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Corporate Social Responsibility after Disaster

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CORPORATE SOCIAL RESPONSIBILITY AFTER DISASTER

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INTRODUCTION

In recent years, corporations have devoted substantial resources to disaster relief worldwide.¹ For instance, Wal-Mart garnered favorable attention for its contributions in New Orleans and the Gulf Coast after Hurricane Katrina.² According to company press releases, Wal-Mart recently gave hundreds of thousands of dollars for disaster relief in Brazil following a flood,³ and it has pledged millions in support of Japan in the wake of the tsunami.⁴

Large corporations have not only the economic resources, but also the logistical capacity and operational expertise to make a difference in the first terrible days after a disaster. However, commentators disagree about how best to harness corporate resources to support disaster relief efforts.⁵ This is not a new issue; the disaster law and policy discussion is only the latest iteration of a longstanding debate concerning the proper role of the corporation in society.⁶

1. See Anisya Thomas & Lynn Fritz, *Disaster Relief, Inc.*, HARV. BUS. REV., Nov. 2006, at 114, 114 (stating that “American companies mobilized more than \$565 million” for disaster relief efforts in Southeast Asia after the 2004 tsunami).

2. See Michael Barbaro & Justin Gillis, *Wal-Mart at Forefront of Hurricane Relief*, WASH. POST, Sept. 6, 2005, at A1 (“Wal-Mart’s response to Katrina—an unrivaled \$20 million in cash donations, 1,500 truckloads of free merchandise, food for 100,000 meals and the promise of a job for every one of its displaced workers—has turned the chain into an unexpected lifeline for much of the Southeast. . . .”); Devin Leonard, *The Only Lifeline was the Wal-Mart*, FORTUNE, Oct. 3, 2005, at 55, available at http://money.cnn.com/magazines/fortune/fortune_archive/2005/10/03/8356743/index.htm.

3. Press Release, Walmart, Walmart Commits More Than \$750,000 in Cash and In-Kind Donations to Support Brazil Flood Victims (Feb. 1, 2011), available at <http://walmartstores.com/pressroom/news/10528.aspx>.

4. Press Release, Walmart, Walmart Contributes \$5 Million in Response to Japan Earthquake (Mar. 15, 2011), available at <http://walmartstores.com/pressroom/news/10558.aspx>.

5. See *infra* notes 13–19.

6. See C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century*, 51 U. KAN. L. REV. 77, 78 (2002) (“Legal debates over corporate social responsibility stretch from the 1930s to the twenty-first century.”) (citing A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932)).

Broadly speaking, there are two frameworks for assessing corporate social responsibility: a “classical” framework that treats non-shareholder interests as outside the corporation’s proper concern, and a “progressive” framework that encourages corporations to pursue a broader social agenda.⁷ According to the classical framework, corporations contribute to society by maximizing profits for their shareholders.⁸ On this view, giving managers discretion to use corporate resources for other purposes only exacerbates agency costs between the managers and the shareholders who entrust their capital to the corporation.⁹ By contrast, the progressive framework emphasizes that corporations owe their existence to the state and benefit from limited liability and other special protections and thus concludes that corporations have a special duty to serve a broader community of stakeholders.¹⁰

The corporate social responsibility debate has important implications for disaster law and policy.¹¹ At bottom, the issue is whether corporations can advance socially desirable objectives consistent with their primary obligation to earn a profit for their shareholders.¹² Some commentators contend that by enhancing public-private partnerships, government can

7. See JOHN R. DANLEY, *THE ROLE OF THE CORPORATION IN A FREE SOCIETY* 3 (1994) (identifying “classical” and “managerial” (i.e., “progressive”) arguments concerning corporate responsibility). Similarly, Professor Harwell Wells contends that a binary structure underlies corporate responsibility debates from the 1920s to the present. Wells, *supra* note 6, at 81 (“From debate to debate, to be sure, the exact legal means for forcing managers and directors to assume a legal duty to nonshareholders changed, but the general form remains: duty to owners alone versus duties to many constituencies.”).

8. For the best-known articulation of this view, see Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 33 (contending that management’s “responsibility [to shareholders] is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society.”)

9. See D. Gordon Smith, *Response: The Dystopian Potential of Corporate Law*, 57 EMORY L.J. 985, 1007 (2008) [hereinafter Smith, *Response*]; Faith Stevelman Kahn, *Pandora’s Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579 (1997). Also, redistributive decisions made by corporate managers may lack democratic legitimacy. See, e.g., DANLEY, *supra* note 7, at 9 (arguing that “debate over the appropriate corporate role remains a surrogate for debate over the appropriate role of government”).

10. See, e.g., Kent Greenfield, *Proposition: Saving the World With Corporate Law*, 57 EMORY L.J. 948, 962–63 (2008) (contending that corporations “are state creations, and no state in its right mind would willfully allow for the creation of institutions as powerful as corporations unless there was a belief that, on balance, society would be better off because of their existence”).

11. Disaster law has emerged recently as a field of academic inquiry. The first book to offer a comprehensive treatment appeared in 2006. See *DISASTERS AND THE LAW: KATRINA AND BEYOND* (Daniel A. Farber & Jim Chen eds., 2006). Disaster law, according to Farber and Chen, “is about assembling the best portfolio of legal rules to deal with catastrophic risks—a portfolio that includes prevention, emergency response, compensation and insurance, and rebuilding strategies.” *Id.* at xix. In this Article, we focus in particular on the legal rules that impact business recovery.

12. See DANLEY, *supra* note 7, at 3.

incentivize the use of private distribution networks like Wal-Mart's in a coordinated effort with public disaster response agencies.¹³ With the right market incentives, corporations can be induced to perform a socially useful function.¹⁴ Other scholars cite Wal-Mart's performance after Katrina as evidence that profit-oriented corporations already have appropriate incentives and will provide necessary relief on their own without the waste and mismanagement too often associated with public relief efforts.¹⁵

On the other hand, some scholars contend that the business corporation's for-profit motivation should disqualify it from serving as a substitute for public disaster relief.¹⁶ According to these commentators, essential government disaster relief functions must not be entrusted to private industry.¹⁷ Indeed, commentators have argued that public-private partnerships are inherently dangerous because private corporations can exploit disaster to serve their own ends and will corrupt public institutions

13. See Robert J. Rhee, *Catastrophic Risk and Governance after Hurricane Katrina: A Postscript to Terrorism Risk in a Post-9/11 Economy*, 38 ARIZ. ST. L.J. 581, 605 (2006) ("It is easy to see how the managerial, logistical and technological expertise of large, sophisticated private firms can provide superior services under crisis conditions."); Susan Rosengrant, *Wal-Mart's Response to Hurricane Katrina: Striving for a Public-Private Partnership*, Kennedy School of Gov't Case Study No. C16-07-1876.0, at 4 (2007). See also Barbaro & Gillis, *supra* note 2 ("[T]he chain's huge scale is suddenly an advantage in providing disaster relief. The same sophisticated supply chain that has turned the company into a widely feared competitor is now viewed as exactly what the waterlogged Gulf Coast needs."); Thomas & Fritz, *supra* note 1, at 117 ("What these agencies need from corporations is not only their wealth of funds and goods but their wealth of operational expertise.").

14. This position is consistent with a broader argument that corporate philanthropy can also serve the goal of profit maximization. See, e.g., Michael E. Porter & Mark R. Kramer, *The Competitive Advantage of Corporate Philanthropy*, HARV. BUS. REV., Dec. 2002, at 57, 68 ("[T]he more closely a company's philanthropy is linked to its competitive context, the greater the company's contribution to society will be.").

15. See Steven Horwitz, *Wal-Mart to the Rescue: Private Enterprise's Response to Hurricane Katrina*, 13 INDEP. REV. 511, 512 (2009) ("Wal-Mart's successful response to Katrina, along with the failure of FEMA and other government agencies, seems to confirm the more general conclusion of modern political economy that private institutions better mobilize resources than do public agencies. To those steeped in the literature of modern Austrian economics, the new institutional economics, property-rights economics, and public-choice theory, Wal-Mart's superior performance comes as no surprise."); Russell S. Sobel & Peter T. Leeson, *The Use of Knowledge in Natural-Disaster Relief Management*, 11 INDEP. REV. 519, 529 (2007) (arguing that "government must be removed from disaster management to the same extent that it is removed from all other successful market activities"); Peter J. Boettke & Daniel J. Smith, *Private Solutions to Public Disasters: Self-Reliance and Social Resilience* (Geo. Mason Univ. Mercatus Ctr., Working Paper No. 09-29, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1720683.

16. See Scott Harshbarger & Goutam U. Jois, *Looking Back and Looking Forward: Sarbanes-Oxley and the Future of Corporate Governance*, 40 AKRON L. REV. 1 (2007).

17. See Corina McKendry, *Disaster for Sale: Neoliberalism and the Privatization of Sociocultural Disaster Relief*, Paper Prepared for the 48th Annual Int'l Studies Assoc'n Convention, Chicago, IL (Feb. 28-Mar. 3, 2007), available at http://citation.allacademic.com/meta/p_mla_apa_research_citation/1/7/9/2/0/pages179200/p179200-1.php.

in the process.¹⁸ Thus, corporate altruism is not seen as a dependable substitute for an effective government-led response to disaster.¹⁹

This Article contends that the standard story concerning corporate social responsibility is incomplete because it features only the largest, publicly traded corporations.²⁰ As a consequence, scholars have overlooked the contributions of closely held, locally owned businesses, whether corporations, LLCs, or even franchise establishments with owners who reside in the community.²¹ Businesses are economic enterprises situated in a broader web of social networks.²² When business owners live where their customers live, these social networks strengthen as business ties overlap with other networks (school, church, recreation) that together form the fabric of place.²³ Locally owned businesses play a critical role in long-term disaster recovery, not only because they are motivated to reinvest in their own communities, but because the investments have social and economic significance.

The argument proceeds as follows. Part I contends that locally owned businesses have the social capital to help communities recover from

18. See generally NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* 357 (2007) (contending that disasters may be used to implement broad political and economic changes that favor the interests of the powerful). One commentator points out that the disaster-capitalism theory seems to lack supporting evidence. See NAOMI ZACK, *ETHICS FOR DISASTER* 116 (2009). However, Klein's arguments concerning the "many 'indirect costs' in the privatization of Katrina" appear to be well taken. *Id.* (noting that one contractor received \$12,500 per dead body removed while "local morticians and volunteers were barred from helping").

