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UNLOCKING PROGRESSIVE CORPORATE GOVERNANCE: THE BLACK AND BROWN HDFC KEY

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For decades, progressive corporate law scholarship has lamented corporate law's captivity to the neoliberal conception of business corporations. For progressive scholars, corporate governance doctrines based in neoliberalism have been a formula for anomie as they reduce corporations — and especially publicly traded ones — to a profit-generating device for equity investors, disregarding anything and anyone else. Progressive scholarship has also criticized neoliberal corporate law on communitarian grounds, namely, for its denial that corporations have any social responsibility or public obligations. But to date, the progressive corporate law critique and corresponding reform program has failed to transform mainstream corporate law. This failure flows from progressive scholarship's perpetuation of neoliberalism's premise that corporations exist to generate wealth. This Article argues that the key to unlocking progressive corporate governance is to base reform on New York City's housing development fund corporations ("HDFCs"). These are business corporations formed by low-income households of color in the 1970s and 1980s so that they could secure themselves with housing denied to them by markets. The HDFC is best suited as the measure for progressive reform because it has been especially harmed

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by the neoliberal corporate governance paradigm and is a proven antidote for neoliberal reduction: against the operation of an aggressive market in the global capital of real estate and finance, HDFCs have successfully preserved their Black and Brown shareholders from disinvestment and displacement. As such, the HDFC advances the progressive perspective by supplying it with an understanding of shareholding that combines the public company equity investor with the sweat equity stakeholder. For concrete reforms advancing a progressive project, this Article proposes that corporate law adopt more searching judicial review of board decisions modelled on anti-discrimination and Massachusetts corporate law and that corporate law be amended to include "sweat equity" investors in governance. With such, corporate law can reflect pluralism, stand as an ally to social movements, and advance the original social function of corporations, obscured during this neoliberal age.

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I. INTRODUCTION

The plight of Black and Brown business corporations, typified by New York City's Housing Development Fund Corporations ("HDFCs"), illustrates how the law of corporate governance suffers from enthrallment to business, and to a limited understanding of "business" at that.¹ Under this dominant paradigm, corporate governance doctrines flow from the proposition that business corporations exist for equity investors to earn money from their activities: there is scarcely a controversy in the field free of this supposition.² As such, the law, reduced to "law-and-economics" finance trends, compels boards of directors solely to look after the wealth of shareholders.³ It frees the board from considering any other interest aside from shareholders' wealth.

Progressive scholars recognize neoliberal corporate law as a social and normative problem.⁴ The social problem is that corporations, with the public benefit of limited liability, do not have any corresponding public duties to corporate stakeholders, such as employees.⁵ Corporations can exploit a tremendous public benefit to manipulate, destroy, and alienate.⁶ The normative problem is that neoliberal governance doctrines are not, properly speaking, law. As Adam Winkler writes in *Corporate Law or The Law of Business?: Stakeholders and Corporate Governance at the End of History*,⁷ the dominant neoliberal model — the law-and-economics "nexus of contract" approach — argues that "[t]he terms of corporate activity are . . . effectively set by markets, not by law."⁸ Winkler locates some limits serving to protect non-stakeholder corporate constituents in other areas of law such as consumer, employment, and securities law.⁹ But by looking beyond corporate law codes for this protection, Winkler indirectly concedes that

1. See Roberta Romano, *After the Revolution in Corporate Law*, 55 J. LEGAL EDUC. 342, 345–46 (2005) (describing the methodological dominance of modern finance in corporate law study).

2. See *id.*

3. See discussion *infra* Part II.

4. See discussion *infra* Section III.A.

5. See Kent Greenfield, *If Corporations Are People, They Should Act Like It*, ATLANTIC (Feb. 1, 2015), <https://www.theatlantic.com/politics/archive/2015/02/if-corporations-are-people-they-should-act-like-it/385034/> (describing opposition to shareholder primacy theory).

6. See *infra* notes 62–64 and accompanying text.

7. Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 L. & CONTEMP. PROBS. 109 (2004).

8. *Id.* at 109–10.

9. *Id.* at 111.

corporate law, as such, does not serve to prescribe and limit.¹⁰ Similarly, in *Citizenship and the Corporation*,¹¹ Ian B. Lee uses political theory to supplement the gap of meaning in corporate law that the same “nexus of contracts” view has produced.¹² For Lee, political theory — the concept of citizenship — is needed to make sense of and legitimize power actually exercised by corporate officials that the economic reduction of the corporation omits or obscures.¹³ As with Winkler’s, Lee’s argument squarely assumes that the neoliberal understanding of corporate law fails to account for many of its aspects.¹⁴

But to date, this progressive challenge has not transformed corporate law. One reason progressive challenges to corporate law have failed is that even progressive arguments have perpetuated neoliberalism by proposing reforms assuming that corporations exist to generate profit.¹⁵ But in doing so, progressive challenges to corporate law have revealed their own normative problem of prescribing more than they are describing and defining,¹⁶ weakening the whole project. For accepting neoliberalism’s reductive premise delegitimizes progressive corporate law from the standpoint of American legal realism, or the supposition that legitimate law must be understood as the empirical reflection of ordinary human activity.¹⁷ This is

10. *See id.* at 132–33 (outlining how progressives have used other bodies of law to regulate “corporate conduct,” like labor law, environmental law, workplace safety law, consumer protection law, and securities law).

11. Ian B. Lee, *Citizenship and the Corporation*, 34 L. & SOC. INQUIRY 129 (2009).

12. *Id.* at 131.

13. *See id.* at 156–58 (arguing the benefits of analyzing the corporation via “a political-theoretical lens” lie in uncovering the corporate officials’ power, whereas viewing the corporation through the “nexus-of-contracts” approach “either denies the phenomenon of power as an empirical matter or else conceptualizes it as residual slack”).

14. *See id.* at 161–62 (explaining that the theoretical conceptualization of a corporation matters from the standpoint of culture because the dominant paradigm allows managers, “when confronted with a business decision raising an ethical issue involving the rights of a third party, not to approach the issue from the standpoint of ethics but rather to adopt one of two rather different frameworks of analysis [an amoral or latitudinarian one]”).

15. *See discussion infra* Section III.B.

16. *Cf.* Lyman Johnson, *Re-Enchanting the Corporation*, 1 WM. & MARY BUS. L. REV. 83, 98–99 (2010) [hereinafter Johnson, *Re-Enchanting the Corporation*] (arguing that corporate law’s recognition of institutional pluralism within the realm of business would make corporate law more “descriptively accurate” in that it would reflect private actors who “are not altogether self-seeking in business dealings” but rather “value integrity and consciously strive to serve others”).

17. *See id.*; *see also* RAYMOND WACKS, *PHILOSOPHY OF LAW: A VERY SHORT INTRODUCTION* 93–96 (1st ed. 2006) (describing critical legal studies as originating in the United States as a “latter-day version” of American realism, a philosophy of empiricism); *AMERICAN LEGAL REALISM* xiv (William W. Fisher III et al. eds., 1993).

because many *business* corporations do not exist, simply or even primarily, to make money for their investors and stakeholders.¹⁸ Rather, like the HDFC,¹⁹ many business corporations are formed to protect their investors from the operation of markets.²⁰

This Article argues that the key to reviving progressive corporate law, as a corrective to neoliberal reduction, is using the example of HDFCs to unlock reform, in much the same way that Black constitutionalism has brought the American political order to fulfilment in Nikole Hannah-Jones' acclaimed argument.²¹ There are three reasons why the progressive corporate law project can be revived by the HDFC. First, HDFCs are fully business corporations, governed by the same procedures, rules, and principles as any other,²² except that they reject economic rationality as conventionally understood. Instead, they are based on a communitarian ethos associated with people of color that regards social solidarity as a basis for strength.²³ This perspective serves as a cipher key concretizing progressive corporate law's principle of communitarianism,²⁴ but in a way that also helps corporate law to overcome its tendency toward white ethnocentric presumption, or "perspectivelessness."²⁵ The HDFC take on rationality is what civil rights

18. See discussion *infra* Section IV.A; see also Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 164–66 (2008) [hereinafter Stout, *Why We Should Stop Teaching Dodge v. Ford*]. In that article, Stout argues that *Dodge v. Ford* — or the case commonly cited and taught for the proposition that a business corporation is organized and carried on primarily for the profit of the stockholders — is bad law because it is an inaccurate description of corporate charters and bylaws, corporate statutes, and case law. As will be clearer in this Article, I agree with Stout that *Dodge v. Ford* is bad law to the extent it says all corporations are, or should be, organized for profit; indeed, I cite low-income housing cooperatives as a counterexample. But her observations in the introduction to her paper demonstrate that *Dodge v. Ford* is shorthand for a view of corporations, amplified by Milton Friedman, that has dominated corporate law thinking of the past forty years. In that sense, it is more "the law" than any other source that she cited. For a discussion of this, see *infra* Section III.B.

19. See discussion *infra* Section IV.A.

20. See discussion *infra* Section IV.A.

21. See Nikole Hannah-Jones, *Our Democracy's Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html> (illuminating the necessary role Black Americans have played throughout U.S. history in reconciling the inherent contradictions and hypocrisy surrounding the drafting of the U.S. Constitution).

22. See discussion *infra* Section IV.A.

23. See discussion *infra* Section IV.A.

24. See discussion *infra* Section IV.A.

25. See Kimberlé Williams Crenshaw, *Foreword: Toward A Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 2, 12 (1988) (defining "perspectivelessness" as the natural consequence of "positing an analytical stance that has no specific cultural, political, or class characteristics").

scholarship has termed as a “counterstory,”²⁶ such a term is generally lacking in corporate law.²⁷ Second, HDFCs especially illustrate the harm of applying a neoliberal governance framework based on *one* type of business corporation — the public company — to *all* business corporations. As we shall see later, with corporations like HDFCs, neoliberal corporate governance is a formula for board corruption that allows subversion from within.²⁸ Third, in having allowed their Black and Brown owners to withstand disinvestment and displacement in the global capital of real estate and finance,²⁹ HDFCs prove that business corporations do in fact counter markets, and quite effectively. Thus, the HDFC supplies progressive corporate law with a concrete, American example of an effective business corporation based on communitarian rationality, a concept thus far absent from its analysis.³⁰

This Article elaborates the HDFC key in five parts. In Part II, this Article summarizes and historicizes the current neoliberal corporate governance paradigm to elaborate on the problem that progressive corporate law reacts to. So that this summary can be most applicable to the HDFC, this Article uses New York law. However, this discussion will have more general applicability since New York law necessarily brings up Delaware decisional law, as is customary in New York jurisprudence.³¹

In Part III, this Article summarizes the progressive critique of neoliberalism governance and explains its failure to change the law. First,

26. See George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930–1980*, 27 U.C. DAVIS L. REV. 555, 614–15 (“One way to help judges break down mindset, broaden their perspectives, and promote justice in civil rights cases, is to provide counterstories — *i.e.*, explain how decisions were not inevitable. Through this process judges can ‘overcome ethnocentrism and the unthinking conviction that [their] way of seeing the world is the only one — that the way things are is inevitable, natural, just, and best’ and thereby avoid moral error when deciding *any* civil rights case.”).

27. See Mae Kuykendall, *No Imagination: The Marginal Role of Narrative in Corporate Law*, 55 BUFF. L. REV. 537, 589 (2007) (arguing that narrative is largely absent from corporate law and does not have a role since business is about efficiency). As will become clear in this Article, I disagree with Kuykendall’s view on the role of narrative in changing corporate law.

28. See discussion *infra* Section IV.C.

29. See SAMUEL STEIN, CAPITAL CITY: GENTRIFICATION AND THE REAL ESTATE STATE 95–115 (2019) (describing features of New York City as a neoliberal real estate state); DAVID MADDEN & PETER MARCUSE, IN DEFENSE OF HOUSING: THE POLITICS OF CRISIS 26–34 (2016) (describing the era of “hyper-commodification” in New York City real estate).

30. See discussion *infra* Section IV.B.

31. See, e.g., *City Trading Fund v. Nye*, 72 N.Y.S.3d 371, 376 (Sup. Ct. N.Y. Cnty. 2018) (observing that North Carolina, like New York, generally follows and applies Delaware corporate law).

in Section III.A, this Article summarizes the key points of the progressive critique of neoliberal corporate law. In Section III.B, this Article addresses the failure of the progressive corporate law movement to inspire reform in terms of its critique. Ultimately, it attributes the movement's failure to challenge the function of corporations to its reliance on theory, tweaks, and subtlety.

In Part IV, this Article introduces the HDFC key. First, in Section IV.A, this Article frames these entities as the paradigmatic counter-market business entity by historicizing them and explaining the particular Black and Brown economic rationality driving them. Then in Section IV.B, this Article describes how, despite the clear difference between HDFCs and public companies, standard neoliberal corporate governance nonetheless applies to HDFCs wholesale. This Article ends Part IV with a case study, presented in Section IV.C, demonstrating the baleful effects of applying standard governance doctrines to such entities.

In Part V, this Article summarizes two existing progressive proposals for reforming corporate law outside of the public company context: the nonprofit charitable corporation and the public benefit corporation. It demonstrates that their limitations prevent them from achieving progressive corporate law's goal of liberating corporate governance from corporate finance.

Finally, in Part VI, this Article proposes solutions for the current law's shortcoming. It argues that the HDFC — and the measure of Black and Brown economic rationality — should be the standard for progressive corporate reform. Reforms inspired by the HDFC would push the law to serve all business corporations, including those formed to counter markets, and not just public companies, by: (i) replacing the business judgment rule (“BJR”) with more searching review of board actions affecting such counter-market entities; and (ii) amending New York's Business Corporation Law (“BCL”) to modify the norm of board supremacy³² by granting shareholders of such entities more statutory rights of participation. This Article concludes by arguing that such HDFC-inspired reform not only would enrich corporate law with more pluralism but also would grow the law from its original, public roots.³³

32. N.Y. BUS. CORP. LAW § 701 (McKinney 2021).

33. See Naomi R. Lamoreaux & William J. Novak, *Corporations and American Democracy: An Introduction*, in *CORPORATIONS AND AMERICAN DEMOCRACY* 7–10 (Naomi R. Lamoreaux & William J. Novak eds., 2017) (stating that after U.S. independence, new state governments started relying on corporations as they helped fund public works projects for tax breaks); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 159 (4th ed. 2019) (chronicling that, before 1800, few corporations were business corporations and that almost all colonial corporations were churches, charities,

II. THE NEOLIBERAL CORPORATE GOVERNANCE PARADIGM

It is well-established that in the business corporation, there is a sharp division between ownership and control.³⁴ Under the standard model, shareholders, those contributing capital to propel the corporation's business, enjoy profit from the business with their exposure cabined to equity, or the residual value after every other claim has been satisfied.³⁵ The cost of this freedom from risk is the requirement that shareholders cede control to professional directors whom they elect.³⁶ Shareholders' current role in corporate governance is limited to electing directors, approving matters that would fundamentally alter or end the corporation, and suing corporations to enforce their collective interests against managers' disregard.³⁷ Managers, in turn, enjoy the full power of control over the corporation's affairs and activities but do not necessarily share in equity; they profit primarily in their salaries.³⁸ And so one finds in corporate law a neat framework reverberating

or cities or boroughs); Ronald E. Seavoy, *The Public Service Origins of the American Business Corporation*, 52 BUS. HIST. REV. 30, 31–33 (1978) (highlighting that corporate privilege was granted to almost any association that worked toward the public benefit and emphasizing that public corporations no longer have important civic responsibilities); KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES 1* (2006) [hereinafter GREENFIELD, *THE FAILURE OF CORPORATE LAW*] (“For much of the history of the United States, ‘public’ corporations were deemed to have important civic responsibilities. At the beginning of the twenty-first century, however, ‘public corporation’ is among the most misleading terms in all of law or business.”).

34. See Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U.L. REV. 547, 559–60 (2003) [hereinafter Bainbridge, *Director Primacy*] (“As Berle and Means famously demonstrated, most public corporations are marked by a separation of ownership and control. Corporate law effectively carves this separation into stone.”); FRANKLIN A. GEVURTZ, *CORPORATION LAW* 179 (2d ed. 2010) (describing corporate governance as following a republican, or representative model, in contrast to partnerships’ Athenian, or direct democracy model, of governance).

35. See, e.g., Stephen M. Bainbridge, *The Business Judgement Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 110–11 (2004) [hereinafter Bainbridge, *The Business Judgment Rule As Abstention Doctrine*]; J. MARK RAMSEYER, *BUSINESS ORGANIZATIONS* 242–43 (2012) (describing the economic justifications for this allocation).

36. See Bainbridge, *Director Primacy*, *supra* note 34, at 568–69 (characterizing shareholder control rights as weak and “scarcely qualify[ing] as part of corporate governance”); RAMSEYER, *supra* note 35, at 242–43; see also MODEL BUS. CORP. ACT § 8.01(b) (2002) (AM. BAR ASS’N, amended 2020).

37. See Bainbridge, *Director Primacy*, *supra* note 34, at 569; D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 284–86 (1998).

38. RAMSEYER, *supra* note 35, at 242–43. In the United States, federal law has developed toward aligning manager compensation with performance. See REINIER KRAAKMAN ET AL., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* § 3.3.2 (3d ed. 2017) (discussing amendments to tax and securities law tying executive compensation to performance and granting shareholders

with good sense, but lacking an origin by which it can be assessed.

The origin story is this: the distinction between ownership and control arose as a premise of limited liability, but nowadays is considered a “cornerstone” of Anglo-American corporate law.³⁹ As framed in Victorian debates about the enactment of England and Wales’ Limited Liability Act of 1855,⁴⁰ limited liability arose to encourage people of limited means to invest their savings in business, or wealthy people to invest in businesses run by such people.⁴¹ The historicity of this necessity is debated among scholars,⁴² but limited liability’s role in democratizing investment stands undisputed.⁴³ Limited liability served this function because, despite Nicholas Butler Murray’s potentially hyperbolic and famous observation,⁴⁴ before limited liability statutes, a person investing in the dominant business entity and the partnership risked total ruin if the business incurred liabilities beyond the value of the entity’s assets.⁴⁵ In such a situation, the partners were personally

an advisory vote on executive performance).

39. Philip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 574–75 (1986); see Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 93–97 (1985).

40. Limited Liability Act 1855, 18 & 19 Vict. c. 133 (Eng.).

41. See Paul Halpern et al., *An Economic Analysis of Limited Liability in Corporation Law*, 30 U. TORONTO L.J. 117, 118 (1980) (stating John Stuart Mill advanced a theory that “the rich would be more likely to invest money in business ventures” of the middle class if there were limited liability because if the business failed, they would not be targeted by the creditors); GEVURTZ, *supra* note 34, at 26–35.

42. See, e.g., Lawrence E. Mitchell, *Close Corporations Reconsidered*, 63 TUL. L. REV. 1143, 1155–56 (1989) (arguing that there is little history supporting the notion that limited liability is needed to incentivize investment); John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2146 (2016) (contending that corporate form is not “the exclusive historical source of . . . legal powers,” such as limited liability, as these were available in the common law business trust).

