jurisprudence: An Agenda for Research*, 56 U. CIN. L. REV. 521, 523 (1987). See generally Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990).

41. Theresa A. Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387, 1413-14 (1992) [hereinafter *Lemonade Stand*].

42. .E.g., CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM (Zillah R. Eisenstein ed., 1979); MARILYN WARING, *IF WOMEN COUNTED: A NEW FEMINIST ECONOMICS* (1988).

43. See, e.g., Alan Carlos Blanco, Comment, *Fetal Protection Programs Under Title VII—Rebutting the Procreation Presumption*, 46 U. PITT. L. REV. 755 (1985) (demonstrating how

ples not endorsed by those excluded from the formative process.⁴⁴ Examining this possibility in the context of given fields of law, including corporate law, is a significant feminist undertaking.⁴⁵ As part of this undertaking, the experience of women is examined, the values of women are explored, and existing legal and social structures are assessed in terms of their arguable congruence with that experience and those values. This type of analysis does not presuppose that the experiences and values of all or most women are significantly different from those of all or most men, but the very real possibility that a difference exists dictates the approach.

One indisputable theoretical difficulty is faced by any feminist analysis attempting to articulate the values manifest in the experience of women.⁴⁶ Focus on the values of women seems to assume that those values will be self-evidently common and appears to suggest that any given woman's experience is an appropriate surrogate for the experience of all. This results in the problem of "essentializing" or "regarding the essence of one's own experience as representative of the experience of others."⁴⁷ Critical race theorists⁴⁸ were instrumental in identifying this issue and illustrating its existence in the context of feminist analysis, pointing out that in many circumstances, the experiences and concerns of privileged, white female academics are not likely to be those of, say, minority welfare mothers.⁴⁹

Accepting the lesson of essentialism does, however, complement and refine the assertion that subjugation can come in different shapes and sizes. Thus, if the values of even some women identifiably diverge from those underlying a legal regime, it is a matter with which to be reckoned, whether or not practical accommodations actually result. One attempt at such reckoning is referred to as "relational" feminism.

Relational feminism reflects an effort to identify and apply in legal and other inquiries a set of values based on the shared experiences

fetal protection plans created by businesses may unlawfully deprive women of equal opportunity in the work force).

44. *Lemonade Stand*, *supra* note 41, at 1416.

45. *Id.* at 1417-18.

46. See Theresa A. Gabaldon, *Feminism, Fairness, and Fiduciary Duty in Corporate and Securities Law*, 5 TEX. J. WOMEN & L. 1, 4 (1995) [hereinafter *Feminism, Fairness, and Fiduciary Duty*] ("[O]ne feminist task is to articulate the values manifest in the experience of women, and to assess various existing legal and social structures for fit with these values.").

47. *Id.* at 5.

48. See *infra* Part II.B.

49. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 603 (1990) (questioning the theory that some women's experience as mothers should be asserted for all women). See generally Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115 (1989).

of those women ascribing to the approach.⁵⁰ These values, notably including compassion and caring, may—or may not—be the product of centuries of male oppression.⁵¹ Relational feminists nonetheless accept them as beneficial to society, as well as an intuitively comfortable fit.⁵² Thus, relational feminists describe women’s physical “potential for connectedness” as a positive shaper of laudable values⁵³ (whereas another feminist school regards this same potential as the primary factor exposing women to male invasion).⁵⁴

Relational feminists generally subscribe to analytic methods believed to effectuate the values that are to be advanced.⁵⁵ These importantly include the grounding in women’s experience referred to above.⁵⁶ This grounding leads to emphasis on the actual context in which a particular issue is presented.⁵⁷ Contextual emphasis is regarded as vital both because it evokes empathy and because it reveals situational variations that demand and permit case-specific accommodations.⁵⁸ Rules that are either derived or applied in abstraction

50. See Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1187-88 (1991) (explaining relational feminism); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 13-42 (1988) [hereinafter *Jurisprudence and Gender*] (same).

51. See, e.g., Leslie Bender, *A Lawyer’s Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 15 (1988) (discussing the construction of gender roles by men); *Jurisprudence and Gender*, *supra* note 50, at 20-28 (discussing traditional gender norms for women); see also NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING* 6 (1978) (discussing the evolution of women’s roles in a male-dominated society). But see, e.g., Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or “The Fem-Crits Go to Law School,”* 38 J. LEGAL EDUC. 61, 72-75 (1988) (presenting the “equal-treatment” perspective, which argues that identification of values unique to the shared experience of women legitimizes repercussions and exclusions based on those differences); Joan W. Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 J. FEMINIST STUD. 33 (1988) (same).

52. See generally CHODOROW, *supra* note 51; CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982); NEL NODDINGS, *CARING: A FEMINE APPROACH TO ETHICS & MORAL EDUCATION* (1984).

53. *Jurisprudence and Gender*, *supra* note 50, at 16-18.

54. *Id.* at 29.

55. Many of these methods have been developed by or in conjunction with other feminist approaches. See, e.g., Dorothy E. Smith, *Women’s Perspective as a Radical Critique of Sociology*, in FEMINISM AND METHODOLOGY 84, 84-85 (Sandra Harding ed., 1987) (arguing for the study of sociology organized from women’s perspectives).

56. Crain, *supra* note 50, at 1187-88.

57. See, e.g., Bender, *supra* note 51, at 10-11 (advocating the application of feminist theories to the law and legal education); Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls’ Theory of Justice*, 16 N.M. L. REV. 613 (1986) (criticizing Rawls’s use of abstraction by comparison to contextual feminist methods); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986) (asserting that abstractions preclude realistic solutions to problems of inequality).

58. *Feminism, Fairness, and Fiduciary Duty*, *supra* note 46, at 11-12.

therefore are suspect—likely to be somewhere between unreliable and oppressive.⁵⁹

B. *Critical Race Theory and Corporate Law*

“A central claim of [critical race theory] is that antiracist politics and legal theory should be informed by the voices of people ‘on the bottom’ of discrimination.”⁶⁰ Arguments in support of this claim include the contention that looking to these voices is likely to lead to correct substantive results,⁶¹ the assertion that calling forth particular voices may be as important as what is said⁶² and the contention that, on issues of race,⁶³ voices on the bottom have more credibility than the voices of those on the top.⁶⁴ This bare-bones description of an increasingly rich literature presents two central questions. First, how broadly is the concept of “antiracist politics and legal theory” to be defined? Second, how is one to identify those “on the bottom” with respect to any particular issue?

For purposes of a corporate law analysis, the second question is simpler than the first, for it is easy to identify a “bottom” more-or-less in apposition to the “top.” Economically privileged white males have shaped corporations, corporate law, and corporate-law commentary;⁶⁵ eliciting the voices of those not sharing all three of those characteristics would, pursuant to a critical race analysis, have intrinsic value *if* the issues to be addressed were those within the realm of critical race concern. This, of course, leads back to, and illuminates, the first question. In any context in which “top” and “bottom” are so easily discerned in terms of race, gender, and economic class, issues within the realm of critical race analysis clearly are invoked.

59. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 848-49 (1990) (discussing recognition of oppression).

60. Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1284 (2002).

61. See, e.g., Richard Delgado, Commentary, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 569, 571 (1984) (arguing that an omission of minority voices skews the academic debate on race-related issues); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 362 (1987) (asserting that the legal concept of reparations arises from experience rather than abstraction).

62. Carbado, *supra* note 60, at 1299.

63. It should be noted that, as race has come to be regarded as a matter of social construct rather than genetic immutability, the inclusion of other social categories of inequity in critical race theorization has become quite natural. Darren Lenard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455, 1459 (2002).

64. Carbado, *supra* note 60, at 1304.

65. See Theresa A. Gabaldon, *Corporate Conscience and the White Man's Burden*, 70 GEO. WASH. L. REV. 944 (2002) [hereinafter *White Man's Burden*].

The practice of looking to the bottom has been criticized as damaging to the goal of racial equality,⁶⁶ as possibly anti-Semitic⁶⁷ and anti-Asian, and as simply being unhelpful.⁶⁸ Even those applauding the practice admit the difficulties arising from the multiracial nature of racism and the complications of gender, class, and sexual orientation; in other words, the essentialism problem is alive and well in critical race theory itself.⁶⁹ Interestingly, the challenges of managing the search for the bottom are less in the area of corporate law than in some other areas simply because the demarcation of haves and have-nots is so clear. Moreover, for those accepting the lesson of the essentialism critique and endorsing the need for contextualization of analysis, the difficulties of the search for the bottom in fact are part of its value.

C. Common Cause

It is fair to say that most women, like most racial minorities and other economically disadvantaged persons, have been outside traditional power structures, including the upper reaches of political, corporate, and academic hierarchies. As outsiders, they may be expected to cast an initially skeptical eye toward the normative analyses and positive laws generated by the traditionally empowered.⁷⁰

Outsider skepticism encompasses both established corporate law doctrines and progressive corporate law reforms that invoke directorial power and discretion.⁷¹ Corporate law and corporate culture concentrate power in the hands of privileged, middle-aged white males over the fate of (relatively more) diverse shareholders, employees, and others.⁷² Proposals for corporate overhaul sometimes call for a fur-

66. See DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* 30-50, 118-37 (1997) (criticizing radical multiculturalists' lack of objectivity and reason).

67. Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CAL. L. REV. 853 (1995).

68. Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 814-15 (1993).

69. See Carbado, *supra* note 60, at 1285.

70. See Scales, *supra* note 57, at 1376-79 (asserting that objective reality is constructed out of patriarchal myth); Jeffrey J. Pyle, Note, *Race, Equality and the Rule of Law: Critical Race Theory's Attack on the Promises of Liberalism*, 40 B.C. L. REV. 787, 797 (1999) (describing the critical race theorists' skepticism of the American legal system).

71. *White Man's Burden*, *supra* note 65, at 952.

72. See Brett W. King, *The Use of Supermajority Voting Rules in Corporate America: Majority Rule, Corporate Legitimacy, and Minority Shareholder Protection*, 21 DEL. J. CORP. L. 895 (1996) (discussing supermajority voting); see also Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 8 (2002) (defending the nexus of contracts approach).

thering of such concentration.⁷³ For instance, progressive and team production appeals to a board that has the discretion and/or duty to consider nonshareholder interests still are appeals to the usual suspects⁷⁴—the group that, even before the adoption of neoclassical shareholder primacy as a sacred totem,⁷⁵ was responsible for laws and policies limiting the opportunities of women and minorities in the workforce.⁷⁶

Granted the preeminence of the board of directors in both accepted corporate dogma and proposals for reform, one way for outsiders to react is to do the best they can with what they have. They thus might resign themselves to the notion that agglomerated capital must, as a matter of at least temporary practicality, be centrally managed. The goal of outsiders then might be to mitigate the “necessary evil” of board-based structures through intense and continuing scrutiny of board composition and function.