19. For example, if corporations are more likely to contribute when there are public relations benefits for doing so, they may ignore serious harms to more isolated communities. McKendry, *supra* note 17, at 12. Also, within a profit-maximizing orientation, there are limits to corporate generosity and the needs of disaster-stricken communities may far exceed those bounds. *Id.* at 13–14.

20. See, e.g., David L. Engel, *An Approach to Corporate Social Responsibility*, 32 *STAN. L. REV.* 1, 27 (1979) (stating that "because that is the type of corporation usually targeted for proposals of mandatory structural reform, I will confine my analysis of whether corporate altruism is a good thing to the case of the public firm" (citation omitted)); Wells, *supra* note 6, at 80 (observing that "[w]hen legal commentators discuss corporate social responsibility, they really mean the social responsibility of giant corporations").

21. In the context of closely held corporations, questions of social responsibility have usually meant the obligations, if any, owed by majority to minority shareholders. See, e.g., Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 *U. PA. L. REV.* 1675 (1990).

22. The central theme of new economic sociology is that economic action is always "embedded" in social context and "takes place within the networks of social relations that make up the social structure." Neil J. Smelser & Richard Swedberg, *The Sociological Perspective on the Economy*, in *THE HANDBOOK OF ECONOMIC SOCIOLOGY* 3, 18 (Neil J. Smelser & Richard Swedberg eds., 1994). In other words, rather than seeking to resolve the tension between profit maximization and altruism, we contend that the traditional criticisms of corporate social responsibility simply do not apply.

23. See, e.g., EMILY CHAMLEE-WRIGHT, *THE CULTURAL AND POLITICAL ECONOMY OF RECOVERY: SOCIAL LEARNING IN A POST-DISASTER ENVIRONMENT* 15–16 (2010) ("[C]ultural economy seeks to understand why and how market processes work the way they do within specific cultural contexts.").

disaster. Part II further defends the importance of social capital, arguing that social capital can enhance a disaster-struck area's prospects for recovery by solving economic coordination problems. Part III revisits the corporate responsibility debate and contends that the inclusion of closely held, locally owned businesses highlights social motivations for choice that neither position in the current debate captures.²⁴ Part IV argues that lawmakers and responsible officials should recognize the role of locally owned businesses in restoring normalcy after disaster and should include business-continuity measures in comprehensive disaster planning.

I. THE SOCIAL CAPITAL OF LOCALLY OWNED BUSINESS

Social capital “refers to the trust, social norms, and networks which affect social and economic activities.”²⁵ Among the most important social norms are “reliability, honesty, and reciprocity.”²⁶ Social capital is enhanced when individuals participate in group activities of various kinds and when those overlapping relationships enhance the overall level of trust.²⁷ In social networks characterized by high degrees of trust and reciprocity, “individuals and groups” are able “to accomplish greater things than they could by their isolated efforts.”²⁸ Social capital may also foster virtues such as volunteerism and civic engagement that are essential to the health of a community.²⁹ According to one scholar, “people who

24. Going forward, we refer simply to locally owned businesses. By this, we do not mean to include the headquarters of national or multinational corporations. Nor do we include closely held businesses that have expanded well beyond a particular region and that may rival public corporations in size. In short, our focus is the local economy and the businesses that comprise it.

25. Yuko Nakagawa & Rajib Shaw, *Social Capital: A Missing Link to Disaster Recovery*, 22 INT'L J. MASS EMERGENCIES & DISASTERS 5, 7 (2004).

26. Owen D. Jones, *On the Nature of Norms: Biology, Morality, and the Disruption of Order*, 98 MICH. L. REV. 2072, 2080 (2000) (book review).

27. See Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1476 (2005) (“Despite the vagueness of attempts to define social capital, something in the concept seems to be closely related to levels of societal trust and trustworthiness, and to the participation in private groups . . .”).

28. Frederick D. Weil, *Reconstituting Community: Varieties of Social Capital in Disaster Recovery* 3 (2007) [hereinafter Weil, *Reconstituting Community*], available at http://katrina.jwa.org/content/vault/Weil_KatrinaSurveyResearchNSFProposalPublic_84af6e7d37.pdf.

29. Robert Putnam describes these qualities as “civic virtues.” ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 136–37 (2000).

Social trust . . . is strongly associated with many other forms of civic engagement and social capital. Other things being equal, people who trust their fellow citizens volunteer more often, contribute more to charity, participate more often in politics and community organizations, serve more readily on juries, give blood more frequently, comply more fully with their tax obligations, are more tolerant of minority views, and display many other forms of civic virtue.

Id.

trust others are all-round good citizens, and those more engaged in community life are both more trusting and more trustworthy.”³⁰

Social capital is an important factor in disaster recovery.³¹ Rebuilding physical infrastructure alone is not enough.³² Resilience appears to have more to do with social infrastructure than with economic capital: “Communities with more trust, civic engagement, and stronger networks can better bounce back after a crisis than fragmented, isolated ones.”³³ To a greater extent than is commonly recognized, “[n]eighbors and friends—not government agencies or NGOs—provide the necessary resources for recovery after disaster.”³⁴

This Part uses examples drawn from the Gulf Coast and New Orleans after Hurricane Katrina to contend that locally owned businesses have an essential role to play in restoring a community after disaster. When locally owned businesses survive, they not only restore economic vibrancy but also replenish and strengthen the community’s social capital. Part I.A acknowledges that public corporations can provide crucial economic assistance and may aid in the restoration of physical infrastructure. Part I.B contrasts the economic role of public corporations with the potential value of locally owned businesses, arguing that local businesses are crucial to a disaster-impacted region’s social infrastructure and residents’ ability to return to a normal life.³⁵

A. *Bottled Water, Pop-Tarts, and Generators*

Wal-Mart’s performance after Hurricane Katrina provides an excellent illustration of the potential value of large business contributions to disaster recovery. As is well known, the storm caught the Federal Emergency

30. *Id.* at 137.

31. See Nakagawa & Shaw, *supra* note 25, at 12 (contending that “[d]isaster recovery is not only about building houses but the reconstruction of the whole community” and that “social capital is a crucial need”).

32. See Daniel P. Aldrich, *Fixing Recovery: Social Capital in Post-Crisis Resilience*, J. HOMELAND SECURITY (2010) [hereinafter Aldrich, *Fixing Recovery*] (“Recovery from natural and other disasters does not depend on the overall amount of aid received nor on the amount of damage done by the disaster; instead, social capital—the bonds which tie citizens together—functions as the main engine of long term recovery.” *Id.* at 1.).

33. *Id.* at 4 (citation omitted).

34. *Id.* at 6.

35. We do not mean to deny that public corporations can act based on social connections in particular communities. Indeed, research concerning the social capital of public corporations—how it is created, how it is accessed—could advance this Article’s central claim: that economic activity takes place in a social context and cannot fully be understood apart from that context.

Management Agency (“FEMA”) unprepared.³⁶ Wal-Mart, however, was ready. Its own meteorologists had been tracking the storm and predicted landfall near New Orleans “more than 12 hours before the National Weather Service issued a similar advisory.”³⁷ Wal-Mart’s Emergency Operations Center successfully routed trucks with “hundreds of thousands of cases of bottled water, Pop-Tarts, and generators to distribution centers” outside the city before the storm hit.³⁸

Within days, most of Wal-Mart’s stores in the Gulf Coast region were operational.³⁹ Indeed, “Wal-Mart employees arrived so early in the disaster area that they often wound up running their own relief efforts.”⁴⁰ According to one local official, “The Red Cross and FEMA need to take a master class in logistics and mobilization from Wal-Mart.”⁴¹ In addition to the goods, services, and employment made possible by its normal business operations, Wal-Mart donated \$20 million to support disaster relief efforts.⁴²

Other corporations also made substantial contributions. For instance, Dunkin’ Donuts provided bi-weekly food shipments to aid in the disaster recovery and made coffee and donuts available for relief workers.⁴³ McDonald’s gave approximately \$5 million and sent nonperishable food items to New Orleans.⁴⁴ SYSCO, a food distribution corporation, worked with the Red Cross to provide hot meals through mobile kitchens.⁴⁵ The

36. See William F. Shughart II, *Katrinanomics: The Politics and Economics of Disaster Relief*, 127 PUB. CHOICE 31, 32 (2006) (“Hurricane Katrina epitomizes governmental failure.”); David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375 (2011) (describing failure of government agencies to make specific advance plans for evacuation despite foreknowledge of many of the problems that actually arose).

37. Leonard, *supra* note 2. As is “run-of-the-mill” when its stores may be in the path of hurricanes, Wal-Mart relied upon “data culled from the National Weather Service and private meteorologists.” *Id.*

38. *Id.* Wal-Mart knew that these goods would be in demand, because it had “studied customer buying patterns in hurricane-prone areas.” *Id.*

39. *Id.*

40. *Id.* (“Philip Capitano, mayor of Kenner, says Wal-Mart’s trucks rolled into his city with supplies several days before the Red Cross and FEMA. ‘The only lifeline in Kenner was the Wal-Mart stores.’”).

41. *Id.* (internal quotation marks omitted).

42. See Barbaro & Gillis, *supra* note 2 (“Wal-Mart’s response to Katrina—an unrivaled \$20 million in cash donations, 1,500 truckloads of free merchandise, food for 100,000 meals and the promise of a job for every one of its displaced workers—has turned the chain into an unexpected lifeline for much of the Southeast . . .”).

43. Sheau Kai Lam & Vanessa Melofchik, *Strategies for an Integrated US Industry Response to a Humanitarian Disaster* 54 (June 2007) (unpublished Master of Engineering Systems thesis, Mass. Inst. Tech.), available at <http://hdl.handle.net/1721.1/40102>.

44. *Id.* at 66.