43. See FRIEDMAN, *supra* note 33, at 160–62 (describing the growth of corporations in the mid-1800s from partnerships with “two or three partners, often related by blood or marriage” to a more efficient “form for organizing a business, legally open to all,” which increased competition in the free market).

44. “The limited liability corporation is the greatest single discovery of modern times. Even steam and electricity are less important than the limited liability company.” Stephen M. Bainbridge, William D. Warren Professor of L., Univ. of L.A. Sch. of L., Reflections on Twenty Years of Law Teaching: Remarks at the Rutter Award Ceremony (Apr. 16, 2008), in UCLA SCHOOL OF LAW: PUBLIC LAW & LEGAL THEORY RESEARCH PAPER SERIES 1, 8 (2008) (quoting Nicholas Murray Butler, President, Colum. Univ.).

45. Of course, this risk of ruin had long been reduced with some unincorporated entities, such as joint-stock companies based on their diffused ownership, and the legal requirement that debts be first satisfied out of business assets before turning to individuals. See *Mason v. Am. Express Co.*, 334 F.2d 392, 401 (2d Cir. 1964) (describing theoretical liability of the unincorporated joint-stock association’s individual members under New York law as practically unimportant and virtually identical to

liable beyond their share of the partnership.⁴⁶ So before the enactment of limited corporations, investment in a company was attractive only to individuals who either wished to take an active role in management (so that they might be in control of risk reduction) or who were sufficiently knowledgeable about the character of management so as to be comfortable placing trust in others.⁴⁷ The old regime excluded pure capitalists as we now understand them: gilded folks, wholly ignorant of a business' particulars, who contribute money solely for a return on investment.⁴⁸

Because limited liability is connected to encouraging investment by pure capitalists,⁴⁹ it makes sense that the enterprise should be directed by experts who should, as a result of this expertise, enjoy complete freedom to grow investments through risks.⁵⁰ Put in contemporary terms, modern corporate governance, and its centerpiece doctrine of the BJR,⁵¹ is rooted in, and informed by, the exact sort of business organization whose shares have long been traded on public markets: the entity in which one takes an

theoretical liability of the same shareholders under section 630 of New York Business Corporation Law); *see also* Morley, *supra* note 42, at 2174–75 (arguing that the common law business trust also provided protection against limited liability).

46. *See* Halpern et al., *supra* note 41, at 118; *cf.* JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* 50–54 (2003) (recounting the origins of limited liability corporations in the mid-19th century).

47. *See* Stephen B. Presser, Commentary, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 NW. U.L. REV. 148, 155–56 (1992) (explaining how limited liability is credited for keeping markets democratic and accessible to modest investors).

48. *See id.* (discussing New York's adoption of limited liability as a means of democratizing investment).

49. *See id.*; Halpern et al., *supra* note 41, at 118 (discussing Victorian proponents of limited liability who argued that it would encourage middle and working classes “otherwise discouraged from investing by the large variance in possible investment outcomes under an unlimited liability regime” to invest and would encourage “the rich . . . to invest money in business ventures involving members of the middle and working classes” if they were certain that the middle and working classes would become “the chief targets of creditors’ attention”).

50. This is Bainbridge’s basic justification for the business judgment rule. *See* Bainbridge, *The Business Judgment Rule As Abstention Doctrine*, *supra* note 35, at 110–11, 123 (discussing how “encouraging optimal risk taking is necessary” and how judicial abstinence is needed to ensure directors are not “skew[ed] . . . away from optimal risk taking”). Indeed, even in the corporate law debate about who “owns” the corporation — shareholders, managers, directors, or stakeholders — all submit that managers should be those in control. *See* WALTER A. EFFROSS, *CORPORATE GOVERNANCE: PRINCIPLES AND PRACTICES* §§ 1.02, 1.05 (2010).

51. *See* Bainbridge, *The Business Judgment Rule As Abstention Doctrine*, *supra* note 35, at 83 (“The business judgment rule pervades every aspect of state corporate law, from the review of allegedly negligent decisions by directors, to self-dealing transactions, to board decisions to seek dismissal of shareholder litigation, and so on.”).

ownership interest purely for the sake of making money from its activities.⁵²

This last point invites a brief excursus on the BJR. In its classical form, the BJR is the legal doctrine under which a court eschews substantive review of a corporate board's decisions unless shareholders can show that a board violated its fiduciary duties of care and loyalty, or proceeded without good faith, in making those decisions.⁵³ And even these standards are far less rigorous than they initially appear, as scholars have observed how the duty of care, since its highpoint in the Delaware Supreme Court's decision of *Smith v. Van Gorkom*,⁵⁴ has become dead letter.⁵⁵ So ultimately, acts of boards that conform with proper procedure, including the aspects of procedure relating to conflicts of interest and minimal attentiveness, enjoy legal impunity.⁵⁶

Eminent corporate scholar Stephen M. Bainbridge has explained the BJR in the same terms as those justifying limited liability,⁵⁷ existing precisely because it encourages the risk-taking that public company shareholders rely upon to grow their investment.⁵⁸ But the BJR applies only insofar as directors are doing what they are supposed to under the bargain with shareholders accounting for the separation of ownership and control: minding shareholders' wealth.⁵⁹ Shareholders' theoretical preference for the BJR ends at precisely the point where directors' decisions are motivated by considerations other than shareholder wealth: self-dealing or a desire to defraud shareholders.⁶⁰ In other terms, within public companies the BJR actually performs the very function that bringing shareholders into the

52. See Bainbridge, *The Business Judgment Rule As Abstention Doctrine*, *supra* note 35, at 109–11; RONALD E. SEAVOY, *THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784–1855* 7 (1982) (explaining the “five stages of corporation creation” and how “rapid technological innovation and [market] expansion” incentivize individuals to mobilize and take advantage of wealth opportunities).

53. See RAMSEYER, *supra* note 35, at 86, 135–36; *Auerbach v. Bennett*, 393 N.E.2d 994, 999–1000 (N.Y. 1979) (quoting *Pollitz v. Wabash R.R. Co.*, 207 N.Y. 113, 124 (1912)).

54. 488 A.2d 858 (Del. 1985).

55. Nadelle Grossman, *Director Compliance with Elusive Fiduciary Duties in a Climate of Corporate Governance Reform*, 12 *FORDHAM J. CORP. & FIN. L.* 393, 404 (2007) (stating that the duty of care has been reduced to an unenforceable aspiration).

56. See *id.* 404 n.49; see also *Auerbach*, 393 N.E.2d at 1000.

57. Bainbridge, *Director Primacy*, *supra* note 34, at 601 (“The business judgment rule is the chief common law corollary to the separation of ownership and control.”).

58. Bainbridge, *The Business Judgment Rule As Abstention Doctrine*, *supra* note 35, at 111.

59. See *id.* at 103 (explaining that a contractual responsibility to shareholders limits the otherwise extensive discretionary powers of the directors to actions that will increase the returns to shareholders).

60. *Id.* at 122–23.

governance structure would: it compels directors to maximize shareholders' interests.⁶¹

It is this very connection between limited liability and shareholder welfare maximization that has provoked progressive calls for reform.⁶² For progressive scholars, there is a great dissonance between conferring the tremendous public benefit of limited liability upon enterprises sociopathically focused on their own private interests.⁶³ In progressive scholars' observations, this has been a formula for corporate anomie.⁶⁴

Historicizing and contextualizing corporate governance doctrines is the first step in evaluating them. For hardly any expertise in corporate law is required to observe that there are many business corporations that are unlike public companies; rather, these businesses' investors are not nearly so indifferent to the function of the entity as their public company counterparts are.⁶⁵ Even leaving aside business structures such as trade unions and worker cooperatives, many business corporations are ones where shareholders are invested in operations. In fact, most corporations doing business in the United States are closely held business corporations⁶⁶ — which substantially overlap with, but are analytically distinct from, the private company, or one whose shares are not traded on a public market.⁶⁷ We are most familiar with

61. See Bainbridge, *Director Primacy*, *supra* note 34, at 601–02.

62. See *id.* at 593–94 (“Many progressives believe that corporate directors currently do not take sufficient account of nonshareholder constituency interests and that legal reform is necessary.”).

63. See Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1428 (1993) [hereinafter Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm*] (describing one of Green’s arguments to which he replies as “envision[ing] the limited liability rule as a privilege conferred by society, in return for which society can demand socially responsible corporate behavior”).

64. See GREENFIELD, *THE FAILURE OF CORPORATE LAW*, *supra* note 33, at 17, 25–26 (illustrating that many shareholders are generally unaware or disinterested in a corporation’s machinations and instead are quite removed from the initial offering, having “bought the stock from someone who bought the stock from someone who bought the stock from someone who bought the stock from an investment banker who bought it from the company”).

65. *But see id.* at 25 (discussing how shareholders are indifferent to companies in which they own stock because of limited liability and diversified investment portfolios).

66. See DANA SHILLING & CHRISTINE VINCENT, *LAWYER’S DESK BOOK* § 1.09 (2d ed. 2020) (“Although most of the largest businesses are publicly owned (i.e., their securities are freely traded on exchanges), most businesses are close corporations, whose shares have no public market.”).

67. See GEVURTZ, *supra* note 34, at 231–32; *PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS* § 1.06 (AM. L. INST. 1994) (defining a closely held corporation as a small number of people owning its equity securities for which “no active trading market exists”).

many “Mom and Pop” businesses run by owners who are often related and for whom the appeal of ownership is having an active role in the business.⁶⁸ To express this point from the angle of recent constitutional debate, much of the discussion today about whether corporations enjoy “religious freedom” is based, in part, on corporations’ claims that their business is more than a commercial activity.⁶⁹ Or these corporations at least insist that commercial activity is also interested in how money is made or what is done to make it.⁷⁰

And yet, with procrustean disregard for peculiarities and real differences, all these business entities are governed by the same law of internal governance. To engage with New York law on this question, it reflects this same, sharp distinction between ownership and control,⁷¹ where default rules provide that shareholders have a veto only in matters such as voting for management, on fundamental changes,⁷² and in a corporation’s terminal events such as whether to dissolve or merge with another entity.⁷³ And for

68. See GEVURTZ, *supra* note 34, at 473 (explaining that “the extraordinarily common practice of closely held corporations” is to disperse “their income to their owners through salaries rather than dividends,” as owners “attribute the earnings of the business to their work”).

69. See generally Amy J. Sepinwall, *Corporate Piety and Impropriety: Hobby Lobby’s Extension of RFRA Rights to the For-Profit Corporation*, 5 HARV. BUS. L. REV. 173 (2015) (discussing RFRA defenses by corporate defendants).

70. See *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 701 (2014) (discussing business owners’ claims about how operation of their business is connected with religious values). Matthew T. Bodie notes a similar reading of *Burwell v. Hobby Lobby* by other scholars. See Matthew T. Bodie, *The Next Iteration of Progressive Corporate Law*, 74 WASH. & LEE L. REV. 739, 762–63 (2017) (“Despite the result in *eBay [Domestic Holdings, Inc. v. Newmark]*, stakeholder theorists have not given up hope for doctrinal victories . . . [due to] [t]he Court’s willingness to depart [in *Burwell*] from shareholder primacy”); see also David K. Millon, *Looking Back, Looking Forward: Personal Reflections on a Scholarly Career*, 74 WASH. & LEE L. REV. 699, 736–37 (2017) [hereinafter Millon, *Looking Back, Looking Forward*] (articulating a similar interpretation of *Hobby Lobby*); KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO: (AND THEY SHOULD ACT LIKE IT) 98 (2018) (arguing that for-profit corporations can have spiritual values too, but the law must be careful to ensure that such is not a pretext for avoiding regulation).

71. See N.Y. BUS. CORP. LAW § 701 (McKinney 2021) (“Subject to any provision in the certificate of incorporation authorized by paragraph (b) of section 620 (Agreements as to voting; provision in certificate of incorporation as to control of directors) or by paragraph (b) of section 715 (Officers), the business of a corporation shall be managed under the direction of its board of directors, each of whom shall be at least eighteen years of age. The certificate of incorporation or the by-laws may prescribe other qualifications for directors.”).

72. See generally *id.* § 706 (regarding the removal of directors for cause, without cause, under certain circumstances, and via court order).

73. See *id.* § 614(a) (vote on directors); *id.* § 803(a) (change of certificate of incorporation subject to shareholder vote or approval except for certain minor matters); *id.* § 903(a) (merger or consolidation authorized only by shareholder vote); *id.* § 1001(a)

all business corporations, corporate governance culminates with the same BJR, which crystallizes the statutory recognition that boards call the shots in corporations.⁷⁴ True, the law acknowledges special circumstances, in closely held corporations, that require the imposition of a “fairness” fiduciary duty on directors and even majority shareholders.⁷⁵ But even there, New York law regards the BJR as protecting procedurally sound decisions: “fair procedures,” it seems, is the sole limitation on directors’ conduct that shareholders enjoy.⁷⁶

How is this absolutism justified? The short answer is that New York corporate law has applied public company reality to every type of business corporation.⁷⁷ This is presumably based on the historically recent belief that the BJR and norm of shareholder maximization represent what *all* shareholders would bargain for or what the democratic capitalist society requires.⁷⁸ Or perhaps the operative assumption is that all business corporations are simply aspiring public companies.⁷⁹ Whatever the underlying reason, the law assumes that if a shareholder has a problem with how a corporation is managed, then she can just sell her shares, including, in the case of a private company, by inducing the corporation or majority shareholders to buy her out.⁸⁰ If the shares are too valuable to part with —

(shareholder vote on dissolution).

74. See *Auerbach v. Bennett*, 393 N.E.2d 994, 999–1000 (N.Y. 1979) (stating that application of the BJR — which defers to directors’ good-faith business decisions — is dispositive).

75. See GEVURTZ, *supra* note 34, at 345–51.

76. See *Gallagher v. Lambert*, 549 N.E.2d 136, 138 (N.Y. 1989) (holding that minority shareholder has no claim for breach of fiduciary duty where he was terminated before higher buy-back percentage vested as buy-back offer was “fair” to him, even if below actual value of shares).

77. See *infra* notes 222–26 and accompanying text.

78. See EFFROSS, *supra* note 50, at 11–12; Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 903 (1997) [hereinafter Bainbridge, *Community and Statism*] (contending that progressive corporate law, departure from mainstream law, and economics views of the corporation “run counter to the spirit of a democratic capitalist society”).

79. See SHILLING & VINCENT, *supra* note 66, § 1.09 (describing a “typical pattern” as one where a company starts up and then goes public with an initial public offering, before which stage a series of problems arises from its small and familial shareholder composition); Benjamin C. Waterhouse, *The Small Business Myth*, AEON (Nov. 8, 2017), <https://aeon.co/essays/what-does-small-business-really-contribute-to-economic-growth> (arguing that in the 1980s, the Republican Party manipulated the mythology of small businesses to abandon the vast majority that, remaining small, promote competition and preserve local values in favor of elevating the few whose value is in “the[] potential to cease to be small businesses”).

80. See N.Y. BUS. CORP. LAW §§ 1104-a, 1118 (McKinney 2021); *In re Cristo Bros., Inc.*, 478 N.E.2d 176, 177 (N.Y. 1985) (holding that the judicially induced buyout

say, the corporation owns some valuable, inalienable property or is party to exclusive contracts — then the law suggests that the shareholder vote out the directors by persuading her peers to appoint a new board.⁸¹ Or, the law insists, the shareholder can just buy a controlling stake and then appoint directors who will do her bidding.⁸² Regardless of the law’s solution, the supposition remains the same: the value of stock in a corporation always can be monetized and liquidated. This means that the law never supposes an investor to be irreparably harmed, in a nonmonetary fashion, by board irresponsibility, even where participation in a corporation is her chief source of income. The remedy always remains the monetary one of dissolution and liquidation.⁸³ The question remains whether this exclusively monetary view of corporations’ value is an accurate description of reality.

III. CRITIQUING THE NEOLIBERAL GOVERNANCE PARADIGM

A. The Progressive Corporate Law Critique and Reform Program

Criticism of neoliberal corporate governance has not been limited to its incompatibility with “Mom and Pop” businesses. Rather, the criticism has most vigorously and roundly been applied to public companies, the very context in which neoliberal corporate governance was developed. The critique of public company corporate governance law has generally been labelled progressive corporate law, but has also been referred to as “communitarianism,” the “multi-fiduciary model,” or the “stakeholder theory.”⁸⁴

This critique has been carried out by many participants, but its main ideas are contained in articles by six scholars⁸⁵ and two books: a 1995 collection

procedure under section 1118 of New York’s Business Corporation Law applies to holders of fifty percent of shares of a closely held corporation).

81. See *S. & S. Realty Corp. v. Kleer-Vu Indus., Inc.*, 384 N.Y.S.2d 796, 797 (App. Div. 1976) (upholding shareholder’s petition for access to shareholder list to distribute materials to fellow shareholders urging them not to re-elect board).

82. See *Crane Co. v. Anaconda Co.*, 346 N.E.2d 507, 514 (N.Y. 1976) (upholding shareholder’s right to access list of shareholders in connection with offer to purchase stock).

83. Compare *In re Kemp & Beatley, Inc.*, 473 N.E.2d 1173, 1176 (N.Y. 1984) (upholding lower court dissolution of corporation because majority shareholders refused to issue dividends to minority shareholder), with *Ingle v. Glamore Motor Sales, Inc.*, 535 N.E.2d 1311, 1313 (N.Y. 1989) (upholding dismissal of action for damages, holding that minority shareholder in a close corporation is not insulated from being fired at will).

84. Bodie, *supra* note 70, at 748.

85. I focus on these six scholars because, as of June 13, 2020, a Westlaw search for “progressive corporate law” produces 527 law review articles. Each of the twenty most cited articles under the search term “progressive corporate law” analyzes or references writings by these six scholars. Ultimately, I acknowledge a point that one of the listed

of essays contained in an anthology entitled *Progressive Corporate Law*,⁸⁶ edited by Lawrence Mitchell, and Kent Greenfield's 2010 work, *The Failure of Corporate Law*.⁸⁷ The articles, whose basic points are summarized in this Section, are by Lynne Dallas,⁸⁸ Kent Greenfield,⁸⁹ Lyman Johnson,⁹⁰ David

scholars concedes: that the exercise of constituting a list is admittedly "idiosyncratic." See David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1391 n.47 (1993) [hereinafter Millon, *Communitarians*] (citing other participants in the communitarian critique and reform movement).

86. PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995).

87. See GREENFIELD, *THE FAILURE OF CORPORATE LAW*, *supra* note 33.

88. Lynne L. Dallas, *Two Models of Corporate Governance: Beyond Berle and Means*, 22 U. MICH. J.L. REFORM 19 (1988) [hereinafter Dallas, *Two Models of Corporate Governance*]; Lynne L. Dallas, *Proposals for Reform of Corporate Boards of Directors: The Dual Board and Board Ombudsperson*, 54 WASH. & LEE L. REV. 91 (1997) [hereinafter Dallas, *Proposals for Reform of Corporate Boards of Directors*]; Lynne L. Dallas, *Law and Socioeconomics in Legal Education*, 55 RUTGERS L. REV. 855 (2003) [hereinafter Dallas, *Law and Socioeconomics in Legal Education*].

