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CORPORATE LAW AND THE RHETORIC OF CHOICE

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ABSTRACT

Rhetorically, the notion of choice has always been a powerful one in politics and law. This essay is intended to offer a note of caution about its use. Despite its progressive hue of individual freedom, the rhetoric of choice increasingly tends to be a notion used to defend and uphold existing matrices of economic and social power. This is because the rhetoric of choice is an excellent way to support existing power relationships. The assertion that people acting within such power relationships are simply choosing their current situation undermines efforts to change those relationships. The powerful stay powerful; the weak stay weak. This is true in a number of areas, from discussions about school vouchers, to debates about tort reform, to the disagreements surrounding the regulation of pornography.

The dependence on choice rhetoric also exists in corporate law, where the school of thought currently dominant in corporate law doctrine holds that the corporation is best seen as a voluntary arrangement among all the various stakeholders of the corporation. The rhetoric of choice is thus a powerful tool to fight against any reform of current relationships within the corporation that would embolden and empower stakeholders traditionally left out of the corporate power structure. Those involved with the corporation, whether shareholders, employees, or communities, have chosen their position, and thus should not complain when they do not receive more than what they explicitly contracted to receive. In this way, the notion of choice is used to bolster a view of corporate law that protects those already within the corporate power structure and excludes important stakeholders from corporate decision-making. The rhetoric of choice is used in the same way in corporate law discourse as it is used elsewhere by the right—to justify or bolster existing matrices of economic and social power.

1. INTRODUCTION

For progressives, a dedication to liberty has often meant a respect for, and protection of, individuals' right to make choices for themselves. When one hears about "the right to choose," the progressive fight to protect a woman's right to an abortion is the example that will leap most quickly to mind, but the concept of choice is broader. Choice has also been an important theme in progressive struggles against poverty as well as discrimination on the basis of race, sex, and sexual orientation. Women deserve the choice as to whether to terminate pregnancy; poor people should be given greater opportunities, and thus more choices, in their lives. Race-based animus, like animus based on sex or sexual orientation, is wrong in part because it limits the choices of the victims of such discrimination.

Historically, the respect for individual choice has been a significant if not essential part of modernity, a part of history's march from feudalism's dependence on status to modernity's

dependence on contract (Coquillette, 2004).¹ It is a part of—perhaps the most crucial aspect of—modernity’s respect for the autonomy and dignity of the individual (*cf.*, Nozick, 1974). Choice is a powerful notion not only in legal and political theory but in political practice as well. Simply framing a political issue as an issue of choice is a very powerful and successful persuasive technique, especially in the United States.

Rhetorically, choice has always been a powerful notion in politics and law. This essay is intended to offer a note of caution about its use. Despite its progressive hue of individual freedom, choice tends (perhaps increasingly) to be a notion used to defend and uphold existing matrices of economic and social power. This is true in a number of doctrinal areas, but especially so in corporate law, where the idea of choice is the defining principle of that slice of mainstream corporate law doctrine and scholarship based on neoclassical economics. There, the notion of choice is used to bolster a view of corporate law that protects those already within the corporate power structure and excludes important corporate stakeholders from corporate decision-making.

This paper will explore the use of choice rhetoric in a number of legal and political debates, including those surrounding issues of school vouchers, pornography, tort reform, regulation, and civil rights. Using insights gained from this analysis, this paper will then criticize the use of parallel choice rhetoric used in corporate law scholarship and doctrine. The paper begins by describing how notions of choice have been used in political and legal debates over the past century or so. Choice rhetoric can be used to support or undermine the status quo, and while it is used in both ways in any given historical moment, trends can be highlighted. For example, the *Lochner* era was characterized by the use of choice rhetoric to support then-existing economic power. After the New Deal era and into the middle part of the twentieth century, the left was able to use the rhetoric of choice as an important aid in its efforts for civil rights, economic rights, and abortion rights. In the last quarter of the twentieth century, the political right again seized on choice rhetoric, most prominently in the law and economics movements but also in other areas of politics and law. The rhetoric of choice is now perhaps the most powerful tool the right can bring to bear in fighting for regulatory efforts as diverse as school vouchers and tort reform, because the rhetoric of choice is an excellent way to support existing power relationships. The assertion that people acting within such power relationships are simply choosing their current situation undermines efforts to change those relationships. The powerful stay powerful; the weak stay weak. Everyone involved has chosen their current position, and their choice should be respected.

This paper will argue that in corporate law, too, the rhetoric of choice has been a powerful tool, especially within the contractarian school of thought that views the corporation as a “nexus of contracts” freely entered into by the corporation’s many constituents. The school of thought currently dominant in corporate law doctrine holds that the corporation is best seen as a voluntary arrangement among all the various stakeholders of the corporation. The rhetoric of choice is thus a powerful tool to fight against any reform of current relationships within the

¹ Coquillette (2004, pp. 473-474) excerpts Sir Henry Maine’s 1864 treatise *Ancient Law*, which says, “There are few general propositions concerning the age to which we belong which seem at first sight liked to be received with readier concurrence than the assertion that the society of our day is mainly distinguished from that of preceding generations by the largeness of the sphere which is occupied in it by Contract....Not many of us are so unobservant as not to perceive that in innumerable cases where old law fixed a man’s social position irreversibly at his birth, modern law allows him to create it for himself by convention.”

corporation that would embolden and empower stakeholders traditionally left out of the corporate power structure. The rhetoric of choice is used in the same way in corporate law discourse as it is used elsewhere by the right—to justify or bolster existing matrices of economic and social power.

2. THE RHETORIC OF CHOICE IN CURRENT DEBATES

Consider the following apparently disparate political issues:

School vouchers. Those supporting school vouchers argue that the state should subsidize the educational choices of students. Vouchers represent an amount of money the state will contribute to the school a student chooses to attend. Each student receives a portable voucher; whether the student goes to a private or public school, in a local neighborhood or far away, the voucher can be used to defray the cost of going to that school. Voucher advocates argue that giving students this freedom to use public money to pay for school enlarges the range of choice available to students. This enlargement of choice is important for all, but especially important (as the argument goes) for students from low-income families and from neighborhoods with poor neighborhood schools.²

Tort reform. For the past few years, congress has been struggling with so-called “tort reform”—statutory limitations on the types of personal injury law suits that can be brought and on the amount that juries can award a successful plaintiff. The general debate on tort reform has focused on medical malpractice, but there have been more particularized efforts to protect fast food companies and gun manufacturers as well. With regard to medical malpractice, a leading argument in favor of tort reform is that patients should not be able to sue for injuries suffered in medical procedures that they *choose* to undergo, knowing their inherent risks. With regard to fast food companies and gun manufacturers, Congress has recently been considering bills barring suits from people claiming harm by the companies’ products.³ The statute protecting fast food companies, called the “Personal Responsibility in Food Consumption Act,” was explicitly based on the notion that customers who choose to eat fast food should not be able to seek redress for harm that befalls them from that choice.⁴

Pornography. In debates about the regulation of pornography and sex work more broadly, one of the most powerful arguments in favor of decriminalization is the notion that the women involved in such work deserve to have their choices respected. As Sylvia Law writes, some feminists “see the freedom to explore sexuality and to recognize women as sexual agents

² See Parents for Choice in Education (n.d.) (“School choice can be best defined as empowering parents to select the educational environment they feel is best for their child. In other words, *school choice is parental choice*. Some families are already able to exercise school choice simply because they have the resources to move to the neighborhood of their choice or to pay private school tuition. Families that do not have these same resources can only exercise choice through the use of different school choice tools, such as vouchers and tuition tax credits.”) (emphasis in original).

³ Protection of Lawful Commerce in Arms Act, S. 397, 109th Cong. (2005) (enacted as Pub. L. No. 109-92 (codified at 15 U.S.C. § 7901)); Commonsense Consumption Act of 2005, S. 908, 109th Cong. (2005) (introduced on Apr. 26, 2005); Protection of Lawful Commerce in Arms Act, H.R. 800, 109th Cong. (2005) (introduced on Oct. 26, 2005); Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Cong. (2005) (passed by the House of Representatives on Feb. 2, 2005).