45. *Id.* at 72.

pharmacy chain CVS “donated approximately \$1.2 million in supplies and money to hurricane victims through the American Red Cross and other local relief organizations.”⁴⁶ CVS also “distributed water, ice and personal care items—goods that CVS carries.”⁴⁷

Corporate donations of goods, services, logistical support, and cash provided immediate and substantial support to the victims of Hurricane Katrina and are emblematic of the value of corporate relief efforts. However, there are limits to what outside entities—public or private—can provide for areas damaged by disaster. Achieving true “life recovery” for the residents requires the rebuilding of social connections within a community,⁴⁸ a task that is necessarily local and that includes the continued operation of locally owned businesses.⁴⁹

B. *The View from Bourbon Street*

This Part accepts the value of large-corporation involvement in disaster relief through philanthropy, public-private partnerships,⁵⁰ and ordinary profit-seeking operations, but offers an alternative version of corporate social responsibility in the wake of disaster. For all Wal-Mart’s well-deserved plaudits after Hurricane Katrina, its assistance to the community should not overshadow the efforts of local establishments like “Johnny White’s . . . a Bourbon Street bar that never closes.”⁵¹ As noted in a number of news accounts, Johnny White’s held true to its motto and stayed open through the storm, the power outages, and the looting that

46. *Id.* at 76.

47. *Id.*

48. See Mayumi Sakamoto & Katsuya Yamori, *A Study of Life Recovery and Social Capital Regarding Disaster Victims: A Case Study of Indian Ocean Tsunami and Central Java Earthquake Recovery*, 31 J. NAT. DISASTER SCI. 49, 49 (2009) (“[I]nternational assistance for victims in disaster-affected areas continues to be directed toward conventional needs such as housing reconstruction and livelihood development, often failing to fully consider life recovery.”). Public corporations may also contribute to life recovery. First, if they are local employers, a decision to reopen may prevent massive dislocation in the employment market. Second, at least in some cases, non-local businesses may offer quasi-public meeting space or otherwise assist in the creation of social capital.

49. See Roxanne Zolin & Fredric Kropp, *How Surviving Businesses Respond During and After a Major Disaster*, 1 J. BUS. CONTINUITY & EMERGENCY PLANNING 183, 183 (2006) (“One of the first needs in disaster recovery is distribution of goods and services. One of the first goals in reconstruction is regrowth of the economy. Both of these needs are served by business activity in the community.”).

50. See Mahfuzar Rahman Chowdhury, *Bridging the Public-Private Partnership in Disaster Management in Bangladesh* 395, 405, in COMMUNITY DISASTER RECOVERY AND RESILIENCY (DeMond Shondell Miller & Jason David Rivera eds., 2011) (“A public-private partnership is a joint venture operated concertedly through government and private initiatives.”).

51. AFP Wire Service, *New Orleans Bar Stayed Open Through Katrina and Chaos that Followed*, BREITBART.COM (Aug. 29, 2005, 08:55AM).

followed.⁵² In fact, the bar ignored official curfews: “Call it madness. Call it anti-authoritarian pigheadedness. Or call it dogged determination not to let a lifestyle die.”⁵³ Although presented as a human-interest story rather than as an example of disaster recovery, Johnny White’s was an essential part of the community’s resilience.

Locally owned businesses like Johnny White’s have access to and enhance social capital, “a concept that generally refers to ‘the stocks of social trust, norms, and networks that people can draw upon in order to solve common problems.’”⁵⁴ The owner, JD Landrum, seemed to recognize as much when he told a reporter, “You’ve got to have someplace open, even during the worst of times.”⁵⁵ Initially, “[t]he bar stools were filled with shell-shocked people who had swum out of their flooded homes to safety only to find that there was no help to be had from the powers that be.”⁵⁶ In the weeks that followed Katrina, “[t]he bar became a community center as a tight knit group of die-hards piled water and military rations up outside. It soon became a favorite among journalists and rescue workers who needed a place they could go to forget the despair and destruction.”⁵⁷

As Johnny White’s illustrates, local businesses are part of existing social networks through which social capital is accessed and used. Additionally, they provide meeting places that are necessary to maintain existing social networks and contribute to emergent networks.⁵⁸ Thus, locally owned businesses can be integral to achieving the normalcy required for the life recovery of disaster victims—“a primary aim of the disaster management process.”⁵⁹ A vision of corporate social responsibility after disaster that focuses on the economic capital of large,

52. *Id.*

53. *Id.*

54. John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 *FORDHAM L. REV.* 1927, 1953 (1999) (quoting Robert E. Lang & Stephen P. Hornburg, *What Is Social Capital and Why Is It Important to Public Policy*, 9 *HOUSING POL’Y DEBATE* 1, 4 (1998)).

55. AFP Wire Service, *supra* note 51 (internal quotation marks omitted).

56. *Id.*

57. *Id.*

58. See Christina Griffin, *Gender and Social Capital: Social Networks Post-Disaster* 79–80 (2009) (unpublished Master of Arts in Geography thesis, University of South Carolina), available at http://webra.cas.sc.edu/hvri/education/docs/christina_griffin_2009.pdf (discussing the need for disaster recovery support “assisting survivors in creating and maintaining new social network connections”).

59. Maureen H. Fordham, *Making Women Visible in Disasters: Problematising the Private Domain*, 22 *DISASTERS* 126, 130 (1998). See also Sakamoto & Yamori, *supra* note 48 (discussing life recovery for disaster victims in developing countries); Claude de Ville de Goyet & André Griekspoor, *Natural Disasters, the Best Friend of Poverty*, 14 *GEO. J. POVERTY L. & POL’Y* 61, 82 (2007) (discussing desire of disaster survivors to return to normalcy).

public corporations misses the importance of social capital. The need for a more complete analysis becomes clear once one considers locally owned businesses that are embedded in a context of community ties and reciprocal obligations.⁶⁰

In New Orleans, once the flood receded and the initial phase of disaster relief ended, the status of local businesses became a vital indicator of the region's ability to recover.⁶¹ When local bars, restaurants, and businesses committed to reopen, their perseverance gave the community hope and a renewed sense of normalcy. Among the local establishments that pledged to rebuild at almost any cost were well-known names such as the Camellia Grill,⁶² Emeril's,⁶³ and Mother's.⁶⁴ Local owners who had a stake in their community refused to abandon restaurants and employees and often went to great lengths in order to get back what they had lost: "Many restaurants set up FEMA trailers so employees could return to the city. Some workers lived in restaurant parking lots, even in the owners' homes for months after the storm."⁶⁵

The importance of locally owned businesses to disaster recovery is difficult to measure because the businesses are part of an interconnected web of mutually reinforcing ties. As Professors Michael Heller and Rick Hills explain,

Homeowners might build up sentimental attachments to property simply by living in it. They develop ties to neighbors through connections at local churches, favorite coffee shops, bars, clubs, or other familiar local watering holes—what some have called 'social

60. Again, our claim is not that social capital is found only in local businesses, but that the corporate social responsibility debate focuses solely on economic power and governance issues in large corporations and thus overlooks questions of community connection that are also relevant to appreciating the role of the business corporation in society.

61. See Zolin & Kropp, *supra* note 49, at 189 (contending that "small-to-medium sized enterprises . . . are an important part of the local economy, providing jobs and fueling economic growth").

62. *Landmark New Orleans Eatery Back in Business: Icon's Return Seen as a Sign of Hope in the Crescent City's Slow Recovery*, ASSOCIATED PRESS, Apr. 23, 2007 ("Neighbors and city officials who frequented the diner before Katrina hugged and swapped stories . . .").

63. *Emeril's Reopens in New Orleans*, ABC NEWS, Dec. 8, 2005, available at <http://abcnews.go.com/print?id=1385065> ("Some New Orleans residents said they found hope in the reopening of Emeril's.").

64. According to the restaurant's website, "On October 15, 2005, Mother's reopened. Vice Admiral Thad Allen, the head of the disaster relief effort in New Orleans, was our first customer." *Hurricane Katrina*, MOTHER'S RESTAURANT.NET, http://mothersrestaurant.net/hurricane_katrina.html (last visited May 12, 2012).

65. Mary Foster, *New Orleans Restaurants are Back in Business after Katrina*, USA TODAY (Jan. 12, 2009), available at http://www.usatoday.com/travel/destinations/2009-01-12-new-orleans-zagat-survey_N.htm.

capital.’ These connections can enable neighbors to overcome collective action problems more easily in monitoring crime or pressuring government for help in maintaining neighborhood quality.⁶⁶

What is true in ordinary times remains true in extraordinary times: in the face of disaster, local businesses shore up the social capital that provides a bulwark against community dispersion.

Although large-scale corporations also make valuable contributions, especially in the immediate aftermath of catastrophic events, longer-term recovery requires the involvement of the affected population, including local businesses, to be successful.⁶⁷ A robust local business community enhances disaster resilience in part because the owners have obligations as members of the community and not just as rational economic actors. For instance, social ties may influence a decision whether to invest in recovery or to seek more attractive investment opportunities elsewhere. By persevering, local businesses help to sustain their communities.

II. THE ECONOMICS OF SOCIAL CAPITAL

In addition to providing non-economic rationales for choice, social capital can also influence economic decision-making. This Part contends that social capital creates economic opportunities that would not otherwise exist by overcoming barriers to collective action, encouraging the use of “voice” over “exit,” and reducing transaction costs.⁶⁸ Thus, social-capital theory is part of economics, broadly understood.

66. Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1475 (2008).

67. See FEMA News Release No. 1983-041, *Disaster Preparedness Urged for Mississippi Businesses* (July 6, 2011), available at www.fema.gov/news/newsrelease.fema?id=56444 (“Local businesses are a cornerstone in a community’s recovery . . .”) (quoting Mississippi Emergency Management Agency Director Mike Womack).

68. Professor Angela Harris offers a similar analysis. See Angela Harris, *Reforming Alone?*, 54 STAN. L. REV. 1449, 1458 (2002) (citing ROBERT PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000)):

First, social capital helps people resolve collective action problems: when people share social norms of mutual aid, free-riding is reduced. Second, social capital reduces transaction costs: “There is no need to spend time and money making sure that others will uphold their end of the arrangement or penalizing them if they don’t.” Third, social capital increases a distinctive set of virtues, such as tolerance and empathy for others.

Id.