89. Prior to publishing his 2010 book, Kent Greenfield had described its main points across nearly twenty years of scholarship. See Kent Greenfield & John E. Nilsson, *Gradgrind's Education: Using Dickens and Aristotle to Understand (and Replace?) the Business Judgment Rule*, 63 BROOK. L. REV. 799 (1997); Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283 (1998); Kent Greenfield, *There's a Forest in Those Trees: Teaching About the Role of Corporations in Society*, 34 GA. L. REV. 1011 (2000); Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. DAVIS. L. REV. 581 (2002); Kent Greenfield & Peter C. Kostant, *An Experimental Test of Fairness Under Agency and Profit-Maximization Constraints (With Notes on Implications for Corporate Governance)*, 71 GEO. WASH. L. REV. 983 (2003); Kent Greenfield, *Proposition: Saving the World with Corporate Law*, 57 EMORY L.J. 948 (2008); Kent Greenfield, *Reclaiming Corporate Law in a New Gilded Age*, 2 HARV. L. & POL'Y REV. 1 (2008); Kent Greenfield, *The Third Way*, 37 Seattle U. L. Rev. 749 (2014).

90. Lyman P.Q. Johnson, *The Social Responsibility of Corporate Law Professors*, 76 TUL. L. REV. 1483 (2002) [hereinafter Johnson, *The Social Responsibility of Corporate Law Professors*]; Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597 (2005) [hereinafter Johnson & Millon, *Recalling Why Corporate Officers Are Fiduciaries*]; Lyman P.Q. Johnson, *Faith and Faithfulness in Corporate Theory*, 56 CATH. U. L. REV. 1 (2006) [hereinafter Johnson, *Faith and Faithfulness in Corporate Theory*]; Johnson, *Re-Enchanting the Corporation*, *supra* note 16.

Millon,⁹¹ Lawrence Mitchell,⁹² and Lynn Stout.⁹³ The two books, also summarized below, have bookended progressive corporate law scholarship, though articles have been published since. For example, Matthew Bodie's 2017 article, as part of a symposium celebrating the scholarship of Lyman Johnson and David Millon, speaks of the *Next Iteration of Progressive Corporate Law*.⁹⁴

Stephen Bainbridge has described the *Progressive Corporate Law* ("PCL") volume as a useful introduction to scholarship opposing law and economics movement in public company corporate law.⁹⁵ Published fifteen years after *PCL*, Greenfield's book stands out as the foremost progressive critique since, in his description, it is the only work expressly challenging the neoliberal, contractarian perspective on corporations informing the current state of law⁹⁶ and proposing concrete reforms advancing the common good.⁹⁷ But all progressive scholars, writing before and after Greenfield's book, put forward similar criticisms of neoliberal governance. Despite their main critic's claim that progressive corporate law scholars "are far more firmly united by what they oppose — Chicago-style law and economics —

91. See Millon, *Communitarians*, *supra* note 85; David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223 (1991) [hereinafter Millon, *Redefining Corporate Law*]; David Millon, *Default Rules, Wealth Distribution, and Corporate Law Reform: Employment at Will Versus Job Security*, 146 U. PA. L. REV. 975 (1998) [hereinafter Millon, *Default Rules*]; David Millon, *New Game Plan or Business As Usual? A Critique of the Team Production Model of Corporate Law*, 86 VA. L. REV. 1001 (2000) [hereinafter Millon, *New Game Plan or Business As Usual?*]; David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013 (2013); David Millon, *Shareholder Social Responsibility*, 36 SEATTLE U. L. REV. 911 (2013) [hereinafter Millon, *Shareholder Social Responsibility*]; Millon, *Looking Back, Looking Forward*, *supra* note 70.

92. Lawrence E. Mitchell, *The Human Corporation: Some Thoughts on Hume, Smith, and Buffett*, 19 CARDOZO L. REV. 341 (1997) [hereinafter Mitchell, *The Human Corporation*]; Lawrence E. Mitchell, *Trust and Team Production in Post-Capitalist Society*, 24 J. CORP. L. 869 (1999) [hereinafter Mitchell, *Trust and Team Production in Post-Capitalist Society*]; Lawrence E. Mitchell, *The Importance of Being Trusted*, 81 B.U. L. REV. 591 (2001) [hereinafter Mitchell, *The Importance of Being Trusted*].

93. Lynn A. Stout, *The Unimportance of Being Efficient: An Economic Analysis of Stock Market Pricing and Securities Regulation*, 87 MICH. L. REV. 613 (1988); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999) [hereinafter Blair & Stout, *A Team Production Theory of Corporate Law*]; Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735 (2001) [hereinafter Blair & Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*]; Stout, *Why We Should Stop Teaching Dodge v. Ford*, *supra* note 18.

94. Bodie, *supra* note 70.

95. See Bainbridge, *Community and Statism*, *supra* note 78, at 857.

96. See GREENFIELD, *THE FAILURE OF CORPORATE LAW*, *supra* note 33, at 3–5.

97. See *id.* at 5.

than by what they support”⁹⁸ — their various criticisms cohere into three main points.

First, progressive scholars contend that modern corporate law has ignored the public function of public companies.⁹⁹ Specifically, they posit that corporate law mistakes public companies for private bodies whose activities serve the common good, if at all, simply by operation of the invisible hand and trickling down.¹⁰⁰ Greenfield observes this by framing his book as a gap filler for neoliberal, contractarian analysis.¹⁰¹ Later on, Greenfield articulates a guiding principle for law: public companies should be measured by whether the value they create is greater than the cost they impose on society on the whole.¹⁰² Similarly, in introducing *PCL*, Lawrence Mitchell states that, in view to all the harms corporations visit upon society, “[o]ur historical treatment of the corporation as a public good in the private service can no longer be sustained It is time that the corporation be recognized as what it is: a public institution with public obligations.”¹⁰³

Second, progressive scholars contend that, as public institutions, public companies must be made to serve the interests of all those with ties to them.¹⁰⁴ All includes direct stakeholders such as workers, but also indirect one such as the public at large, who are injured by the externalities of corporations’ activities.¹⁰⁵ Progressive scholars are also united in asserting that corporate law should recognize and protect the nonmonetary and humanistic benefits that public companies confer upon other stakeholders, primarily employees. In an essay within *PCL* entitled *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*,¹⁰⁶ David Millon describes the “challenge[] to corporate law’s traditional commitment to the shareholder primary principle” as the “communitarian approach,” where the focus is on the “sociological and moral phenomenon of the corporation as

98. Bainbridge, *Community and Statism*, *supra* note 78, at 857.

99. See GREENFIELD, *THE FAILURE OF CORPORATE LAW*, *supra* note 33, at 1–2.

100. See *id.* at 2 (discussing the harms and flaws in American corporate law as a result of the way corporations are organized).

101. See *id.* at 4–5.

102. See *id.* at 128.

103. See Lawrence E. Mitchell, *Preface* to *PROGRESSIVE CORPORATE LAW* xiii (Lawrence E. Mitchell ed., 1995) [hereinafter Mitchell, *Preface*].

104. See David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, in *PROGRESSIVE CORPORATE LAW* 5 (Lawrence E. Mitchell ed., 1995) [hereinafter Millon, *Communitarianism in Corporate Law*].

105. See *id.* (noting that, for example, when a plant closes, communitarians consider not only the employees who will lose their jobs, but also the consumers who may lose access to the product and the community that may lose tax revenues).

106. Millon, *Communitarianism in Corporate Law*, *supra* note 104.

community, in contrast to the individualistic, self-reliant, contractarian stance that dominates current academic discourse in corporate law.”¹⁰⁷ Millon regards this communitarian turn in public company corporate law as being inspired by “concern about the harm to nonshareholders that can occur as a result of managerial adherence to the shareholder primacy principle.”¹⁰⁸ In a more recent article, Millon makes the same point negatively by arguing that the modern, mainstream corporate governance view of shareholder welfare maximization, based on self-interest, is simply incompatible with a public company exercising any social responsibility to anyone.¹⁰⁹ Returning to *PCL*, Lewis D. Solomon closes the book with an essay entitled *On the Frontier of Capitalism: Implementation of Humanomics by Modern Publicly Held Corporations — A Critical Assessment*,¹¹⁰ where he favorably examines two corporations — one formed in the United States and the other in England — that have implemented a humanomics approach to business operations.¹¹¹ Solomon frames the humanomics approach as one that can create “business organizations that will promote both human growth and ecological considerations as part of a larger interest in the quality of life and the preservation of the planet.”¹¹²

Third, all progressive scholars reject the contractarian reduction of public company corporate law, or the contention that such corporations are not societies in and of themselves governed by social mores, but rather are mere “nexus[es] of contracts.”¹¹³ These progressives reject contractarianism because it obscures the degree to which all contracts are subject to pre-contractual entitlement rules that are not themselves products of the market but rather are informed by socio-cultural considerations.¹¹⁴ For example,

107. *Id.* at 1.

108. *Id.*

109. Millon, *Shareholder Social Responsibility*, *supra* note 91, at 911, 928–29 (arguing that short-termism, the current practice arising out of the shareholder welfare maximization norm, is incompatible with corporate social responsibility).

110. Lewis D. Solomon, *On the Frontier of Capitalism: The Implementation of Humanomics by Modern Publicly Held Corporations: A Critical Assessment*, 50 WASH. & LEE L. REV. 1625, 1642–43 (1993), *reprinted in* PROGRESSIVE CORPORATE LAW 281 (Lawrence E. Mitchell ed., 1995)

111. *See generally id.* (analyzing Ben & Jerry’s, the American one, and The Body Shop International PLC, the English one).

112. *Id.* at 282.

113. *See, e.g.,* GREENFIELD, THE FAILURE OF CORPORATE LAW, *supra* note 33, at 149 (stating that under the “nexus of contracts” view of a firm, important market participants should be put in decision-making positions as this is the best way to make fair decisions).

114. *See* Mitchell, *Preface*, *supra* note 103, at xiii–xv (stating that the “dominant trend in corporate law scholarship” that treats corporations like private contractual arrangements is “doomed to fail” because it does not consider human behavior and is detached from reality).

Millon criticizes what he classifies as progressive contractarian arguments on the very basis that they elide how property rights are the product of societal policy decisions.¹¹⁵ Likewise, Lynne Dallas' essay in the same volume, *Working Toward a New Paradigm*,¹¹⁶ expresses deep skepticism of the shareholder primacy norm as "economically natural," remarking that it is the product of policymaking.¹¹⁷ Dallas also follows Millon in arguing that contractarianism is normatively suspect because it ignores other, pre-contractual considerations such as the public function of work for employees, disregarding other stakeholders' investment of labor, an asset.¹¹⁸ In another *PCL* essay, *Some Observations Writing the Legal History of the Corporation in the Age of Theory*,¹¹⁹ Gregory A. Marks reinforces this critique through tracing the historiography of corporate law, showing that neoliberal theory has overtaken history to recast the origins of corporations as the natural result of market economics, instead of as the product of policy-making.¹²⁰ Finally, although Greenfield notes that his proposal ironically stands as "the genuine realization of the 'nexus of contracts' view of the firm,"¹²¹ he rejects contractarian atomization of the corporation in that he advocates for the robust participation of other stakeholders in governance by having a seat on the board as a matter of course.¹²² This reflects a social, rather than contractual, view of entities.

As part of criticizing this reduction, progressive corporate scholars also reject the contractarian, self-interest rationality undergirding neoliberal governance for a more social and relational understanding of human beings.¹²³ Solomon's essay on humanonics discussed above points to this,¹²⁴ though other progressive scholars are more explicit. They all agree on a more social and communitarian view of economic rationality, but their precise conceptions span a range whose poles are a harder institutional

115. See Millon, *Communitarianism in Corporate Law*, *supra* note 104, at 24–25.

116. Lynne L. Dallas, *Working Toward a New Paradigm*, in *PROGRESSIVE CORPORATE LAW* (Lawrence E. Mitchell ed., 1995).

117. See *id.* at 39.

118. See *id.* at 49–50.

119. Gregory A. Mark, *Some Observations on Writing the Legal History of the Corporation in the Age of Theory*, in *PROGRESSIVE CORPORATE LAW* (Lawrence E. Mitchell ed., 1995).

120. See *id.* at 85.

121. GREENFIELD, *THE FAILURE OF CORPORATE LAW*, *supra* note 33, at 149.

122. See *id.* at 149–50.

123. See Blair & Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, *supra* note 93, at 1737 (arguing that self-interested contractarian rationality cannot fully account for how corporate constituents cooperate amongst each other).

124. See *supra* notes 110–12 and accompanying text.

understanding and a softer cultural one. At the harder end is Dallas' power vision of public companies, where a corporation is thought of as a more formal institution, but one molded by historical, cultural, and political forces, rather than standing as an economically efficient firm.¹²⁵ Almost twenty years later, Dallas stood by her basic viewpoint, describing this perspective as law and socioeconomics ("LSOC").¹²⁶ As Dallas describes it, LSOC understands all economic participants, and not just corporate ones, to be consumers within the context of the legal/institutional environment, social rules, and market power, not just economically efficient structures.¹²⁷ At the center is Stout and Blair's team production model, which regards public companies as webs of personal relationships mediated by the board,¹²⁸ sort of like electrons circulating a nucleus. In an article two years after their team production one, Stout and Blair elaborated the interstitial fulcrum of the team, or the matrix in which the electrons and nucleus exist: the central concept of trust.¹²⁹ This concept both brings us back to the center and segues to the opposite pole. Looking backwards, Mitchell draws upon Blair and Stout's observation and argues that trust renders the corporation a social institution, and much less an arms-length nexus of self-interested actors.¹³⁰ Moving forward, Mitchell and Johnson both argue that the operative necessity of trust emphasizes the humanity of corporations, a quality that allows for a pluralistic view of corporations as also being governed by social values, including religion, instead of rational self-interest.¹³¹ In a later article, Johnson and Mitchell join Blair and Stout¹³² in arguing that the personal, social notion of trust also better explains certain elements of corporate law doctrine such as the fiduciary duties of loyalty and care,¹³³

125. Dallas, *Two Models of Corporate Governance*, *supra* note 88, at 25–27.

126. See Dallas, *Law and Socioeconomics in Legal Education*, *supra* note 88, at 855–56, 858–59.

127. *Id.*

128. See Blair & Stout, *A Team Production Theory of Corporate Law*, *supra* note 93, at 253–54 (arguing that boards exist to protect enterprise-specific investments of all members of the team).

129. See Blair & Stout, *Trust, Trustworthiness, and the Behavioral Foundations*, *supra* note 93, at 1737–38.

130. Mitchell, *Trust and Team Production in Post-Capitalist Society*, *supra* note 92, at 870–72.

131. See Mitchell, *The Human Corporation*, *supra* note 92, at 358–61; Johnson, *Faith and Faithfulness in Corporate Theory*, *supra* note 90, at 6; Johnson, *Re-Enchanting the Corporation*, *supra* note 16, at 98–99 (positing that many business actors are motivated more by “sympathy towards others” than profit maximization).

132. See Mitchell, *Trust and Team Production in Post-Capitalist Society*, *supra* note 92, at 871; Johnson, *Faith and Faithfulness in Corporate Theory*, *supra* note 90, at 6.

133. See Johnson, *The Social Responsibility of Corporate Law Professors*, *supra* note 90, at 1499–1500 (arguing that law professors have a duty to teach fiduciary duties in a

which we considered above in Part II.

Building from these three points, progressive scholars propose the same communitarian changes to corporate governance. In his book, Greenfield refers to “three proposals most often put forward by progressive corporate law scholars . . . : relaxation of the profit norm, including workers within the directors’ fiduciary duties, and placing workers’ representatives on the boards of directors,” based on European models.¹³⁴ He describes these as so common among progressives that he need not even discuss their rationales.¹³⁵ Millon, though uncertain of the concrete details of a communitarian turn, aligns with Greenfield in proposing reforms meant to bring social benefit into corporate law by authorizing directors to consider other stakeholders’ interests.¹³⁶ In a later article, Greenfield becomes a bit more concrete and proposes what he characterizes as a “modest reform”: enacting a statute changing default rules whereby employee stakeholder interests would be assumed.¹³⁷ By this, they would not be left to protect themselves through private bargaining, an inadequate path given clear wealth and power disparities.¹³⁸ Continuing along this path of statutory reforms, Millon and Johnson argue that to build cultures of morality, corporate law should adopt the more rigorous agency-law fiduciary standard for corporate managers, and not the lesser standard corporate law applies to directors.¹³⁹ For Dallas, the key reform is a variant on the sort Greenfield describes: a requirement that public companies have two boards, each led by an independent ombudsperson serving outsiders.¹⁴⁰ Through this reform, corporations can monitor for conflicts (the task of one board), but also advance the relationships with corporations consistent with her power theory (the task for the other).¹⁴¹

It is important to observe from this summary what the progressive corporate critique affirms of public companies. It recognizes them as valid

broad, moral, and social sense); Johnson, *Re-Enchanting the Corporation*, *supra* note 16, at 98–99; Mitchell, *The Importance of Being Trusted*, *supra* note 92, at 614–15.

134. See GREENFIELD, *THE FAILURE OF CORPORATE LAW*, *supra* note 33, at 124.

135. See *id.*

136. See Millon, *Communitarianism in Corporate Law*, *supra* note 104, at 13, 30–31 (describing the communitarian turn as reforming the entitlement structure underlying corporate law).

137. See Millon, *Default Rules*, *supra* note 91, at 979, 995.

138. See *id.* at 979.

139. Johnson & Millon, *Recalling Why Corporate Officers Are Fiduciaries*, *supra* note 90, at 1601.

140. Dallas, *Proposals for Reform of Corporate Boards of Directors*, *supra* note 88, at 130–32.

141. *Id.* at 132–34.

and useful in and of themselves, avoiding the notion that they should be abolished in the name of public good. Indeed, Greenfield goes the furthest on this point and identifies four specific characteristics of business corporations — “[the] easy transferability of shares, limited liability, specialized and centralized management, and a perpetual existence separate from their shareholders” — as features that render them “especially able to create financial prosperity.”¹⁴² Millon recognizes how public companies, in providing “adequate compensation, healthful and pleasant working conditions, some amount of control over work, and job security are necessary for the achievement of self-realization in the workplace.”¹⁴³ Millon’s problem is that the “current market conditions may render these goods unattainable for many employees.”¹⁴⁴

From this, we should appreciate that the progressive project has simply sought to ensure that public companies’ social function is not undermined by the market; they identify the source of corporate anomie as the norm of shareholder welfare maximization, not the structure itself. Accordingly, they propose changes to corporate law that amount to advancing a “thicker” conception of the public company as a community of all constituents formed for the benefit of larger society, instead of as a loose nexus of self-interested profiteers. They argue that this thickening can happen by broadening the scope of interests that corporate directors must take into account.

B. The Failure of Progressive Corporate Law to Reform Public Company Governance

To date, this “thicker” communitarian conception of a public company has failed to displace corporate law’s looser, contractual conception apotheosizing profit.¹⁴⁵ The question remains why it has failed. I submit that this is because progressive proposals have been too theoretical, modest, or subtle to take. For example, take the reform of weakening the maximization norm and mandating stakeholder representation on the board, principally workers. It is based on the landscape in Germany,¹⁴⁶ which serves to suggest that it is feasible. But relying on a German example raises the question of whether it can be implemented in the United States’ different

142. GREENFIELD, *THE FAILURE OF CORPORATE LAW*, *supra* note 33, at 131.

143. *See* Millon, *Communitarianism in Corporate Law*, *supra* note 104, at 9.