A second, and complementary, reaction is to reimagine some of the basic assumptions of corporate law. This reimagining then can be put to use, at least at the margins, in devising practical reforms and in providing standards for the board scrutiny demanded by the “necessary evil” view.

III. EXPERIENCE, VALUES, SYMBOLS, AND LOGIC

The proposition that outsiders have reason to be skeptical of the board-centric model of corporate law leads to a series of possible concerns worth enumeration and, in many cases, further investigation. These propositions, which are related but separable, are the subjects of separate discussions below. They are as follows: First, although the abstracted nature of past corporate law discussion has conflated the actual experiences of outsiders in dealing with corporations with

73. See, e.g., CORPORATE IRRESPONSIBILITY, *supra* note 20, at 129-34, 157-61 (calling for lengthening the term of board members and lengthening the time between mandated disclosure of financial reports as methods of alleviating the pressure on boards to focus on short-term results).

74. See Janis Sarra, *The Gender Implications of Corporate Governance Change*, 1 SEATTLE J. SOC. JUST. 457, 487 (2002) (discussing a 2001 Canadian survey that found that only 9.8% of board seats in Canada, and only 12.4% of Fortune 500 board seats in the United States, were held by women); see also Cheryl L. Wade, *Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure*, 63 U. PITT. L. REV. 389, 423 n.148 (2002) (citing a 1998 study that stated only 0.6% of senior-level managers in major companies were African American).

75. See *supra* Part I.A.

76. See generally Alison A. Gormley, Note, *The Underground Exposed: The United States Corporations' Use of Sweatshops Abroad, and the Abuse of Women*, 25 SUFFOLK TRANSNAT'L L. REV. 109 (2001).

those of non-outsiders, the divergences are worthy of note. Second, the conclusions of these abstract prior discussions are inconsistent with the conclusions likely to be reached by outsiders on the basis of their own experience. Third, some of the central values manifest in past corporate law analyses are anathema to at least some outsiders. Fourth, the prevailing symbolic expression of these central values obscures the effect of corporate law on outsider experience, thus helping to explain the first proposition described. Fifth, once the prevailing symbolism is rejected and analysis is injected with healthy doses of skepticism and reference to real-world experience, it becomes apparent that shareholders of publicly held companies in fact are unnecessary. Finally, decoding the symbolism and value-laden structure of existing corporate law supports the conclusion, advanced as an intuitive matter above, that board-centric, investor-privileging models by no means are the best choice for outsider endorsement.

A. *The Lessons of Experience*

The first claim to be examined is that, although the abstract nature of past corporate law discussion has conflated the experiences of outsiders in dealing with corporations with those of non-outsiders, the divergence of those experiences is worthy of note. The common methods of feminists and critical race theorists generally call for an appeal to the actual voices and a recitation of the actual experiences of women and minorities in the context of various issues.⁷⁷ As a preliminary and self-consciously brief foray into this area, this Article cannot purport to identify, much less exhaust, the possible permutations of outsider experience in the context of shareholder primacy. It is relevant, nonetheless, to raise a few brief points about each of the main roles played in the corporate scenarios usually described by contractarian, progressive, and team production scholars. The first, shared point is that the roles themselves are non-outsider constructs that conceal both nuance and possible overlap, therefore risking ultimate preclusion of an adequate consideration of actual experience. In this regard, it is useful to note that the roles of shareholder, director, etc., typically are defined in terms of their relationships to one another, without regard to the actual characteristics of the persons occupying the positions described.

77. See *supra* notes 44-45, 48-58 and accompanying text.

1. *Shareholders.*—Contractarians have identified a corporation's shareholders as its passive, relatively vulnerable providers of capital,⁷⁸ but also, as a group, as the corporation's spectral monitor of managers.⁷⁹ As noted above, this combination of functions renders the shareholder group as the corporate end-all; the corporation's business is conducted for the purpose of increasing the value of the shareholders' interests.⁸⁰ Progressives typically do not draw a privileging distinction between shareholders and other providers of capital, human or otherwise.⁸¹ Thus, they have argued that the duty of those managing the business runs not only to a corporation's workers, but also to its creditors; some have made proposals, such as lengthening the terms of the board of directors, that would tend to enhance the shareholders' pacific nature.⁸² Team production analysts similarly argue for a more-or-less equal managerial duty running to shareholders, creditors, and workers (and to anyone else with a "team-specific" input).⁸³ The difference is in the type of the duty, which rather than being fiducial in nature is to serve as a mediating hierarch.⁸⁴ In this view, too, shareholders play a passive role.⁸⁵ In none of the approaches described are possible divergences of interest among shareholders specifically addressed,⁸⁶ except in terms of taste for risk and institutional character.⁸⁷

Without a doubt, outsiders actually have begun participating in the financial markets in record numbers.⁸⁸ In part, this is because of work-force participation that brings with it retirement plan benefits

78. See, e.g., *supra* note 6. With certain exceptions (see, e.g., Black & Scholes, *supra* note 29), contractarians have not been particularly interested in the role of creditors, who of course also play a role in providing capital.

79. R. William Ide, *Post-Enron Corporate Governance Opportunities: Creating a Culture of Greater Board Collaboration and Oversight*, 54 MERCER L. REV. 829, 836 (2003).

80. EASTERBROOK & FISCHER, *supra* note 6, at 35-39.

81. See *Communitarianism*, *supra* note 15, at 3-4, 16-18.

82. See *Team Production*, *supra* note 21, at 249-53 (suggesting that boards exist not just to protect shareholders but to protect the investments of all members of the corporate team).

83. *Id.* at 276-87.

84. *Id.* at 250.

85. E.g., Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 522 (1990).

86. See *id.* at 525 (noting the various potential causes for shareholder passivity).

87. See Ralph K. Winter, *On "Protecting the Ordinary Investor,"* 63 WASH. L. REV. 881, 883-88 (1988) (distinguishing among different types of investors).

88. Theresa A. Gabaldon, *John Law, with a Tulip, in the South Seas: Gambling and the Regulation of Euphoric Market Transactions*, 26 J. CORP. L. 225, 227-29 (2001) [hereinafter *Euphoric Market Transactions*] (discussing the increase in outsider investment prior to the burst of the bubble).

invested in the employers' and other issuers' securities.⁸⁹ In this capacity, outsider participation in corporate "ownership" frequently has been through a financial intermediary, such as an investment fund. Moreover, in some instances, outsiders have invested in corporate debt rather than corporate equity. Nonetheless, it is clear that the boom of the late 1990s lured outsiders as well as non-outsiders into making direct, voluntary financial investments in corporate stock.⁹⁰

The claim thus is not that the capital markets are intentionally discriminatory in excluding outsider investment or that outsiders have special purity with respect to their existing motivation to share American wealth, to get their piece of the American financial pie. The claim is that those on the bottom are not indifferent to the pie's ingredients, to who the baker is, or to how the size of the pieces is determined. They are experienced, in fact, with the notion that increasing the size of a pie does not automatically assure that everyone gets a slice (much less a bigger slice).

Stock market participation in fact has been said by non-outsider commentators to be democratizing.⁹¹ To every appearance, access to participation indeed seems color-blind.⁹² This may be as it may be, but outsiders have learned to be suspicious of neutrality claims. Thus, for instance, the denial of pregnancy benefits to men and women alike once was held by the Supreme Court to be gender-neutral,⁹³ but women experienced the denial differently than did men. It is entirely possible, even indisputable, that persons of different gender, race, and/or economic class experience financial market participation in different ways: studies show that racial minorities are far less likely than whites to participate in equity markets.⁹⁴ It would be interesting to know the actual proportions in which they hold corporate debt rather than equity.⁹⁵ It also would be interesting to verify the intui-

89. See generally Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501, 1505-13 (2004) (setting forth the significant tax advantages that accompany certain employer-provided pension plans).

90. See *id.* at 1535 (describing pension participation by various racial groups).

91. Cf. Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 571, 596 (2001) (arguing that the privatization of welfare would transfer power from the government to local communities, increasing access to participation).

92. See Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. REV. 1283, 1450 (1996) (suggesting that property rules contain distributive principles that prevent the exclusion of groups of people based on race).

93. *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974). The Court found that "so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point." *Id.* at 495.

94. Brown, *supra* note 89, at 1536-38.

95. See generally Theresa A. Gabaldon, *The Role of Law in Managing Market Moods: The Whole Story of Jason, Who Bought High*, 69 GEO. WASH. L. REV. 111, 123-25 (2000) (book

tion that outsiders tended to be some of the latest entrants into the speculative frenzy of the 1990s and thus to be the hardest hit when the bubble collapsed.⁹⁶ If outsiders' experience with the role of shareholder indeed is that it is somewhat perilous and not quite what the hype has made it out to be, they well may value the structures and rules privileging shareholders differently than those for whom participation has been more successful. In other words, the interests of outsiders in participating in the economy as investors very well may be subordinate to their interests in participating as workers and consumers. This Article contends that the ingrained investor-privileging doctrines and imagery of corporate law stand in the way of addressing this matter in order to achieve the appropriate balance.

2. *Managers.*—As described above, contractarians prefer to regard management (in the form of the board of directors) as the agent of the owners of the residual value of the corporation and therefore as responsible for maximizing that residual value.⁹⁷ Progressives agree that this is the prevailing legal and social view of the role of the board, but call for a change in its regard for workers, creditors, and consumers.⁹⁸ Team production scholars argue that, as a matter of current legal structure as well as normative preference, regard for workers and creditors already is implicit in the board's function.⁹⁹

However one defines "management"—as the corporation's board of directors, as its board and executive officers, or as its highest echelon of employees—it is clear that it is a group that is far more heavily populated by white males than by women and minorities.¹⁰⁰ Since women and minorities are, in fact, significantly "better" represented as workers and consumers, and, for that matter, as investors, it is the duties, incentives, and privileges of management that are most suspect to outsiders. For instance, a model that aligns manager interests with those of shareholders by permitting managers to reward themselves with gigantic incentive payments obviously benefits privileged insiders much more directly than it improves the lot of outsiders. It smacks, in

review) [hereinafter *Managing Market Moods*] (noting the possible effect of federal law on market moods).