A. *Collective Action*

Social dilemmas involving collective action arise when individually rational behavior leads to collectively irrational results.⁶⁹ The classic example of a collective action problem, sometimes called the “tragedy of the commons,” asks us to envision a field owned in common by many individual cattle herders and endangered by overgrazing.⁷⁰ This “is a story about a form of social interdependence in which the collective consequence of reasonable individual choices is disaster.”⁷¹

If each herder acts in the best interest of all, she will reduce her cattle’s grazing allowance to a level that, if adopted by the other herders, would ensure the field’s survival. The problem, though, is that each herder reaps the full benefit of the grazing that she permits her herd to engage in and shares the cost of overgrazing with all the other herders.⁷² Therefore, the individually rational thing to do—the dominant strategy—is for a herder to allow her herd to graze as much as it wants.⁷³ To the extent that other herders restrain their herds, an individual herder’s defection will allow her to maximize her own profits (fattening her cattle for sale) without paying any of the shared cost. Unfortunately, if the other herders make the same rational calculation, the field is doomed and the cattle will starve.⁷⁴

69. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

70. See Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968). The theory of the commons underlies a number of important recent contributions to legal scholarship. See, e.g., Abraham Bell & Gideon Parchomovsky, *Of Property and Antiproperty*, 102 *MICH. L. REV.* 1 (2003); William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 *IOWA L. REV.* 1 (2003); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 *HARV. L. REV.* 621 (1998); Amnon Lehari & Amir N. Licht, *Eminent Domain, Inc.*, 107 *COLUM. L. REV.* 1704 (2007); Michael J. Madison et al., *Constructing Commons in the Cultural Environment*, 95 *CORNELL L. REV.* 657 (2010).

71. David M. Messick & Marilyn B. Brewer, *Solving Social Dilemmas*, in *REV. PERSONALITY & SOC. PSYCHOL.* 11, 12 (L. Wheeler & P. Shaver eds., 1983).

72. See Hardin, *supra* note 70. For instance, a rancher enjoys 100 percent of the benefits of overgrazing while bearing only 5 percent of the costs if twenty farmers have access to the field.

73. See, e.g., Lee Anne Fennell, *Properties of Concentration*, 73 *U. CHI. L. REV.* 1227, 1245 (2006) (“All commons tragedies share two features: actors do not internalize all the costs and benefits of their actions, and those actions have the potential to reduce the overall amount of the good available for everyone.”).

74. See Hardin, *supra* note 70, at 1244. (“[T]he rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another; and another. . . . But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons.”) (ellipsis in original).

Communities that enjoy high levels of social capital may be able to solve collective action problems on their own without top-down state intervention.⁷⁵ The ability to solve these problems is particularly vital in the wake of disaster when state services such as fire, police, trash collection, and home care for the elderly and disabled are disrupted.⁷⁶ Individually rational, disconnected individuals might hope that others would take the initiative to establish these services but would fail to “coordinate their efforts to bring about these desired outcomes.”⁷⁷ Why contribute to group needs when others may do the work for you, and, if they do not, your own efforts will be wasted? Social capital predicts disaster recovery because “[n]eighbors with greater levels of social capital share information about bureaucratic procedures and upcoming deadlines, monitor public space to prevent dumping, and deter looting in their community.”⁷⁸ By contrast, communities that lack social capital may remain stagnant, regardless of whether they receive public resources.⁷⁹

The collective action problem applies as well when individuals must decide whether to rebuild in a devastated community: “Survivors of Katrina did not want to return to be the only household on their blocks, as this could be risky due to both crime and a lack of social support.”⁸⁰ Unless strong social networks and mutual trust offered assurances that others would return, the individually rational choice would be to leave or, at a minimum, wait to see what others decided.⁸¹ Consequently, when

75. See ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 180 (1990) (observing that self-governance requires the development of consensus and institutional support); JAMES M. ACHESON, *THE LOBSTER GANGS OF MAINE* (1988). We thank our colleague Josh Eagle for bringing this work to our attention.

76. Aldrich, *Fixing Recovery*, *supra* note 32, at 7.

77. *Id.*

78. *Id.* (citing Kirstin Dow, *The Extraordinary and the Everyday in Explanations of Vulnerability to an Oil Spill*, 89 *GEOGRAPHICAL REV.* 74 (1999); James DeFilippis, *The Myth of Social Capital in Community Development*, 12 *HOUSING POL’Y DEBATE* 781 (2001)).

79. Aldrich, *Fixing Recovery*, *supra* note 32, at 7 (noting that “[e]ven with grant money. . . [t]he neighborhood of Mikura in Kobe, could not coordinate debris removal because no one volunteered to organize written agreements from property owners”) (citations omitted).

80. *Id.* at 6. Aldrich raises this example to illustrate the value of communication networks that social capital makes possible and that “cannot be replaced by government pronouncements.” *Id.* In our view, the choice made by many individuals and families about whether to return is a collective action issue. A free rider in this situation might choose to wait to see what other people decide before committing to return to the community. Of course, if everyone adopts a wait-and-see attitude, then the community will remain desolate.

81. See Todd Pittman, *Japan: Post-Tsunami, Town Wonders if to Rebuild*, ASSOCIATED PRESS, Apr. 2, 2011 (“‘We don’t want to leave,’ Suda said. ‘But if nobody else comes back, we can’t stay. You cannot build a life by yourself.’”).

local businesses committed to reopen in New Orleans, they sent a powerful signal that the community would be restored.⁸²

B. *Exit, Voice, and Loyalty*

The economist Albert Hirschman offers another perspective for analyzing the fundamental stay-or-go decision residents made in the wake of Katrina, and for connecting economic choice with political alternatives. Framed in Hirschman's terms, the issue was whether individuals would seek to improve their circumstances (with "voice" metonymically representing the range of political actions available), or whether they would simply relocate somewhere else (the "exit" option).⁸³

As Hirschman observed, there are two basic options that individuals can choose when faced with declining quality in an organization.⁸⁴ First, there is the "exit" option: "Some customers stop buying the firm's products or . . . leave the organization."⁸⁵ Shareholders in a publicly traded corporation typically react to negative information by selling stock. The resulting decline in the firm's market value sends a message to management to fix the problem.⁸⁶ No words are needed. Thus, because the message is communicated via market price information, Hirschman characterizes exit in economic terms.⁸⁷

Alternatively, an individual may exercise her "voice" option.⁸⁸ This choice involves political participation; ideas for improvement are

82. See Emily Chamlee-Wright, *The Long Road Back: Signal Noise in the Post-Katrina Context*, 12 INDEP. REV. 235, 238 (2007) (noting the importance of signals sent by reopened businesses but contending that these signals were to some extent masked by "[d]isaster-relief policies and procedures, government management of flood-protection and flood insurance programs, and the regime uncertainty created by postdisaster redevelopment planning"). Professor Chamlee-Wright argues that absent these distortions, business decisions "would guide swift and responsible adjustment to the new circumstances." *Id.*

83. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970). We exclude from consideration here questions regarding the wisdom of rebuilding in certain areas. See, e.g., Ian Jared Miller, *Bitter Legacy, Injured Coast*, N.Y. TIMES, Mar. 19, 2011, at C10 ("In a landscape where earthquakes are a regular occurrence but major tsunamis happen irregularly, people naturally forget.")

84. After a disaster, "declining quality" may mean the disruption of even basic services.

85. HIRSCHMAN, *supra* note 83, at 4.

86. *Id.* at 23 ("[U]pon finding out about customer desertion, management undertakes to repair its failings.")

87. *Id.* at 15–16 ("This is the sort of mechanism economics thrives on. It is neat—one either exits or one does not; it is impersonal . . . and success and failure of the organization are communicated to it by a set of statistics; and it is indirect—any recovery on the part of the declining firm comes by courtesy of the Invisible Hand, as an unintended by-product of the customer's decision to shift.")

88. *Id.* at 30 ("Voice is here defined as any attempt at all to change, rather than to escape from, an objectionable state of affairs . . ."). See, e.g., Heather K. Gerken, *Foreword: Federalism All the*

communicated directly through interest articulation.⁸⁹ For instance, an unhappy consumer could write a letter of complaint to a business demanding better service. Or shareholders might seek to elect new directors or to push through a proposal for corporate change. In situations in which exit is more difficult—from families and nations, for instance—voice becomes correspondingly more important as a mechanism for change.⁹⁰

According to one commentator, “[s]trong social networks raise the cost of exit from a community and increase the probability that residents will exercise voice to join rebuilding efforts.”⁹¹ Although the connection between social networks and exit cost is not elaborated, it seems plausible to suppose that an individual who benefits from reciprocal arrangements of trust in a particular community would be disinclined to start over among strangers elsewhere. The effort involved in replicating those arrangements as well as the uncertainty of result when engaging a foreign social network or creating one anew would increase the costs of exit.⁹² These costs, in turn, make exit less likely.

In our view, however, social capital also has potential relevance as a way of elaborating “loyalty,” Hirschman’s third, linking concept. In some situations, it may be unclear whether exit, voice, or some combination of the two is the right choice, and Hirschman surmised that loyalty among organization members would influence the decision.⁹³ When loyalty is high, a customer, shareholder, or community member will hesitate to

Way Down, 124 HARV. L. REV. 4, 7 (2010) (contending that in areas where state sovereignty is limited, “institutional arrangements promote voice, not exit”); Michael R. Siebecker, *A New Discourse Theory of the Firm after Citizens United*, 79 GEO. WASH. L. REV. 161, 164 (2010) (contending that “shareholders require a greater voice in the deliberative process that leads to the selection of directors”).

89. HIRSCHMAN, *supra* note 83, at 16 (“[V]oice is just the opposite of exit. It is a far more ‘messy’ concept because it can be graduated, all the way from faint grumbling to violent protest; it implies articulation of one’s critical opinions rather than a private, ‘secret’ vote in the anonymity of a supermarket . . .”).

90. *Id.* at 17 (“In a whole gamut of human institutions, from the state to the family, voice, however ‘cumbrous,’ is all their members normally have to work with.”). One of this Article’s authors has previously developed an argument for enhanced scrutiny of majority shareholder actions in close corporations based upon the same premise. See Benjamin Means, *A Voice-Based Framework for Evaluating Claims of Minority Shareholder Oppression in the Close Corporation*, 97 GEO. L.J. 1207 (2009).

91. Aldrich, *Fixing Recovery*, *supra* note 32, at 7–8.

92. In accounting terms, this cost could be described as a loss of goodwill—the value of a business in excess of its assets that includes customer loyalty and reputation.