⁴ For an excellent analysis of the role of choice in the tort reform battle, with special attention paid to the problem of obesity and fast food, see Benforado, Hanson, and Yosifon (2004).

as a central tenant and energizing, organizing principle of the women's liberation movement of the late twentieth century." (Law, 2000, p. 540). Or as Alan Wertheimer writes in a related context, sexual consent should be respected even within contexts of inequality: "I do not doubt that women sometimes agree to sexual relations that they would reject under different or more just or equal background conditions. But we do not enhance their welfare or their autonomy by denying the transformative power of their consent." (Wertheimer, 2003, p. 191).

Many other current debates seem to center on the concept of choice. For example, with the perceived need for additional security, the law surrounding "consensual" searches continues to evolve,⁵ and by some accounts an increasing proportion of police oversight is based on consent.⁶ Similarly, issues of gay rights depend increasingly on whether sexuality is seen as a preference or an orientation dictated by heredity.⁷ Likewise, arguments in favor of the privatization of Social Security, the issue on which President George W. Bush chose to spend much of his political capital at the beginning of his second term, were based in large part on the attraction of offering a greater range of investment choices to those wanting to plan for their retirement (Bush, 2005; Caffrey, 2005, p. K1; Toner, 2005, p. A16).

There are additional examples of the invocation of choice arguments at the level of political theory. In democratic societies, the "consent of the governed" has been a concept that has long won adherents. Rousseau (1762, p. 109), for example, argued that "residence constitutes consent," meaning that anyone who chooses to live within a jurisdiction can be considered to have agreed to whatever laws that jurisdiction puts forth. This stance remains the theory behind electoral politics: if your candidate doesn't win, you still have to obey the laws until you get another chance to vote. This is the high theory behind the old bumper sticker saying "America: Love It or Leave It." It is also the concept behind an exchange in an episode of "30 Days," a television program on the FX network where an individual must live for 30 days in an uncomfortable situation that challenges his or her beliefs. In one episode, an atheist lived with an evangelical Christian family. The atheist invited the family to a meeting of other non-believers, who talked about their offense at having "In God We Trust" on United States currency

⁵ See *Schneckloth v. Bustamonte* (1973) (discussing value of searches based on consent); *Georgia v. Randolph* (2006) (discussing role of consent in search of house when one resident consents and the other objects). It is worth noting that the entire field of search and seizure law depends, in a sense, on choice. A search occurs only when an individual's reasonable expectation of privacy has been violated. See, e.g., "[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States* (2001) (citing *Katz v. United States* (1967) (Harlan, J., concurring)). In many cases, this inquiry turns on whether a person has chosen to subjected herself to public view or to put herself in the position where she knows she has no expectation of privacy. The cases are abundant. See, e.g., *Dow Chemical Co. v. United States*, (1986) (holding that photographing an industrial complex with a precision aerial mapping camera is not a search); *United States v. Taketa* (1991, p.667) ("[v]ideotaping of suspects in public places, such as banks, does not violate the fourth amendment" because there is no expectation of privacy in these places); *United States v. Gonzalez*, (2003) (mailroom of a public hospital); *Thompson v. Johnson County Community College* (1996) (security personnel locker area of a community college); *United States v. Lopez* (1984) (public street); *United States v. Bifield* (1980) (gas station); *State v. Augafa* (1999) (public street); *State v. Henry* (2002) (public restroom).

⁶ See Simmons (2005, p. 773) ("Over 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment."); Strauss (2001, p. 214) ("Although precise figures detailing the number of searches conducted pursuant to consent are not—and probably can never be—available, there is no dispute that these type of searches affect tens of thousands, if not hundreds of thousands, of people every year."); Whorf (2001).

⁷ See, e.g., Editorial (July 2, 2006), "The freedom to be gay", *L.A. Times*, p. M4; Angier (1993, p. A24).

and coins. The evangelicals' response was: "I guess it doesn't bother me that it's on the money. If it bothers you, move." (*30 Days*, 2006).

A similar view on choice has been expressed by one of the nation's leading conservative constitutional law scholars, Steven Calabresi. He has written that the gay rights issue should be handled by having gays and lesbians "who wish to escape moral opprobrium" move to "secular" cities, while "Americans of faith" should "form and live in communities" where they can discriminate openly. Channeling Rousseau, Calabresi (2004, p. 1123) suggests that "[t]hose who choose to live in a part of the country where their views on homosexuality are in the minority should learn to gracefully put up with a prevalence of opposing views."

What unites each of these debates is the centrality of the rhetoric of choice. *How* it is used, however, differs in various contexts. In some situations, public policy arguments are made that purport to build and expand choice (school vouchers, Social Security privatization). In others, the arguments are in favor of greater protection for existing choices, or in favor of recognizing the right to make certain choices (sex work, pornography). In the largest category, arguments are made that people should be held accountable for their choices under the existing legal or political framework (gay rights, tort reform, religious establishment).⁸

The power of choice as a rhetorical tool is striking in each of these situations, even though in the end its use is seemingly contradictory. In some cases, additional choice is an aspiration and it is argued that the choices available now are not sufficient; we should use the law to add choices. In other situations, even if existing choices are narrow and constrained, the arguments are made in favor of recognizing the rights of the choosers to make those very choices. In still other situations, choices are seen less as a right than as an act for which one must take responsibility, even if the choices are constrained and limited.

What explains the use of choice as a rhetorical tool in each of these public policy debates? Furthermore, what do they have to do with corporate law? Let us look deeper.

3. THE RHETORIC OF CHOICE IN REGULATORY BATTLES

The use of the rhetoric of choice is not a new phenomenon. On occasion, it is used to hold the line against regulatory protection. Other times, it is used to argue in favor of such protection. Perhaps the most famous example of using choice rhetoric as an obstacle to regulatory protection is the early twentieth-century case of *Lochner v New York*. The use of choice rhetoric to support regulatory protections is a newer phenomenon.

3.1. *Lochner*: A Case Study in Using Choice to Protect the Status Quo

Despite its progressive hue, the notion of choice is often touted to justify the status quo. This is Calabresi's tactic when he argues that gay men and lesbians should choose not to live in cities where the majority population discriminates against them. It is similarly the tactic applied by evangelicals in their conversations with atheists described above. An excellent way to support the existing framework of laws and regulation, whatever they are, is to argue that people have already voluntarily subjected themselves to it. Whatever mix of rights and obligations that

⁸ See Benforado, Hanson, and Yosifon (2004, p. 1802) ("dispositionism [the belief that people's own choices determine their behavior] has had and continues to have an immense effect on both the framing and resolution of virtually every major social policy debate, from affirmative action to standardized testing, from gun control to school 'choice,' and from gay rights to the war on terrorism.").

already exists has been chosen, which offers the concomitant legitimacy that comes with choice. Moreover, the argument is made that within a given set of legal rules, one's actions within that framework constitutes a free choice to accept whatever outcomes that are created by those actions.

This tactic has typically been used by the right, since it is extremely powerful in defending the status quo and opposing progressive movements calling for change in that status quo. Progressives fighting the injustice that occurs within the status quo must either argue that people are not really making the choices that they seem to be making, that the choices made do not reflect the true preferences of the actors, or that the choices should not be respected. But these counter-arguments find little traction in a political and social culture that revels in individualism. As George Annas (1998, p. xi) has written in the context of medical consent (but which applies more broadly): "Because of the high value Americans place on liberty and autonomy, and because it supports market values, choice rhetoric has assumed such prominence in public discourse that merely labeling something as a "choice" has a tendency to arrest conversation and prevent more than superficial analysis of the nature of the choice in question."

Perhaps the most famous use of the choice frame in opposing regulatory protections is its use in the Supreme Court's so-called *Lochner* era, which lasted for 50 years or so from the latter part of the Nineteenth century until the New Deal. During that time, the Supreme Court routinely struck down economic regulations as violations of freedom of contract. The freedom of contract—really a principle of freedom of economic choice—was seen as a value protected from governmental attack. Any regulation of economic life that constrained choice was constitutionally suspect. As the Court said in *Lochner* itself, the decision juxtaposed the right of the state to regulate with the right of the workers to *choose* the conditions of their job:

[W]hen the state . . . has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood... it becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring...(*Lochner*, 1905, p. 54).