96. It has been shown that at least some minorities abandoned the equity markets post-bubble and missed the subsequent rally. Brown, *supra* note 89, at 1537.

97. See *supra* notes 9-11 and accompanying text.

98. See *supra* notes 16-20 and accompanying text.

99. See *supra* notes 24-27 and accompanying text.

100. See Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 600 (2000) ("[W]hite men account for a disproportionate share of executive, administrative, and management jobs.").

fact, of the unhappy minority experience with the self-privileging conduct of the managers of British colonial investment.¹⁰¹

Token representations of women, minorities, workers, etc., on boards are, of course, ostensible incursions by outsiders.¹⁰² These representations are, however, unlikely to lead to anything like rapid meaningful reform. The tokens elected to boards, unless responsible in some fairly immediate legal or emotional way to those they theoretically represent, are likely to assume—indeed are likely already to have assumed—the attitudes of the majority board members.¹⁰³ This might be short-handed as the “Clarence Thomas argument,” and its logical extension is the expressed fear that the presence of tokens on the board may be a placebo interfering with more meaningful change.¹⁰⁴

101. See Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT'L L. & POL'Y 903, 909, 932 (1997) (discussing the colonialist assumption that Western thoughts and systems provided a universal definition of civilization); Ruth-Arlene W. Howe, *Transracial Adoption (TRA): Old Prejudices and Discrimination Float Under a New Halo*, 6 B.U. PUB. INT. L.J. 409, 457 n.277 (1997) (explaining how the two aspects of philanthropic colonialism—paternalism and clinicalism—form the basis for the concept of “the white man’s burden”); Ali Khan, *The Dignity of Labor*, 32 COLUM. HUM. RTS. L. REV. 289, 291 n.6 (2001) (noting that throughout history colonizers have likened the colonized people to children, “capable of improvement under the guidance of colonizers”). See generally WINTHROP D. JORDAN, *THE WHITE MAN’S BURDEN: HISTORICAL ORIGINS OF RACISM IN THE UNITED STATES* (1974).

102. See Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1365, 1384-88 (2002) (commenting on the “new” corporate social responsibility movement and its effects on the diversity of corporate boards of directors); Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J.L. BUS. & FIN. 85, 124 (2000) (listing the benefits of transitioning corporate America from a segregated power to a diverse and multi-cultural one).

103. E.g., Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645, 1688-90 (2004) (establishing the likelihood that racial minorities at the top of the corporate hierarchy will neither racially reform the corporation nor engage in door-opening activities for other minorities); John M. Darley, *How Organizations Socialize Individuals into Evildoing*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 13, 25-28 (David M. Messick & Ann E. Tenbrunsel eds., 1996) (describing how individuals can get caught up in the attitude of the majority and subsequently be altered by it).

104. See Carbado & Gulati, *supra* note 103, at 1685-86 (discussing how the presence of racial minorities at a senior level might increase the demand for racial comfort and sameness within the corporation). *But cf.*, e.g., David A. Carter et al., *Corporate Governance, Board Diversity, and Firm Value*, 38 FIN. REV. 33, 50-51 (2003) (describing increases in firm value correlating with board diversity); Thomas W. Joo, *A Trip Through the Maze of “Corporate Democracy”: Shareholder Voice and Management Composition*, 77 ST. JOHN’S L. REV. 735, 739-40 (2003) (setting forth general benefits of diversity at the director and executive levels of the corporation); Steven A. Ramirez, *A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?*, 77 ST. JOHN’S L. REV. 837, 845-56 (2003) (analyzing the many benefits of diversity within the corporation, including potentially quelling corporate corruption).

3. *Workers.*—Workers are, to contractarians, something like part of the landscape against which managers and shareholders act out their dramas. In other words, they receive relatively little attention. When they are discussed, they are assumed to be canny creatures of free will, making judgments in their own self-interest and attempting to extract concessions from management.¹⁰⁵ Progressives pooh-pooh this notion, contending that workers are in a position at least as vulnerable as that of shareholders and deserve the protections of a fiducial relationship with management.¹⁰⁶ Team production scholars claim that neither shareholders, workers, nor any other group should claim more from management (that is, the board of directors) than its services as mediating hierarch.¹⁰⁷ As a general matter, the contractarian, progressive, and team production accounts fail to seriously assess the possibility that different workers have different experiences.

Generally left without comment in corporate law analysis, then, is the fact that, as workers, women and minorities have experienced years of overt discrimination and other inequity.¹⁰⁸ Even recently, the average female worker made seventy-one percent of the earnings of the average male;¹⁰⁹ the average African-American male worker made seventy-eight percent of the income of the average white male.¹¹⁰ Disparities between the highest paid workers and the rank-and-file also are well documented.¹¹¹ This means, of course, that identification of a single worker “class,” the interests of which are to be considered by the board, balanced against investor interests, etc., conflates a number of demarcations, including those of gender, race, and organizational hierarchy.

It is true, even from the perspective of outsiders, that it can be quite useful to define a worker class in terms of significant attributes

105. Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. DAVIS L. REV. 581, 586-87 (2002).

106. Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 305-11 (1998).

107. *Team Production*, *supra* note 21, at 250.

108. *See supra* note 39.

109. B. Tobias Isbell, Comment, *Gender Inequality and Wage Differentials Between the Sexes: Is It Inevitable or Is There an Answer?*, 50 WASH. U. J. URB. & CONTEMP. L. 369, 369 (1996).

110. LEX K. LARSON, 1 EMPLOYMENT DISCRIMINATION § 2.09, at 2-44-2-45 (2d ed. 1996); *see also* Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary's Honor Center v. Hicks, Pretext, and the "Personality" Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183, 238 (1997) (describing the wage differentials between men, women, and minorities). *See generally* Chinhui Juhn, *Labor Market Dropouts and Trends in the Wages of Black and White Men*, 56 INDUS. & LAB. REL. REV. 643 (2003).

111. *See* Gary Burtless, *Effects of Growing Wage Disparities and Changing Family Composition on the U.S. Income Distribution 1-2* (Ctr. on Soc. & Econ. Dynamics, Working Paper No. 4, 1999) (noting the dramatic increase in earnings inequality in the 1980s and 1990s).

lacked: these are participation in management and financial independence from employment. The interests of many white male workers, as a matter of this culturally shaped, common-sense definition, indeed may be closer to those of women and minority workers (or, for that matter, women and minorities generally) than to those of managers or investors generally. This is a leap of faith, however, and one easily can imagine various worker-empowerment solutions pursuant to which relatively privileged workers' interests supplant those of the relatively unprivileged. In any event, meaningful worker empowerment is beyond the realm of actual American experience, although no doubt is suggested at the elusive margin between workers and managers.¹¹²

4. *Consumers.*—Contractarians view consumers much the same way that they view workers: they are poorly sketched, self-interested antagonists to the interests of shareholders and, therefore, of managers.¹¹³ They are, however, regarded as the incidental beneficiaries of the increasing number of technological developments achieved by corporations in their quest for profit.¹¹⁴ Consumers are the recipients of some sympathy from progressives, although generally to a lesser extent than workers.¹¹⁵ Team production analysis generally concerns itself with those who have “team-specific” inputs; as a usual matter, a consumer’s cash or credit is not specifically dedicated to a particular corporation and she or he therefore is not a member of the team served by the board.¹¹⁶ Again, in none of these accounts is a possible disparity of interest recognized.

It is relatively easy to raise numerous unhappy consequences that profit-driven, shareholder-privileging corporate decisions have had on, e.g., wearers of the Dalkon Shield intrauterine device,¹¹⁷ users of silicon breast implants,¹¹⁸ and ghetto children enticed into violence and theft by Nike’s sneakers du jour.¹¹⁹ It is well known that lending practices discriminate on the basis of race (and zip codes which not

112. For discussion of a model awarding employees with ownership rights, see *infra* Part IV.B.3.

113. See *supra* note 6 and accompanying text.

114. See *supra* note 6 and accompanying text.

115. See *supra* note 15.

116. See *supra* notes 21-27 and accompanying text.

117. Sylvia A. Law, *Tort Liability and the Availability of Contraceptive Drugs and Devices in the United States*, 23 N.Y.U. REV. L. & SOC. CHANGE 339, 362-68 (1997).

118. Douglas A. Orr, *Saline Breast Implants: A Tricky Solution*, 25 RUTGERS L. REC. 1 (2001).

119. Cf. Troy Y. Nelson, Commentary, *If Clothes Make the Person, Do Uniforms Make the Student?: Constitutional Free Speech Rights and Student Uniforms in Public Schools*, 118 ED. LAW.

coincidentally have racial correlatives).¹²⁰ Women and minorities pay higher car prices than do white males.¹²¹ These simple facts adequately demonstrate (as does common sense) that there is no such thing as a single consumer “class.” In fact, consumption is not a matter of class at all: obviously, everyone is a consumer. As individuals with different attributes engage in the activity of consumption, however, they have had dramatically different experiences. Claims, then, that consumers, as a group, are better off if there is more choice between products¹²² or if products carry a lower price, simply are not well thought out.¹²³

5. *Crossing Lines.*—The concept of “class” has a fixed sociological meaning that might distinguish among at least some of the groupings that could be relevant to development of corporate law (i.e., identification of a “worker” or “working” class).¹²⁴ Clearly recognizing that consumption is merely an “activity” in which everyone engages, rather than a “class,” nonetheless tempts one to “declassify” the constructs of “worker,” “investor,” and “management.” “Investment” is an activity in which consumers, workers, and managers also engage. In the vernacular, “management” also is a type of “work.” In determining one’s own interests and preferences it is expedient to consider all of one’s activities, but important to do so in light of the practical limitations of one’s experience as a woman or as a minority or with economic deprivation. It is easy, then, to imagine the voice of someone with experience “at the bottom” of economic society calling for a better paying job, and therefore, at least for some period of time, for more “worker-regarding” behavior by managers, and caring very little

REP. 1, 3-4 (1997) (noting how school uniforms decrease violence among students over designer clothing or sneakers).

120. See, e.g., FRANKLIN J. JAMES ET AL., CTR. FOR PUB.-PRIVATE SECTOR COOPERATION, DISCRIMINATION, SEGREGATION AND MINORITY HOUSING CONDITIONS IN SUNBELT CITIES: A STUDY OF DENVER, HOUSTON & PHOENIX 92, 96 (1983).

121. For a 1991 study revealing discrimination in car negotiations, see Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 825-41 (1991).