144. *Id.*

145. *See* Bodie, *supra* note 70, at 740 (explaining that progressive corporate law is moving away from shareholder wealth maximization towards a “communitarian vision of the corporation,” yet progressive theory must continue to evolve in order to be a formidable alternative).

146. *See* GREENFIELD, *THE FAILURE OF CORPORATE LAW*, *supra* note 33, at 42, 150.

socio-legal culture. When shifting to other proposals, the problem becomes that they appear as mere tweaks to the standard model:¹⁴⁷ for example, the proposals calling for the application of agency-law fiduciary standard,¹⁴⁸ a shift of contract rules default rules,¹⁴⁹ or conception of omnipotent boards of directors as relational mediators.¹⁵⁰

One reason why progressives seem to tread lightly is because of what they affirm about public companies: they propose reform in the name of classical capitalism as found in Adam Smith's *The Wealth of Nations*.¹⁵¹ As discussed above, the whole point of the progressive critique is for public companies to serve as the greatest vehicle for wealth creation in human history for all, not just a miniscule elite.¹⁵² As such, the critique seems to presuppose that business corporations serve ends defined as market capitalism, instead of standing as a counter to the ruthlessness of markets. For this reason, their proposals focus on public companies, and largely leave intact the basic structure of neoliberal governance corporate law discussed above in Part II.¹⁵³

At the root of the progressive critique's inefficacy is its description of the problem as "shareholder primacy." On closer inspection of progressives' arguments, they posit the problem as the law's requirement that managers care only about shareholders' monetary interests, to the detriment of any nonmonetary interest for anyone.¹⁵⁴ This is what shareholder primacy actually means, regardless of whether one technically adheres to a neoliberal governance theory giving directors, as opposed to shareholders, corporate primacy.¹⁵⁵ But as we saw from the discussion above in Part II, New York

147. Bodie, *supra* note 70, at 750–51.

148. See Johnson & Millon, *Recalling Why Corporate Officers Are Fiduciaries*, *supra* note 90, at 1601 (discussing their proposed reform).

149. See Millon, *Default Rules*, *supra* note 91, at 979, 995 (discussing his proposed reform).

150. See Dallas, *Proposals for Reform of Corporate Boards of Directors*, *supra* note 88, at 130–32 (discussing the conceptualization of boards).

151. See ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS: COMPLETE AND UNABRIDGED* 421–22 (Edwin Cannan ed., 1904) (1776) (discussing the "classicus locus" of the invisible hand concept).

152. See GREENFIELD, *THE FAILURE OF CORPORATE LAW*, *supra* note 33, at 132.

153. See Bodie, *supra* note 70, at 750–51; see also Millon, *New Game Plan or Business As Usual?*, *supra* note 91, at 1003–05 (arguing that the Stout and Blair team production model perpetuates the status quo regarding a board of directors as a mediating hierarch within a relationship conception of corporations but does not propose anything serving to insulate boards from political pressure undermining communitarianism).

154. See, e.g., Millon, *Communitarianism in Corporate Law*, *supra* note 104, at 5–6.

155. See Bainbridge, *Director Primacy*, *supra* note 34, at 563, 574 ("[D]irector primacy does not discard the concept of shareholder wealth maximalization as a bargained for right of the shareholders.").

corporate law and corporate law generally, do not really protect or care about *anyone's* nonmonetary interests, even if those folks are shareholders.¹⁵⁶ And so, the problem of neoliberal corporate law is not so much shareholder primacy, but rather the absolutization of profit, for which the idea of shareholder primacy stands as a proxy.¹⁵⁷

However, because progressive scholars have expressed their criticisms in terms of shareholder primacy, they have set their critique up for rejection. This is because, wholly assuming that corporations, and especially public companies, are uniquely suited to generate wealth — a point that progressives seemingly concede in, for example, Greenfield's observation of their special attributes¹⁵⁸ — weakening shareholders' legal primacy threatens to undermine corporations' ability to do what they are best suited for. Eminent corporate scholar Bainbridge has formulated the entire case against progressive public company law by reinforcing this risk with two points. First, Bainbridge has suggested that the current law, especially its norm of shareholder wealth maximization, reflects what economically rational investors would bargain for anyway.¹⁵⁹ That is why the shareholder norm governs even when, as Bainbridge holds, directors technically enjoy primacy in corporations.¹⁶⁰ Second, he has contended that the wealth maximization norm reflects human nature and the quiddity of the U.S. democratic capitalist system.¹⁶¹ If Europeans allow for another norm to govern, that is because

156. See *supra* notes 78–83 and accompanying text.

157. See GREENFIELD, *THE FAILURE OF CORPORATE LAW*, *supra* note 33, at 218, 224–26; EFFROSS, *supra* note 50, § 1.07(C) (citing LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT* 4–5 (2001)) (“Unlike advocates of shareholder primacy, communitarians have attacked the maximalization of shareholder wealth as ‘an imperative that is as destructive as it is simple’ because it emphasizes short-term financial gains over long-term social welfare.”).

158. See Johnson & Millon, *Recalling Why Corporate Officers Are Fiduciaries*, *supra* note 90, at 1630 (citing Greenfield's research on officers' “duty to maximize stockholder wealth”).

159. See EFFROSS, *supra* note 50, § 1.05 (citing STEPHEN M. BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* 65–66 (2008)); see also MICHAEL R. DIAMOND, *CORPORATIONS: A CONTEMPORARY APPROACH* 23–26 (5th ed. 2019) (citing ALLAN A. KENNEDY, *THE END OF SHAREHOLDER VALUE: CORPORATIONS AT THE CROSSROADS* (2001)) (discussing shareholder valuiism, on the obsession over stock price arising out of the high tech boom, in the context of Allan Kennedy's thesis in *The End of Shareholder Value: Corporations at the Crossroads* that “the contemporary obsession on stock prices has created the idea that the sole purpose for the existence of business is to make money . . . driving managers to focus on stock prices in the short-term, with adverse consequences for long-term business health . . .”).

160. See Bainbridge, *The Business Judgment Rule As Abstention Doctrine*, *supra* note 35, at 110–11, 123.

161. See Bainbridge, *Community and Statism*, *supra* note 78, at 903.

their society is different: they might be statist.¹⁶²

The upshot of Bainbridge's argument is that shareholder wealth maximization may be a fifth feature — to add to Greenfield's four mentioned above¹⁶³ — explaining why corporations have a genius for attracting capital. Even worse for the progressive project, it too would be a cultural principle, standing as a normative account of how *all* corporations should be organized in our “free society.”¹⁶⁴ If it is true that the feature of shareholder welfare maximization is why corporations are so effective in attracting investment, it follows that displacing the maximization norm risks ruining corporations' very social utility. On the basis of progressives' theoretical and subtle arguments so far, why should policymakers take any chances, especially where even progressives agree with the social benefit of corporate wealth-generation?¹⁶⁵

The progressive argument has suffered from want of a concrete, American example of an effective communitarian business corporation. Absent this example, the progressive case cannot seize the argument. Rather, its proposals are received as ideals corporate managers are free to adopt and test out in a market and judges are free to disregard. But such an approach produces no change. This is a danger Millon recognized twenty-five years ago.¹⁶⁶ His observation remains. As a result, progressive proposals for public company reform have failed to cure corporate law's disregard of communitarian rationality.¹⁶⁷ Having failed to question whether the *purpose* of a business corporation is profit, but rather only having raised some concern about profits for whose benefit, it has reinforced the validity of neoliberal governance.

162. *Id.*

163. See *supra* note 142 and accompanying text.

164. See Bainbridge, *Community and Statism*, *supra* note 78, at 890–900 (arguing that the progressive corporate law project is statist and, thereby, incompatible with American culture's ideal of free, voluntary trust and community). This, of course, also is Milton Friedman's argument in his famous 1970 article: that social responsibility should arise out of the free choice of charity, not the normative compulsion of corporate social responsibility. See Milton Friedman, *A Friedman Doctrine — The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970) [hereinafter Friedman, *A Friedman Doctrine*], <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>.

165. See GREENFIELD, *THE FAILURE OF CORPORATE LAW*, *supra* note 33, at 131–32.

166. See Millon, *Communitarianism in Corporate Law*, *supra* note 104, at 13.

167. See Bodie, *supra* note 70, at 740 (discussing the shortcomings of progressive theory despite its successes).

IV. ADVANCING THE CRITIQUE: THE HDFC AS A BUSINESS CORPORATION COUNTERING MARKETS

A. Unlocking Function: The Key of the Black and Brown HDFC

As we saw in Section III.B, the progressive critique of public company governance leaves us to imagine that all corporations serve a monetary function. For it invites us to question to whom corporate profit should go, but it does not question whether the point of a corporation is profit. The HDFC comes in to pick up where progressive corporate law leaves off, providing a different answer. For like the public company, the HDFC is incorporated as a business corporation; New York's business corporation law, and the whole standard corporate drama involving derivative suits and shareholder inspection and proxy contests, fully apply to it.¹⁶⁸ And the HDFC operates its business in a competitive and cutthroat market: New York City's hypercommodified real estate market.¹⁶⁹ But serving as a vehicle for stability countering the real estate market,¹⁷⁰ it rejects the public company's understanding of corporate function and posits that at least some business corporations exist for reasons other than profit.

A closer examination of the HDFC allows this duality to become clearer. In an HDFC, tenants invest to own shares in a corporation owning and operating a residential apartment building as housing for low-income individuals.¹⁷¹ Even though HDFCs, when formed as business corporations, are still subject to the "non-distribution constraint" typical of nonprofits,¹⁷²

168. See N.Y. PRIV. HOUS. FIN. LAW § 573(1) (McKinney 2021); *Valyrakis v. 346 W. 48th St. Hous. Dev. Fund Corp.*, 76 N.Y.S.3d 523, 527 (App. Div. 2018) (determining shareholder tenant's complaints under the derivative litigation demand standard and business judgment rule); *Santiesteban v. 94–102 Hamilton Place H.D.F.C.*, No. 11736/09, 2009 N.Y. Misc. LEXIS 6446, at *13–14 (Sup. Ct. Nov. 18, 2009) (granting HDFC shareholder right to access records under business corporation law and common law).

169. See sources cited *supra* note 29.

170. See Greg Olear, *A Look at HDFCs: Understanding Housing Development Fund Corporation Co-Ops*, N.Y. COOPERATOR, (Sept. 2017), <https://cooperator.com/article/a-look-at-hdfcs/full> (“One of the things that is beautiful about HDFC co-ops is that the people who lived in the distressed, neglected, and abandoned buildings in the neighborhoods in the ‘70s and ‘80s where these HDFCs were first created are still there now,” says Rachel Christmas Derrick, director of communications and fundraising for [Urban Housing Assistance Board]. “Though sadly, many of their neighbors in rentals are being displaced by gentrification. So that many of these people — particularly in Harlem and Brooklyn neighborhoods — are still the primarily black and Latino residents who lived there in the beginning. And they can now enjoy the positive aspects of the neighborhoods that they fought so long and hard to improve.”).

171. See N.Y. PRIV. HOUS. FIN. LAW §§ 571, 573.

172. See *id.* § 573(3) (“3. The certificate of incorporation of any such corporation shall, in addition to any other requirements of law, provide: . . . b. that all income and

their shareholders benefit from owning shares worth hundreds of thousands of dollars in gentrifying real estate markets.¹⁷³ HDFCs also offer standard tax-law benefits such as mortgage interest deduction.¹⁷⁴ And since HDFCs have to pay New York City property taxes, albeit reduced ones — one reason why HDFCs came to own buildings was that the government could generate tax revenue¹⁷⁵ — shareholders often benefit from an effectively run, solvent business. This is especially the case in New York City, where building owners behind on property taxes face divestment under a Third Party Transfer Program (“TPT”) discussed further below.¹⁷⁶

But there is a different rationality at operation. At the level of investment, we can observe another type of logic. Buying into a housing cooperative is a business decision — it is a tenant’s perennial interest to obtain the most affordable, stable, and secure housing.¹⁷⁷ But buying into a housing

earnings of the corporation shall be used exclusively for corporate purposes, and that no part of the net income or net earnings of the corporation shall inure to the benefit or profit of any private individual, firm, corporation or association.”); James J. Fishman, *The Development of Nonprofit Corporation Law and An Agenda for Reform*, 34 EMORY L.J. 617, 663 (1985) (noting the “non-distribution constraint” in the HDFC statute).

173. See Emily Nonko, *New York City’s Affordable HDFC Co-Op Explained*, CURBED N.Y. (Mar. 25, 2020, 8:56 AM), <https://ny.curbed.com/2020/3/25/21192807/hd-fc-new-york-income-based-housing> (“[O]riginally, the apartments were sold to residents for a mere \$250. For years the units were resold for moderate amounts, but the past decade or so has brought super-gentrification to some of the neighborhoods in which HDFCs are plentiful. Resale listings have popped up for as much as \$1 million (though that high of an asking price is rare), and buyers have increasingly made all-cash offers. As a result, prices have trended up for HDFC coop housing in recent years and made many out of reach for low-income New Yorkers The modern-day HDFC buyer tends to be one with a lower income but significant assets: retirees, young buyers with financial assistance from parents, and those with trust funds or an inheritance.”); Memorandum from Geoffrey Propheeter, N.Y. Indep. Budget Off., on Cost Estimates for Alternative Tax Exemptions for Some HDFC Coops to George Sweeting, N.Y. Indep. Budget Off., 8–9 (Dec. 3, 2015), <https://ibo.nyc.ny.us/iboreports/estimating-cost-of-full-tax-exemption-for-hd-fc-coop-buildings.pdf> (stating that New York City-wide median sales price for HDFC cooperative units from 2010 through 2015 had been \$270,200, with median prices in strong markets such as mid-and-lower Manhattan and downtown Brooklyn and Williamsburg/Greenpoint being \$360,000); Michelle Higgins, *Bargains With a “But,”* N.Y. TIMES (June 27, 2014), <https://www.nytimes.com/2014/06/29/real-estate/affordable-new-york-apartments-with-a-catch.html>.

174. Cf. *United Hous. Found. Inc. v. Forman*, 421 U.S. 837, 846, 853–54 (1975) (highlighting the income-boosting benefits of co-ops, including the tax benefits, which raised a question as to whether shares in the co-op were securities).

175. See Olear, *supra* note 170 (referring to statement from Gregory Baggett, executive director of the New York Council for Housing Development Fund Companies (“NYC HDFC”), that a significant number of abandoned properties mainly “[w]ent to private real estate developers,” nonprofit entities, and building residents — which served as the basis for the formation of the HDFC — thus increasing the city’s tax revenues).

176. See *infra* note 251 and accompanying text.

177. Cf. *United Hous. Found.*, 421 U.S. at 841 (listing the benefits afforded to tenants

cooperative is not the same type of business decision as that made by an investor, or a money manager on her behalf, in the stock market. For the individual buying into an HDFC spends money or gives other consideration to buy a home that will remain more affordable than one she can rent on the open market.¹⁷⁸ By contrast, the person buying into a publicly traded company generally does not care about the specifics (if she even knows them); all she cares about is money.¹⁷⁹ The same point can be made by saying that with HDFC investors, their bottom-line is affordable housing. But this benefit is one that they cannot obtain unless they pool resources with trustworthy individuals sharing these social values.

Historicizing the HDFC highlights its communitarian function. As best captured in Jacqueline Leavitt and Susan Saegert's study *From Abandonment to Hope: Community-Households in Harlem*,¹⁸⁰ studying the formation of HDFCs in Harlem, and Malve von Hassell's *Homesteading in New York City, 1978–1993: The Divided Heart of Loisaída*,¹⁸¹ studying the same in Manhattan's Lower East Side, HDFCs arose as a response to landlord "economically rational" neglect and abandonment, a gradual dehousing in New York City from the late 1960s to the early 1980s.¹⁸² Confronted with the choice of being gentrified out, staying put in such dilapidation, or leaving, "many tenants stayed in their communities, some seizing the opportunity of landlord disinvestment to take control of their own housing . . ."¹⁸³ Specifically, neglected tenants availed themselves of government programs to preserve their homes and rebuilt abandoned communities by assuming the status of resident owner.¹⁸⁴ By doing so, they thwarted the ostensible goal of widespread neglect: to use "planned

who purchase shares in the co-op).

178. See *id.* at 853–54.

179. See GREENFIELD, *THE FAILURE OF CORPORATE LAW*, *supra* note 33, at 122–23.

180. JACQUELINE LEAVITT & SUSAN SAEGERT, *FROM ABANDONMENT TO HOPE: COMMUNITY-HOUSEHOLDS IN HARLEM* (1990).

181. MALVE VON HASSELL, *HOMESTEADING IN NEW YORK CITY, 1978–1993: THE DIVIDED HEART OF LOISAÍDA* (1999).

182. See LEAVITT & SAEGERT *supra* note 180, at 3–4; see also David Reiss, *Housing Abandonment and New York City's Response*, 22 N.Y.U. REV. L. & SOC. CHANGE 783, 787–89 (1997) (outlining how inflation, heightened housing costs, and declining public assistance payments have contributed to New York City's abandonment crisis); Andrea McArdle, *[Re]Integrating Community Space: The Legal and Social Meanings of Reclaiming Abandoned Space in New York's Lower East Side*, 2 SAVANNAH L. REV. 247, 249–54, 257–59 (2015) (describing abandonment and enterprising residents' reinvestment in deteriorating neighborhoods through their own labor, which is known as urban homesteading).

183. LEAVITT & SAEGERT, *supra* note 180, at 5.

184. See VON HASSELL, *supra* note 181, at 2; McArdle, *supra* note 182, at 247–54, 257–58.

shrinkage” as a way of razing low-income communities and transforming them into luxury housing by skirting slum clearance or eminent domain.¹⁸⁵

Under such government programs, New York City, default owner of properties abandoned by capital, transferred its ownership title to HDFC corporations, also to divest itself of responsibility for such properties.¹⁸⁶ These entities were formed by tenants who had already been working collectively to oppose their marginalization through rent-strikes and Article 7A proceedings to compel repairs; indeed, their collective actions often induced capital to abandon the properties.¹⁸⁷ These collaborating tenants then became shareholders of a real-estate company by paying as little as \$250.¹⁸⁸ As part of their transformation into shareholders, the tenants also contributed labor — or “sweat equity” as it is often termed¹⁸⁹ — by participating in the rehabilitation of housing.¹⁹⁰ Overall, the “sweat-equity” urban homesteading “was a community-based response to the shortage of affordable housing for the working poor:”¹⁹¹ that is, a rational response to a market failure.

In sum, tenants, overwhelmingly low-income households of color headed by women,¹⁹² ironically *went corporate* — that is, formed corporations and became shareholders by investing a month of rent and years of labor¹⁹³ — to protect themselves from markets. And from the description, we can see that rationality spurring this investment is fundamentally communitarian: it conceives of incorporation as a collective action for self-protection against market forces.¹⁹⁴ Most tenants who bought shares in HDFCs invested in

185. See VON HASSELL, *supra* note 181, at 54.

186. See LEAVITT & SAEGERT, *supra* note 180, at 3; Reiss, *supra* note 182, at 787–89 (describing efforts by the New York City Council to alleviate the abandonment crisis through tax initiatives and the establishment of the Department of Housing Preservation and Development).