This notion of choice was not very robust, of course, in that it ignored the constraints faced by the workers in the contracting process. Few would seriously contend that it is much of a choice when the two alternatives are to work in unsafe conditions for 80 or more hours per week or to have yourself and your family go hungry because of lack of money. But the absence of real alternatives did not much bother the Court, nor did it concern the laissez-faire theorists of the time. As long as government was not skewing the choices of the parties to a contract, the differences in bargaining power, or the dearth of alternatives for one party or the other, did not vitiate the sanctity of the choices in fact made.

The *Lochnerian* assumptions about choice in economics paralleled those of Rousseau in politics or Calabresi with regard to gay rights. What exists is chosen. *Lochner* went further, in the sense that the market was considered to be natural and given, so that anything that occurred within it won the imprimatur of consent. The market was free; whatever happened in it was chosen, and choice was liberty to be protected by the Constitution (Sunstein, 1993, pp. 45-62).

The Court did not begin to question its notion of choice until the principles of laissez-faire economics themselves came under attack during the New Deal. The New Deal constituted

a sea-change in economics, law, and politics. The intellectual giants of the era saw that the so-called “free market” was a creature of politics and law.⁹ But they also operated on the basis of a new insight about choice, namely that the market was *not* an area ruled by choice. Rather, it was an area dominated by coercion—the coercion of the marketplace—which forced people to sell their labor in horrid conditions in order to house, feed, and clothe themselves and their families.¹⁰ New Deal theorists recognized that choice in the narrow, limited sense, which had been protected by the *Lochner*-era Court, was not only inconsistent with economic well-being but also inconsistent with the nation’s aspirations to improve the lot of citizens most in need. Government assistance was necessary to make real choices available.¹¹ This was the exact insight later used by civil rights leaders calling for government assistance to end *de facto* segregation as well as private prejudice in the marketplace.

3.2. *Using the Rhetoric of Choice In Support of Regulatory Protections*

The second way the rhetoric of choice is used is as a part of an argument *in favor of* adjustments in the regulatory or legal framework. Here, the typical move is to argue for the expansion of choice, an especially powerful strategy in United States politics because of its connection, as mentioned above, with individualism and freedom. For several decades, choice rhetoric was used primarily by those on the left. The New Deal insights—that government was necessary in order to build the conditions necessary for choice and opportunity to flourish—were expanded beyond issues of economic rights and applied to assist movements for civil rights and eventually abortion rights.

In the initial desegregation battles, choice rhetoric was a powerful tool in casting doubt on state laws and private policies requiring the separation of people based on race. Students in some areas of the country were not allowed into their schools of choice based on their race. Some people were not allowed to enter their local public swimming pool because of their race, or to eat or work where they wished, or to purchase houses in the areas where they wanted to live. All of these prejudices resulted in, or were embodied by, restrictions on the choices of racial minorities. Some of these restrictions, for example school segregation, arose as a function of laws that explicitly limited the choices of racial minorities about, for instance, the schools available to their children. Others, such as the limitation on the range of choices arising from discrimination in employment and housing, arose out of the *absence* of laws offering meaningful regulation of other private parties—usually whites—who were restricting market choices because of racial animus.

Changes in laws were thus seen as the answer to the restriction on choice. The end of segregation *de jure*, limiting choice, clearly required a change in law. But the end of segregation

⁹ For a review of that analysis, see Sunstein (1993, p. 50) (“The law created property and contract rights, and the law imposed various limits on those rights. Market wages and market hours were in this sense a creation of law, not of nature, and not of laissez-faire.”).

¹⁰ See *Ibid.* (pp. 48-49) (“If coercion and law were seen there [in the market], regulation would be a justified corrective. The same principle that doomed slavery could also call for government assistance against the forms of coercion that drive people to take menial jobs at trivial pay, or that force people to work sixty hours per week if they are to work at all.”). The most influential piece from the time is likely Hale (1923).

¹¹ See Sunstein (1997, p. 320) (discussing Franklin Roosevelt’s “Second Bill of Rights,” which included “the right to a useful and remunerative job,” “the right to earn enough to provide adequate food and clothing and recreation,” “the right of every family to a decent home,” “the right to adequate medical care,” and others).

de facto, which limited choice just as much, required a change in law as well. Even though laws such as the Civil Rights Act (1964) and the Fair Housing Act (1968) nominally consisted of limitation on the choices of certain market actors (such as employers, shopkeepers, and home sellers) to discriminate, such laws were seen as important components of a *protection* of choice. Government guarantees were necessary in order to protect individuals' choices that otherwise would have been restricted by the so-called "free market." The market was a source of coercion, and government assistance was required in order to be free of it.

The language of choice was even more pronounced in the abortion rights battle, and its use was intentional. Historian Rickie Solinger traces the use of the word "choice" in the abortion context to a 1969 decision by the National Abortion Rights Action League (NARAL) to name their first national action "Children by Choice" (Solinger, 2002, pp. 4-5). "Choice" was, in effect, being market-tested as the watchword of the movement (Wood, 2006). And in his opinion for the Supreme Court, Justice Harry Blackmun picked up on the choice language in *Roe v. Wade* itself. Choice rhetoric thus became the way to talk about a very difficult subject without alienating moderates. "Many people believed that 'choice'—a term that evoked women shoppers selecting among options in the marketplace—would be an easier sell." (Solinger, 2002, p. 5).

Interestingly, both sides in the abortion debate used choice rhetoric. In the *Roe v. Wade* oral argument, the assistant attorney general who argued in support of Texas's abortion prohibition suggested that the real choice was made at the time Roe (Norma McCorvey) became pregnant and stated, "Now I think she makes her choice prior to the time she becomes pregnant. That is the time of the choice. . . . Once a child is born, a woman has no choice; and I think pregnancy makes her make that choice as well." (*Roe v. Wade* Transcript, 1971). In direct response, Justice Stewart added another take on choice, saying, "Maybe she makes her choice when she decides to live in Texas." (Ibid.). It is not clear from the transcript whether this latter comment was intended to be sarcastic; indeed, Justice Stewart voted with the majority in *Roe*. But it is notable that Stewart's likely sarcasm is the exact argument used by Stephen Calabresi with regard to gay rights.

Note that in the abortion debate, the use of choice rhetoric was used most successfully in service of the de-regulatory move—to strike down prohibitions on abortions. Once the movement required affirmative regulatory assistance, however, choice rhetoric became less available, and political and legal momentum lagged earlier than it had in the civil rights movement. For example, when Congress restricted the use of Medicaid and other federal monies from being used to pay for abortions, it was not seen as a restriction on choice but instead a recognition of the notion that taxpayers should not be forced to pay for procedures that they found abhorrent (Coats, 1996; *Harris v. McRae*, p. 309). In *Harris v. McRae* (p. 309), the Supreme Court case upholding the restriction, Justice Brennan's dissent criticized the Court for failing to recognize that the government's "denial of public funds for medically necessary abortions . . . serves to coerce indigent pregnant women to bear children that they would otherwise elect not to have" in part because they did not adopt restrictions. His argument that the *absence* of affirmative funding amounted to coercion of women to continue pregnancies failed to

resonate with most Americans. A poll more than a decade after the decision indicated that over 70% of Americans people supported prohibiting the use Medicaid monies to pay for abortions.¹²

Note, however, that Brennan's argument in *McRae* was probably correct as a matter of fact. Merely lifting prohibitions on abortion allows for choice for some, but for many women who needed abortion the so-called choice would only be made real if they could use public funding to pay for it. Government assistance was necessary to support genuine choice, just as in the civil rights struggle. Such arguments, however, failed to carry the day in the abortion debate.

Compare the above examples with the current push for "school choice." This is an effort to enlist the assistance of public funds to enable children to attend public *or* private schools. The effort of the school choice movement mirrors the goals of both the civil rights movement and the abortion movement to enlist affirmative government assistance to make the choices sought in those movements genuine possibilities. Not surprisingly, advocates of school choice make explicit their similarity with the civil rights movement, where the efforts to enlist government support were successful, at least early on. According to one school choice advocate, "Parental educational choice is an historical movement destined to succeed, powered by the same moral imperatives which made the *civil* rights movement's success inevitable." (Byrne, 1999).