122. Fernando R. Laguarda, *Unleashing “Instant Messaging” from Regulatory Oversight*, 10 RICH. J.L. & TECH. 24, ¶ 34 (2004), <http://law.richmond.edu/jolt/v10i3/article24.pdf>.

123. As one simple illustration of this point, imagine, for a moment, the experience of a harried single parent dealing with a child pausing in the grocery aisle before the latest high-calorie, high-fat snack craze or clamoring for the latest violent video game.

124. See generally Marion Crain & Ken Matheny, *“Labor’s Divided Ranks”: Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542 (1999) (discussing and criticizing a sociological single-class approach to labor law); Jennifer M. Russell, *The Race/Class Conundrum and the Pursuit of Individualism in the Making of Social Policy*, 46 HASTINGS L.J. 1353 (1995) (discussing and criticizing a sociological single-category approach to either race or class in the post-Civil Rights Era).

for the claim that society overall would thereby lose the theoretical benefit of the pure principal-agent model.

B. Posited Voices

The second claim made above, and anticipated in discussion of the first claim, is that the abstract conclusions of past corporate law analyses are inconsistent with the conclusions likely to be reached by outsiders on the basis of their own experience. Here, the point to be reckoned with is that eliciting the actual voices of experience at the bottom of corporate law issues is an unaccustomed task.¹²⁵ The actual voices of outsiders thus have yet to be heard on the subject of shareholder primacy and the various issues it raises. Substituting a posited outsider voice or voices is a dangerous—in fact, ultrahazardous—activity that nonetheless may be unavoidable in light of the current state of corporate law debate, which usually has addressed the alleged concerns of workers, consumers, and investors without considering the possible divergences of gender, race, and/or economic strata.¹²⁶ Incremental, if tentative, enlightenment thus may lie in an imagined exchange on the subject of a few outsider concerns.

Consider, then, the following, non-exhaustive iteration: the concerns of middle-aged women facing increased health problems due to hormone replacement therapy,¹²⁷ the concerns of third-world workers employed under sweatshop working conditions,¹²⁸ and the concerns of low-level employees who lost their retirement nest eggs in the boom and bust of the late 1990s.¹²⁹ Contractarians might assert that, on an ex ante basis, the healthy economy theoretically fostered by corporate profit-maximization so sufficiently better the lives of the masses that everyone (including those who will become tort victims but do not yet know it) willingly accepts its costs. They also might observe that having a job at a sweatshop is better than having no job, pointing as evidence to sweatshop workers' own demonstrated preferences in taking

125. See *Lemonade Stand*, *supra* note 41, at 1413-14 (alluding to the paucity of corporate legal publications from a feminist perspective).

126. See Theresa A. Gabaldon, *Assumptions About Relationships Reflected in the Federal Securities Laws*, 17 WIS. WOMEN'S L.J. 215, 222 (2002) (discussing the lack of application of feminist approaches to corporate and securities law topics).

127. See generally Leticia M. Diaz, *Hormone Replacement Therapy, or Just Eat More Meat: The Technological Hare vs. The Regulatory Tortoise*, 27 B.C. ENVTL. AFF. L. REV. 391 (2000) (exploring the correlations between diet, therapy, and hormonal upsets in women).

128. See Gormley, *supra* note 76, at 110-14 (describing the abusive effects of third-world sweatshops on women).

129. See *Managing Market Moods*, *supra* note 95, at 111-15 (discussing the stock market boom and bust of the late 1990s).

such employment. They also might comment that the increasing participation of women and minorities in financial markets evidences their “voice” on the matter of corporate governance—their “vote” with their pocketbooks. More sympathetically, progressives and team production scholars would acknowledge each of the problems presented by the outsiders’ iteration and would attempt to offer board-reliant solutions.

The outsiders’ response to the contractarians (which also implies a response to progressive and team production scholars) presumably is that “choices” to accept health risks, to accept sweatshop conditions, and to accept corporate law as currently structured are completely illusory—exactly like the “choice” that women and minorities make to work in lower-paying jobs than white males and to pay higher prices for their cars. In other words, at least some of those on the bottom simply have been taken along on someone else’s ride without perceiving realistic alternatives. To the extent participation in, e.g., financial markets is anything like a real matter of choice, it still is entirely possible that women and minorities have been sold a bill of goods. It is, in fact, more than likely that outsiders participate as shareholders without necessarily and/or consciously subscribing to the notion that corporate directors serve as their agents cum trustees cum father figures.

In fact, positing conscious outsider acceptance of a model in which a group of predominantly privileged, white male directors are charged with maximizing profit is laughable. For that matter, so is assuming outsider endorsement of a model that permits shareholders exhibiting at least some diversity to empower a monolith of directors by abdicating control and responsibility for the use of their funds, thus vanishing into faceless anonymity vis-à-vis possible and entirely predictable adverse consequences to nonshareholders.¹³⁰ Just as importantly, if outsiders adopted as a working premise the notion that directors should act to maximize the return on one activity (investing), they clearly would accept the risk of adverse effect on the activities of working and consuming. Outsiders individually and collectively might wish to consider quite closely whether higher wages and lower consumer prices would be more to their benefit than increased share

130. Accepting the principal-agent model would represent acceptance of a dichotomy in the lives of the purported principals: the separation of home/work spheres that has been decried by feminists thus is echoed in the creation of personal/financial spheres of interest and enterprise. See *Lemonade Stand*, *supra* note 41, at 1445 (noting that feminist analysis would deplore the separation of various social and legal structures seen in corporate law).

price (particularly if increased share price is subject to rapid and unpredictable deflation).¹³¹

C. On Values, Shirking, and Power

The third concern listed above is that some of the central values manifest in past corporate law analyses are anathema to at least some outsiders. The clash of values in part has to do with responsibility.

One of the central problems of the principal-agent relationship identified by contractarians is shirking.¹³² Fearing that managers will loll about, accepting compensation without adequately exploiting business opportunities (like signing the hottest sports figure to pimp expensive sneakers) or undertaking enough high-risk enterprises (like rushing the latest pharmaceutical breakthrough to market), contractarians state that the would-be shirkers must be monitored. This monitoring must be the concern of a single class (shareholders), lest the multiplication of groups of principals lead to problems of the commons and inadequate monitoring incentives overall.¹³³ Giving shareholders the “residual” claim to the corporation’s earnings is thought to provide the appropriate motivation.¹³⁴

Somewhat perplexingly, given the contractarian emphasis on the role of shareholders as monitors, it is not unusual for corporate commentators in general to allude to the powerlessness of individual shareholders, both in support of a shareholder primacy norm (since shareholders, unlike other groups such as, say, the wily day laborers theorized by contractarians, have no ability to bargain over specific situational accommodations) and otherwise.¹³⁵ A shareholder primacy norm effectively applauds and continues this state of powerlessness, assuring shareholders that they are expected to be children in

131. See Robert B. Thompson, *Corporate Governance After Enron*, 40 Hous. L. Rev. 99, 100-01 (2003) [hereinafter *Corporate Governance*] (comparing the effects of the Enron scandal on employees whose retirement savings were locked into Enron stock with those of top-level management, who received large employment compensation packages).

132. Kimberly D. Krawiec, *Building the Basic Course Around Intra-Firm Relations*, 34 GA. L. Rev. 785, 788-89 (2000).

133. See William W. Bratton & Joseph A. McCahery, *Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference*, 38 COLUM. J. TRANSNAT'L L. 213, 261 (1999) (stating that a shareholder has no motivation to participate in a monitoring coalition when she can receive the benefits of the monitoring without incurring its costs).

134. See generally Ira M. Millstein & Paul W. MacAvoy, *The Active Board of Directors and Performance of the Large Publicly Traded Corporation*, 98 COLUM. L. REV. 1283 (1998) (finding that shareholders received a higher return where the board is active and independent of management).

135. See, e.g., Black, *supra* note 85, at 530-36 (discussing how the legal rules governing shareholder voting make it hard, if not impossible, for an individual shareholder to obtain a sizable share of a company).

financial matters, that they need never grow up, need never seek active involvement, and need never accept responsibility for the actions of the enterprises operated for their benefit. The shirking that is thought unacceptable for managers thus is heartily endorsed for shareholders.

The paternalism inherent in this picture is clear, and paternalism emphatically is not, from the standpoint of feminists and critical race theorists, a value to be nurtured.¹³⁶ Without a doubt, the patriarchal-board/passive-shareholder dichotomy permits and encourages shareholders to ignore the possible exploitation of third parties while providing the very means of exploitation.¹³⁷ This is, among other things, a form of failure to care decried by relational feminists.¹³⁸

D. *The Logic of Symbols*

The fourth claim made above is that the prevailing symbolic expression of the central values of corporate law seduces public imagination, leaving observers disinclined to examine the effect of corporate law on outsider experience. The seductive symbol in question is the entrepreneur—Henry Ford before he went public.¹³⁹

The introduction to this Article referred to the role of the public shareholders as “owners” of the corporation as a guiding myth based on the perceived operation of solely owned businesses. In the solely owned business, those who control the business enjoy the net benefits of its operation. They may be expected to spend some amount of time and energy in figuring out how to choose to maximize those benefits. This aligns with assumptions of law and economics scholars,¹⁴⁰ is a matter of common sense, and is a more-or-less attractive sociopolitical image.¹⁴¹ In hearing about the sole owner, it seems easy, and a matter of common sense, to anticipate entrepreneurial enterprise leading to social progress. The term “entrepreneurship” thus conjures the image of men in garages building cars, computers, and other

136. See Marie-Andrée Jacob, *On Silencing and Slicing: Presumed Consent to Post-Mortem Organ “Donation” in Diversified Societies*, 11 *TULSA J. COMP. & INT’L L.* 239, 245 (2003) (commenting on the general discomfort with paternalism in current bioethical literature, especially in feminist approaches).

137. *Lemonade Stand*, *supra* note 41, at 1431.

138. For a discussion of relational feminism, see *supra* text accompanying notes 50-53.

139. See Douglas G. Baird, *In Coase’s Footsteps*, 70 *U. CHI. L. REV.* 23, 32-36 (2003) (discussing Henry Ford’s extraordinary qualities that enabled him to succeed as an entrepreneur).