187. See LEAVITT & SAEGERT, *supra* note 180, at 84–87; see also Nonko, *supra* note 173.

188. See LEAVITT & SAEGERT, *supra* note 180, at 7.

189. See McArdle, *supra* note 182, at 253.

190. See VON HASSELL, *supra* note 181, at 80–81.

191. VON HASSELL, *supra* note 181, at 1.

192. VON HASSELL, *supra* note 181, at 65 (stating that the Lower East Side homesteaders were overwhelmingly Puerto Rican and had lower incomes than others); LEAVITT & SAEGERT, *supra* note 180, at 25–30 (describing how homesteading households were overwhelmingly Black or Hispanic and headed by women).

193. See VON HASSELL, *supra* note 181, at 2.

194. See Peter Marcuse, *Abandonment, Gentrification, and Displacement: The Linkages in New York City*, in *GENTRIFICATION OF THE CITY* 172–73 (Neil Smith & Peter Williams eds., 1986).

corporations owning worthless, abandoned buildings.¹⁹⁵ They did this to secure place in a community by attaining a status to which the law accords real power: that of a property owner. And in operating their corporation, they sought civic and community-minded investors whom they trusted, not just individuals who would infuse cash despite the desperate need for such funds. The following passage from Leavitt and Saegert's study captures the nub of this rationality:

Tenants placed great emphasis on filling vacancies [in HDFCs] with people who would be active and have skills. The one vacancy that occurred after co-opting was filled with John Paynes and his wife, Martha. Paynes, who had some experience with housing organizations and city agencies, became the bookkeeper for the tenants' association. The women on the board were trying to help the wife set up a day-care center to bring in income for the building. A beautification club to do painting and cleaning was formed and involved many of the young people. Here, we see the extension of domestic activities from the individual household to the building.¹⁹⁶

As we have hopefully come to appreciate during these continuing days of Reconstruction,¹⁹⁷ this rationality has roots in civil rights protests. It is that which seeks empowerment through collective strength, evocative of Malcolm X's description of the business aspect of Black nationalism most forcefully described in his April 1964 speech, "The Ballot or the Bullet."¹⁹⁸ The relevant portion must be quoted at length here:

The economic philosophy of black nationalism is pure and simple. It only means that we should control the economy of our community. Why should white people be running all the stores in our community? Why should white people be running all the banks of our community? Why should the economy of our community be in the hands of a white man? Why? If a black man can't move his store into a white community, you tell me why a white man should move his store into a black community. The philosophy of black nationalism involves a re-education program in the black community in regards to economics. Our people have to be

195. See generally LEAVITT & SAEGERT, *supra* note 180 (exposing typical conditions tenants faced after the deterioration of their buildings); Marcuse, *supra* note 194 (remarking on the general state of disrepair of the buildings that were abandoned in New York City).

196. LEAVITT & SAEGERT, *supra* note 180, at 43.

197. See Alexander Manevitz, *The Failures of Reconstruction Have Never Been More Evident — Or Relevant — Than Today*, WASH. POST (June 11, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/06/11/failures-reconstruction-have-never-been-more-evident-or-relevant-than-today/>.

198. Malcolm X, *The Ballot or the Bullet Speech* (Apr. 3, 1964), in MALCOLM X SPEAKS: SELECTED SPEECHES AND STATEMENTS 38–39 (George Breitman ed., 1989).

made to see that any time you take your dollar out of your community, and spend it in a community where you don't live, the community where you live will get poorer and poorer, and the community where you spend your money will get richer and richer. Then you wonder why where you live is always a ghetto or a slum area. And where you and I are concerned, not only do we lose it when we spend it out of the community, but the white man has got all our stores in the community tied up; so that though we spend it in the community, at sundown the man who runs the store stakes it over across town somewhere. He's got us in a vise. So the economic philosophy of black nationalism means in every church, in every civic organization, in every fraternal order, it's time now for our people to become conscious of the importance of controlling the economy of our community. If we own the stores, if we operate the businesses, if we try and establish some industry in our own community, then we're developing to the position where we are creating employment for our own kind. Once you gain control of the economy of your own community, then you don't have to picket and boycott and beg some [white person] downtown for a job in his business.¹⁹⁹

In a word, the HDFC's genius is to combine the public company investor and the labor stakeholder into one role: the shareholder. For it reflects a conception of business purpose and economic rationality that is the American tradition of independence and concomitant power,²⁰⁰ at the heart of investment. But it contains a view of power which more recently has been observed among people of color: one centered on inalienable, nonmonetizable power, and the power of individuals in a space and within a community, rather than that which can be liquidated and traded.²⁰¹ In terms

199. *Id.*

200. As Aziz Rana details throughout *TWO FACES OF AMERICAN FREEDOM* (2010), economic independence has traditionally, for white Americans, been regarded as essential to the concept of free, republican citizenship foundational to our political order. *See generally* AZIZ RANA, *TWO FACES OF AMERICAN FREEDOM* (2010) (detailing the connection between liberty and power in the United States). *See*, for example, page 12:

As a consequence, American settlerism was organized around four basic components. First, in radicalizing those seventeenth-century republican ideas that were increasingly prevalent in England, settlers came to view economic independence as the ethical basis of free citizenship. Centuries of Americans saw control over the instruments and conditions of work as providing insiders with a collective experience in autonomy and moral independence.

Id. at 12.

201. *See, e.g.*, Thomas Boston, *The Role of Black-Owned Businesses in Black Community Development*, in *JOBS AND ECONOMIC DEVELOPMENT IN MINORITY COMMUNITIES* 161–63 (Paul M. Ong & Anastasia Loukaitou-Sideris eds., 2006) (citing studies that eighty percent of Black entrepreneurs surveyed in 2003 stated that the reason for starting their own business was the desire to exercise more control over their destiny and that Black-owned firms create more employment for Blacks than white-owned ones); MELVIN DELGADO, *LATIN SMALL BUSINESS AND THE AMERICAN DREAM* 94–95 (2011)

of progressive corporate law framework discussed above,²⁰² this is a rationality rejecting the loose bonds of self-interest limited solely by contract for thicker, more personal bonds.

Most significant to the argument here, the communitarian business corporation of the HDFC has been very successful as a counter-market strategy. As discussed above, during the 1970s and 1980s, the formation of HDFCs allowed Black and Brown households to preserve themselves against the attempt to displace and gentrify through abandonment.²⁰³ In today's hypercommodified market²⁰⁴ in the global capital of real estate and financialization,²⁰⁵ HDFCs endurance as affordable housing for families of color has allowed them to remain in gentrifying neighborhoods.²⁰⁶ It is for this reason that, despite the remarkable return on investment HDFC share ownership presents, HDFC shareholders have not sold in bulk.²⁰⁷ Lest we imagine this success as inevitable due to the advantage of nonexistent start-up costs, the plight of similarly situated tenant enterprises in Detroit, for example, cautions otherwise.²⁰⁸ Indeed, the lesson from Detroit²⁰⁹ is that New York City HDFCs succeeded where others failed because their Black and Brown economic rationality was a business model perfectly adapted to its particular market.²¹⁰

B. The Plight of Black and Brown HDFCs Within the Neoliberal Paradigm

Put in terms of the progressive critique discussed above in Section III.A,

("[Latino] [s]mall business owners are like homeowners. They're committed to the neighborhood; they're a committed citizenry. The hope is that entrepreneurship brings more civic engagement by immigrants. That they'll have their voices heard more. That they'll be anchors, developing roots in the community, and serve as role models.").

202. See *supra* Section III.A.

203. See Marcuse, *supra* note 194, at 172–73.

204. See sources cited *supra* note 29 and accompanying text.

205. See sources cited *supra* note 29 and accompanying text.

206. See Olear, *supra* note 170 (quoting Rachel Christmas Derrick, Director of Communications and Fundraising, UHAB) ("One of the things that is beautiful about HDFC co-ops is that the people who lived in the distressed, neglected, and abandoned buildings . . . in the '70s and '80s . . . are still there now Though sadly, many of their neighbors in rentals are being displaced by gentrification.").

207. See *id.*

208. See generally David Goldberg, *From Landless to Landlords: Black Power, Black Capitalism, and the Co-Optation of Detroit's Tenants Rights Movement, 1964–69*, in *THE BUSINESS OF BLACK POWER* (Lauren Warren Hill and Julia Rabig eds., 2012) (describing the failure of Black United Tenants for Collective Action to convert collective action of rent-strike into a sustainable homeownership model due to the lack of resources).

209. *Id.* at 158.

210. See *id.* at 163.

the HDFC is the thickest type of business corporation. It is formed under an economic rationality reflecting oppressed people's desire to counter market force through collective strength. Put another way, it suggests that the viewpoint asserted in the Delaware Chancery Court decision in *eBay Domestic Holdings v. Newmark*²¹¹ is flat out wrong: the "philanthropic" end of aiding communities is the very reason why some people form a for-profit, business corporation.²¹² They do so because the status of shareholder, and the rights attendant to do, are rights that a white man is bound to respect.²¹³

The U.S. Supreme Court's decision in *United Housing Foundation, Inc. v. Forman*²¹⁴ reflects the distinction between this rationality, characteristic of HDFC shareholders, and that characteristic of public company investors. Reversing the Second Circuit, the Court held shares of a tenant cooperative to be exempt from the Securities Act of 1933.²¹⁵ The Court reasoned that the Securities Act, regulating the purchase and sale of investment shares, did not apply to a person investing for a home rather than money.²¹⁶ Of course, the home is an asset that has monetary value: this is the point that the plaintiffs in the case relied on for the textualist argument that the Securities Act's definition of a "security" should capture cooperative shares.²¹⁷ It is also the point informing the Second Circuit's reasoning that the lower housing cost and tax benefits derived from owning shares in a cooperative involves money, and, therefore, qualifies such shares as "securities" under the Securities Act's definition.²¹⁸ As the Second Circuit correctly reasoned, people buy into low-income cooperatives because it is cheaper than renting.²¹⁹ But the Court in *Forman* emphasizes that a cooperative is a sort of business where the value of a home as an asset is incidental to its value as a home; with it, the social value is absolute.²²⁰ In stark contrast, it is

211. 16 A.3d 1 (2010).

212. See *infra* note 252. But see *eBay Domestic Holdings*, 16 A.3d at 34 ("The corporate form . . . is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment.").

213. Cf. Civil Rights Act of 1866, 42 U.S.C. §§ 1981, 1982 (codifying and enforcing equal rights in contract and property).

214. 421 U.S. 837 (1975).

215. *Id.* at 847.

216. *Id.* at 848.

217. See *id.* (rejecting respondents' literal interpretation that because the statute defining securities uses the language "any . . . stock" that respondents' shares in the cooperative should fall within it).

218. *Id.* at 846–47, 854–56.

219. See *id.* at 855.

220. See *id.* at 851, 853–54 (emphasizing that co-ops are affordable and provide an opportunity for home ownership).

unimaginable that any capitalist would invest in a company lacking equity, and lacking any path to equity. Indeed, public markets do not even have a place for unprofitable companies.²²¹

Yet for this clear difference, public company governance doctrines are applied wholesale to HDFCs. Courts continue to treat shareholders as “passive investors” yielding total control to boards of directors. In twenty-five years, New York’s highest court — the Court of Appeals — has twice affirmed that the BJR governs decisions of tenant cooperatives such as HDFCs.²²² In both cases, the Court of Appeals courts invoked the distinction between “ownership” and “control”²²³ to reject a standard requiring boards to show reasonableness justifying their decisions and, by that, deny shareholders substantive review of matters affecting their homes. The Court of Appeals has done this even though such shareholders have a stronger interest in controlling internal corporate affairs than their investment counterparts: the interest in preserving their homes.²²⁴ Even worse, the Court of Appeals in its landmark *Levandusky v. One Fifth Avenue Apt. Corp.*²²⁵ decision rather fancifully interprets shareholders’ investment as the purchase of stake in a community where living decisions are through common, centralized control.²²⁶ As if that stake, and not the quest for stable, affordable housing in a hypercommodified real estate market, was the dominant consideration of the typical cooperative investor.

The reasoning underlying the standard BJR simply does not apply to companies like tenant cooperatives, where the board are volunteers²²⁷ typically drawn from the pool of resident shareholders: the *Levandusky* court recognized that much.²²⁸ As such, and in contrast to management of public

221. See NYSE, COMPANY LISTING MANUAL § 802.01 (2016), https://nyse.wolterskluwer.cloud/listed-company-manual/document?treeNodeId=csh-da-filter!WKUS-TAL-DOCS-PHC-%7B0588BF4A-D3B5-4B91-94EA-BE9F17057DF0%7D--WKUS_TAL_5667%23teid-167 (stating that companies where shareholders’ equity is less than \$50,000,000 may be suspended from dealings or removed from the list).

222. See *40 W. 67th St. v. Pullman*, 790 N.E.2d 1174, 1176, 1182 (N.Y. 2003); *Levandusky v. One Fifth Ave. Apt. Corp.*, 553 N.E.2d 1317, 1324 (N.Y. 1990).

223. See *40 W. 67th St.*, 790 N.E.2d at 1178–79; *Levandusky*, 553 N.E.2d at 1320–21.

224. The *Levandusky* court based its reasoning, in part, on the fact that shareholders have the freedom not to purchase the apartment, the common argument in all disputes about whether corporations treat shareholders any which way they desire. See *supra* Part II, notes 77–83 and accompanying text.

225. 553 N.E.2d 1317 (1990).

226. See *id.* at 1320–21.

227. See N.Y.C. DEP’T OF HOUS. PRES. AND DEV., FACT SHEET FOR COOPERATIVE HDFC SHAREHOLDERS 2 (2019) [hereinafter HPD FACT SHEET], <https://www1.nyc.gov/assets/hpd/downloads/pdfs/services/hdfc-coop-fact-sheet.pdf> (providing that under New York law, HDFC directors are volunteers).

228. See *Levandusky*, 553 N.E.2d at 1320–21.

companies,²²⁹ the board managing a cooperative are typically no more sophisticated or expert in the business of owning and running property than any resident.²³⁰ Thus, there is no reason to suppose shareholders rising to the rank of board members are any more sophisticated or incorruptible than their neighbors. And to the extent that they ever develop “enterprise,” it is acquired by serving as board members — the patina of longevity or experience, as it were.

Despite this, decisions of tenant cooperative boards are subject to no special review different to that for public companies. Nor are board members’ similarly situated neighbors afforded any meaningful power to scrutinize decisions. Still worse, the BJR serves to create conditions for board entrenchment, from which corruption hails, by giving an advantage to incumbents in power.²³¹ The next Section elaborates the corrupting and oppressive function of neoliberal governance on corporations like HDFCs.

C. The Harm of Universalizing Neoliberal Governance: A Case Study

The corrosive impact of the current governance paradigm, and especially the BJR, on counter-market business corporations is best illustrated by a case. A few years ago, I represented a group of shareholders residing at Lindsay Park Housing Corporation, the largest Mitchell-Lama housing cooperative in Brooklyn.²³² Like an HDFC, a Mitchell-Lama housing cooperative is a business corporation serving to counter the function of markets. It is formed and owned by low-to-middle income Black and Brown households, or the same segment of the population as HDFC investors, whose created entity also owns and operates an affordable, middle-income housing project.²³³ For our purposes here, the only difference between an

229. See Bainbridge, *Director Primacy*, *supra* note 34, at 559, (explaining that formal power rests with the board of directors rather than the shareholders of a publicly traded company).

230. See SYLVIA SHAPIRO, *THE NEW YORK CO-OP BIBLE: EVERYTHING YOU NEED TO KNOW ABOUT CO-OPS AND CONDOS: GETTING IN, STAYING IN, SURVIVING, THRIVING* 172 (rev. ed. 2005) (comparing the director elections process for public companies with the process for co-ops and condos, noting that directors of public corporations are subject “to the glare of public scrutiny,” whereas management for co-ops and condos is “not subject to any such competency checks”).

231. See *id.* at 172–73.

232. Adele Niederman, *Lindsay Park Celebrates 50th Anniversary!*, COOPERATORS UNITED FOR MITCHELL LAMA (Sept. 16, 2015), <https://cu4ml.com/lindsay-park-celebrates-50th-anniversary>.

233. See Julie Gilgoff, Note, *Local Responses to Today’s Housing Crisis: Permanently Affordable Housing Models*, 20 CUNY L. REV. 587, 598–600 (2017); Camille Rosca, Comment, *From Affordable to Profitable: The Privatization of Mitchell-Lama Housing & How the New York Court of Appeals Got It Wrong*, 45 SETON HALL L. REV. 945, 951–54 (2015); cf. LEAVITT & SAEGERT, *supra* note 180, at 25–30 (noting that

HDFC and Mitchell-Lama is historical, as Mitchell-Lama housing arose in the robust real estate market following World War II and out of recognition that government intervention was needed to stimulate the private sector's construction of affordable housing.²³⁴

Continuing with the story, the Lindsay Park shareholders organized a campaign to call a special meeting for amending Lindsay Park's bylaws to prohibit the use of proxies in board elections.²³⁵ The point of this was to further the corporation's purpose and preserve the affordable housing through corporate governance: namely, by bringing accountability to an entrenched board led by a corrupt president who, as a former educator, had no especial expertise in housing. Indeed, reflecting this apparent incompetence, she was doing a rather poor job: for reasons that will become clear shortly, her decade-long reign as board president saw significant increases in maintenance costs, serving to nullify many long-term residents' investment in affordable housing.²³⁶

The shareholders' reform campaign sought to address the riddle of how a disastrous board president nonetheless managed to be so consistently and overwhelmingly re-elected.²³⁷ The proxy system at Lindsay Park conducted a vicious cycle where the board president's reign was perpetuated by proxy votes. She in turn was widely accused of sanctioning under-the-table apartment sales, which violate restrictions governing sales in Mitchell-Lama cooperatives.²³⁸ Information that many shareholders had obtained suggested that she did this in exchange for, at least, the incoming shareholders' pledge of their proxy to her; and with these proxies, she re-elected herself and surrounded herself with a board beholden unto servility.²³⁹ With each such

homesteading households were Black and Hispanic-dominated).

234. See Robert W. Snyder, *Lower Rents: A History Lesson*, N.Y. DAILY NEWS (Jul. 13, 2018, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-historys-lessons-for-slowing-rent-hikes-20180712-story.html> (discussing the passage of the Mitchell-Lama Act). Compare N.Y. PRIV. HOUS. FIN. LAW § 11 (McKinney 2021) (supporting Mitchell-Lama's recognizing need for private enterprise to be incentivized to build low-income housing), with *id.* § 571 (supporting HDFCs and recognizing the need for coordination among federal, state, and local governments and private actors to increase the supply of housing for low-income persons, improving quality of life in state).