4. THE RETURN OF CHOICE ON THE RIGHT: CHOICE IN CORPORATE LAW

The successful capture of choice rhetoric by the left did not last long. Perhaps because choice rhetoric was not as easily applicable, public support for "second stage" efforts in the civil rights movement, such as affirmative action and "forced" busing, waned. Similarly, as mentioned above, public funding for abortions—necessary to make the promises of *Roe* a reality—was not provided, in part because many taxpayers felt that public funding meant that they would be *forced* to pay for abortions (notably the opposite notion of choice).

The economic promises of the New Deal were also under attack. Ronald Reagan gained widespread public acclaim for his deregulatory appeals, saying that regulation was constraining America rather than liberating it.¹³ Concurrently, neoclassical economics, with its lionization of individual choice and aversion to government regulation, came back into vogue in law schools—under the guise of the Law and Economics movement—and to some extent in economics departments. While the focus on choice in the decades between the New Deal and the Reagan era had been a part of the civil rights and women's rights movements, the Law and Economics movement adopted the notion of choice as a key rhetorical and theoretical tool, transplanting it from its civil rights context back into its *Lochner*-era usage.

While a fixation on neoclassical law-and-economics has weakened over time in most legal disciplines, the field of corporate law developed into, and remains, one of its bastions within the legal academy.¹⁴ The primary way neoclassical economics has projected itself within

¹² A CBS/New York Times poll in 1993 indicated that 72% of Americans did not want their tax dollars to pay for abortions (*Health Reform at Risk—Coverage of Abortion Under National Healthcare Policy*, 1993; Ellerbock (1995).

¹³ See Fukuyama (2008) (calling "financial deregulation" a Reagan-era "article of faith"); Horwitz (1991, p. 264) ("The Reagan Administration came to power in 1980 on a program of reducing the size of government and getting government out of the economy").

¹⁴ See Greenfield and Nilsson (1998) (arguing that corporate law is the "closest living relative" of classic utilitarianism); Arlen, Spitzer and Talley (2000) (Corporate law is an "intellectual bastion of economic conventionalism").

corporate law is through the assertion that corporate law is “contractarian.” But the notion of contract utilized is quite narrow, depending on a very simplistic notion of choice.¹⁵

The scholars who popularized the contractarian model of corporate law made the notion of choice central to their argument. University of Chicago professor Daniel Fischel (1982, pp. 1273-1274) argued in one of his first descriptions of the nexus-of-contracts version of corporate law that “[b]ecause the corporation is a particular type of firm formed by individuals acting *voluntarily* and for their mutual benefit, it can far more reasonably be viewed as the product of private contract than as a creature of the state.” The implications of this view are well-known. Corporate constituencies are assumed to be best able to determine their mutual rights and obligations by way of voluntary arrangement. Corporate law should thus provide “off-the-rack” rules that are primarily enabling (rather than prescriptive) and that can be easily contracted around (Easterbrook and Fischel, 1991). Law should not dictate the details of the obligations among the parties because each party is assumed to know her own interests and to protect them best through bargaining and exchange. In this way, the argument goes, developments in corporate charters and, indeed, in corporate law, will trend toward efficiency, because inefficient arrangements will cause participants in those arrangements to change the terms of the bargain over time in order to avoid losses.

Moreover, because people know and protect their own interests, terms of the corporate “contract,” whether in charters or in state incorporation statutes, are correctly “priced” through an efficient capital market. The fact that the terms all have a price associated with them means that the contractarians can call the complete contract “consensual” in that any shareholder who buys the security can be said to have agreed completely to the contract. “All the terms in corporate governance are contractual in the sense that they are fully priced in transactions among the interested parties.” (Ibid., p. 17). This view of corporate law, then, depends fundamentally on the notion that the participants in the corporate contract are economically rational actors, and are *choosing* to take part in the corporate form exactly as they find it. This mimics Rousseau, in that agreeing to participate within an existing legal regime is taken to constitute choice to abide by whatever happens.

Importantly, corporate law adopts the fiction that shareholders make exactly this type of decision about every stock they own. Because shareholders can learn about companies from information freely available and can sell stock in a fluid securities market, it is assumed that those who hold a company’s stock voluntarily accept the risk/return ratio of that security. If the stock tanks, then the shareholder cannot blame anyone but herself. Even if no actual shareholder is as informed as the theory would have it, the theory wins out. These fictions allow corporations to be characterized as voluntary, consensual organizations. In Easterbrook and Fischel terms, “the corporation is a voluntary adventure.” (Ibid., p. 12).

Contractarian thought found traction within the courts early on, where it was used to endorse a very pro-management view of fiduciary duty. Shareholders were the principals who contracted with management to run the company. The arrangement was voluntary, so law did not need to step in to vary the terms of the deal.¹⁶ Perhaps the best statement of this assumption appears in Judge Winter’s famous opinion in *Joy v. North*, one of the earliest articulations of the

¹⁵ For a more in depth discussion of the underlying assumptions of main stream corporate law scholarship, particularly that the correct view of corporate law is one based on private, voluntary contracts, *see* Greenfield (2006, pp. 29-37).

¹⁶ *See generally* Mitchell and Mitchell (2006, p. 101) (explaining how agency law depends on notions of choice).

contractarian model within the context of a case. Explaining why shareholders should not be able to win a suit brought against negligent directors alleging they breached their fiduciary duty to shareholders, Judge Winter argued that shareholders had *chosen* to take the risk of directors' negligent behavior. "Shareholders to a very real degree voluntarily undertake the risk of bad business judgment." (*Joy v. North*, 1982, p. 885) How had they expressed their choice? By buying the stock. As Judge Winter stated:

Investors need not buy stock, for investment markets offer an array of opportunities less vulnerable to mistakes in judgment by corporate officers. Nor need investors buy stock in particular corporations. In the exercise of what is genuinely a *free choice*, the quality of a firm's management is often decisive and information is available from professional advisors. Since shareholders can and do select among investments partly on the basis of management, the business judgment rule merely recognizes a certain voluntariness in undertaking the risk of bad business decisions. (*Ibid.*). (emphasis added).

Notice that the assumption of choice implicit in *Joy* goes beyond even that which the *Lochner* Court made in the employment context, which Calabresi recently made with regard to gay rights, and which Rousseau made with democratic theory. *Joy* is famous, and appears in many corporate law casebooks, in part because it expresses a new and aggressive view of judicial deference to managerial decisions. The question of what the shareholders had agreed to – i.e., the level of fiduciary duty contained in the corporate "contract" between shareholders and management – was the question to be *answered* by the case. Judge Winter answered it by simply noting that the shareholders had purchased stock. Of course, if one were to take the contractarian notion of choice seriously, one would have to determine at least that the legal rule was so deferential when shareholders bought the stock, and that they actually voluntarily subjected themselves to it. But *Joy* did not ask the question of what the shareholders really chose. While the *Lochner* Court, Calabresi, and Rousseau only go so far as to assume that individuals' decisions within a legal framework constitutes a meaningful choice to subject themselves to those rules, Winter assumed that shareholders' "choices" in purchasing stock constituted a voluntary subjection to a legal framework that had not yet been clearly articulated.

Also problematic is the fact that the assumption about consent and voluntariness within corporate law extends beyond shareholders. Everyone else involved in a company—from creditors to employees, from customers to communities—is also assumed to be consenting to their involvement in a meaningful way. This is what the Law and Economics scholars mean when they say a corporation is a "*nexus* of contracts." Everyone else connected to the firm—creditors, communities, workers, the government—is voluntarily so connected. No one is being coerced. If the parties dislike the terms of the "contract" between themselves and the company, they can leave. Not only can shareholders sell their shares, but employees can quit, managers can find a different company to manage, suppliers can sell their goods elsewhere, creditors can sell their bonds. Communities, we shall presume, can kick the corporation out or refuse to allow it to do business.¹⁷

¹⁷ Cf. Macey (1991, pp. 42-43) (arguing that even though other non-shareholder stakeholders can protect themselves through contract, communities cannot; the remedy for them is through appeal to "local and state government for redress").