140. See *supra* note 6 and accompanying text.

141. Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 *J. POL. ECON.* 288, 289 (1980).

worthy devices, soon to be marketed to the public through entities steadily increasing in size. The imagery is quite important because it conveys a promise of progress for both society and the individuals involved and generally disregards the possibility that profits may, rather than resulting from useful innovation, simply be extracted from others, such as advertisement-sodden children.¹⁴²

When it is thought desirable to replicate entrepreneurial enterprise on a larger scale (Henry Ford going public), it is simple to imagine that a similar incentive structure must be employed—that a composite “sole owner” group must be permitted to enjoy the net benefits of corporate operation in order to be properly motivated to maximize those benefits by engaging in the inventive activity that will benefit society. The difficulty, of course, in this replication lies in the inability of the composite group to engage directly in the incentive activity desired. Between capital provider and inventors, management enters the scene.

At this point, the analogy between solely owned and public enterprise simply breaks down. There are two reasons for the disintegration. First, although sole owners of businesses reasonably have profit in mind, they also are clearly entitled to ignore profitability. Neither the law nor any legal academic ever has come up with a comfortable large-enterprise surrogate for the sole owner’s ability to self-disregard. Second, upon the emergence of management in corporate law analysis, the inventors simply disappear. Both of these points are discussed below.

1. *The Freedom to Self-Disregard.*—As stated above, sole owners—that is, those we think of as socially valued entrepreneurs—can, when they choose, moderate their self-regard. Out of respect for individual rights (a non-outsider construct)¹⁴³ we do not require that they exercise regard for others, but we do not fear that when it occurs it will mean the end of innovation; on the basis of experience, we know that it will not.

142. See Dennis Crouch, *The Social Welfare of Advertising to Children*, 9 U. CHI. L. SCH. ROUNDTABLE 179, 180 (2002) (“[A]dvertising to children has become very big business.”); see also Theresa A. Gabaldon, *Joe Camel Explains It to the Board: Corporate Law and the Exploitation of Children*, 13 DUKE J. GENDER L. & POL’Y (forthcoming 2006).

143. See *Jurisprudence and Gender*, *supra* note 50, at 9 (viewing the individual as inherently more valuable than a collective social entity). But see ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* (1994) (criticizing a conservative interpretation of the Fourteenth Amendment focused in part on individual freedom and instead arguing for a progressive interpretation focused on the positive liberties of societal participation, work, and intimacy).

Fearing management shirking and opportunism, no one has devised a clear-cut way to permit managers to disregard shareholder interests. Being told only that they are to manage for the benefit of the “owners” (as opposed to themselves or others who might suborn them),¹⁴⁴ managers must form some notion of what that benefit is. For want of the more specific guidance from owners that generally has been denied by corporate law’s insistence on shareholder passivity, coupled with the potential difficulties of collective action in a private property context, it is easy to see how profitability has become the surrogate for the self-regarding interests of the “owners,” without in any way reflecting the sole owner’s ability to self-disregard.¹⁴⁵

This analytic gap sometimes has been excused by reference to private philanthropy.¹⁴⁶ Thus, it is true that once managers have earned profits for shareholders, the shareholders are free to dispense them to charitable causes. It would seldom be obvious to shareholders faced with this freedom that they might “share the wealth” with the very workers, consumers, and community hosts who contributed to its production. Even if the opportunity for wealth-sharing were readily discerned, interposing the steps of distribution to shareholders and redistribution to worthy contributors hardly seems very efficient. This is particularly true if, e.g., consumers or the environment already have suffered physical harm.

Corporate constituency statutes permitting directors to consider the interests of nonshareholders without fear of personal liability might be straight-facedly said to address these concerns.¹⁴⁷ Of longer standing, most, if not all, state statutes boast a provision generally granting a corporation all the powers of an individual and specifically enumerating the power to make charitable contributions.¹⁴⁸ On the basis of experience, however, neither the “powers” nor the “corporate constituency” provisions appear to have had the power to override the

144. See *Theoretical Framework*, *supra* note 3, at 595 (noting that the problem created by the separation of ownership and control in the corporation is to prevent management from acting in its own interest).

145. Given the media’s portrayals of the short-term nature of shareholding toward the end of the twentieth century, it also is easy to see how share price became a surrogate for profitability and thus for the interests of the “owners.” See *Managing Market Moods*, *supra* note 95, at 111-12 (alluding to the media’s skewed portrayal of the stock market).

146. See generally Jill E. Fisch, *Questioning Philanthropy from a Corporate Governance Perspective*, 41 N.Y.L. SCH. L. REV. 1091, 1092-94 (1997) (questioning management’s role in making decisions about philanthropic spending as well as the overall purpose and place of corporate philanthropy).

147. *Theoretical Framework*, *supra* note 3, at 607.

148. See *id.* at 601 (discussing the relationship between charitable contributions and corporate purpose).

practical incentives and psychological pressures leading to behavior that apparently conforms to a profit/price-maximizing ideology.¹⁴⁹

Conscious of the void, many corporate progressives have attempted to provide, not a method for directors sometimes to disregard the interests of shareholders, but a definite mandate that they do so.¹⁵⁰ This is accomplished by constructing a legally enforceable duty to other corporate constituents. These attempts have foundered as a practical matter; as a theoretical matter, they also encounter difficulties in terms of specifying how directors, acting at their peril, are to balance conflicting interests.¹⁵¹ Team production analysis attempts not to provide the necessary specification, but to smooth over its absence.¹⁵² This approach in effect casts the board of directors as the ultimate “black box,” resulting in substantially more concentration of power than many outsiders rationally would regard as comfortable.

2. *The Vanishing Inventor.*—Contractarians long since have rejected the symbolism of the entrepreneur, recasting managers and risk-bearers as the meaningful actors in economic life.¹⁵³ In doing so, they have lost sight of the innovators actually responsible for the invention of new products, processes, etc. In large part this is because profitability, more or less the touchstone of the manager seeking to maximize the residual value of the firm for its ultimate risk-bearers, does not demand innovation. Profitability, in fact, does not conceptually discriminate between simple extraction of money from third parties and the creation of new value.¹⁵⁴

Although unsung and largely invisible in corporate analysis, we know that innovators do continue to exist.¹⁵⁵ We also know some significant number of them function outside of the umbrella of large organizations: small companies have developed one-half of the inno-

149. *See id.* at 594 (finding that the corporate structure creates incentives for directors to favor stockholders' interests).

150. *Communitarianism*, *supra* note 15, at 16-22.

151. *Theoretical Framework*, *supra* note 3, at 595-99.

152. *See Team Production*, *supra* note 21, at 288-89 (arguing that corporate law should, and in fact does, encourage directors to serve the joint interests of the corporate team).

153. *See Fama*, *supra* note 141, at 289 (laying to rest the “attractive concept” of “entrepreneur” and distinguishing the separate functions of management and risk-bearing).

154. *Cf. Theresa Gabaldon, Experiencing Limited Liability: On Insularity and Inbreeding in Corporate Law*, in *PROGRESSIVE CORPORATE LAW*, *supra* note 15, at 111, 128 (arguing that the “benefits of limited liability are not attributable to an affirmative desire to impose costs on third parties,” but to lower risk).

155. *See generally* Ann Bartow, *Inventors of the World, Unite! A Call for Collective Action by Employee-Inventors*, 37 SANTA CLARA L. REV. 673, 674 (1997) (discussing the role of the employee-inventor in the corporate context).

vations now reaching the market.¹⁵⁶ Without a doubt, this is a phenomenon worth study and further comment, as are the relationships between innovators, capital-providers, and their managerial interface.

E. *The Emperor's New Clothes*

The fifth claim made above is that once we reject the romantic analogy of the entrepreneur, inject a bit of skepticism about traditional corporate structuring, and toss in a dash of realism, we are in a position to recognize that there really is nothing special for the shareholders of public corporations to do. As an initial matter, we can easily note that public shareholders (unlike at least some shareholders of closely held firms) emphatically are not managers; neither are they inventors.¹⁵⁷ Their remaining formal role, then, is that of capital provider.¹⁵⁸

Various concomitant but subsidiary roles from time to time have been ascribed to public shareholders. These subsidiary roles generally are related to the monitoring function described by contractarians. They might be seen as the repository of the ultimate governing authority, owing to (1) their ability to deny capital to the corporation in the first place, (2) their ability to elect the board of directors, (3) their ability to sell their shares to someone else who is interested in electing the board of directors,¹⁵⁹ and/or (4) their ability to enforce the fiduciary duties of corporate managers¹⁶⁰ by bringing derivative causes of action on behalf of the corporation.¹⁶¹

From a practical standpoint, these subsidiary roles may be rather quickly dismissed. First, the initial public offering bubble of the late 1990s shows just how limited the perspicacity of both individual and institutional investors can be in discerning the worth of capital-seeking companies.¹⁶² Second, shareholders of public corporations are infamous for electing the slate of directors that management

156. Harold C. Livesay, *Entrepreneurial Dominance in Businesses Large and Small, Past and Present*, 63 BUS. HIST. REV. 1, 4 & n.7 (1989) (referring to companies with fewer than 500 employees).

157. See Stout, *supra* note 11, at 1191 (arguing that shareholders have limited power to control the corporation).

158. See *id.* at 1191-92 (rejecting the idea that shareholders own a corporation merely because they provide capital).

159. *Team Production*, *supra* note 21, at 310; Robert B. Thompson, *Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell, and Sue*, 62 LAW & CONTEMP. PROBS. 215, 216-18 (1999) [hereinafter *Preemption and Federalism*].

160. *Preemption and Federalism*, *supra* note 159, at 220.

161. *Team Production*, *supra* note 21, at 292-93.

162. See generally *Corporate Governance*, *supra* note 131, at 101 (discussing the market in late 1990s).

suggests.¹⁶³ Third, there is empirical evidence that shareholders of public corporations who “vote with their feet” by selling in large numbers to someone who wishes to install new (presumably superior) management are not necessarily disposing of systematically mismanaged firms.¹⁶⁴ Fourth, the ability to bring derivative causes of action has been so severely restricted¹⁶⁵ and the liability of officers and directors so limited¹⁶⁶ as to diminish the right to relative triviality.¹⁶⁷

A somewhat more descriptively accurate role also has been assigned to the shareholders of public corporations. Shareholders widely are described as the “residual claimants” vis-à-vis the corporation.¹⁶⁸ Accordingly, when “profits increase, the shareholders benefit from this bounty; if profits decline, shareholders feel the loss.”¹⁶⁹ The role, then, translates to the acceptance of the risk of corporate loss in exchange for the possibility of theoretically unlimited gain.