93. See HIRSCHMAN, *supra* note 83, at 82 (“Loyalty is a key concept in the battle between exit and voice . . .”).

exit.⁹⁴ He or she is also more likely to use voice.⁹⁵ By contrast, when an individual feels no particular loyalty, exit may be the simpler, more rational decision.⁹⁶

Notably, the benefits Hirschman ascribes to loyalty are also the civic virtues that follow from high levels of social capital. As one scholar observes, focusing on a context in which social capital tends to be high, “virtually all forms of altruism—volunteerism, community projects, philanthropy, directions for strangers, aid for the afflicted, and so on—are demonstrably more common in small towns.”⁹⁷ After a disaster, these civic virtues become critically important because the community’s survival depends upon mutual aid.⁹⁸

To the extent that social capital enhances loyalty, therefore, it may influence members of a community to use voice and to reinvest in the community.⁹⁹ For example, one researcher found substantial evidence that, in the wake of a major earthquake, the Tokyo neighborhoods with the most social capital experienced “stronger population recovery.”¹⁰⁰ Thus, social capital theory can be seen as a way of extending Hirschman’s framework by providing a more robust theory of loyalty and trust.¹⁰¹

C. Transaction Costs

Social capital may also facilitate rebuilding in the wake of disasters by reducing what economists refer to as transaction costs.¹⁰² Before a market exchange takes place, the participants need to acquire information about the proposed transaction, they must negotiate the terms, and they must be able to monitor the other party’s performance. Although some economic

94. *Id.* at 77 (“Clearly the presence of loyalty makes exit less likely . . .”).

95. *Id.* (stating that “the likelihood of voice increases with the degree of loyalty”).

96. *Id.* at 82–83 (“In the absence of feelings of loyalty, exit per se is essentially costless, except for the cost of gathering information about alternative products and organizations.”).

97. PUTNAM, *supra* note 29, at 138.

98. See Aldrich, *Fixing Recovery*, *supra* note 32, at 6 (“Information and signals from civil society—such as ‘who is coming back when and what services will be provided’—are critical to decision-making processes of survivors, and cannot be replaced by government pronouncements.”).

99. Also, in reciprocal social networks one might expect that one’s view would at least be heard. See HIRSCHMAN, *supra* note 83, at 37 (“[T]he decision whether to exit will often be taken in the light of the prospects for the effective use of voice. If customers are sufficiently convinced that voice will be effective, then they may well postpone exit.”) (emphasis removed).

100. Daniel P. Aldrich, *Social, Not Physical, Infrastructure: The Critical Role of Civil Society after the 1923 Tokyo Earthquake* 20 (2009), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1017&context=daniel_aldrich [hereinafter Aldrich, *Social, Not Physical, Infrastructure*].

101. We hope to further develop the connection between Hirschman’s theory of loyalty and social capital in future work.

102. See Harris, *supra* note 68, at 1458.

models assume zero transaction costs, most real-world exchanges involve significant costs.¹⁰³ When the costs are high, otherwise efficient exchanges may not take place.¹⁰⁴

Consider, for instance, the decision whether to open a restaurant in an area damaged by disaster. Although one might anticipate a market need that such a restaurant could serve, the first hurdle would be gathering information about the region. Are there reliable patrons? How does one acquire the necessary licenses to do business? Will suppliers sell food products at reasonable prices? Having gathered the necessary information—a time consuming and costly process—the prospective restaurant owner would need to negotiate with suppliers and hire people to build and to run the restaurant. Finally, the owner would need to invest substantial energy monitoring her employees to ensure that they devoted their full efforts to the business and did not shirk their duties.¹⁰⁵

An interested restaurant owner who is already part of a social network may benefit from reduced transaction costs for each of these tasks. First, information will be more readily available: the owner will know whom to ask, what to ask, and where to look. Second, negotiations within existing networks can be cheaper if trust exists as a lubricant.¹⁰⁶ Rather than negotiating each detail and worrying about whether the prices requested are fair, trust permits business participants to rely (to some degree) on the good faith of their counter-parties. Further, social capital ensures that the prices charged by suppliers, in fact, will be fair.¹⁰⁷ Finally, social connections of loyalty reduce the risk that employees will steal or

103. See, e.g., Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 255 (1984) (“Lawyers function as *transaction cost engineers*, devising efficient mechanisms which bridge the gap between capital asset pricing theory’s hypothetical world of perfect markets and the less-than-perfect reality of effecting transactions in this world.”) (emphasis in original).

104. See Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960); Zohar Goshen, *The Efficiency of Controlling Corporate Self-Dealing: Theory Meets Reality*, 91 CALIF. L. REV. 393, 414 (2003).

105. See Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J. CORP. L. 657, 670 (1996) (defining agency costs “as the sum of the monitoring and bonding costs, plus any residual loss, incurred to prevent shirking by agents”). As Professor Bainbridge explains, “an essential economic function of management is monitoring the various inputs into the team effort.” *Id.* at 671.

106. See Steven Knack & Philip Keefer, *Does Social Capital Have an Economic Payoff? A Cross-Country Investigation*, 112 Q. J. ECON. 1251, 1252 (1997) (“Economic activities that require some agents to rely on the future actions of others are accomplished at lower cost in higher-trust environments.”). Indeed, “[v]irtually every commercial transaction has within itself an element of trust.” Kenneth J. Arrow, *Gifts and Exchanges*, 1 PHIL. & PUB. AFF. 343, 357 (1972).

107. See Knack & Keefer, *supra* note 106, at 1252 (“Individuals in higher-trust societies spend less to protect themselves from being exploited in economic transactions.”).

otherwise default in their duties, and this, in turn, lowers monitoring costs.¹⁰⁸ Thus, economic transactions in communities with high social capital can be more efficient.

The importance of social capital in reducing transaction costs is reflected in the ethnic homogeneity of many business communities, including, for instance, Korean grocers in New York, Pakistani and Indian budget motel owners in New York, and Soviet Jewish cab drivers in Los Angeles.¹⁰⁹ Of course, the connection of race, ethnicity, and social capital creates its own legal challenges and may have troubling implications concerning disaster resilience and diversity.¹¹⁰ From an economic standpoint, however, social capital has clear advantages. Locally owned businesses, situated in particular communities, whether distinguished by ethnic or other markers, can take advantage of trust and social networks to reduce their costs of operation.¹¹¹ For communities to recover from disaster quickly, the efficient operation of locally owned businesses, and their ability to tap into existing social networks, may be critical.

108. *Id.*

109. See Lan Cao, *The Ethnic Question in Law and Development*, 102 MICH. L. REV. 1044, 1057–58 (2004) (reviewing AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* (2003)). Additional ethnic minority enclaves include “Arab[] and Lebanese Muslim[] . . . grocery stores in Chicago and Detroit, respectively” and Korean “wig stores nationwide.” *Id.*

110. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 754 (2011) (responding to the “challenge” that if “diversity dramatically decreases social capital in the short to medium run, this should be a national concern that cannot be answered with anodyne calls to ‘celebrate diversity’”).

111. J. Rogers Hollingsworth & Robert Boyer, *Coordination of Economic Actors and Social Systems of Production*, in *CONTEMPORARY CAPITALISM: THE EMBEDDEDNESS OF INSTITUTIONS* 1, 11 (J. Roger Hollingsworth & Robert Boyer eds., 1997) (“All other things being equal, the more powerful the social bonds among transacting partners, the more economic competition is likely to be restrained.”). *But see* Alejandro Portes, *Social Capital: Its Origins and Applications in Modern Sociology*, 24 ANN. REV. SOC. 1, 15 (1998) (noting that “the same strong ties that bring benefits to members of a group commonly enable it to bar others from access”). Professor Portes cites as examples “control exercised by white ethnics . . . over the construction trades and the fire and police unions of New York[,] . . . the growing control of the produce business by Korean immigrants in several East Coast cities, the traditional monopoly of Jewish merchants over the New York diamond trade, and the dominance of Cubans over numerous sectors of the Miami economy.” *Id.* “In each instance, social capital generated by bounded solidarity and trust are at the core of the group’s economic advance.” *Id.* However, “the same social relations that . . . enhance the ease and efficiency of economic exchanges among community members implicitly restrict outsiders.” *Id.* (ellipsis in original) (citations omitted) (internal quotation marks omitted).

*D. Slinging Arrows at Social-Capital Theory*¹¹²

Kenneth Arrow, a Nobel Laureate in economics, admits “the plausibility of the hypothesis that social networks can affect economic performance,”¹¹³ but he raises concerns about social capital as a concept. First, Arrow observes that there is nothing inherently good about a social network—the influence of other members of the network can spread bad behavior as easily as good behavior.¹¹⁴ Second, social networks are not usually built to serve economic purposes and are largely their own reward.¹¹⁵ Thus, it is not clear to Arrow why social networks should count as “capital.” He contends that the metaphor is misleading and should be discarded.¹¹⁶

Undoubtedly, social networks can be misused; they may help teenage gang members organize as easily as other social networks help adults monitor the neighborhoods in which those gangs operate.¹¹⁷ Social capital is important, not because there can be any guarantee that the capital will always be spent towards worthwhile ends, but because it greatly increases the effectiveness of individual activity. The fact that social networks of trust can be misused only heightens the importance of understanding their character.¹¹⁸

Further, although social capital is a metaphor, it is a helpful metaphor because it sharpens the distinction between conventional economic reasoning and the social factors that influence individual choice.¹¹⁹

112. Cf. Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990).

113. Kenneth J. Arrow, *Observations on Social Capital*, in SOCIAL CAPITAL: A MULTIFACETED PERSPECTIVE 3, 3 (Partha Dasgupta & Ismail Serageldin eds., 2000).

114. *Id.*

115. *Id.*

116. *Id.* at 4; see also Carl L. Bankston III & Min Zhou, *Social Capital as Process: The Meanings and Problems of a Theoretical Metaphor*, 72 SOC. INQUIRY 285, 285 (2002) (“The term ‘capital’ refers to resources for investment. . . . However, social capital . . . does not consist of resources that are held by individuals or by groups but of processes of social interaction leading to constructive outcomes.”); Nakagawa & Shaw, *supra* note 25, at 9 (criticizing the term “social capital” for its “over-versatility”) (citing Tom Schuller et al., *Social Capital: A Review and Critique*, in SOCIAL CAPITAL: CRITICAL PERSPECTIVES 1 (Stephen Baron et al. eds., 2000)).