This leaves the corporation completely able to disregard any putative obligation that is not explicitly set out in contract, regulation, or common law.¹⁸ According to Fischel (1982, p. 1271), corporations should not be held accountable to society in addition to ways explicitly set out in the corporate “contract” because doing so would “disrupt the *voluntary* arrangements that private parties have entered into in forming corporations.” Corporations should not be asked to look after the needs of their employees either, since workers “must look to their contractual rights rather than invoke fiduciary claims.” (Easterbrook and Fischel, 1982, p. 91). Further, if employees bargain for a certain contract with only limited job security protection, “they ought not grumble if they are held to their bargains when business goes bad. Each investor must live with the structure of risks built into the firm. . . it is all a matter of enforcing the contracts. And for any employee . . . that means the explicit negotiated contract.” (Ibid., p. 37).

Moreover, the absence of protections within the labor contract does not mean, according to contractarians, that workers are unable to bargain for those protections. “Rather, the absence of contractual protections . . . may simply reflect the fact that [non-shareholder] constituencies are unwilling to pay for such protection in the form of lower wages” (Ibid, p. 36). In other words, if workers wanted to be the beneficiaries of management’s fiduciary duties, they would simply bargain for such a contractual benefit. Because they have not chosen the protections, they must have chosen the lack of protection. We should respect their choice.

This is a return to *Lochner*, if only within corporate law. Contract is available to all; protections are there for those who negotiate for them; the market protects those who choose to protect themselves. People should be held responsible for the choices they make.¹⁹

5. EVALUATING CHOICE

The fixation on choice within corporate law is derived from a set of beliefs about individual autonomy and behavior. The assumption is that people actually *choose*—which is taken to be a mental decision of some kind usually followed by some kind of physical manifestation of that decision. This is the same assumption made throughout neoclassical economics, and it is worth examining.

Indeed, the notion of choice remains central to neoclassical economics’ “rational actor” theory. Individuals are assumed to act in a way—by choosing behaviors, products, everything—that maximizes their own welfare (Thomas, 2000). As each person acts as to maximize her own welfare, the exchanges that occur will inevitably make all parties to voluntary deals better off. Economics thus recommends that individuals are given as much freedom to choose (and to contract) as possible, because with such freedom to choose comes not only individual benefit but social benefit as well.

¹⁸ Actually, Fischel and Easterbrook (1982, p. 1177, n. 57) famously wrote that corporations should not even be required to obey laws, as long as the expected penalties for breaking the law are lower than the expected benefits from disobedience: “(M)anagers not only may but also should violate the rules when it is profitable to do so.” For a critique, see Greenfield (2006, ch. 4).

¹⁹ It is important to note the irony here. This view of corporate law fits within the current fixation on choice and personal responsibility, but only if one ignores one of the fundamental characteristics of the corporate form: limited liability. The protection of shareholders from liability arising from the acts of the corporation may make sense for a number of reasons, perhaps most clearly as a straightforward subsidy for businesses organizing themselves in the corporate form. But it can hardly be squared with the rhetoric of personal responsibility, since it is the exact opposite.

But of course the economist's version of "rationality" is not particularly robust. It does not require an inquiry into the substance of any choice. Economists determine what is rational by observing what people actually *do*. This determination turns on an assumption about choice: what is chosen is by definition rational because if it were not they would choose to do something else.

The problem with this assumption, of course, is that if the economists are correct, then there is no way to observe a person acting irrationally, or making a poor choice (unless they are actually crazy). Viewed in this light, rationality is something that humans share with lower animals. Judge Posner (1986, p. 15) admits in his Law and Economics text that "it would not be a solecism to speak of a rational frog." Rationality, in the economists' view, is something that could be used to describe the decisions of a frog in deciding which lily pad to sit on.

So, the economists' "rational" choice does not mean much, since there is *some* element of choice in virtually every human act. Even someone who signs a contract with a gun to his head is making an economically rational choice—it is more beneficial to sign even a bad contract than to be shot in the head.²⁰ Economists are assuming that the entire human situation is characterized by rational choice, and that laws and regulations should be made on that assumption. But if rational choice does not in fact exist, then economics is fundamentally flawed.

The rational actor theory has been the subject of myriad attacks. So-called behavioral economics has been especially influential in the last decade or so, deconstructing the rational actor theory using insights from psychology, which provide an account of human behavior that is more sophisticated than typically used in economics. These more sophisticated models of human behavior take into consideration, for instance, bounded rationality and bounded willpower, as well as a richer definition of self-interest (Jolls, Sunstein and Thaler, 1998). Study of actual humans (rather than the so-called "rational" humans of economic theory) shows that choices are malleable and easily manipulated—human preferences can be created and destroyed. Choices, behavioral economists assert, are not so rational after all, and more and more research is showing just that.

For example, studies show that more choice sometimes makes people *less* happy (which is irrational from an economic point of view). In a study that examined the marketing of jam, one store offered a number of jams to taste and choose among while a different store offered only a few jam choices (Schwartz, 2005, pp. 19-20). When offered more choices of jam, people made *fewer* purchases of jam. What's more, when offered more choices, buyers were *less* happy with the purchases they did make.

There are additional examples that relate to the concept of "anchoring." Research has shown that consumer choice for an item is affected drastically by the other items ("anchors") offered around it. For example, when someone decides how much to spend on a new suit, the prices of suits *they will not buy* affect their decisions about suits they *will* buy. As Barry Schwartz describes in *The Paradox of Choice*, in a fancy department store displaying suits costing over \$1500, an \$800 pinstripe may seem like a bargain, and will likely be purchased, but in a store where most suits cost less than \$500, that same \$800 suit will seem extravagant, and will probably be left on the shelf (Ibid., pp. 61-62). Another example comes from a catalog of high-end kitchen equipment offering a bread maker for \$279. Sometime later, the catalog added

²⁰ In fact, rational choice theorists would also assert that taking a bullet instead of signing a contract would *also* be rational, if that is what one observes. If it were not rational, the person would not have chosen it.

a deluxe version for \$429. The catalog did not sell many of the expensive ones, but the sales of the \$279 version almost doubled (Ibid.). Traditional theory would predict that rational actors would be unaffected by extraneous information, such as the price of a product that is not purchased. But as a matter of fact, people's choices can be manipulated in predictable ways, and marketers take advantage of these "irrationalities" all the time.

The rationality of choice also depends on the ability of people to know and predict their own preferences. Efficient outcomes occur only if the choices made in fact increase utility. If the actual results of an exchange do not map very well onto what was expected, then efficiency will not correlate very well with choice, either. Worse, if utility is only randomly associated with choice, then one cannot be sure that respecting choice will have any connection with utility (or happiness) at all.

Indeed, the studies that are relevant here suggest that humans have a difficult time anticipating what will make them happy in the future. This is in part based on yet another problem with how humans process information—that many people cannot even correctly keep track of what made them happy in the past. This is because the human brain collapses past experiences and stores them as memories in ways that distort their accuracy. According to some studies, humans remember past experiences by condensing them to their salient elements, which tend to be whatever was best or worst about the experience, and whatever happened first and last (Ibid., p. 49; Gilbert, 2006, pp. 202-205). This makes a significant difference in how people make choices, since their choices about the future are inevitably based on their poor memories of past choices. Thus, if their memories are not accurate reflections of how they felt in the past, then their choices will lead to poor results even by their own assessment.

The most colorful example of this difficulty comes from a study of patients undergoing colonoscopies (Schwartz, 2005, p. 50). The painful procedure entails a physician manually inserting a probe into the colon. The procedure is painful throughout, but when the doctor manipulates the probe it is particularly so. In the study, the doctors removed the probe from some patients as soon as the procedure was done. For other patients, the doctor would leave the probe motionless inside the colon for 20 additional seconds. While painful, these last 20 seconds are less painful than the earlier part of the procedure. This latter group of patients thus endured more total time with a probe inside their colon, and the total amount of pain they suffered was greater than the first group by any objective or subjective measure the additional 20 seconds were less painful than the earlier part of the procedure. The remarkable finding from this study was that the latter group of patients, who had undergone more discomfort and a longer procedure, *remembered* less discomfort than the first group (Ibid.). Their memories were influenced less by the aggregate amount of discomfort than by what they felt during the last 20 seconds. This is more than just an esoteric point from medical research. Those who remembered less discomfort (even though they had actually suffered more) were *more willing to return for annual screenings*.