In considering the importance of the role of residual claimants, it is important to note that, given the existence of limited liability, shareholders cannot feel the loss of anything beyond their initial capital input.¹⁷⁰ This is exactly the kind of risk that a creditor accepts; the only difference has to do with the size of the risk. Risk differentials

163. See Arthur R. Pinto, *Corporate Governance: Monitoring the Board of Directors in American Corporations*, 46 AM. J. COMP. L. 317, 325-26 (Supp. 1998) (suggesting that management's control over corporate information and proxy solicitation at the corporation's expense, as well as stockholders' general passivity, allow them to influence a shareholder's voting decision).

164. See Anup Agrawal & Jeffrey F. Jaffe, *Do Takeover Targets Underperform? Evidence from Operating and Stock Returns*, 38 J. FIN. & QUANTITATIVE ANALYSIS 721, 742-44 (2003) (concluding takeover targets are no less profitable than other companies); see also DAVID J. RAVENSCRAFT & F.M. SCHERER, *MERGERS, SELL-OFFS, AND ECONOMIC EFFICIENCY* 68-70, 101-03, 122 (1987) (concluding from a study of 6000 manufacturing firm acquisitions that (1) before acquisition, acquired companies generally had above average profitability for their industries, although those companies acquired by tender offer had profits slightly below the industry average, and (2) profitability tended to decline after acquisition, except in those companies acquired by tender offer, where profitability neither declined nor improved).

165. Pinto, *supra* note 163, at 342.

166. Tim Oliver Brandi, *The Strike Suit: A Common Problem of the Derivative Suit and the Shareholder Class Action*, 98 DICK. L. REV. 355, 387 (1994).

167. The right also is one regularly only exercised at the instigation of self-interested attorneys. See Theresa A. Gabaldon, *Free Riders and the Greedy Gadfly: Examining Aspects of Shareholder Litigation as an Exercise in Integrating Ethical Regulation and Laws of General Applicability*, 73 MINN. L. REV. 425, 439-40 (1988) (highlighting the ethical problems that arise by lawyer solicitations of various corporate derivative suits).

168. See *Director Accountability*, *supra* note 28, at 410 (explaining contractarian arguments for shareholder primacy).

169. *Id.*

170. Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89-90 (1985); Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80, 81 n.1 (1991).

are, of course, most usually dealt with by adjusting rates of return.¹⁷¹ In other words, highly compensated, long-term creditors would do just as well as shareholders when it comes to the task of bearing risk.

This analysis casts into doubt the notion that shareholders must receive the prospect of unlimited returns in order to induce them to accept the limited risk of loss of their capital. All that shareholders logically should require is an adequate return to make foregoing alternate investments worthwhile. The real role of shareholders of public corporations, then, is to permit some amount of capital-raising in which the terms of repayment and return are relatively unspecified. This may be convenient for the corporation, but is not obviously necessary for entities with any sort of proven track record any more than open-ended repayment terms are necessary for borrowers of loans to buy homes.¹⁷² Even its convenience for the corporation is not a foregone conclusion, given the fact that the corporate debt market is the source of much more capital than the stock market.¹⁷³

Ironically, although shareholders are not necessary to be residual risk bearers (and in fact are not truly residual risk bearers, given limited liability), they (or someone like them) are necessary to “absorb” a corporation’s generation of profits in excess of its costs, including its cost of capital. After all, were there no deemed motive to benefit

171. Easterbrook & Fischel, *supra* note 170, at 97. According to Easterbrook and Fischel, the Coase Theorem demonstrates that the risk of a particular investment always is reflected in its price. *Id.* at 97 & n.13. See generally R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

172. It does, however, permit unsophisticated capital providers to take respectable gambles.

173. See LAWRENCE E. MITCHELL ET AL., *CORPORATE FINANCE AND GOVERNANCE* 456 (2d ed. 1996) (noting the increased capacity of debt securities to yield high returns); John Floegel, *Equity Financing for Public Corporations: Reasons and Methods to Encourage It*, 138 U. PA. L. REV. 1411, 1419 (1990) (explaining that in 1990, equity financings represented “a negligible percentage of total corporate financing”); Lynn A. Stout, *The Unimportance of Being Efficient: An Economic Analysis of Stock Market Pricing and Securities Regulation*, 87 MICH. L. REV. 613, 645 (1988) (“Firms rarely use equity issues to raise capital.”); see also *Australian Q3 Current A/C Deficit 7.871 Bln Aud Vs 7.305 Bln Q2; Consensus 7.6*, AFX EUROPEAN FOCUS, Nov. 29, 2002 (describing 57 billion Australian dollars of equity, as compared to 347 billion Australian dollars of debt); *Canadian Oil Industry Financings Hit 10-Year High*, OIL & GAS J., Mar. 10, 2003, at 38 (finding that the Canadian oil and natural gas industry’s debt comprised 7.02 billion Canadian dollars of the 9.98 billion total oil financing in 2002). Moreover, even if nonspecific terms of repayment and return are highly desirable for at least some corporations, there is no reason that classes of debt with these terms could not exist. This highlights, of course, the fact (related to the team production point about “ownership,” described *supra* Part I.C) that “debt” and “equity” are just matters of definition and borrows from corporate finance’s willingness to hybridize the two. The question then merely becomes what enforcement and monitoring rights would be required before creditors would sign on to the deal. If they were to replicate the current perceived package of shareholder entitlements, nothing would be gained by the redenomination.

shareholders, what would the corporation's purpose be? Might all publicly held corporations be managed primarily for the purpose of creating goods and providing services, creating jobs and the like? One thinks not. Actual adoption of such a model (further discussed below)¹⁷⁴ would be roughly as likely as selection of an Asian female as pope. In other words, modeling all corporations essentially along nonprofit lines would be a complete political nonstarter—a flop, a failure, dead in the water from the get-go. We regard ourselves as a capitalist nation¹⁷⁵ and prize our putatively open markets.¹⁷⁶ Quite arguably, the primary, and only truly indispensable, role of the shareholder of a public corporation is to symbolize commitment to these theoretical ideals.

IV. PROBLEMS AND SOLUTIONS

A. *Recapitulation of the Problems Presented by Shareholder Primacy*

The problems presented by the doctrine of shareholder primacy are numerous. Those intimated above include (1) the effect on shareholders' security, ultimately reducing their sense of responsibility; (2) the potential encouragement for directors to manhandle workers and exploit consumers; (3) the possibility of adverse effects on innovation, in part owing to the failure to address it; (4) encouragement of management to seek profits without limit; and (5) the obscuring of the effect of corporate structuring on those outside existing power elites. Although not previously raised in this Article, it also seems obvious that shareholder primacy thinking contributes to irrational stock pricing in both initial- and after-markets.¹⁷⁷

As indicated above, although shareholder primacy is not, at present, the absolute mandate of statutory law, it is the object of admiration of contractarians and, it seems, management itself.¹⁷⁸ The practical pressures on management to observe shareholder primacy, including psychological acculturation, competition for capital, and avoidance of hostile takeover,¹⁷⁹ thus appear to have been sufficient to outweigh any attempt to endow management (as embodied in the

174. See discussion *infra* Part IV.B.1.

175. For a basic description of capitalism, see ADAM SMITH, *THE WEALTH OF NATIONS*, at bk. 4 (Edwin Cannan ed., 2003).

176. *Id.*; see also Posner & Parisi, *supra* note 2, at xi.

177. See *Euphoric Market Transactions*, *supra* note 88, at 233-34 (discussing the various reasons for stockholders' investment choices).

178. See generally *supra* Part I.A.

179. See *supra* notes 36-37 and accompanying text; *infra* notes 213-216 and accompanying text.

board of directors) with discretion to consider nonshareholder constituents.

B. Solutions—Unscaled Eyes

Outsiders may be relatively more willing than the traditionally privileged to color outside the lines, relying on their own experiences in questioning and valuing traditional analyses and structures. Frankly, some of the theoretical solutions that this process may reveal would suffer the fate of the nonprofit model raised briefly above.¹⁸⁰ This recognition no doubt takes some of the fun out of the enterprise, but does not discredit it. Fresh views and fringe analyses, although not gaining anything like immediate acceptance, nonetheless may exercise some gravitational pull. Thus justified, the following comprises a non-exhaustive sketching of theoretical solutions that might bear further outsider consideration. The discussion proceeds in something like an ascending order of perceived political plausibility.

1. *The Abolition of Shareholders of Publicly Held Corporations.*—This is a proposal that would call for abolition of shareholding of public corporations, per se, substituting all-debt capitalizations coupled with government or contractual monitoring of managers. As no more than an elaboration on the nonprofit model briefly advanced above,¹⁸¹ it presents a glaring concern with plausibility.

A second substantial concern is whether such a model would risk disincentive to innovation. Thus, some might fear that because managers would not be charged with maximizing “residue” (there being no one with a claim to it) they would have no particular reason to finance such activities as research and development. There are at least four responses to this concern. First, a great deal of the profitability of public corporations results from profit extraction rather than innovation,¹⁸² so the risk might not be as great as first meets the eye. Second, some half of innovation takes place outside of public corporations and would not, as an initial matter, be placed at risk.¹⁸³ Third, pride, curiosity, and the like could provide psychological motivations for innovation notwithstanding the lack of a duty to sharehold-

180. See *supra* notes 170-172 and accompanying text.

181. See *supra* notes 170-172 and accompanying text.

182. See Bartow, *supra* note 155, at 674 (commenting on the uncertainty that corporations will profit from even the most diligent employee-investors as compared to profits more predictably gleaned from an assembly line or service worker).

183. See *id.* at 673 (indicating that many inventions originate accidentally).

ers.¹⁸⁴ Fourth, there very well could be methods of directly rewarding innovation by permitting management bonuses or the like.¹⁸⁵

The third obvious concern about the abolition model is that it would invite management for the benefit of managers themselves. This perceived detriment is somewhat easier to address than the first and second. Providing shareholders with the right to elect the board and to police management activity through derivative litigation may be a method of at least symbolically diverting management from its own interest (the necessity of which is discussed below),¹⁸⁶ but there certainly could be other effective methods of allocating and rewarding the exercise of these rights without coupling them with the right to residual profits. Contractarians doubtless would assert that such a separation would result in a theoretical reduction of efficiency,¹⁸⁷ but to progressives and outsiders that price might well be endurable.

2. *The Granting of Residual Rights to Management.*—A brief fling also may be enjoyed with a model in which publicly held corporations would be managed overtly for the benefit of management. Shareholders would receive only contractual entitlements, which might include a profit share; any residue would be awarded to management. This model would enable managers, after satisfying contractual entitlements to shareholders and others, to disregard their own interests, along the lines of sole ownership. In order to assure that skewing toward management's short-term interests did not occur, and to provide for orderly succession, some part of the profit earned could not be withdrawn for an extended number of years and management would be responsible for naming its successors.