117. See, e.g., Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983 (2010).

118. Police departments, for instance, might recognize the special danger of gang activity in areas affected by disaster. See Susan S. Kuo, *Bringing in the State: Toward a Constitutional Duty to Protect from Mob Violence*, 79 IND. L.J. 177, 222 (2004) (arguing that social science evidence is relevant in determining whether police officials have breached a duty to the public by failing to respond appropriately to riot harm).

119. See, e.g., Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273, 326 (2004) (“The social capital

Nothing turns on the fact that social capital is a metaphor—so is economic capital¹²⁰ and, for that matter, the idea of a financial marketplace.¹²¹ However, Arrow may be right to worry about the “snare” of seeking to measure social capital with more precision than the concept will bear.¹²² He suggests that

Instead of thinking of more and less, it may be more fruitful to think of the existing social relations as a preexisting network into which new parts of the economy (for example, development projects) have to be fitted. We would want to fit new projects so as to exploit complementarity relations and avoid rivalries. Of course, new projects will create their own unintended social relations, possibly destroying existing ones.¹²³

Even if social networks cannot be measured with great precision, it is evident that locally owned businesses benefit from them and that disaster development funds can work either with or against preexisting social networks.¹²⁴ Although we see no harm, and much benefit, in seeking tools to better evaluate social capital—how it is created, what enhances it, and what diminishes it—Arrow is surely correct that an analysis of the importance of social networks and bottom-up disaster recovery efforts need not depend on the details of any particular measurement of social capital.

Rather, highlighting the ways that economic behavior is situated in social context helps us avoid the mistake of assuming that outputs are connected to inputs by some mathematical, unvarying calculus.¹²⁵ In sum,

literature, in any event, seems to assume that what can be attained through social position and relations is not substitutable, at least not perfectly, with what can be bought. That is what makes social relations a form of capital distinct from financial capital.”)

120. In particular, the posited distinction between economic capital amassed by individuals and social capital that exists only in exchange does not hold up to closer inspection. *See* Bankston & Zhou, *supra* note 116, at 286 (“Perhaps the greatest difference between ‘social capital’ and ‘financial capital’ or ‘human capital’ is that ‘financial capital’ and ‘human capital’ can both be defined as specifiable quantities with definite locations in the socioeconomic arrangement of human affairs, while ‘social capital’ cannot be so defined.”). In fact, economic capital cannot exist independent of societal judgments concerning what counts as money and consensus concerning processes of exchange. *See* JOHN R. SEARLE, *MIND, LANGUAGE AND SOCIETY: PHILOSOPHY IN THE REAL WORLD* 126 (1998) (“Money cannot perform its functions in virtue of physics alone.”). Capital, whether economic credit or social credibility, enables exchanges with other people and has no inherent value.

121. *See generally* GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980) (arguing that human rationality involves the imaginative use of metaphor rather than linear logic).

122. Arrow, *supra* note 113, at 4.

123. *Id.*

124. *See infra* Part IV.

125. Within economics, scholars affiliated with the new economic sociology movement have

although social capital is primarily a sociological tool and not an economic concept, its value to disaster recovery efforts can be described in the language of economics: (1) as a solution to collective action problems; (2) as an indicator of whether individual residents are more likely to choose “voice” or “exit” when the community suffers losses in a disaster; and (3) as a way of reducing transaction costs.¹²⁶ By sustaining a disaster-stricken community’s social capital, locally owned businesses have the potential to overcome economic coordination problems and to set the foundation for longer-term recovery.

III. REVISITING CORPORATE SOCIAL RESPONSIBILITY

Advocates of corporate social responsibility contend that corporations ought to do more than maximize returns for their shareholders and that “the legitimate concerns of a corporation should include such broader objectives as sustainable growth, equitable employment practices, and long-term social and environmental well-being.”¹²⁷ The debate among legal scholars concerning corporate social responsibility focuses on how managers resolve tradeoffs between the needs of society and the interests of the corporation’s shareholders.¹²⁸ Cases in which those interests align are perceived as uninteresting or, worse, as phony justifications for corporate social responsibility.¹²⁹

made similar arguments. *See, e.g.*, NEIL FLIGSTEIN, THE ARCHITECTURE OF MARKETS: AN ECONOMIC SOCIOLOGY OF TWENTY-FIRST-CENTURY CAPITALIST SOCIETIES 6 (2001) (“Economic sociology is the study of how the material production and consumption of human populations depend on social processes for their structure and dynamics.”).

126. *See* Harris, *supra* note 68, at 1458 (identifying first and third elements); Aldrich, *Fixing Recovery*, *supra* note 32, at 7 (identifying second element). Aldrich also discusses collective action problems, but he does not discuss conflicts between individual and collective rationality, and it is therefore not clear whether he means to employ the concept in its classic sense, or whether he is concerned more generally with the need to act collectively and to coordinate efforts. *Id.*

127. John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 J. CORP. L. 1, 1–2 (2005) (summarizing the basic claims of corporate social responsibility proponents).

128. Recent contributions to the topic include the following: Ian B. Lee, *Citizenship and the Corporation*, 34 LAW & SOC. INQUIRY 129 (2009); Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004); Yoshiro Miwa, *Corporate Social Responsibility: Dangerous and Harmful, Though Maybe Not Irrelevant*, 84 CORNELL L. REV. 1227 (1999); Peter Nobel, *Social Responsibility of Corporations*, 84 CORNELL L. REV. 1255 (1999); Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856 (1997) (reviewing PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995)).

129. Dean Gordon Smith puts the matter plainly:

When boards of directors are able to enhance employee welfare, make the environment cleaner, or improve human rights throughout the world without impairing shareholder value,

Part III.A evaluates the traditional theories of corporate social responsibility: classical and progressive. Part III.B contends that these theories are incomplete. By excluding closely held, locally owned businesses from the debate, the discussion has narrowly focused on governance issues between shareholders and managers in large business corporations. As a consequence, even advocates of corporate social responsibility have failed to fully consider how social capital can influence business choices.

A. Agency Costs and Moral Obligation

Classical and progressive theories of corporate social responsibility concern themselves with large, publicly traded corporations and offer two principal alternatives—that corporate managers benefit society indirectly by maximizing economic return for their shareholders or, alternatively, that managers should pursue other socially valuable goals, even at the cost of failing to maximize corporate profits.¹³⁰ Thus, the two camps give diametrically opposed answers to the *same* question.¹³¹ For both classical and progressive scholars, the issue is the authority of corporate managers to decide to advance goals that provide no direct benefit for the corporation's shareholders.¹³²

1. The Classical Framework

The dominant view of the corporation is that it is designed to maximize shareholder wealth.¹³³ However, the proposition that corporations contribute to society by facilitating the aggregation and growth of capital

they often do it. This is not “corporate social responsibility,” but good management. And the failure to pursue such strategies would be a problem of managerial incompetence, not a problem of improper incentives.

Smith, *Response*, *supra* note 9, at 1008 (citation omitted).

130. See Wells, *supra* note 6, at 78.

131. See Christopher D. Stone, *Corporate Social Responsibility: What It Might Mean, if It Were Really to Matter*, 71 IOWA L. REV. 557, 569 (1986) (“[I]n the conventional view, there is no true question of corporate social responsibility until the dilemma is presented in the form of whether to subordinate a clear-cut, economically optimal choice for some other, less profitable alternative.”).

132. See Smith, *Response*, *supra* note 9, at 990 (“Pared to its core, ‘corporate law’ is the set of rules that defines the decisionmaking structure of corporations.” (citation omitted)).

133. See, e.g., Cynthia A. Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CIN. L. REV. 75, 75 (2005) (“According to the majority of corporate law professors in the United States, a corporation’s primary, and possibly exclusive, goal is to maximize shareholder wealth within the confines of the law.”); see also WILLIAM A. KLEIN & JOHN C. COFFEE, JR., *BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES* 131 (9th ed. 2004).

does not prohibit corporations from behaving responsibly in other ways.¹³⁴ Rather, it emphasizes the for-profit corporation's primary purpose: achieving lawful returns for its investors.¹³⁵ Any departure from wealth maximization adds "complexity" to the process by which shareholder investment drives economic activity.¹³⁶

If the fundamental question is "whether it is socially desirable for corporations organized for profit voluntarily to identify and pursue social ends where this pursuit conflicts with the presumptive shareholder desire to maximize profit,"¹³⁷ the classical position holds that the answer is no. This skepticism includes charitable donations and any activity that the corporation engages in with an objective other than maximizing shareholder profits.¹³⁸ Scholars operating within the classical framework identify several concerns associated with empowering management to follow a significantly more progressive agenda.

134. Socially responsible choices might be reserved to the discretion of the corporation's managers or dictated by law. For instance, in some European countries, there is a requirement for "labor representation on boards of directors." Conley & Williams, *supra* note 127, at 2.

135. According to one theory, shareholders benefit when directors cannot be compelled to maximize their profits. See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 280-81 (1999) ("[T]he primary job of the board of directors of a public corporation is not to act as agents who ruthlessly pursue shareholders' interests at the expense of employees, creditors, or other team members. Rather, the directors are trustees for the corporation itself—mediating hierarchs whose job is to balance team members' competing interests in a fashion that keeps everyone happy enough that the productive coalition stays together.") (emphasis in original).

136. See M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571, 574-75 (2009):

Ordinarily, corporations obtain financing from shareholders and use it to purchase labor from employees, who in turn manufacture products that are sold to consumers. At the end of the day, consumers obtain a product in return for their payment, employees receive a wage for their labor, and shareholders get back a financial return on their investment. The production of altruism adds a layer of complexity to this process. When the corporation engages in philanthropy, it may satisfy the altruism demand of shareholders, employees, and consumers alike; every corporate stakeholder may feel good knowing that the firm is helping others. All three parties also pay: Consumers may pay more for the corporation's products, employees may take a lower wage to work for the corporation, and shareholders may accept a lower return on their investment. It is precisely this contortion of the usual producer-consumer relationship that makes corporate philanthropy controversial.

137. Engel, *supra* note 20, at 3 ("[T]he basic question of corporate social responsibility is not whether we wish to compel or forbid certain kinds of corporate conduct by legislative command...but rather whether it is socially desirable for corporations organized for profit voluntarily to identify and pursue social ends where this pursuit conflicts with the presumptive shareholder desire to maximize profit."). After all, if a particular course of action were truly calculated to earn greater profits for the corporation, now or in the future, then the corporation's managers would be expected to follow that course regardless of any inclination to behave "responsibly." Smith, *Response*, *supra* note 9, at 1008.