235. See Complaint for Declaratory and Injunctive Relief at 2, 9, *Gonzalez v. Been*, Index No. 653242/2014 (N.Y. Sup. Ct. Oct. 23, 2014) (NYSCEF Doc. No. 1) [hereinafter Complaint].

236. See *id.* at 2.

237. See *id.* at 12–14 (describing the process by which the board president allegedly obtained votes and proxy votes and noting that in 2013, despite only 350 shareholders voting by live ballot, the incumbent president received 1,275 votes).

238. See RULES OF THE CITY OF N.Y. tit. 28, § 3-02(h)(13) (2021) (stating selections for next person to rent from apartment must be drawn from waiting list).

239. See Complaint, *supra* note 235, at 13–14.

campaign cycle, she obtained even more proxies to secure deeper entrenchment.

When the shareholder campaign had succeeded in collecting enough shareholder signatures to support a petition, the board made the wholly predictable move that absolute power does: it invented a “signature verification” procedure that just so happened to nullify enough votes to bring the tally below the threshold for triggering a special meeting.²⁴⁰ Undeterred, shareholders commenced a lawsuit challenging this obvious abuse of power and attempt to evade accountability, loading their complaint with the entire gestalt, including clear evidence of the president’s flagrant corruption.²⁴¹ The trial court, presided over by a justice raised in Black, home-owning Queens, immediately got it.²⁴² She denied the Lindsay Park’s summary judgment motion on the BJR and ordered discovery on the board’s invented review procedure.²⁴³ Yet when the cooperative appealed, an appellate court panel, constituted differently, reversed the trial court by perfunctorily applying the BJR to uphold the board gambit,²⁴⁴ insulating it from meaningful scrutiny.

But the story did not end there. About a year after the BJR served to leave shareholders disenfranchised and end their attempt at salutary governance, the board president was arrested and eventually convicted for participating in a commercial bribery scheme.²⁴⁵ The scheme specifically involved her, and the two heads of the management team that the board hired and paid, receiving a kickback from a corporate vendor who overcharged the company for repairs.²⁴⁶ Naturally, this cost was recouped from tenants in the form of the very maintenance increases that reformers cited as part of the corruption they sought to deter with accountability.²⁴⁷ The kickback scheme contributed to inflated repair costs reflected in Lindsay Park’s financial records.²⁴⁸

240. *See id.* at 11–12.

241. *See id.* at 13–15.

242. *Gonzalez v. Been*, No. 653242/14, 2015 WL 3961752, at *1 (N.Y. Sup. Ct. June 30, 2015).

243. *Id.*

244. *See Gonzalez v. Been*, 41 N.Y.S.3d 700, 701 (App. Div. 2016) (reversing trial court).

245. Benjamin Fang, *Former Lindsay Park Co-Op President Sentenced for Corruption*, GREENPOINT STAR (Jan. 30, 2018), http://www.greenpointstar.com/view/full_story/27537861/article-Former-Lindsay-Park-co-op-president-sentenced-for-corruption.

246. *Id.*

247. *See id.*

248. *Id.*

This Lindsay Park episode is an account of how neoliberal governance doctrines cost investors in business corporations such as HDFCs the very benefit of their investment. But, sadly, the problem is evident even in more mundane contexts, without this anfractuous criminality. For example, I have also represented shareholders at two other low-income housing cooperatives in Brooklyn — these both HDFCs — where directors who did not even reside at the cooperative²⁴⁹ jeopardized its very existence by failing to pay water and tax bills.²⁵⁰ Based on the broader social context, it was clear that their malfeasance was really a ploy seeking to force out older residents to sell units to wealthier gentrifiers and, thereby, turn a profit. In New York City, this gambit carries a tremendous risk to everyone since the government has the authority, under the TPT, to foreclose upon properties owing taxes and utilities and transfer property title to private or nonprofit corporations.²⁵¹ But even when the board creates a problem, neoliberal governance doctrines protect them in pursuing “solutions” that harm investors. For example, the BJR has been applied to protect boards in taking out loans causing maintenance increases beyond levels affordable to elderly residents instead of taking government assistance that would solve the problem in a manner more consistent with the corporation’s purpose.²⁵²

In sum, neoliberal governance rules defeat even the thickest conception of

249. Generally, shareholders and directors are required to reside at the cooperative. See HPD FACT SHEET, *supra* note 227, at 2.

250. See Complaint for Declaratory and Injunctive Relief and Damages at 8, *Coronel v. 350–52 South 4 Street Hous. Dev. Fund Corp.*, Index No. 8083/2014 (N.Y. Sup. Ct. May 21, 2014) (NYSCEF Doc. No. 14).

251. For the legal authority of the Third Party Transfer Program (“TPT”), see RULES OF THE CITY OF N.Y. tit. 28, § 8-01 (2021) (enacted pursuant to N.Y.C. ADMIN. CODE tit. 11, § 11-401 (2021)). It is the corollary of government policy, discussed above in Olear, leading to the transfer of abandoned property to HDFCs. As we might expect, TPT operates to disproportionately divest Black and Brown homeowners, and as such, are disproportionately affected by such divestment. See Claudia Irizzary Aponte, *Brooklyn Foreclosures Must Stick, City Lawyers Argue*, THE CITY (May 2, 2019, 4:00 AM), <https://thecity.nyc/2019/05/brooklyn-third-party-transfer-foreclosures-must-stick-city.html>; Claudia Irizzary Aponte, *City Task Force to Take Fresh Look at Feared Foreclosure Program*, THE CITY (June 14, 2019, 2:57 PM), <https://thecity.nyc/2019/06/city-task-force-to-take-fresh-look-at-foreclosure-program.html>.

252. See generally *Cannings v. E. Midtown Plaza Hous. Co.*, No. 401071/10, 2011 WL 5142033 (Sup. Ct. N.Y. Cnty. Oct. 18, 2011), *aff’d*, 960 N.Y.S.2d 413 (App. Div. 2013) (upholding board decision to take out loan to obtain repairs even though funding for repairs was obtainable through a public, government grant conditioning funds on extending affordability requirements). An unstated premise is that boards can avoid the condition of much government assistance — that the HDFC agrees to enter into a regulatory agreement with the government in exchange for assistance. However, since the regulatory agreement would preserve affordability by the imposition of flip taxes and government oversight, it is still more consistent with corporate purpose than the alternative of market financing. See N.Y. PRIV. HOUS. FIN. LAW § 576 (McKinney 2021).

a corporation that has been effective in countering markets. But unlike with public companies, the standard recourse — which assumes liquidity — is meaningless to shareholding tenants seeking to defend their corporation as a society. Selling shares costs them an affordable home, the very thing that they invested for.²⁵³ Yet neoliberal governance leaves them helpless in a society diluted by irresponsible boards, until the market tide eventually washes them out.

V. THE CURRENT PROGRESSIVE REFORM STRUCTURES FOR PRIVATE COMPANIES AND THEIR LIMITS

The discussion of neoliberal governance's effect on HDPC rationality raises the question of what corporate governance structure is most appropriate for it. Before turning to this Article's proposals, we examine progressive scholarship's ideas on governance reform of private companies, not the public ones on which progressive corporate law focuses.

As an overview, aside from the constituency statute,²⁵⁴ these progressive private company reforms have been placed under the rubric of "social enterprise."²⁵⁵ This term refers to the use of organizations to achieve social goals through business methods.²⁵⁶ The tendency of scholars has been to regard the progressive solution as one of structures.²⁵⁷ At the strict level of

253. See *United Hous. Found. v. Forman*, 421 U.S. 837, 846–57 (1975).

254. See Roberta Romano, *The States As a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 *YALE J. ON REG.* 209, 215 (2006) (counting thirty-one states with other constituent statutes); see also Millon, *Redefining Corporate Law*, *supra* note 91, at 266–68 (setting forth principles of how constituency statutes should be interpreted to accomplish the purposes for which they were enacted).

255. Dana Brakman Reiser, *Theorizing Forms for Social Enterprise*, 62 *EMORY L.J.* 681, 682 (2013) [hereinafter Reiser, *Theorizing Forms for Social Enterprise*].

256. See *id.* (describing the impact "social enterprises" can have on society compared to profit-generating and nonprofit corporations due to the combination of the business methods found in profit-generating corporations and the social goals found in nonprofits); see also Antony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility?*, 34 *SEATTLE U. L. REV.* 1351, 1352–53 (2011) (describing progressive corporate law as "a collection of proposals aimed at remaking corporate law to encourage processes and outcomes more beneficial to the interests of [stakeholders or] nonshareholders with significant stakes in a corporation's activities" as "the most muscular and structural interaction of [corporate social responsibility]" and contending that the social enterprise movement is connected to corporate social responsibility).

257. See Reiser, *Theorizing Forms for Social Enterprise*, *supra* note 255, at 683 (describing how, across the country and around the globe, jurisdictions have begun to respond to the claims that traditional for-profit and nonprofit legal forms frustrate social entrepreneurs' bold vision for achieving social change by offering a variety of specialized legal forms intended to house social enterprises).

corporate law,²⁵⁸ scholars have promoted the use of two alternative structures as reform: the old, familiar form of nonprofit corporation, and the newer, more obscure form of the public benefit corporation. Both are considered and critiqued below.

A. The Traditional Alternative: The Nonprofit Corporation and Its Limits

American law's longstanding structure for protecting and advancing social and non-monetary enterprise is the nonprofit corporation.²⁵⁹ Legal scholarship and decisional law have arrived at this view both affirmatively and negatively. The affirmative claim is that the non-distribution constraint governing such entities²⁶⁰ makes them best suited to provide public goods that the market will not.²⁶¹ Put differently, the claim is that they are structured in a manner inspiring more confidence that they can better deliver public goods and services than for-profit entities.²⁶² The negative view, epitomized by the Delaware Chancery Court's discussion in *eBay Domestic Holdings, Inc. v. Newmark*,²⁶³ assumes that anyone seeking to operate an entity for philanthropic ends should not form it as a for-profit business corporation lest they cheat investors.²⁶⁴ This leaves the nonprofit, with its hallmark non-distribution constraint, as the default option.²⁶⁵

One essential point to clear up, and to explain why an article on business

258. This Article excludes discussion of limited liability companies ("LLCs"), including the low-profit limited liability company ("L3C"), and the benefit limited liability company. Discussion of LLCs — which are commonly regarded to be more like partnerships — would go beyond the scope of this Article.

259. Fishman, *supra* note 172, at 630–31 ("As early as the seventeenth century the [nonprofit] corporation was used in the New World as an organizational form for charitable activities Almost all colonial corporations had charitable purposes. They were churches, charities, educational institutions, or municipal corporations Many of the colonial business corporations would be considered cooperatives or quasi-philanthropic today.").

260. See Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980) [hereinafter Hansmann, *The Role of Nonprofit Enterprise*].

261. *Id.* at 873 (stressing the non-distribution constraint as "the essential characteristic that permits nonprofit organizations to serve effectively as a response to contract failure").

262. See *id.* at 844–45 (arguing that, according to economic theory, lack of profit incentive renders nonprofits more desirable market participants). *But see* Dana Brakman Reiser, *For-Profit Philanthropy*, 77 FORDHAM L. REV. 2437, 2452–54 (2009) (describing Google's development of a division within its for-profit entity dedicated to philanthropy as a means of being free to invest in for-profit business pursuing philanthropic goals and avoiding restrictions on that division's ability to access Google resources, and on political activities).

263. 16 A.3d 1 (Del. Ch. 2010).

264. See *id.* at 34.

265. See Hansmann, *The Role of Nonprofit Enterprise*, *supra* note 260, at 838.

corporation reform is discussing nonprofit corporations, is the economic nature of nonprofit firms. Many people who work for social services nonprofits suppose the nonprofit's quiddity to be something amounting to "socialism" or "mendicancy."²⁶⁶ Nothing could be further from the truth. Nonprofits are businesses, rather big and sophisticated businesses, in fact.²⁶⁷ Many, referred to as "commercial nonprofits" in scholarship, quite explicitly rely on sales revenue to sustain operations for the mission.²⁶⁸ Along these lines, the law has routinely cautioned that it is a mistake to regard nonprofits as anything other than profit-generating businesses.²⁶⁹ Indeed, they meet the definition of "social enterprises" precisely because, like business corporations, they use business methods to advance their social missions.²⁷⁰ The only difference is that, with nonprofits, corporate profits are not supposed to go into the pockets of their owners or other individuals; instead, corporate profits should be applied to further the entity's purpose or mission.²⁷¹

Despite all this, there are two reasons why nonprofits have never served to revolutionize corporate law and change the way that people think about business law generally. First, because nonprofits lack shareholders²⁷² and are subject to the non-distribution constraint,²⁷³ they cannot offer investors

266. See Gail A. Lasprogata & Marya N. Cotten, *Contemplating "Enterprise": The Business and Legal Challenges of Social Entrepreneurship*, 41 AM. BUS. L.J. 67, 87–88 (2003) (noting a primary concern for many social service nonprofit organizations is the disconnect between service and supporting the enterprise as opposed to earning a profit).

267. See, e.g., Henry J. Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 54–55 (1981) [hereinafter Hansmann, *The Rationale for Exempting Nonprofit Organizations*] (stating that nonprofit organizations now more commonly resemble the for-profit sector and even compete with for-profit companies in various industries); Lasprogata & Cotten, *supra* note 266, at 67 (providing that the economic impact of nonprofit organizations amounts to \$700 billion annually and over \$1 trillion in assets); Felix Salmon, *Introducing the Slate 90: A Dive into the Multibillion-Dollar Nonprofit Sector*, SLATE (May 10, 2018, 5:50 AM), <https://slate.com/business/2018/05/nonprofits-need-more-scrutiny-enter-the-slate-90.html>.

268. See Robert A. Katz & Antony Page, *Sustainable Business*, 62 EMORY L.J. 851, 855 (2013) (quoting Hansmann, *The Role of Nonprofit Enterprise*, *supra* note 260, at 840–41).

269. See *Am. Baptist Churches of Metro. N.Y. v. Galloway*, 710 N.Y.S.2d 12, 14–15 (App. Div. 2000).

270. See *id.* at 15 ("Just as the goal of a for-profit corporation is to make money for its investors, the goal of a not-for-profit is to make money that can be spent on furthering its social welfare objectives.")

271. See *id.*; Fishman, *supra* note 172, at 630–31.

272. See N.Y. NOT-FOR-PROFIT CORP. LAW § 501 (McKinney 2021) (prohibiting nonprofits from issuing equity).

273. *Id.* §§ 102(a)(5), 204.

anything but tax deductions²⁷⁴ or, in some cases, tax credits as part of an affordable housing project.²⁷⁵ Their main “investors” are: (1) their individual members paying dues, which also includes members of the limited nonprofit, tax-exempt entities that are permitted to distribute profits to such members;²⁷⁶ (2) governments that pay nonprofit corporations to exercise public welfare functions;²⁷⁷ or (3) private persons, and the pools of their wealth known as foundations, who may wish to support the business of charity.²⁷⁸ As mentioned before, nonprofits can also obtain income from sales revenue and other commercial activities,²⁷⁹ but that is not investment.²⁸⁰ Outside of the affordable housing venture, nonprofits fail to attract folks looking to invest capital or anything else counting as consideration under the law.²⁸¹ As a result of this, they are not thought to be relevant to discussions about how business law can be reformed to advance nonmonetary

274. See VICTORIA B. BJORKLUND ET AL., *NEW YORK NONPROFIT LAW AND PRACTICE: WITH TAX ANALYSIS* § 20.01 (2d ed. 2013) (discussing restrictions on nonprofits related to charitable contributions).

275. See Megan J. Ballard, *Profiting from Poverty: The Competition Between For-Profit and Nonprofit Developers for Low-Income Housing Tax Credits*, 55 *HASTINGS L.J.* 211, 233 (2003) (citing I.R.C. § 501(c)(3)) (“The Internal Revenue Code prohibits the payment of profits from a tax-exempt charity to shareholders, members, or individuals.”).

276. See BJORKLUND ET AL., *supra* note 274, § 1.02 n.8 (“There are some specialized New York nonprofit corporations to which the nondistribution constraint [under I.R.C. 501(c)(3) and Treas. Res. 1.501(c)(3)] does not strictly apply. These include cooperative corporations and public housing finance corporations.”). I note here that this exception includes the tenant cooperatives discussed in Part IV above.

277. See Elizabeth T. Boris & C. Eugene Steuerle, *Scope and Dimension of the Nonprofit Sector*, in *THE NON-PROFIT SECTOR: A RESEARCH HANDBOOK* 74–75 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006) (discussing government funding of nonprofits).

278. See BETSY SCHMIDT, *NONPROFIT LAW: THE LIFE CYCLE OF A CHARITABLE ORGANIZATION* 255 (2011).

279. See Hansmann, *The Rationale for Exempting Nonprofit Organizations*, *supra* note 267, at 58–62.

280. New York also allows not-for-profit entities to induce capital contributions from insiders (members) and from outsiders through a device termed a “subvention.” But since they basically are subordinate debt securities, financing obtained through the use of them should not be considered an investment. See N.Y. NOT-FOR-PROFIT CORP. §§ 502–505 (McKinney 2021); BJORKLUND ET AL., *supra* note 274, § 5.05[2]–[3]. (discussing capital contributions for members of nonprofit corporations and subventions).

281. See, e.g., N.Y. BUS. CORP. LAW § 504(a) (McKinney 2021) (“Consideration for the issue of shares shall consist of money or other property, tangible or intangible; labor or services actually received by or performed for the corporation or for its benefit or in its formation or reorganization; a binding obligation to pay the purchase price or the subscription price in cash or other property; a binding obligation to perform services having an agreed value; or a combination thereof.”).

considerations.²⁸²

As a second problem, the nonprofit corporation is not a particularly effective structure for protecting its beneficiaries from market forces. This is because its beneficiaries are at the mercy of nonprofit directors as they have no legal remedy against board decisions undermining a nonprofit's purpose and mission.²⁸³ In jurisdictions like New York, beneficiaries can try to increase their power and leverage by becoming nonprofit "members," or assuming a governance role roughly equivalent to shareholders' in business corporations.²⁸⁴ However, as we saw of shareholders in business corporations under the neoliberal order, this practically means the reign of directors, who are especially dominant in the nonprofit realm since most nonprofits lack members.²⁸⁵ As with for-profit entities, nonprofit boards remain largely free and unfettered to give their own meaning to corporate purpose and function.²⁸⁶ Still worse, they are even authorized to exercise power that undermines members' major control: their power to elect directors.²⁸⁷ This reflects how much New York's Not-For-Profit Corporation Law is modelled after the BCL and imports its public-company concept of board supremacy.²⁸⁸ The upshot of all this is that nonprofit corporations are a "third way" between the public sector and private

282. See Reiser, *Theorizing Forms for Social Enterprise*, *supra* note 255, at 683 ("If [a founder] forms a for-profit, particularly a for-profit corporation, shareholder primacy will force her to single-mindedly focus on profit, with no way to protect the social mission of the entity or its founders. If she forms a nonprofit, this social vision can be protected, but business strategies, especially equity capital, are foreclosed.").