There are two reasons for rejection of this model at this time. First, of course, is its far-fetchedness. Second, feminists, critical race theorists, and anyone who is even mildly skeptical of human nature would fear that we would get, not a management group resembling Henry Ford at his most benevolent, but something far more menacing. Until the character of the managerial group is much more thoroughly examined and, perhaps, revised, proposals relying on managerial incentive and/or good will are more than a bit dodgy.

184. *See id.* at 682 (discussing the manner in which patent laws aim to reward creativity and individual innovation).

185. *Contra id.* at 682-83 (identifying the negative impact that corporation's marginalization of employee-investors can have on innovation).

186. *See infra* text accompanying note 188.

187. *See* EASTERBROOK & FISCHER, *supra* note 6, at 91 (discussing the inevitable divergence between the interests of those who contribute capital and the interests of management).

3. *The Granting of Residual Rights to Employees.*—In the third model, shareholders would be granted contractual entitlements, which might include profit-sharing. The residual “owners” of the enterprise would, however, be the employees. Explicit fiduciary duties would run from managers to employees and employees would be charged with selecting and monitoring managers. This model would, among other things, permit focus on the integration of employee-innovators into the corporate picture. This might work particularly well where some of the innovation to be hoped for is good customer service. The touted success of the employee ownership model of Southwest Airlines might provide some valuable data in this regard.¹⁸⁸

It is easy to understand why an employee ownership model would have appeal to at least those outsiders historically better represented as workers than as shareholders or managers. It also is easy to imagine at least limited public acceptance for companies that would be so organized. Quite clearly, however, there will be no full-fledged revamping of existing corporations along these lines and no political mandate that new companies adopt an employee-ownership form.

4. *Investor Empowerment.*—There exists an extensive literature discussing the merits and demerits of various methods to empower investors.¹⁸⁹ The methods proposed include facilitating the communication of information among shareholders,¹⁹⁰ enlarging the range of matters that shareholders may vote upon and may require management to include in its annual proxy statement,¹⁹¹ and developing a “new breed” of professional directors elected to represent the inter-

188. See generally Paul Caver, Comment, *Employee-Owned Airlines: The Cure for an Ailing Industry?*, 61 J. AIR L. & COM. 639, 659-60 (1996) (describing the profitability of Southwest Airlines).

189. See, e.g., Black, *supra* note 85, at 522-23 (emphasizing the importance of a formal shareholder voting mechanism to provide managerial oversight); Alfred F. Conard, *Beyond Managerialism: Investor Capitalism?*, 22 U. MICH. J.L. REFORM 117, 163-76 (1988) (analyzing the potential consequences of “investor capitalism” operating as a check on “managerialism”); George W. Dent, Jr., *Toward Unifying Ownership and Control in the Public Corporation*, 1989 WIS. L. REV. 881, 907-23 (suggesting empowering shareholders through the appointment of a committee of the corporation’s largest stockholders and evaluating the benefits and drawbacks of such an arrangement).

190. Roberta S. Karmel, *Is It Time for a Federal Corporation Law?*, 57 BROOK. L. REV. 55, 83 (1991).

191. See *id.* at 78-81 (discussing changes to the one-share, one-vote standard).

ests of institutional investors.¹⁹² In some of these regards, progress already has been made.¹⁹³

Still, the image of shareholder passivity is so “deeply ingrained in market ideology and current legal structures,”¹⁹⁴ one tends to suspect that it would be impossible to eradicate it entirely.¹⁹⁵ Moreover, even if generic shareholder empowerment somehow were achieved as a theoretical matter, how could individual shareholders have the time, the smarts, the hubris, and therefore the real incentive to get involved? How could individual shareholders actually hope to perceive and value all of their own interests as women, workers, etc.? These questions may also be posed in terms of personal inclination and experience: how many of us, when returning from work at the end of the day, would rather read proxy statements than watch television?

The fact of the matter is that when shareholders of a publicly held corporation take an active interest in corporate business, it is newsworthy and almost exclusively a phenomenon of involvement by institutional investors.¹⁹⁶ If we can neither expect nor realistically facilitate involvement by individual investors, it would appear that institutions must act as their proxies. In this event, some substantially increased amount of attention should be devoted to the representative character of these institutions.¹⁹⁷

5. *Creation of Safe Harbors (Including Constituency Statutes and the Business Judgment Rule).*—We have had decades of experience with constituency statutes and the business judgment rule. Both of these might fairly be characterized as safe harbors (unintended in the case of the business judgment rule) for corporate directors who wish to

192. See Ronald J. Gilson & Reinier Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 STAN. L. REV. 863, 885-86 (1991) (describing the advantages of this kind of director to institutional shareholders).

193. See, e.g., Security Holder Director Nominations, 68 Fed. Reg. 60,784 (proposed Oct. 23, 2003) (to be codified at 17 C.F.R. pts. 240, 249 & 274) (proposing methods of increasing shareholder access to management’s proxy for the purpose of nominating directors); see also Joo, *supra* note 104, at 735-37 (discussing both progress and impediments to progress).

194. *Lemonade Stand*, *supra* note 41, at 1431 (footnotes omitted).

195. *Id.* at 1431 n.255 (“It must be recognized, for instance, that there always will be individuals who are physically, mentally, or emotionally incapable of anything but passivity.”).

196. See Bernard S. Black, *Shareholder Activism and Corporate Governance in the United States*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 459 (Peter Newman ed., 1998) (discussing shareholder activism).

197. See generally John J. Donohue III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583, 2585-86 (1994) (describing methods of enhancing representative characteristics).

take into account matters of human decency.¹⁹⁸ Neither could be fairly characterized as any outstanding success in this regard, perhaps because of the perception that market forces reward only the strong and not the kind.¹⁹⁹

Let us posit, then, something a bit less open-ended. This is the creation of a safe harbor for management disregard of shareholder interests in any context, provided that a minimum protection of contractually defined profit and/or share price is achieved and provided that the disregard in question does not implicate management's self-interest.²⁰⁰ Although, as is the case with any safe harbor, there would be no assurance that it would be employed, one can imagine three possible prompts for usage.

The first two prompts can be easily described. The first is that the safe harbor's relative specificity could contribute to some marginal shift in cultural norms—a way for legislatures to signal that enough shareholder moolah is enough.²⁰¹ The second is that the safe harbor could create substantial interest in groups that would lobby management for a share of the pie. At least from the standpoint of labor, such a safe harbor could create a substantial lever, for at a certain level of profitability, management expressly would lose the ability to invoke shareholder interest as a justification for rejecting worker demands.²⁰²

The third prompt is more subtle. This is the possible effect on share valuation of the existence of the proposal and the mere prospect of its use. Thus, if it is known by the market that directors have

198. See EASTERBROOK & FISCHER, *supra* note 6, at 93-94 (recognizing that the business judgment rule shields managers from liability for negligent behavior). Note that the business judgment rule as currently applied clearly would tolerate disregard of profit when human decency so prompts. See *id.* That this possibility is misunderstood (or at any rate ignored) by directors may be attributable to their perception of the likelihood of market discipline. See *supra* notes 37-38 and accompanying text; *infra* notes 213-217 and accompanying text.

199. As a matter of fact, it seems that things got worse. This probably was a question of perceived marketplace pressure, rather than cause and effect. For discussion of marketplace pressure, see *infra* notes 213-217 and accompanying text.

200. This creation could be accomplished by statute. The change would likely be regarded as too extreme for mere judicial re-definition of the business judgment rule.

201. See Jayne Seminare Docherty, *Culture and Negotiation: Symmetrical Anthropology for Negotiators*, 87 MARQ. L. REV. 711, 713-17 (2004) (examining methods of shifting cultural norms).

202. See *Team Production*, *supra* note 21, at 253 (adopting a team production model where the interests of players other than shareholders are considered, including the corporation's employees). It is possible that this lever would be so strong that amounts in excess of the cut-off automatically would go to labor. Such an outcome would, however, presumably require a great deal of union activity, to which the proposal itself might actually contribute.

formal discretion to disregard profitability above a certain level, and that interest groups will be lobbying for use of that discretion, might not that knowledge creep back into the value of the shares themselves?²⁰³ After all, only if the directors of a corporation credibly could signal that the safe harbor would never (or seldom) be used would it be rational for share prices to balloon past some reasonable relationship with the profit “cap” (this, by itself, distinguishing this safe harbor from the more open-ended general constituency statutes). And if the valuation of the shares is, in effect, capped by the existence of the safe harbor, might not directors go ahead and succumb to its use? As suggested just above, their only alternative would seem to be an attempt to signal non-usage. Signals by way of public announcement would hardly result in very good publicity either for the corporation or for the directors as human beings; signals through historical conduct would require a long-term resoluteness that would be difficult in these days of managerial turn-over.²⁰⁴

A second, perhaps supplementary, form of safe harbor might confer immunity from liability for specific acts. For instance, it might be stated that directors would never be liable for decisions reasonably designed to augment worker or product safety, to assure legal compliance, or to contribute to protection of the ozone. Almost without a doubt, the most significant effect of this type of safe harbor would be on directorial awareness (since the business judgment rule already confers sufficient flexibility to accommodate the activities described).²⁰⁵ This might or might not offset market pressures to disregard the matters listed, but once again, one can imagine an effect on interest group mobilization.

6. *Requiring Conscience Committees.*—We are, at this point in time, becoming quite accustomed to the notion that a publicly held corporation should have a committee of independent directors charged with overseeing the audit of the company’s financials.²⁰⁶ This locates with specific individuals’ responsibility for seeing that a process that we hope will produce complete and correct financial statements is car-

203. See generally MITCHELL ET AL., *supra* note 173, at 259-80 (generally discussing valuation and the “efficient capital market hypothesis”).

204. See *id.* at 269-70 (discussing the “random walk model” of determining the price of securities, namely, that stock prices change as a result of new information about the security).

205. EASTERBROOK & FISCHER, *supra* note 6, at 93-94; see also *supra* note 198 and accompanying text.

206. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28 & 29 U.S.C. (Supp. II 2002)).

ried out.²⁰⁷ Reform of this type creates a context in which individuals may act as well as an occasion for doing so; moreover, it signals a public commitment that may have an acculturating effect on actual behavior. Although it cannot assure its desired results, it should increase the chances that they will occur.