There are literally thousands of similar studies showing that people are not as economically rational as the rationality theory would assume. Authority, marketing, memories, and lack of information clearly affect people. People act out of altruism and spite. People misremember their pasts and do not accurately predict their futures.²¹

All this is to say that people's actual choices are hardly a reliable method by which to make economic judgments, even if efficiency is our only or primary goal. Here I am saying

²¹ For an excellent review of these studies in a very readable form, see Gilbert (2006).

nothing original; even if the notion of choice continues to have power in political discourse, its explanatory power in economics is undergoing withering attack. The important point here is that many traditional Law and Economics scholars do not seem to realize this, and most of those who do not realize this seem to work in the area of corporate law.

If choice has such limited use in actuality, why is it used so often at the level of rationale and justification, whether in politics or in legal doctrine? And why is it that we see it now, perhaps more than ever, in debates ranging from school vouchers to corporate law?

Allow me to venture one hypothesis: despite its limited value in explaining anything, choice is *very* powerful as a rationale brought to bear in defense of the status quo or in order to bolster existing power and wealth matrixes. Socially, economically and politically, Americans are returning to a *Lochnerian* era, where a fixation on choice protects the prerogatives of the already privileged party. The rhetoric of choice and contract protects the existing power dynamic and economic status quo.

Recall the earlier arguments about school vouchers, tort reform, pornography, gay rights, and the like, and how the rhetoric of choice was used to protect existing power dynamics. With regard to school vouchers, studies are beginning to show that school “choice” does not benefit the less well off among us by actually giving them more educational opportunities. Rather, it merely reduces the costs of private schools for those who already go to private schools (Schiller, 2001, p.2; Lips and Jacoby, 2001, p. 8; Murphy, Nelson and Rosenberg, 1997, p. 16). Children from disadvantaged communities end up staying in the same schools where they started, but with less public money at their disposal because a portion of public education funds now flow to private schools. Children who started out with more opportunity get even more choice. If true, this trend will exacerbate existing educational inequality (Chemerinsky, 2003; Green, 2002).

With tort reform, the mantra of personal responsibility is used to focus attention on the actions of those who suffer harms caused by certain products or services. As individuals’ decisions to undergo the surgery or eat the Big Mac become the focus, attention is shifted away from the decisions of those who manufacture those products or provide those services, even if those decisions are negligent or reckless toward the possibility of harms arising from those products. This adjustment in public attention has the effect of insulating the corporate decision makers from liability and shifting the cost of injuries away from corporations and onto customers, patients, or other tort victims.

The same is true about the other examples mentioned at the beginning of this paper. Respect for the choices of sex workers shifts attention away from the constraints under which those choices are made, and makes into an afterthought the culpability of the (mostly) men who take advantage of the availability of sex work. And while there are reasonable grounds for disagreement on the point (Law, 2000), the wide availability of pornography and sex work would seem to underscore the existing status quo of sex relations rather than undermine it (MacKinnon, 1993).

Even in many of the current civil rights battles, choice rhetoric is used as a way to maintain the status quo. In the debates about gay rights, for example, the rhetoric of choice is used in two ways to justify the existing status quo of discrimination on the basis of sexual orientation. If sexual orientation is a choice, then many people on both sides of the debate seem to assume that the grounds for protection against discrimination are less than they would be if sexual orientation is immutable. This argument mimics the arguments made in constitutional law equal protection cases relating to race and sex discrimination. In part because neither race

nor sex is a matter of choice, statutes referencing such classifications are deemed constitutionally suspect. But the problem arises when these assumptions are transplanted into the arguments about discrimination based on sexual orientation. Many people on *both* sides of the debate seem to assume that if sexual orientation is not a function of choice then it might be protected; if it is a matter of choice then it is not.²² And note that for some, discrimination against LGBT (lesbian, gay, bisexual and transgendered) people may be appropriate even if sexual orientation *is* immutable, since the choice of where to live is still a choice. If Calabresi is right, the mere choice of living in a jurisdiction where being gay is unprotected constitutes a choice to be subject to such discrimination.

In my view, the same thing happens in corporate law.²³ Government should not step in to adjust corporate governance, because doing so would upset voluntary arrangements. If management chooses to lay off employees or close a factory, the employees have no reason to complain unless they have explicit job protection provisions written into their contract (*cf. Local 1330, United Steel Workers v. United States Steel Corp.*). They chose to take on the risk of job loss. If the management acts negligently and hurts the financial fortunes of the company, the employees and shareholders cannot complain since they voluntarily chose to run the risk of mismanagement (*cf. Joy v. North*). Communities that offer millions of dollars in tax breaks to entice companies to locate there or stay in place have no recourse if the company takes the money and leaves. They chose to give the money, and if the community wanted to protect itself it should have done so through contract (*Ypsilanti Charter Township of Ypsilanti v. General Motors Corp.*).

But of course depending on explicit contract as the only method of recourse or self-protection is hardly a neutral principle. Parties to contracts only get the protection that they are able to pay for. One receives only the protection that one's market power can seize. If you are a community struggling to maintain yourself, an employee who cannot easily pick up and move to the next town or state or country; or a minority shareholder whose voting power is nonexistent, then contract law does not offer many protections. One must look for recourse to other areas of law – to areas of law that use principles of fiduciary duty or some other source of obligation. But if the only law available is based on contract, then we are back at square one, with the powerless unable to improve their lot. They cannot choose to do better unless another party chooses to

²² Though there are exceptions, many people on both sides of the debate on gay rights tend to make the immutability assumption (Balog (2006); Pickhardt (1998)). This is an extremely problematic assumption, however. *See generally* Richards (1999). Even if one's decision as to sexual orientation is undetermined by genetic makeup, it may nevertheless be the kind of choice that is deserving of not only political protection but heightened constitutional protection as well. For further discussion, *see* Smith (2005); Marcossou (2001); Halley (1994) (arguing that litigation over sexual orientation should not rely on the immutability of sexual orientation). Cases that try to come to terms with this problem include *Nabozny v. Podlesny* (holding that high school students who were homosexual, regardless of whether it is a choice or not, could pursue claims for a violation of equal protection against school administrators who were deliberately indifferent to harassment and beatings inflicted on the students); *Montgomery v. Indep. Sch. Dist. No. 709* (holding that a student who was harassed and beaten on the basis of his perceived sexual orientation could proceed with an equal protection claim, regardless of whether he is a member of a specially protected class or not); *Tanner v. Oregon Health Sciences Univ.* (“cases make clear that immutability—in the sense of inability to alter or change—is not necessary”); *High Tech Gays v. Defense Indus. Sec. Clearance Office* (applying rational basis review to a policy that discriminated on the basis of sexual orientation because “[h]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes”).

²³ For another excellent analysis of this point, *see* Greenwood, D. (2005).

allow them to do so. So in corporate law as elsewhere, the rhetoric of choice is a powerful tool to protect existing market power.

What bears attention, however, is that the fixation on choice is increasingly being used throughout politics and law for the same ultimate purpose: to maintain existing economic and social power. If the status quo is deserving of defense and congratulation, then legal doctrines recognizing choice are the way to go. If not, we need to find a better way, and not just in arguments about school vouchers, tort reform, gay rights, and pornography, but in corporate law as well.

6. BEYOND CHOICE

Where does this take us? I must be much more tentative in my prescriptions than in my descriptions, but I am beginning to believe that we are on the cusp of a new stage of legal and political development over the issue of choice and contract. We are about to move from mere choice to something else, and the move may be analogous to similar historical developments in the civil rights movements to protect people from discrimination based on sex and race.²⁴

The move looks like this: the focus on choice in the contexts mentioned in this article is something like formal neutrality in constitutional law and political philosophy. As in many first-generation civil rights movements, the emphasis is on formal equality: remove legal impediments that apply to a certain group. "Do not allow the law to impose special disabilities on us. At least allow us to be formally equal. At least allow us to choose, engage in contracting as any other person would be allowed to do."²⁵

But we have recognized in constitutional law and political philosophy that formal neutrality, over time, simply replicates existing power relationships. Formal neutrality removes legal impediments, but it does not redress inequalities.²⁶ *A focus on choice does the same thing; it gives everyone the same right to be acted on by others and by the market.*²⁷

²⁴ For a more robust treatment of this point, see Greenwood (2003).