138. See Henderson & Malani, *supra* note 136, at 573 ("Corporations do not merely channel funds to nonprofits, but do many things to help others at the expense of corporate profits.").

First, managerial discretion increases agency costs. An individual might spend discretionary income on charity but, in the context of a public corporation, “the pleasure taken . . . by the donors themselves” does not justify the use of shareholder money.¹³⁹ Yet, because the markets in which large corporations operate are not perfectly competitive and management decisions are protected by the business judgment rule, “the essential economic limit on the kinds of voluntarism we are discussing is the level of altruistic activity at which, were an outsider to try to wrest corporate *control* from the current managers and eliminate the altruistic practice, his expected gains from so doing would exceed his costs.”¹⁴⁰ The takeover constraint, however, leaves ample room for slack management, including deliberately non-wealth-maximizing choices.¹⁴¹

Second, there is a concern about democratic legitimacy when a corporation’s managers decide for themselves what social ends to pursue on behalf of society and how far to pursue those ends at the expense of shareholder profit.¹⁴² The shareholders elect the members of the board, with voting weighted according to shares held, but board members and the corporate officers that they appoint are not public officials and have no direct role in democratic decision making.¹⁴³ Consequently, any distributive choices that they make absent specific legislative guidance may privilege certain objectives over others contrary to the real preferences of the relevant community.

Indeed, one scholar contends that legislative guidance would be necessary to support an argument that corporations can serve non-wealth-maximizing purposes:

One cannot persuasively claim to have found an extra-profit goal that society wants corporations to pursue, unless one can offer at

139. Engel, *supra* note 20, at 22 (“And as soon as the matter is put that way it becomes apparent, as a question of both law and policy, that this ‘consumption’ justification just does not work with respect to corporate donations.”) (citations omitted).

140. *Id.* at 25. “The less competitive the product market, the more the costs of altruism will be borne by the firm’s customers rather than its shareholders.” *Id.*

141. See Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1011 (1997) (observing that formal oversight mechanisms including “the market for corporate control” fail “to provide a very robust check on managers” and offering alternative social explanations for the effectiveness of the corporate governance system).

142. Engel, *supra* note 20, at 30–31 (“Nor is there available—however much we might wish there were—any system of corporate ‘ethics’ with which a given management can somehow legitimately and competently (but altruistically) make distributional decisions for the society.”).

143. Henderson & Malani, *supra* note 136, at 582 (“Managers installed by shareholders to make money for shareholders are poorly positioned to know what the public good is or how best to deliver it.”).

least a plausible explanation of why the legislature did not long ago enact liability rules, regulations, or other measures, to implement the goal in question quite independently of any management practice of social responsibility.¹⁴⁴

This is a puzzling claim, as it would seem to suggest that society does not want good Samaritans; after all, the law imposes no general duty to rescue.¹⁴⁵ Perhaps, as is true for individual persons, the required minimum does not exhaust the social obligations of corporations.¹⁴⁶ Also, the absence of mandatory regulation might be justified by administrative feasibility. The extent to which corporations ought to pursue non-profit-maximizing goals across a wide range of possible scenarios involves too many variables to reduce to a clear rule.¹⁴⁷

Third, to the extent socially responsible choices are mandated by government regulation, advocates of the classical framework raise a different kind of democratic objection: that government cooption will mean the loss of the corporation as an effective mediating institution between the all-powerful state and the individual citizen.¹⁴⁸ Also, such mandates may interfere with corporations' ability to generate profits, a loss of societal wealth that must be weighed against any benefits from greater corporate social responsibility.¹⁴⁹

144. Engel, *supra* note 20, at 36.

145. See Christopher H. White, Note, *No Good Deed Goes Unpunished: The Case for Reform of the Rescue Doctrine*, 97 NW. U. L. REV. 507, 507 (2002) ("Under traditional common-law rules, individuals have no duty to come to the aid of others trapped in dangerous situations.").

146. See, e.g., Stone, *supra* note 131, at 567 ("[W]hile we acknowledge the legal right of citizens to do whatever they please within the bounds of the law, no society that ever existed has accepted the law as the only constraint on what is morally proper. On the contrary, every society we know of has encouraged its members to channel and temper their impulses by reference to moral codes, to engage in reflective ethical reasoning, even simply to practice good manners . . .").

147. See *id.* at 568 ("[A]ttempts to enforce all social desiderata through law are costly. These costs include not only the obvious monitoring and enforcement costs—expenditures in the narrow sense—but also less tangible social costs, such as the costs of enlarging the role of government while atrophying the moral timbre of the individual citizen.").

148. See, e.g., Bainbridge, *supra* note 128, at 897 (arguing that the "subordination of economic institutions to the state poses a grave threat to personal liberty"). Professor Bainbridge contends that large corporations represent "an intermediary institution standing between the individual and Leviathan." *Id.*

149. See Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 745 (2005) ("Arguments that socially responsible conduct would increase profits are . . . probably less about identifying profit-maximizing opportunities that corporations have missed than about helping create a patina of conceivable profitability that makes it easier for managers to engage in conduct that really sacrifices expected corporate profits.").

2. *The Progressive Framework*

For progressive scholars, the true value of corporations' wealth-generating activities is overstated, because the stock price does not fully reflect the costs to the environment, to labor rights, and even the basic social structure of society.¹⁵⁰ The advocates of corporate social responsibility are not content with existing law that invests boards with the legal power to consider other stakeholders.¹⁵¹ Rather, in some fashion, progressive scholars "want to impose on corporate decision-makers a legal duty to take into account the interests of the corporation's other constituencies, most often their employees and the communities where they are based."¹⁵² Greater social responsibility might be achieved by imposing a fiduciary duty on management to consider the interests of other stakeholders.¹⁵³ Alternatively, corporate law might facilitate more inclusive decision making by giving non-shareholder constituencies a direct role in management.¹⁵⁴

In opposing the classical view, progressive corporate law scholars list a number of problems with unfettered corporate power. First, progressive scholars contend that economic power has become too concentrated and that the largest corporations threaten democracy.¹⁵⁵ Second, they contend

150. See, e.g., Lynne Dallas, *Working Toward a New Paradigm*, in PROGRESSIVE CORPORATE LAW 35, 36 (Lawrence E. Mitchell ed., 1995) (contending that "market theories define efficiency too narrowly and that efficiency cannot be separated from concepts of social justice and normative goals."); Greenfield, *supra* note 10, at 951 ("Given their nature, governance, and objectives, corporations fail in predictable ways. They produce costly externalities; they are amoral; they fail to sustain implicit or explicit commitments to communities; they privilege some stakeholders (shareholders) at the expense of others (for example, employees)."); David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1378–79 (1993) ("For example, a plant closing may serve the interests of shareholders while imposing substantial uncompensated costs on laid-off workers and on a local community that has made infrastructure investments in the expectation of a continued corporate presence.").

151. Smith, *Response*, *supra* note 9, at 1000–01 ("Even if one were dissatisfied with the results of director discretion, it is clear that the U.S. corporate governance system already contains a substantial dose of 'stakeholder governance.'" (citation omitted)).

152. Wells, *supra* note 6, at 80–81.

153. See Greenfield, *supra* note 10, at 952 ("The law could recognize non-shareholder stakeholders as important non-equity investors in the firm, and the legal obligations of the board could be expanded to require it to look after the interests of those non-equity investors. The same duties of care and loyalty that are owed to shareholders would be owed to non-equity investors.").

154. See *id.* ("More provocatively, the board's makeup could be broadened to include representatives of non-equity investors. This would lead, almost inevitably, to the more equitable distribution of the corporate surplus among the firm's equity and non-equity investors, which would inure to the benefit of both society and the firm over time.").

155. See Greenfield, *supra* note 10, at 951 ("They manipulate regulatory oversight and exert disproportionate political power."); Lawrence E. Mitchell, *The Age of Aquarius or, How I (Almost) Learned to Stop Worrying and Love Free Markets*, 88 MINN. L. REV. 921, 928–33 (2004) (book

that the logic of the market has displaced other important values.¹⁵⁶ For instance, even accepting the proposition that corporations maximize wealth for the working class and the wealthy, progressive scholars question whether economic wealth is the same as welfare.¹⁵⁷ Third, progressive scholars argue that the various constituencies affected by corporate activity cannot always bargain contractually to protect their interests.¹⁵⁸ Without significant public regulation, disparities of information and power make it unlikely that corporate governance will aim toward socially acceptable outcomes.¹⁵⁹

Finally, advocates of greater corporate responsibility contend that the wealth-maximization project fails on its own terms.¹⁶⁰ Rational economic actors could not generate the trust necessary for their markets to operate effectively. Indeed, “[a] paradox arises in these situations—the conscious pursuit of self-interest is incompatible with its attainment.”¹⁶¹ There is a moral dimension to the analysis: “For the model to work, satisfaction from doing the right thing must not be premised on the fact that material gains may later follow; it must be intrinsic to the act itself.”¹⁶² Although the details of the classical and progressive positions exceed the scope of this Article, it should already be clear that the scholars associated with each camp disagree on almost every significant point concerning corporate social responsibility.

review) (identifying anti-democratic dangers of finance theory); Wells, *supra* note 6, at 80 (“The initial debate over corporate social responsibility emerged out of, and cannot be understood apart from, a vision of the American economy that first took root in the 1920s. That vision sees the American economy dominated by a small number of gigantic, stable corporations that essentially control the nation’s business.”). According to Professor Wells, progressive scholars in each generation have worried that “[n]ot only do these corporations dominate American business, but they will, if left unchecked, continue to accrue economic, political, and social power.” *Id.*

156. Mitchell, *supra* note 155, at 948 (“The race for profits led corporations to massive layoffs to undo the burdens of the age of hierarchy, first of the traditionally vulnerable blue-collar worker whose vulnerability had been enhanced by his loss of union power, and then of the newly vulnerable white-collar worker.”).

157. *Id.* at 964 (“One’s psychological measure of well-being is dependent on far more than the simple metric of absolute wealth.”).

158. Millon, *supra* note 150, at 1379 (“Accordingly, one way in which communitarians differ from contractarians is in their greater willingness to use legal intervention to overcome the transaction costs and market failures that impede self-protection through contract.”).