283. See *Alco Gravure v. Knapp Found.*, 479 N.E.2d 752, 755 (N.Y. 1985) (analogizing New York not-for-profit corporations to trusts and applying the general rule that "one who is merely a possible beneficiary of a charitable trust, or a member of a class of possible beneficiaries, is not entitled to sue for enforcement of the trust" or nonprofit); *Kemp's Bus Serv., Inc. v. Livingston-Wyo. Chapter of NYSARC, Inc.*, 701 N.Y.S.2d 575, 575 (App. Div. 1999) ("[The] Not-For-Profit Corporation Law was enacted to protect defendant [corporation] and its members, not plaintiff [bus service vendor]."); *BJORKLUND ET AL.*, *supra* note 274, § 11.05[1][a] ("In New York, as in most jurisdictions, beneficiaries of an organization . . . cannot sue [to enforce directors' duties].").

284. *BJORKLUND ET AL.*, *supra* note 274, § 9.01. Members can be individuals or entities. See N.Y. NOT-FOR-PROFIT CORP. LAW § 601.

285. See N.Y. NOT-FOR-PROFIT CORP. LAW § 601 (noting that charitable corporations are not required to have members); see also *BJORKLUND ET AL.*, *supra* note 274, § 9.01.

286. See *Van Campen v. Olean Gen. Hosp.*, 205 N.Y.S. 554, 554–55, 557–58 (App. Div. 1924), *aff'd*, 147 N.E. 219, 219 (N.Y. 1925) (emphasizing the court's inability to interfere with actions taken by the board in furtherance of the corporation unless clearly erroneous).

287. See *Bailey v. Am. Soc'y for Prevention of Cruelty to Animals*, 125 N.Y.S.2d 18, 24–25 (App. Div. 1953), *aff'd*, 120 N.E.2d 853, 854 (N.Y. 1954) (holding that directors' adoption of bylaws allowing their self-perpetuation did not violate members' powers).

288. See *BJORKLUND ET AL.*, *supra* note 274, § 9.01.

businesses.²⁸⁹ Nonprofit corporations are not the key to reconceptualizing business corporation law.

B. The Innovation: The Benefit Corporation and Its Limits

Perhaps recognizing these limitations on nonprofits, thirty-seven states have passed benefit corporation statutes creating a hybrid corporate structure with monetary and non-monetary purposes.²⁹⁰ New York's benefit corporation statutory scheme — contained in Article 17 of its Business Corporation Law — seeks to address the problem of monetary reduction by codifying others' interests.²⁹¹ Specifically, the New York benefit corporation statute, which has been cited as a model for other states,²⁹² provides that “[e]very [such] corporation shall have a purpose of creating general public benefit” (in addition to any other lawful business purpose) and that the general public benefit shall limit, and prevail over, any other or inconsistent corporate purpose.²⁹³ It also requires the “directors and officers of [such] a corporation [to] consider the effects of any action upon:”

(A) the ability of the benefit corporation to accomplish its general and any specific public benefit purpose; (B) the shareholders of the benefit corporation; (C) the employees and workforce of the benefit corporation and its subsidiaries and suppliers; (D) the interests of customers as beneficiaries of the general or specific public benefit purposes of the benefit corporation; (E) community and societal considerations, including those of any community in which offices or facilities of the benefit corporation or its subsidiaries or supplies are located; (F) the local and global environment; and (G) the short-term and long-term interests of the benefit corporation²⁹⁴

At first blush, the benefit corporation seems promising. The statute creating benefit corporations mandates board recognition of the nonmonetary, social, and even counter-capitalism function of entities.²⁹⁵ As such, it reflects and advances an approach to business and of economic

289. See THOMAS WOLF, *MANAGING A NONPROFIT ORGANIZATION* 6–7 (21st ed. 2012) (describing the nonprofit corporation's mediating standing).

290. See Ofer Eldar, *Designing Business Forms to Pursue Social Goals*, 106 VA. L. REV. 937, 964 (2020) (citing *State by State Status of Legislation*, B-LAB, BENEFIT CORP., <https://benefitcorp.net/policymakers/state-by-state-status> (last visited Feb. 5, 2021)).

291. N.Y. BUS. CORP. LAW §§ 1701–09 (McKinney 2021).

292. See Reiser, *Theorizing Forms for Social Enterprise*, *supra* note 255, at 704 (stating that specialized form legislation should follow New York's lead and “clearly state that only social enterprises that prioritize social good may adopt the specialized form[]”).

293. N.Y. BUS. CORP. LAW § 1706(a).

294. *Id.* § 1707(a)(1).

295. See *id.*

rationality liberated from the neoliberal paradigm: namely, team or “we” rationality. This is a perspective, associated with Black, Brown, and marginalized people around the world, that has gained traction in Europe and the United States.²⁹⁶

The ultimate problem with the benefit corporation, however, is that its liberated understanding of business is consigned to corporate “contracts” such as the articles or certificate of incorporation. As such, it leaves change to bargaining, rather than imposing it as a substantive principle. This point can be expressed with the same criticism as that made of standard progressive corporate law: the lack of a corporate governance theory, or rules that apply where contracts are insufficient.²⁹⁷ In many ways, the benefit corporation worsens the neoliberal director principle by making everything dependent upon directors.²⁹⁸

Since, then, private company progressive reform depends upon the benefit corporation, it can be stymied simply by investors’ refusal to invest. And it

296. See, e.g., Solomon, *supra* note 110, at 281–303 (describing the corporation Ben & Jerry Homemade, Inc. as modelling a humanonics approach, or the running of business as the “reflection of our conscious caring for the people around us”); Robert T. Esposito, *The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation*, 4 WM. & MARY BUS. L. REV. 639, 671–95 (2013) (describing Europe as the birthplace of modern social enterprise, with its social cooperative and community interest company forms, and forms in the United States such as low-profit limited liability companies (“L3C”), flexible purpose corporation (“FPC”), social purpose corporation (“SPC”), and benefit corporation); Luigino Bruni, *Toward an Economic Rationality “Capable of Communion,”* in TOWARD A MULTI-DIMENSIONAL ECONOMIC CULTURE: THE ECONOMY OF COMMUNION 41–67 (Luigino Bruni ed., 2002) (describing economic “We” rationality based in the work of Martin Hollis and Robert Sugden that invites a person, in deciding which action to undertake, not to think about whether the action has good consequences for individuals but rather whether their part in action has good consequences for us); LORNA GOLD, NEW FINANCIAL HORIZONS: THE EMERGENCE OF AN ECONOMY OF COMMUNION 13–31 (2010) (introducing the economy of communion, tying fiscal crisis and economic instability to the notion of economic self-interest under the *homo economicus* paradigm and proposing alternatives informed by the developing world’s perspectives reflecting different economic rationality based in value and social solidarity instead of self-interest). See generally JOHN GALLAGHER & JEANNE BUCKEY, STRUCTURES OF GRACE: THE BUSINESS PRACTICES OF THE ECONOMY OF COMMUNION (2014) (studying business, marketing, and competitive practices and governance of fourteen companies throughout the United States and Canada reflecting such economy of communion principles: Mundell & Associates and Sofira Violins (Indianapolis, IN), Finish Line (Hyde Park, NY), Terra Nuova (Rhinebeck, NY), First Fruits Farm (Los Angeles, CA), Dealerflow (Kokomo, IN), Ideal Safety Communication (Chicago, IL), Netutive (Reston, VA), Spiritours (Montreal, QB), Arc-en-Saisons (Granby, QB), La Parola (Denver, Co.), The Solinsky Financial Group (Tuscon, AZ), Techquest, Inc. (Houston, TX), and CHB Consulting (Freehold, NJ)).

297. See Bodie, *supra* note 70, at 752.

298. See *id.* at 750–51 (explaining the expanded discretionary authority of directors under the stakeholder theory and the constituency statute).

makes sense that investors would avoid the benefit corporation since it reproduces neoliberal's director primacy but frees directors of the one constraint serving to ensure that they serve investor's interests: the shareholder welfare maximization norm.²⁹⁹ Since shareholders have long been solicitous of channeling board discretion toward serving investor interests,³⁰⁰ it is hard to see why shareholders would sign on to a structure authorizing boards to exercise power for someone else's benefit. The complete absence of decisional law reflecting disputes under New York's public benefit statute³⁰¹ suggests that this project too has failed to shift the paradigm.

But even if the benefit corporation appealed to investors, a second problem lurks: the issue of enforcement against dissenters. The question is how effective radical contracts can be within the neoliberal paradigm. Scholarship has suggested that enforcement is the problem of benefit corporations.³⁰² I suspect that scholars have arrived at this conclusion by looking at the fate of other contractual terms reflecting social values in corporate law. To take an example, federal securities law implies certain governance rights for shareholders such as the right to participate by including policy proposals in proxy materials.³⁰³ But as exemplified by

299. See Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm*, *supra* note 63, at 1423.

300. See Bainbridge, *Director Primacy*, *supra* note 34, at 576–77 (noting that shareholders have sought to constrain director discretion in public companies by compensating directors with stock, thus incentivizing the corporation to operate under the shareholder welfare maximization principle); KRAAKMAN ET AL., *supra* note 38, § 3.3.2 (discussing the reward-based compensation structure for managers).

301. See DIAMOND, *supra* note 159, at 26–28, 761.

302. See Dana Brakman Reiser, *Benefit Corporations — A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 592–93 (2011) (“[L]ike the other hybrid forms simultaneously under development, the benefit corporation lacks robust mechanisms to enforce dual mission, which will ultimately undermine its ability to expand funding streams and create a strong brand for social enterprise as sustainable organizations.”).

303. Regulations implementing the Securities Exchange Act of 1934 explain the right as follows: “(i): If I have complied with the procedural requirements, on what other bases may a company rely to exclude my proposal? (1) Improper under state law: If the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company’s organization; Note to paragraph (I)(1): Depending on the subject matter, some proposals are not considered proper under state law if they would be binding on the company if approved by shareholders. In our experience, most proposals that are cast as recommendations or requests that the board of directors take specified action are proper under state law. Accordingly, we will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise.” 17 C.F.R. § 240.14a-8(h)(3)(i) (2020).

Apache Corporation v. NYC Employees Retirement System,³⁰⁴ these rights are analyzed through a neoliberal lens. In the case, a Delaware independent energy corporation headquartered in Houston, Texas sought a declaratory judgment in federal court that it properly excluded the proposal of five shareholders, all New York City pension funds, from its proxy materials.³⁰⁵ The proxy proposal invited all of the company's shareholders to vote on a proposal requesting that the corporation adopt a policy against discrimination on the basis of sexual orientation and gender identity.³⁰⁶ The company refused to include it, invoking Rule 14a-8(i)(7) of the Securities and Exchange Commission ("SEC")'s Rules implementing the Securities Exchange Act of 1934.³⁰⁷ That rule allows regulated corporations to exclude proposals related to the company's ordinary business operations.³⁰⁸ In establishing what "ordinary business operations" means, the district court, in following Second Circuit precedent, interpreted the law *de novo*, rather than simply affirming the SEC's exclusion action and the interpretation implied within.³⁰⁹ Relying on SEC guidance, the court held the "ordinary business operation" exception to permit the exclusion of mundane matters involving significant policy issues that nonetheless involve what it described as micromanagement of a business.³¹⁰ For the court, proposals about significant policy issues were nonetheless excludable as "micromanagement" when proposals prevent management from exercising its "specialized talents,"³¹¹ that familiar justification for the BJR.³¹² As a result, the court determined that, because the proposal at issue in the case included some principles that did not implicate social policy, and because those which did nonetheless constituted "micromanagement" because they directed the board to change certain business practices, the corporation could rightly exclude it.³¹³ This was so despite the proposal being, on its face, a request that is nonbinding by its nature³¹⁴ (and, therefore, incapable of

304. 621 F. Supp. 2d 444 (S.D. Tex. 2008).

305. *Id.* at 445–46.

306. *See id.* at 446–47 (referring to the full text of the proposal).

307. *See id.* at 446, 449 (citing 17 C.F.R. § 240.14a-8(i)(7) (2008)).

308. 17 C.F.R. § 240.14a-8(i)(7); *see also Apache Corp.*, 621 F. Supp. 3d at 449.

309. *See Apache Corp.*, 621 F. Supp. 3d at 449–50.

310. *Id.* at 451.

311. *Id.* (citing *Med. Comm. for Hum. Rts. v. SEC*, 432 F.2d 659, 679 (D.C. Cir. 1970), *vacated as moot* 404 U.S. 403 (1972)) ("As one court explained, 'management cannot exercise its specialized talents effectively if corporate investors assert the power to dictate the minutiae of daily business decisions.'").

312. *See id.*

313. *Id.* at 452–53.

314. *See Sarah C. Haan, Shareholder Proposal Settlements and the Private Ordering*

managing whatsoever) and clearly a social policy issue.³¹⁵

Apache is thus doubly concerning. As a case about textual interpretation, it reveals corporate law's tendency to narrow law-and-economics construction of express and implied contractual rights.³¹⁶ As a case developing the meaning of management prerogatives, it suggests that the neoliberal view of director supremacy prevails over non-directors' contractual rights. Accordingly, the case cautions that even if the benefit corporation caught on in the market as an attractive business vehicle, its socially useful ends would still have to overcome judicial conceptualization of their function. This brings us to consider what might be a more effective path to securing progressive reform.

VI. AN ALTERNATIVE REFORM PROGRAM: JUDICIAL AND LEGISLATIVE CHANGE BASED ON THE HDFC

Neoliberalism governance cannot be solved merely with tweaks or structures.³¹⁷ The tweaks discussed in Section III.A above, including following Germany in adding stakeholders to corporate boards, adopting agency law's fiduciary standard, shifting default rules to serve workers, and rethinking boards as relational mediators, have not taken. As for structures, the simplest argument against them is that their longstanding existence has

of Public Elections, 126 YALE L.J. 262, 273 (2016) (“[M]ost shareholder proposals — and virtually all social and environmental proposals — are precatory, which means that they are recommendations and are not binding on management.”).

315. See *Apache Corp.*, 621 F. Supp. 2d at 450–53. See generally Joseph A. Roy, Note, *Non-Traditional Activism: Using Shareholder Proposals to Urge LGBT Nondiscrimination Protection*, 74 BROOK. L. REV. 1513 (2009) (explaining that workplace discrimination is a clear, significant social policy issue).

316. Quite sensibly, no one ever feels *that* badly for banks and billionaires, but the infamous case of *Metropolitan Life Insurance Co. v. RJR Nabisco, Inc.* reflects this judicial tendency in corporate law to read contracts exceedingly narrowly given the sophistication of parties. See 716 F. Supp. 1504, 1518–19 (S.D.N.Y. 1989), *vacated*, 906 F.2d 884 (2d. Cir. 1990). But as one commentator has said, this “if it isn’t prohibited then it is permitted” approach is too simplistic. See John C. Coffee, Jr., *Unstable Coalitions: Corporate Governance As a Multi-Player Game*, 78 GEO. L.J. 1495, 1503 (1990). A narrow approach to contracts also pervades *Local 1330 United Steel Workers v. United States Steel Corp.*, a case Kent Greenfield relies upon in urging the need for public company reform giving workers a seat on corporate boards as they cannot protect their interests with contracts. See GREENFIELD, THE FAILURE OF CORPORATE LAW, *supra* note 33, at 194, n.19 (citing *Local 1330, United Steel Workers v. U.S. Steel Corp.*, 631 F.2d 1264, 1277 (6th Cir. 1980)).

317. See generally Katz & Page, *supra* note 268 (arguing that because none of the new structures have any enforcement mechanisms, the most important factor for producing enforceable change in corporate law is getting the people in charge, including investors, on board).

not served to displace neoliberalism's normative dominance.³¹⁸ Two reasons account for why theorizing tweaks and structures has not worked. First, theory is generally a tough sell, but especially so in an area of the law so very concerned with practical outcomes for everyone.³¹⁹ Second, the legal problem is more substantive than procedural. The real change needed is at the cultural level. Structures are helpful in the consideration of culture as they signal social acceptability and reduce transaction costs.³²⁰ But structure, itself, is not culture.

So, successful reform requires two things. First, it must rely on something tried and true here in the United States to allay concerns about feasibility, since public companies succeed as businesses under the current governance paradigm. Second, it must be centered on the cultural element since that is what neoliberalism governance is missing. These two reasons are why reform should be based on the HDFC. As discussed in Section IV.A, they have a proven track record of success in the crucible of New York City's market, satisfying the element of corporate law concerned about equity investors. But as also mentioned, they epitomize the communitarian culture of protecting "sweat equity" stakeholders from market depredation.³²¹ As noted in Section III.A, the best way to think about the HDFC is as a vehicle combining the public company investor and stakeholder ("sweat equity") into one role, the shareholder. From this combination, the HDFC bridges neoliberalism's insistence on shareholder rights with communitarianism's focus on stakeholder protection.

In elaborating what culture means for corporate law, we must proceed from the most essential part of any reform project: the role of the judiciary. Corporate governance reform requires all participants, and investors especially, to have an explicit role.³²² This must be done for no other reason than, as discussed above, relying on directors to benevolently exercise discretion just will not do.³²³ Humankind are not angels; and so, we must have governance by all.³²⁴ But investors can have a real role only if the

318. See Bodie, *supra* note 70, at 740.

319. See KRAAKMAN ET AL., *supra* note 38, § 1.5 (describing the goal of corporate law as "to serve the interests of society as a whole").

320. See Katz & Page, *supra* note 268, at 864, 869–70.

321. See McArdle, *supra* note 182, at 253–54.

322. See Katz & Page, *supra* note 268, at 864, 869–70. See generally *infra* note 347 (discussing the potential of benefit corporation statutes to make way for corporate managers to "do the right thing").

323. See Bodie, *supra* note 70, at 750–51.

324. This, of course, is the famous basis for both government and checks and balances of government articulated in Federalist No. 51. See generally THE FEDERALIST NO. 51 (James Madison) (discussing the necessity for a "separate and distinct exercise of the

judiciary aids them: that is the lesson of *Apache*. Corporate law reform cannot continue to disregard this factor, or regard contracts including corporate charters, as self-executing.

The misplaced confidence in contracts has led scholarship to regard the “bad law” perpetuating extreme neoliberal governance — *Dodge v. Ford*³²⁵ and *eBay Domestic Holdings, Inc. v. Newmark* — as aberrations.³²⁶ But another equally valid explanation is that these cases are indeed “the law” in that they have effectively discouraged corporate boards from even trying Henry Ford, Jim Buckmaster, and Craig Newmark’s brazen imposition of communitarianism upon equity investors.³²⁷ If boards really had the power to impose philanthropy, why are *Dodge* and *eBay* the only two cases of their kind? Sure, law students are assigned cases about courts authorizing boards to make minor philanthropic donations,³²⁸ but never ones with *Dodge* and *eBay* facts and a different result. Consequently, it largely remains another bit of theory, upon which the benefit corporation idea especially depends, that the BJR goes so far as to protect directors in philanthropizing the business corporation.³²⁹

different powers of government which . . . is . . . essential to the preservation of liberty . . .”).

325. 170 N.W. 668 (Mich. 1919).

326. See Stout, *Why We Should Stop Teaching Dodge v. Ford*, *supra* note 18, at 166 (criticizing the reliance on *Dodge v. Ford* because the case is outdated and its most often cited proposition is merely dicta); Katz & Page, *supra* note 268, at 864 (claiming that new forms have been devised to avert outcomes caused by *Dodge* and *eBay* and describing them as essentially the only two cases in a century where controllers lost).