²⁵ *Civil Rights Act of 1866* ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."). See also Justice Clarence Thomas's dissent, quoting Frederick Douglass, in *Grutter v. Bollinger*, the case upholding college admissions policies that consider race in order to promote a diverse student body: "[I]n regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply justice. The American people have always been anxious to know what they shall do with us...I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! ... And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! ... [Y]our interference is doing him positive injury." *What the Black Man Wants: An Address Delivered in Boston, Massachusetts, on 26 January 1865*, reprinted in 4 *The Frederick Douglass Papers* 59, 68 (J. Blassingame & J. McKivigan eds. 1991) (emphasis in original), quoted in *Grutter v. Bollinger*, 539 U.S. 306, 349-50 (2003) (Thomas, J., dissenting).

²⁶ See Greenfield (2006, p. 18) ("The most profound difficulty in the enablingism account [that corporate law simply enables parties to the corporate contract to dictate their own relationships] is the assertion that the corporate contract optimizes the interests of the various parties to the deal. Because law is supposed to stand aside, any contract that results from a negotiation depends upon the power of the parties going into the negotiation. The resulting contract defining the terms of corporate governance thus mirrors the preexisting market power of the various parties. To say

Over the course of the twentieth century, we learned this truth with regard to economic choice, and race and sexual discrimination. Mere choice, in the simple, neoclassical, Posnerian frog sense, does not help much if one does not have meaningful alternatives, sufficient information, and adequate resources.²⁸ The New Deal embodied a notion that economic choice needed substantive support; the civil rights movements learned the same lessons, even if they were less successful in winning the public policy changes necessary to make the choices real. We need to keep these insights in mind even now, especially with the rhetoric of choice spreading throughout politics and law.

How can we make these insights accessible? One idea is to make a conceptual shift, distinguishing between choice and something more robust. Perhaps we could use the term “consent” to identify the more meaningful notion. While choice is something even a frog can do, it takes a human to consent. The notion of consent takes into account the quality of knowledge and information available; the existence of alternatives; the oppressiveness or lack thereof of the situation. We know something of what consent looks like; our intuitions are that it should indeed be respected. The distinction may resonate with people and make it easier to challenge the choice rhetoric that has become so pronounced.²⁹

Moving from choice to consent would mean that we would be especially skeptical of areas of law founded on choice alone, instead of consent. Moving from choice to consent would encourage us to build capacity for consent (in our children, in our schools, in our workplaces, in our laws) rather than respecting mere choice. Moving from choice to consent would mean that we should use metrics for policy other than simple unconsidered preferences. Moving from choice to consent would make us quite wary of areas of our lives where our choices and preferences are manipulated.

We would recognize that choice cannot be our touchstone. It purports to explain and excuse everything; but in fact it explains nothing. It is used, cynically, to justify the existing balance of power. As George Annas (1998, p. xv) has said, “[All this is] not to say that choice is bad – only that limited, illusory, or coercive choices do not deserve to be honored with liberty rhetoric or taken seriously... In America, when we are told of something new that is proposed

that a contract optimizes the interests of the parties may be true in that it allows the parties to improve on what would be their lot without such a contract. But it is emphatically not the case that all contracts are fair, just, supportive of human dignity, or consistent with the interests of society as a whole.”

²⁷ As Anatole France (1894, p. 95) observed: “The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.”

²⁸ See Benforado, Hanson, and Yosifon (2004, p. 1797) (“While the law sometimes recognizes a concept of ‘imperfect information’ there is no similar concept of ‘imperfect autonomy.’ We see ‘free choice’ or ‘no choice’ and nothing in between. And yet ‘imperfect autonomy’ is the reality of our predicament.”).

²⁹ This shift in terminology would only work if “consent” is indeed considered more meaningful than choice. In present usage, this may or may not be the case. In some situations, the term “consent” does not connote the robust level of agency I want to propose. For example, in the area of so-called consensual searches under the Fourth Amendment, there is no requirement at all that the person “consenting” to a search even be aware that the search can be refused (*Schneekloth v. Bustamonte*), and there is no requirement that the situation itself be free of coercive elements (*United States v. Drayton*) (search deemed consensual even though conducted in a bus with an armed police officer at the front and rear of the bus and another bending over passenger requesting search). Outside the Fourth Amendment context, however, the term “consent” does imply a level of information and understanding that is worth building on. Consider the requirements for consent in the context of medical care, for example, which urge doctors to make sure the patient consenting to treatment have a level of understanding and knowledge before making a choice (Annas, 1998).

because it will increase choice and control, we should all ... dig deeper to try to discover what's really at stake."

NOTES

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REFERENCES

- 30 Days, "Atheist/Christian," aired on the FX network, originally broadcast August 9, 2006.
- Angier, N. (July 18, 1993), "Study of Sex Orientation Doesn't Neatly Fit Mold", *New York Times*, p. A24.
- Annas, G.J. (1998), *Some Choice: Law, Medicine, and the Market*, Oxford University Press, New York, NY.
- Arlen, J., Spitzer, M., and Talley, E. (draft, April 21, 2000), "Endowment Effects, Other-Regarding Preferences and Corporate Law", *Olin Working Paper No. 00-2 2*.
- Balog, K. (2006), "Equal Protection for Homosexuals: Why the Immutability Argument is Necessary and How It is Met", *Cleveland State Law Review*, Vol. 53, p. 557.
- Benforado, A., Hanson, J., and Yosifon, D. (2004), "Broken Scales: Obesity and Justice in America", *Emory Law Journal*, Vol 53, p. 1645.
- Byrne, C.A. (July 8, 1999), "School Choice is Civil Rights Issue of New Century", *The Sun*, available at:
http://www.acton.org/ppolicy/education/theology/new_century.html.
- Caffrey, A. (Apr. 3, 2005), "Can You Manage Your Own Money? Amid Push to Privatize Social Security, Many in US Admit They're Daunted or Don't Know Investing Basics", *Boston Globe*, p. K1.
- Calabresi, S.G. (2004), "Lawrence, The Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal", *Ohio State Law Journal*, Vol. 65, p. 1123.
- Chemerinsky, E. (2003), "Separate and Unequal: American Public Education Today", *American University Law Review*, Vol. 52, p. 1474.
- Coats, D. (Senator) (1996), "Statement of Senator Coats", *Congressional Record*, 142 Cong. Rec. S10245, 10277.
- Coquillette, D.R. (2d Ed., 2004), *The Anglo-American Legal Heritage*, Carolina Academic Press, Durham, NC.
- Easterbrook, F.H. and Fischel, D.R. (1982), "Antitrust Suits by Targets of Tender Offers", *Michigan Law Review*, Vol. 80, p. 1177, n.57.
- Easterbrook, F.H. and Fischel, D.R. (1991), *The Economic Structure of Corporate Law*, Harvard University Press, Cambridge, MA.