One easily can imagine the creation of board corporate conscience committees charged with considering such goals as fair treatment of workers, good stewardship of the environment, and the like.²⁰⁸ Insofar as creation of such committees would institutionalize process, create context and occasion, locate responsibility with individuals, and signal public commitment, it would seem that at least some progress toward the specified goals would be made.

On the other hand, and as discussed above, we should be wary of over (or perhaps any) reliance on board-centered proposals for change.²⁰⁹ Moreover, even if a conscience committee were to bring about some sort of progress, could it possibly be enough? If not, is not there a danger that the fanfare associated with adoption and implementation of the proposals would consume all available energy and attention, while something which might be more far-reaching and ultimately successful were foregone? Finally, is not locating responsibility for conscience issues with specific individuals a method of letting other individuals off the hook?²¹⁰ At least some of these risks might be mitigated by supplementing the conscience committee proposal with a code requiring some sort of conscience reports from line and staff alike, but it is obvious that something along these lines would need to be done.

7. *Reinterpreting Market Forces.*—One of the most useful contributions that outsiders could make toward alleviating the costs of shareholder primacy might be to provide their perspectives on the usually catalogued arguments about the market pressures allegedly forcing managers to put profits first—to act as though there were, in fact, an enforceable legal duty to maximize those profits for the benefit of

207. *Id.* § 101(c), 116 Stat. at 750-51. Of a piece, and consistent with the notion of fiducial responsibilities on the part of individual agents, are requirements that particular officers certify the corporation's financial statements. *Id.* § 302(a), 116 Stat. at 777.

208. See Theresa A. Gabaldon, *The Story of Pinocchio: Now I'm a Real Boy*, 45 B.C. L. REV. 829, 857-68 (2004) (discussing the conscience committee proposal in depth).

209. See Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 450-51 (2001) (analyzing the efficiency disadvantages of alternative models as compared to the standard shareholder-based model).

210. See *Feminism, Fairness, and Fiduciary Duty*, *supra* note 46, at 19-20 (criticizing Justice Cardozo's model of fiduciary duties for perpetuating problems of accountability and responsibility).

shareholders. These arguments include the need to keep product prices low in order to meet competition, the need to compete for capital, the desire to avoid hostile takeover, and general psychological acculturation.²¹¹ With respect to each of these arguments, outsiders' perspectives will be colored by their own experiences. The few thoughts set out below are intended to do no more than play a role in soliciting additional accounts.

The need to keep prices low to be competitive tends, at face value, to be pro-consumer and anti-worker. Thus understood, it does not demand increased profitability and in fact could be consistent with lower profitability up to the point of financial unviability. The real point for directors, of course, is that if enough transactional volume is not maintained, shareholders will be disappointed and will sell their shares. This is simply a manifestation, then, of the "competition for capital" and "avoidance of takeover" arguments fleshed out immediately below. It is worth noting, however, that to the extent workers could share in the benefits of lowered prices, the trade-off might be a less painful one. The experience of Southwest Airlines, which has succeeded where others have failed by keeping prices low while simultaneously protecting the interests of its worker/owners, once again is noteworthy.²¹²

The argument that competition for capital plays a critical role in managerial profit-seeking is easily understandable, albeit a bit overblown. Not everyone has experience with accumulation for its own sake; there are many who have been forced to realize that it is possible to get by on less than what someone else has. In other words, why does a corporation need more capital than it actually needs? Why must it endlessly grow?²¹³ Given, too, the availability of debt financing, is it not true that a large part of managerial preoccupation with stock price is a concern with the fortunes of those who choose to engage in stock market speculation? This concern seems, rather than to stand on its own two feet, to segue seamlessly into the "takeover avoidance" argument.

Thus, the flip side of the competition for capital argument is the hostile takeover argument. Management fears that shareholders will vote with their feet for new management. Such fears could be assuaged with long-term management "contracts," but those could pose

211. See Gevurtz, *supra* note 32, at 651-53 (discussing factors influencing the shareholder primacy model); see also *supra* note 37 and accompanying text.

212. See *supra* note 188 and accompanying text.

213. See generally Kellye Y. Testy, *Adding Value(s) to Corporate Law: An Agenda for Reform*, 34 GA. L. REV. 1025, 1034-36 (2000).

their own hazards, at least from the standpoint of outsiders. Interestingly, contractarians value hostile takeovers as a form of market discipline, urging the view that managerial efficiency will be enhanced if it is realized that undervalued and/or underperforming firms are subject to acquisition.²¹⁴ The argument is a theoretically and emotionally coherent one. After all, most of us can understand reasoning to the effect that “if I do well and please the owner of the business, he won’t fire me.” It is, however, noteworthy that there is no proof that it is in fact underperforming firms that are acquired; there actually is modest evidence to the contrary.²¹⁵ It seems somewhat perverse to continue to rely on an empirically unproven theory to justify the result of shareholder primacy, at least if that result is viewed by some as being quite costly.

The fourth argument explaining shareholder primacy has to do with psychological pressure. One hardly can contest the notion that managers are influenced by culture, press accounts, etc., and thus may believe such things as that “big” is better for “big’s” own sake and that it is, in fact, management’s job to increase stock price.²¹⁶ That said, hand-wringing is not often endorsed as the solution to mass delusion, nor should it be here.

8. *Treating Symptoms.*—At this point, it seems quite logical to admit that we do not know how to cure the patient and nonetheless attempt to address a few of the patient’s most troubling symptoms. For instance, we may be concerned that shareholder primacy thinking contributes to irrational secondary market pricing,²¹⁷ as well as that irrational secondary market pricing feeds back into shareholder primacy thinking. The argument here is that if potential shareholders believe that corporations will be ruthlessly operated so as to maximize profit at every turn, they will perceive no rational cap on stock price and/or believe that others will perceive no such cap, and sometimes will bid wildly. Conversely, if stock prices generally inflate, managers will believe that they must signal utmost concern for increasing the

214. See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target’s Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1169-74 (1981) (arguing that the tender bidding process serves as a check on managers’ behavior, whether or not the process results in an offer); Daniel R. Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1, 9 (1978) (emphasizing the incentive value created by the possibility of tender offers).

215. See *supra* note 164 and accompanying text.

216. See Hansmann & Kraakman, *supra* note 209, at 449-51 (commenting on the logical, exemplary, and competitive success of shareholder primacy as a form of corporate governance).

217. See generally MITCHELL ET AL., *supra* note 173, at 259-80 (discussing valuation).

market value of the shares of their particular corporations. If these indeed are concerns, perhaps we should address irrational stock pricing directly. Would it be that hard, after all, to adopt some sort of reverse circuit-breaker rule, calling for a market cooling-off period when a stock price ceases to bear any reasonable relationship to the issuing corporation's anticipated earnings?²¹⁸ For that matter, would it be too difficult to provide that transactions involving such prices simply could not be executed by any national exchange or automated trading system?²¹⁹

Of a piece, if we are troubled by the notion that, in the name of shareholder primacy, public corporations sometimes extract unjustifiable profit by exploiting vulnerable groups, let us meet the problem head on. If we are concerned about childish purchasers convinced to pay eye-popping prices for celebrity-endorsed apparel,²²⁰ or led to believe that they cannot live without the guts-and-glory video games that habituate them to violence,²²¹ let us talk about counter-publicity and rating systems with long, sharp teeth.

CONCLUSION

Because feminist analysis and critical race theory are firmly grounded in non-utopian experience, they necessarily eschew utopian visions. They neither would nor could, at this point in time, properly dictate a complete theoretical retooling of corporate law or corporate America. Still, at least some of the adherents of feminist and critical race theory presumably could endorse, and willingly advance, concrete proposals for incremental progress.²²² From this standpoint, recommendations smelling even slightly of, say, worker empowerment or protection of childish consumers might be warmly welcomed. Outsiders may, however, have an even more immediate contribution to make to corporate law. This contribution is the addition of new per-

218. See *Euphoric Market Transactions*, *supra* note 88, at 278 (proposing a stop on secondary market purchases one hundred times the potential earnings of the stock).

219. See *id.* at 279 (arguing that day traders should be required to complete a course or possess minimum credentials before trading).

220. See generally Crouch, *supra* note 142, at 179-80 (discussing concern for the detrimental effects of advertising on children).

221. See generally Bonnie B. Phillips, Note, *Virtual Violence or Virtual Apprenticeship: Justification for the Recognition of a Violent Video Game Exception to the Scope of First Amendment Rights of Minors*, 36 *IND. L. REV.* 1385, 1385-86 (2003) (commenting on the effect of video games on violence rates among children).

222. See, e.g., Katharine T. Bartlett, *Tradition, Change, and the Idea of Progress in Feminist Legal Thought*, 1995 *Wis. L. REV.* 303, 303-08 (generally addressing the progress of feminism and the law and emphasizing the role of tradition in advancing feminist ideals).

spectives, different values, and previously unheard experiential accounts to the corporate analytic brew.

From the time man began to tell stories, God-myths gave order to human existence.²²³ They gave us reasons for being, as well as for doing things beyond the instinctive. Some of these things doubtless were instrumental to human survival, such as the observance of taboos against eating unsafe foods.²²⁴ Many of our divinely attributed mandates were articulated and eventually subsumed as cultural mores. Thus, at one time, we did not steal because God said not to. We learned to believe, then, that stealing is bad and still generally live according to that dictate. This rule, and many others, continues to operate beyond the express invocation of the God-myth.²²⁵

Owner-myths have given order to large-scale human enterprise.²²⁶ Observations made in the context of small businesses (augmented, no doubt, by near-religious American beliefs in private property)²²⁷ evidently have programmed us to believe that someone must “own” the public corporation in order to bring about innovation and social progress. Like God-myths, owner-myths have been sufficiently subsumed in American culture to operate without express invocation and therefore without proper scrutiny. Might not it be possible to revisit this matter? And might not those who have not, in the past, played a role in the telling of official stories be the ones to shoulder the task?

223. See generally EDITH HAMILTON, MYTHOLOGY 14-23 (1942) (describing the effect of myths).

224. *Id.* at 49-54.

225. See Robert L. Palmer, *When Law Fails: Ethics, Commerce, and Tales of Value*, 2 S. CAL. INTERDISC. L.J. 245, 267-71 (1993) (discussing operation of myths and stories).

226. See *supra* Part III.D.

227. See Majorie E. Kornhauser, *A Taxing Woman: The Relationship of Feminist Scholarship to Tax*, 6 S. CAL. REV. L. & WOMEN'S STUD. 301, 315 n.42 (1997) (emphasizing that feminist theory is not unconcerned with private property).