327. See Reiser, *Theorizing Forms for Social Enterprise*, *supra* note 255, at 687–88 (citing anecdotal reports that secretaries of state will not accept certificates of incorporation containing blended mission clauses and data suggesting that directors have internalized the shareholder welfare maximization norm); Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2073 (2001) (“Norms in American business circles, starting with business school education, emphasize the value, appropriateness, and indeed justice of maximizing shareholder wealth . . .”); Bainbridge, *Director Primacy*, *supra* note 34, at 575–76 (“Although some scholars claim that directors do not adhere to the shareholder wealth maximization norm, the weight of the evidence suggests the contrary. First, shareholder wealth maximization is not only the law, but also is a basic feature of corporate ideology. A 1995 National Association of Corporate Directors (NACD) report stated: ‘The primary objective of the corporation is to conduct business activities with a view to enhancing corporate profit and shareholder gain.’ A 1996 NACD report on director professionalism set out the same objective, without any qualifying language on nonshareholder constituencies. A 1999 Conference Board survey found that directors of U.S. corporations generally define their role as running the company for the benefit of its shareholders.”).

328. See *Steinway v. Steinway & Sons*, 40 N.Y.S. 718, 722 (Sup. Ct. 1896); *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581, 589 (N.J. 1953); see also *DIAMOND*, *supra* note 159, at 15–20, 28–31.

329. Some corporate scholars claim this. See Katz & Page, *supra* note 268, at 868, 872 (citing Todd Henderson, *Al Franken, Shareholder Wealth Maximization, and the*

Thus, the HDFC supplies what progressive corporate law has long required to persuade: a concrete American example of effective and lasting communitarianism to provoke salutary legal development. The closest corporate law had to this was Ben & Jerry's, mentioned above in Section III.B in Solomon's *PCL* essay,³³⁰ but its eventual acquisition by a publicly traded company has, in the very least, complicated its communitarian witness.³³¹ So the HDFC, with its hybrid shareholder, is left to compel judicial adoption of a legal realist approach toward corporate governance. How that should work is discussed below.

Progressive reformers should use disputes involving HDFCs to urge courts to review board decisions by considering the sort of business corporation at issue, much like the U.S. Supreme Court did in the securities law context with *United Housing Foundation v. Forman*.³³² Where the business corporation is like an HDFC, or one where investors rely on the corporate form itself to enjoy the nonmonetary benefit of sovereign power they would otherwise lack,³³³ the court should evaluate board action under something akin to anti-discrimination law's less burdensome standard.³³⁴ For a more apposite concretization of this, the approach advocated here would universalize the Massachusetts Supreme Judicial Court's approach in *Wilkes v. Springside Nursing Home, Inc.*³³⁵ In that case, the court proceeded from the type of business corporation at issue — a closely held one — and fashioned a governance doctrine commensurate with such purpose.³³⁶ Specifically, the court held that because shareholders in closely held corporations invest for the very purpose of enjoying guaranteed employment

Business Judgment Rule, PROFESSORBAINBRIDGE.COM (Jul. 27, 2020, 4:07 PM), <https://www.professorbainbridge.com/professorbainbridge.com/2010/07/shareholder-wealth-maximization-and-the-business-judgment-rule.html>); Reiser, *Theorizing Forms for Social Enterprise*, *supra* note 255, at 686–87.

330. See Solomon, *supra* note 110, at 1642–43.

331. See Katz & Page, *supra* note 268, at 858–59 (citing their 2010 article about the extinguishment of Ben & Jerry's social benefits after Unilever acquired it but mentioning that its capacity to grow after the acquisition produces other social benefits, such as allowing Ben & Jerry's to use hormone-free milk).

332. See *supra* notes 214–21 and accompanying text (discussing *United Housing Foundation, Inc. v. Forman*).

333. See *supra* note 83 (discussing *In re Kemp & Beatley* and *Ingle v. Glamore Motor Sales*).

334. Cf. 24 C.F.R. § 100.500 (2020) (asserting disparate impact analysis and its less discriminatory effect standard in federal housing discrimination cases).

335. 353 N.E.2d 657, 659 (Mass. 1976).

336. See *id.* at 663 (citing *Donahue v. Rodd Electrotype Co. of New England, Inc.*, 328 N.E.2d 505, 511–12 (Mass. 1975)) (stating standard as “strict obligation on the part of the majority stockholders in a close corporation to deal with the minority with the utmost good faith and loyalty”).

and other nonmonetary interests, a board infringing upon such rights must pass heightened scrutiny.³³⁷ The board must adduce a legitimate business purpose for the infringement. Once a corporation makes this showing, the burden shifts to the challenging shareholder to show that the same legitimate objective could have been achieved through means less harmful to her interest.³³⁸

Applied to HDFCs, this test would produce heightened scrutiny curtailing board tactics that drive out investors in a hot rental market, a tension in gentrifying areas such as Brooklyn.³³⁹ For example, a board of an HDFC would no longer be able to increase maintenance or costs at a rate the law deems excessive or unconscionable³⁴⁰ without showing that there are compelling reasons and no alternatives.

Lest we regard heightened scrutiny as some novelty in corporate law, it has long existed in the mergers and acquisitions context. Neoliberalism had long ago pushed courts to apply heightened scrutiny to such transactions where shareholder profit is at stake. This more searching examination, emerging from the Delaware Supreme Court's decisions in *Unocal Corp. v. Mesa Petroleum Co.*,³⁴¹ *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,³⁴² and *Paramount Communications Inc. v. QVC Network, Inc.*,³⁴³ takes the shareholder welfare maximization principle seriously to give it teeth.³⁴⁴

337. See *id.* (holding the strict standard set forth in *Donahue* applied to the instant case).

338. See *id.* at 663 (emphasizing courts must consider the “practicability” of the less harmful means asserted by minority shareholders in examining the action).

339. See Olear, *supra* note 170.

340. See, e.g., 303 W. 122nd St., *HDFC v. Hussein*, No. 570123/14, 2015 WL 753367, at *1 (N.Y. App. Term 2015) (remanding eviction case for new trial where trial court dismissed eviction predicated on tenant's refusal of a ninety-two percent rent increase as unconscionable).

341. 493 A.2d 946 (Del. 1985).

342. 506 A.2d 173 (Del. 1986).

343. 637 A.2d 34 (Del. 1994).

344. See *Unocal Corp.*, 493 A.2d at 958 (holding the “Court will not substitute its judgment for that of the board”); *Revlon Inc.*, 506 A.2d at 185 (holding “[t]he measures were properly enjoined” and that the “board's action [was] not entitled to the deference accorded it by the business judgment rule”); *Paramount Commc'ns Inc.*, 637 A.2d at 55 (“It is not appropriate for this Court to prescribe in the abstract any particular remedy or to provide an exclusive list of remedies under such circumstances.”). I argue this despite that, as Bainbridge points out, *Unocal* can legitimately be read to suggest that directors may take the interests of other stakeholders into account in opposing a takeover (the quintessential transaction involving shareholder wealth). See Bainbridge, *Director Primacy*, *supra* note 34, at 583 n.176. However, the key here is that in all three decisions, the court applied heightened scrutiny as a way of emphasizing the normative centrality of shareholder welfare maximization. This jurisprudence is undoubtedly a key part of why directors take shareholder welfare maximization so seriously.

For corporations formed to afford their owners a protective shield of power, courts should apply the same heightened scrutiny to give those corporate purposes bite.³⁴⁵

The HDFC, with its hybrid investor-sweat equity shareholder, also unlocks progressive legislative reform. Inspired by the harm of neoliberal governance on HDFCs, New York should amend the BCL to provide that for corporations with shareholder compositions such as those of S corporations — or ones made up of 100 or fewer natural people³⁴⁶ — any decision which substantially affects shareholders' rights is subject to shareholder ratification.³⁴⁷ This change, serving to check director primacy as expressed in BCL § 701, would harmonize the law in this way: just as shareholders have a say on fundamental changes to certificates of incorporation³⁴⁸ or terminal events such as mergers³⁴⁹ or dissolution,³⁵⁰ so too must their active ones have a say in matters that effectively kill a corporation by undermining its purpose and function. The obvious categories of matters that shareholders should have to approve are decisions affecting voting procedures, decisions to alienate or encumber corporate property, or decisions that would result in increases to cooperative constituents' costs in excess of a commercial standard such as the consumer price index.

Having stated these legislative proposals, this Article cannot overstate the importance of judicial reform. As Katharina Pistor's example of property rights and the Maya illustrates,³⁵¹ the path to reform, and out of any reductionist bog, is through a sea change to the judiciary's approach to law, a change especially important since all U.S. states regulate corporate behavior through litigation rather than administrative rulemaking.³⁵² What

345. Anticipating the next point, *Unocal*, *Revlon*, and *Paramount* are also instances of judicial implying of purposes. Courts have taken the “any lawful business purpose” idea and implied into it a purpose of maximizing return, at least in the auction context. See Bainbridge, *Director Primacy*, *supra* note 34, at 548 (discussing the fiduciary obligations of a corporation in maximizing shareholder wealth).

346. This could alternatively read 100 or fewer shareholders each of whom is a natural person. See I.R.C. § 1361(b).

347. This accords with former Chief Justice of the Delaware Supreme Court Leo E. Strine, Jr.'s observation, in support of the benefit corporation described above in Section V.B, that it is incumbent upon corporate shareholders, and not directors, to enforce corporate commitments to general social welfare. See Leo E. Strine, Jr., *Making It Easier for Directors to “Do the Right Thing”?*, 4 HARV. BUS. L. REV. 235, 246–47 (2014).

348. N.Y. BUS. CORP. LAW § 803(a) (McKinney 2021).

349. *Id.* § 903.

350. *Id.* § 1001.

351. See KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* 24–29 (2019).

352. See CAN DELAWARE BE DETHRONED? EVALUATING THE DOMINANCE OF CORPORATE LAW 10 (Stephen M. Bainbridge et al. eds., 2018).

corporate law reform desperately requires is *judicial* acknowledgement of that, illustrated by HDFCs, which progressive corporate scholars have long contended:³⁵³ the existence of other types of economic rationality aside from the relentless profit machine of Milton Friedman's imagination.³⁵⁴ New York's standard business corporate law has long contained a corporate constituent statute reciting the communitarian type of BJR that Millon argues for in his *PCL* essay referenced above in Section III.A.³⁵⁵ Specifically, the statute grants directors, in rendering decisions for corporations, the right to take other considerations into account aside from shareholders and managers' pockets.³⁵⁶ But under the current neoliberal paradigm, disputes under these statutes have not even come up.³⁵⁷ This is even true of the Indiana corporate constituent statute cited by one commentator as evidence that existing corporate law already protects corporations' ability to pursue social aims.³⁵⁸

Because, throughout the United States' legal systems, judges "say what

353. See discussion *supra* Section III.A.

354. See Eric Posner, *Milton Friedman Was Wrong*, ATLANTIC (Aug. 22, 2019), <https://www.theatlantic.com/ideas/archive/2019/08/milton-friedman-shareholder-wrong/596545> (criticizing Friedman's shareholder theory as a method for corporations to escape social responsibility for actions while increasing profits); see also Stout, *Why We Should Stop Teaching Dodge v. Ford*, *supra* note 18, at 164 (citing Friedman, *A Friedman Doctrine*, *supra* note 164) (explaining how taxation of shareholders for social purposes is contrary to the duty of an agent to act in best interest of the principal); JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* (2004) (characterizing this shareholder welfare maximization — without regard to law, ethics, or the interests of society — as a dangerous psychopathy).

355. See Millon, *Communitarianism in Corporate Law*, *supra* note 104, at 11.

356. See N.Y. BUS. CORP. LAW § 717(b) (McKinney 2021).

357. To elaborate, in *Progressive Corporate Law* ("PCL") and back in 1995, Millon notes, of these provisions, that "[s]ome of these statutes limit concern for nonshareholders to management actions in defending against hostile turnovers, but most apply generally to corporate decisionmaking. No one yet knows how state courts will interpret these statutes or how corporate boards will respond to their mandate. On their face, the statutes seem to herald a potentially radical departure from the traditional shareholder primacy principle, but the statutes' vagueness allows room for a range of interpretive possibility." Millon, *Communitarianism in Corporate Law*, *supra* note 104, at 11–12. To date, no court has ever interpreted these statutes to have any force. This includes Connecticut, the lone state identified by Millon as mandating the board to so consider. See also DIAMOND, *supra* note 159, at 761 (noting that there is little case law addressing these statutes and that none analyze what their substantive content requires).

358. See Katz & Page, *supra* note 268, at 868 (citing IND. CODE ANN. § 23-1-35-1(d), (g) (West 2021)). No court has yet to elaborate how subsections (d) and (g) apply. In *Murray v. Conseco, Inc.*, the Indiana Court of Appeals discussed these subsections in connection with a board's decision to remove a shareholder-appointed director. 766 N.E.2d 38, 44 (Ind. Ct. App. 2002). Tellingly, however, this opinion was then vacated by the Indiana Supreme Court. See *Murray v. Conseco, Inc.*, 795 N.E.2d 454, 462 (Ind. 2003).

the law is,”³⁵⁹ no legislative standard has any reach apart from what judges grant it. Indeed, anticipation of what judges will do discourages legal challenge to the status quo. This is a long recognized problem: the impossibility of legal reform absent a judiciary receptive and deferential to social reality, as captured by litigants in Brandeis’ briefs or expressed in legislative findings.³⁶⁰ Just as the judiciary finally came back to the world as it is to recognize the unequal bargaining power necessitating regulation in the name of social health,³⁶¹ judges must accept that there are also business corporations, such as HDFCs, formed to counter the unfettered operation of markets. This cultural change will allow nonmonetary and counter-market businesses to be given their intended force.

Finally, the legislative and judicial reforms discussed here would also further progressive public company reform by opening up the legal mind to its central claim. As discussed in Section III.B, the progressive corporate law movement has suffered from its inability to frame *business* corporations as serving goals other than shareholder profit. The implementation of the reforms proposed here, based on the concrete case of the HDFC and the dual role of the HDFC shareholder as a hybrid stakeholder-investor, would help reorient law toward imagining the business corporation as *also* serving a communitarian function, a corporate civic-mindedness emerging in the 2019 Business Roundtable’s recasting of a corporation’s purpose³⁶² and New York

359. This famously comes from *Marbury v. Madison*: “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.” 5 U.S. 137, 177 (1803).

360. See, e.g., FRIEDMAN, *supra* note 33, at 649; G. EDWARD WHITE, AMERICAN LEGAL HISTORY: A VERY SHORT INTRODUCTION 39–40 (2013); cf. *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1082 (D.C. Cir. 1970) (discarding caveat lessee and adopting implied warranty of habitability).

361. See G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 248–49 (2000) (citing *Lochner v. New York*, 198 U.S. 45 (1905) (Holmes, J., dissenting)) (describing the reasoning behind Justice Oliver Wendell Holmes Jr.’s dissent in *Lochner* — which came to frame U.S. jurisprudence on economic regulation — that stated that economic freedom is an illusion and heavily swayed by money, power, and politics).

362. Press Release, Bus. Roundtable, Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy that Serves All Americans’ (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>; see also Andrew Ross Sorkin, *Has Business Left Milton Friedman Behind?*, N.Y. TIMES (Sept. 11, 2020), <https://www.nytimes.com/2020/09/11/business/dealbook/milton-friedman-anniversary-sorkin-essay.html>.

Times' essay series revisiting³⁶³ Milton Friedman's aforementioned op-ed³⁶⁴ on its fiftieth anniversary. From this emerging reorientation, the next step will be for the law to recognize public company stakeholders as investors also entitled to protection and participation, much like their HDFC counterparts. Happily, in addition to those proposed by progressive reformers,³⁶⁵ federal tax and securities law and other elements of the legal code present possibilities for enforcing communitarian reform of public companies.³⁶⁶

VII. CONCLUSION

Examining and historicizing the dominant neoliberalism governance paradigm as well as the progressive challenges to it demonstrates that corporate law reform must rely on the example Black and Brown economic rationality — embodied by the HDFC — to be successful. As a business corporation countering an aggressive market, the HDFC is a concrete, and not merely conjectural, vehicle for compelling corporate law's recognition of nonmonetary communitarian rationality. As a result, using the HDFC can produce judicial and legislative change that would free corporate governance from neoliberal reduction to sustain corporations intentionally formed to protect their stakeholders from markets.

It should not be surprising that corporate law can be enriched by Black and Brown lived experiences. As discussed in the introduction, Nikole Hannah-Jones' acclaimed essay reveals how Black experiences have moved United States constitutionalism toward universality and entelechy.³⁶⁷ We should expect no different of corporate law. Especially in this moment where the shameful absence of the Black perspectives in economics has

363. *Greed Is Good. Except When It's Bad*, N.Y. TIMES (Sept. 13, 2020), <https://www.nytimes.com/2020/09/13/business/dealbook/milton-friedman-essay-anniversary.html>; see also Sorkin, *supra* note 362.

364. Friedman, *A Friedman Doctrine*, *supra* note 164.

365. See GREENFIELD, *THE FAILURE OF CORPORATE LAW*, *supra* note 33, at 115–16.

366. See Winkler, *supra* note 7, at 109–10; KRAAKMAN, *supra* note 38, § 3.3.2 (discussing the use of federal tax and securities laws as a tool inadvertently enhancing executive pay by aligning it with company performance). Greenfield might bemuse to see Kraakman's text cited as a source for ideas on progressive law reform, given how much Kraakman and Henry Hansmann are opposed to Greenfield's principle reform of empowering workers to join boards, following the German model. See GREENFIELD, *THE FAILURE OF CORPORATE LAW*, *supra* note 33, at 15–17 (discussing Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001), as criticizing, on efficiency grounds, the German model of worker-cooperative boards); see also PISTOR, *supra* note 351, at 24–29.

367. See Hannah-Jones, *supra* note 21.

become conspicuous,³⁶⁸ progressive proposals based on Black and Brown economic rationality and experience can contribute to corporate reform. Through such, and especially where recent scholarship has already identified corporate power as an instrument for social activism,³⁶⁹ law students, public interest lawyers, and jurists may find business corporate law to be an ally, not a hindrance, to the struggle against second-class citizenship. If this is achieved, corporate law would regain the social democratic function that it long has had in American law,³⁷⁰ obscured in this neoliberal age.

368. See Ben Casselman & Jim Tankersley, *Economics, Dominated by White Men, Is Roiled by Black Lives Matter*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/10/business/economy/white-economists-black-lives-matter.html> (exploring the impact of underrepresentation of Black Americans in the field of economics and how the history of discrimination in economics is relevant today).

369. See generally, e.g., Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535 (2018) (providing a comprehensive account and framework for analysis of using corporations to advance social activism); Stephen M. Bainbridge, *Corporate Purpose in a Populist Era*, 98 NEB. L. REV. 543 (2020) (observing the use of corporate power for progressive ends and predicting right-of-center workers' reactions to it).

370. See generally Lamoreaux & Novak, *supra* note 33 (discussing the corporation's historic role in American democracy).