- David Ellerbrock, D. (March 20, 1995), "Unfair Health Insurance," *The Daily Collegian Online*, available at: <http://www.collegian.psu.edu/archive/1995/03/03-20-95tdc/03-20-95dops-letter-1.asp>.
- Fischel, D.R. (1982), "The Corporate Governance Movement", *Vanderbilt Law Review*, Vol. 35, pp. 1273-74.
- France, A. (1894), *The Red Lily*, (Stephens, W., trans. 1921), John Lane, New York, NY.
- Fukuyama, F. (October 13, 2008), "The Fall of America, Inc.", *Newsweek*, available at: <http://www.newsweek.com/id/162401/output/print>.
- Gilbert, D. (2006), *Stumbling on Happiness*, Random House/Knopf Publishing, New York, NY.
- Green, S.K. (2002), "The Illusionary Aspect of "Private Choice" for Constitutional Analysis", *Willamette Law Review*, Vol. 28, pp. 557-60.
- Greenfield, K. and Nilsson, J.E. (1998), "Gradgrind's Education: Using Dickens and Aristotle to Understand (and Replace?) the Business Judgment Rule", *Brooklyn Law Review*, Vol. 63, p. 799.
- Greenfield, K. (2006), *The Failure of Corporate Law*, University of Chicago Press, Chicago, IL.
- Greenwood, D. (2005), "Markets and Democracy: The Illegitimacy of Corporate Law", *University of Missouri-Kansas City Law Review*, Vol. 74, No. 1, p. 41.
- Greenwood, D. (2003), "Gendered Workers/Market Equality," *Texas Journal of Women and the Law*, Vol. 12, p. 323.
- Hale, R. (1923), "Coercion and Distribution in a Supposedly Non-Coercive State", *Political Science Quarterly*, Vol. 28, p. 470.
- Halley, J.E. (1994), "Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability", *Stanford Law Review*, Vol. 46, p. 503.
- "Health Reform at Risk – Coverage of Abortion Under National Healthcare Policy – Editorial", (July 16, 1993), *Commonweal*, available at: http://findarticles.com/p/articles/mi_m1252/is_/ai_14061944.
- Horwitz, R.B. (1991), *The Irony of Regulatory Reform: The Deregulation of American Telecommunications*, Oxford University Press, New York, NY, p. 264.
- Jolls, C., Sunstein, C., and Thaler, R. (1998), "A Behavioral Approach to Law and Economics", *Stanford Law Review*, Vol. 50, p. 1471.
- Law, S.A. (2000), "Commercial Sex: Beyond Decriminalization", *Southern California Law Review*, Vol. 73, p. 540.
- Lips, C. and Jacoby, J. (Sept. 17, 2001), "The Arizona Scholarship Tax Credit: Giving Parents Choices, Saving Taxpayers Money", *The Cato Institute/Policy Analysis*, available at: <http://www.cato.org/pubs/pas/pa414.pdf>, p. 8.
- Macey, J.R. (1991), "An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties", *Stetson Law Review*, Vol. 21, pp. 42-43.
- MacKinnon, C. (1993), *Only Words*, Harvard University Press, Cambridge, MA.
- Marcosson, S. (April 2001), "Constructive Immutability", *University of Pennsylvania Journal of Constitutional Law*, Vol. 3, p. 646.
- Mitchell, L. and Mitchell, D.T. (2006), *Corporations: Cases and Materials*, Carolina Academic Press, Durham, NC.

- Murphy, D., Nelson, F.H., and Rosenberg, B. (1997), "The Cleveland Voucher Program: Who Chooses? Who Gets Chosen? Who Pays?", *American Federation of Teachers*, available at: <http://www.aft.org/research/downloads/charter/ClevelandVoucherProgram.pdf>, p. 16.
- National Education Association, *Vouchers*, available at: <http://www.nea.org/vouchers/index.html>.
- Nozick, R. (1974), *Anarchy, State, and Utopia*, Basic Books, New York, NY.
- Parents for Choice in Education (n.d.), "School Choice Info/Frequently Asked Questions", available at: http://www.choiceineducation.org/schoolchoice_faq.php.
- Pickhardt, J. (1998), "Choose or Lose: Embracing Theories of Choice in Gay Rights Litigation Strategies", *New York University Law Review*, Vol. 73, pp. 928, 952.
- Posner, R.A. (3d ed. 1986), *Economic Analysis of Law*, Little, Brown and Company, Toronto, ON..
- President Bush, G.W. (Feb. 2005), "Strengthening Social Security for the 21st Century", available at: <http://www.whitehouse.gov/infocus/social-security/200501/socialsecurity.pdf>.
- Richards, D. (1999), *Identity and the Case for Gay Rights*, University of Chicago Press, Chicago, IL.
- Rousseau, J. (1762), *The Social Contract*, Hayes Barton Press (2005), Raleigh, NC.
- Schiller, Z. (Sept. 2001), "Cleveland School Vouchers: Where the Students Come From, Policy Matters", available at: <http://www.policymattersohio.org/pdf/ClevelandVouchers.pdf>, p. 2.
- Schwartz, B. (2005), *The Paradox of Choice: Why More is Less*, HarperCollins, New York, NY.
- Simmons, R. (2005), "Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine", *Indiana Law Journal*, Vol. 80, p. 773.
- Smith, J.B. (May 2005), "The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation", *Fordham Law Review*, Vol. 73, p. 2769.
- Solinger, R. (2002), *Beggars and Choosers: How the Politics of Choice Shaped Adoption, Abortion, and Welfare in the United States*, Macmillan/Hill and Wang, New York, NY.
- Strauss, M. (2001), "Criminal Law: Reconstructing Consent", *Journal of Criminal Law and Criminology*, Vol. 92, p. 214.
- Sunstein, C. (1993), *The Partial Constitution*, Harvard University Press, Cambridge, MA.
- Sunstein, C. (1997), *Free Markets and Social Justice*, Oxford University Press, New York, NY.
- Thompson, R.B. (2000), "Teaching Business Associations: Norms, Economics and Cognitive Learning", *Georgia Law Review*, Vol. 34, p. 1000.
- Toner, R. (Mar. 22, 2005), "It's 'Private' vs. 'Personal' in Debate Over Bush Plan", *New York Times*, p. A16.
- Wertheimer, A. (2003), *Consent to Sexual Relations*, Cambridge University Press, Cambridge, UK.

Whorf, R.H. (2001), "Consent Searches Following Routine Traffic Stops: The Troubled Jurisprudence of a Doomed Drug Interdiction Technique", *Ohio Northern University Law Review*, Vol. 28, p. 21.

Wood, S. (2006), "On Language: Choice", *BITCHfest*, p. 144-147.

Laws and Statutes

Civil Rights Act of 1866, 42 U.S.C. § 1981 (1866).

Commonsense Consumption Act of 2005, S. 908, 109th Cong. (2005).

Protection of Lawful Commerce in Arms Act, S. 397, 109th Cong. (2005).

Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Cong. (2005).

Protection of Lawful Commerce in Arms Act, H.R. 800, 109th Cong. (2005).

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1964)

Fair Housing Act, 42 U.S.C. § 3604 (1968).

Cases

Dow Chemical Co. v. United States, 476 U.S. 227 (1986).

Georgia v. Randolph, 547 U.S. 103 (2006).

Grutter v. Bollinger, 539 U.S. 306, 349-50 (2003).

Harris v. McRae, 448 U.S. 297 (1980).

High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563 (9th Cir. 1990).

Joy v North, 692 F.2d. 880 (1982).

Katz v. United States, 389 U.S. 347 (1967).

Kyllo v. United States, 533 U.S. 27 (2001).

Local 1330, United Steel Workers v. United States Steel Corp., 631 F.2d 1264 (1980).

Lochner v New York, 198 U.S. 45 (1905).

Montgomery v. Independent School District No. 709, 109 F. Supp. 2d 1081 (D. Minn. 2000).

Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996).

Roe v Wade, 410 U.S. 113 (1973).

Schnecko v. Bustamonte, 412 U.S. 218 (1973).

State v. Augafa, 92 Haw. 454 (Haw. 1999).

State v. Henry, 151 Ohio App. 3d 128 (Ohio App. 2002).

Tanner v. Oregon Health Sciences Univ., 157 Or. App. 502 (Or. App. 1998).

Thompson v. Johnson County Community College, 930 F. Supp. 501 (D. Kan. 1996).

United States v. Bifield, 498 F. Supp. 497 (D. Conn. 1980).

United States v. Drayton, 536 U.S. 194 (2002)

United States v. Lopez, 585 F. Supp. 1400 (D. Conn. 1984).

United States v. Taketa, 923 F.2d 665 (9th Cir. 1991).

United States v. Gonzalez, 328 F.3d 543 (9th Cir. 2003).

Ypsilanti Charter Township of Ypsilanti v. General Motors Corp., 506 N.W.2d 556 (Mich. Ct. App. 1993).