159. *Id.*

160. See, e.g., Greenfield, *supra* note 10, at 966 (“The argument, as I understand it, is that corporate managers best advance society’s interests by ignoring them. And not only *should* managers ignore social welfare, but they should be *required* to ignore it. Not even Adam Smith’s invisible hand was assumed to be so powerful that people should be *prohibited* from taking the interests of others, or society in general, into account.”).

161. William W. Bratton, *Game Theory and the Restoration of Honor to Corporate Law’s Duty of Loyalty*, in *PROGRESSIVE CORPORATE LAW* 139, 167 (Lawrence E. Mitchell ed., 1995).

162. *Id.*

Notwithstanding their deep substantive disagreements, though, classical and progressive scholars generally accept that the issue is whether large, publicly traded corporations can serve interests aside from wealth-maximization for their shareholders.¹⁶³ In other words, although they reach starkly different conclusions, corporate law scholars of both stripes address the same fundamental question. Consequently, the corporate social responsibility literature has almost nothing to say about the potential role of smaller, locally owned business.

B. Beyond Agency Costs

We contend that, as it has been framed, the corporate social responsibility debate has produced diminishing returns.¹⁶⁴ First, whatever adjustments might be made at the margin,¹⁶⁵ the locus of power in a public corporation will remain the board of directors.¹⁶⁶ Second, despite the maxim that managers should seek to increase profits for the shareholders,¹⁶⁷ corporate law rules permit managers to make charitable contributions and to take into account other interests.¹⁶⁸ If the managers of

163. See Wells, *supra* note 6, at 79 (contending that the debates concerning corporate social responsibility have all been “premised on the idea that the American economy was dominated by a relatively small number of enormous, powerful, and stable business corporations that were qualitatively different from their smaller competitors”).

164. See Wells, *supra* note 6, at 78:

Contemporary works on corporate social responsibility touch on deep and important questions: what does the corporation owe to its shareholders? to its workers? to the larger community? But there is a problem with these debates: they rarely seem to go anywhere. Viewed in historical perspective, it is clear that each new round of debate on corporate social responsibility largely recapitulates the earlier debate in a slightly altered form.

165. Compare Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 836 (2005) (advocating a greater governance role for shareholders), with Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1749 (2006) (defending the dominance of directors in corporate decision-making).

166. See, e.g., DEL. CODE ANN. tit. 8, § 141(a) (2006) (“The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . .”).

167. See, e.g., *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.”); KLEIN & COFFEE, *supra* note 133, at 131 (“[D]irectors have great discretion over how to maximize the return to shareholders, but not whether to.”).

168. Delaware law, for instance, specifically authorizes managers to “[m]ake donations for the public welfare or for charitable, scientific or educational purposes.” DEL. CODE ANN. tit. 8, § 122(9) (2006). These contributions must be reasonable but management decision making is protected by the business judgment rule and, absent self-dealing or other breaches of fiduciary duty, essentially unreviewable. D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 286 (1998). From a strictly legal standpoint, there may not be much more to say. See Smith, *Response*, *supra* note 9, at 990 (“Pared to its core, ‘corporate law’ is the set of rules that defines the decisionmaking structure of corporations.”).

large, public corporations nevertheless feel compelled to pursue profits to the exclusion of every other consideration, market pressures rather than legal rules are the likely culprit.¹⁶⁹

Moreover, the debate assumes a particular kind of corporation—the large, publicly held firm with diffuse, passive shareholders and responsibility for business affairs invested in a central group of managers.¹⁷⁰ Separating ownership from control enables capital aggregation through passive investment,¹⁷¹ but the division of responsibility also produces agency costs to the extent that managers can find ways to prefer their own interests.¹⁷² Thus, if public corporations are the main characters in a story about social responsibility, it should not be surprising to find that agency costs are central to the plot. Framed in terms of agency costs, the corporate responsibility debate concerns the extent of management's power to serve non-shareholder interests rather than the reasons that could motivate a rational business corporation to choose to pursue socially useful objectives.

A fuller account of corporate responsibility might begin, therefore, by considering the range of available business entities, closely held and publicly traded. Changing the scope of the inquiry adjusts the perspective. For instance, the agency-cost story of corporate social responsibility has little relevance in closely held businesses that are not characterized by a separation of ownership and control.¹⁷³ Once shareholder and manager interests align, the corporate governance problem recedes, and it becomes

169. Smith, *Response*, *supra* note 9, at 996 (“While changes in the composition of the board of directors may have some marginal effects on corporate decisionmaking, market forces severely constrain the range of options available to the boards of large, publicly traded companies.”). As Dean Smith puts it, “powerful capital and takeover markets provide strong incentives for corporate managers to maximize profits.” *Id.* For a rare situation in which corporate law rules do require managers to focus exclusively on shareholder value, see *Revlon v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), holding that managers may not take into account other considerations once a sale of a company becomes inevitable.

170. See Wells, *supra* note 6, at 80.

171. See Martin C. McWilliams, Jr., *Who Bears the Costs of Lawyers' Mistakes?—Against Limited Liability*, 36 ARIZ. ST. L.J. 885, 900–01 (2004) (“Agency efficiencies are manifested in terms of fiduciary managers employing the capital of passive investors—enabling the investors to take risk with minimal due diligence, to diversify, and to enter and exit investments at low cost.”); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1595 (1988).

172. See, e.g., Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 260 (2010) (“Tax-avoidance strategies . . . can actually reduce firm value by allowing managers to manipulate the share price or otherwise extract rents.”).

173. See McWilliams, *supra* note 171, at 901 (“By contrast, the close corporation manifests agency efficiencies in terms of unity of interest among active long-term investors, policymakers, and managers—different models altogether, distinguished in particular by the distinct roles of the residual claimants.”).

possible to consider other, under-explored issues of corporate responsibility.

There is no evidence to support a claim that *any* pursuit of social responsibility controverts the “pure” business decision that would otherwise be generated through the economic calculation of an autonomous, disassociated entity. Except for a few specialized contexts—such as market trading—business transactions are neither anonymous nor arms-length. Rather, business relationships are situated within a wider sphere of social intercourse. An expanded account of corporate social responsibility should include social motivations for choice and the socially embedded nature of economic activity. To frame a business decision in binary terms as profit seeking or altruistic is already to misunderstand the social context in which businesses operate.¹⁷⁴

For a smaller, locally owned business, the line between profit seeking and community obligation may not even be intelligible.¹⁷⁵ Locally owned businesses exist in particular communities and rely upon reciprocal community obligations. These networks of trust and mutual support are social capital and enable a business to operate and to earn a profit. At the same time, they motivate the business owners to behave in a socially responsible fashion even at the expense of short-term profits. Although all business activity takes place in a social context, local business owners are especially likely to perceive their business interests as part and parcel of a broader set of interconnected social relationships.¹⁷⁶ Just as human beings often have a variety of motivations, it may not matter to the owners whether a particular decision serves a business need or reflects a social obligation.¹⁷⁷

174. See FLIGSTEIN, *supra* note 125, at 18 (describing “social structures in markets” in terms of a “search for stable interactions with competitors, suppliers, and workers”). However, a full exploration of economic sociology is beyond the scope of this Article.

175. For instance, if a local business owner provides temporary shelter for employees who are helping her restore her business, is that a charitable act or a business decision?

176. To our knowledge, there has been only one empirical study comparing the levels of assistance provided after a natural disaster by locally owned and national corporations. See Okmyung Bin & Bob Edwards, *Social Capital and Business Giving to Charity Following a Natural Disaster: An Empirical Assessment*, 38 J. SOCIO-ECONOMICS 601, 602 (2009) (finding that “[l]ocal branches of national chains were less likely than locally owned franchises to provide assistance to employees and less likely than independent local businesses to provide in-kind contributions to local relief and recovery efforts”).

177. See Stone, *supra* note 131, at 559 (“It has always seemed to me that the best way to supply some hard content to the notion of corporate social responsibility is to go back and examine the general issue, what ‘being responsible’ entails when our subject is not corporations, but ordinary flesh and blood mortals. What are we driving at when we enjoin an ordinary person to be responsible?”).

To be sure, there remains a tension between profit seeking and social responsibility, and it is important to acknowledge the existence of tradeoffs, or else the problem of choice would dissolve. However, analysis of locally owned businesses shows that social responsibility and investor interests are not necessarily in conflict. First, decision-making occurs in an atmosphere of substantial uncertainty and there may be more than one plausible path toward profit.¹⁷⁸ Decisions about marketing, product development, and the like can be approached in different ways. In a complex business environment, taking account of multiple time horizons, the more profitable course of action will not always be clear and greater attention to the social consequences of corporate decisions would not necessarily implicate profitability.¹⁷⁹

Second, even if a particular decision would sacrifice profits in order to serve some other purpose, or at least was not reasonably calculated to maximize profits, the business owners have substantial latitude to pursue any course they choose. Most locally owned businesses are closely held. Unlike public corporations, closely held businesses do not implicate Adolf Berle and Gardiner Means' famous diagnosis that corporate law is characterized by a fundamental separation of ownership and control.¹⁸⁰ In closely held businesses, ownership and control overlap,¹⁸¹ and the owners may have strong social as well as business motivations for responding to community needs. Thus, we can ask the question a different way—how can the shareholders maximize the value of their investment? If all participants agree that value can be measured not solely in economic terms, then a model that divides altruism and profit seeking may ignore the owners' own judgments about value.¹⁸²

178. *See id.* at 568 (“In the life of the enterprise, there are many occasions on which the managers have no ‘most profitable’ option lying on their desks. Considering the uncertainties in any business’ environment and the limited data available to it, there will be some range of choices all equally consistent with that ill-defined and elusive favorite of the economics textbooks, the investment uniquely calculated to maximize the shareholders’ wealth.”).

179. *See Engel, supra* note 20, at 9 n.30 (“It is, of course, a question of degree whether a given corporate action, not justified in terms of short term profits, is motivated, in whole or in part, by an expectation that it will augment long term profits, or solely by a desire to do the right thing in the society even at some risk to long term profits.”). This holds true for public and private corporations.

180. *See generally* ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

181. 1 F. HODGE O’NEAL & ROBERT B. THOMPSON, O’NEAL AND THOMPSON’S CLOSE CORPORATIONS AND LLCs: LAW AND PRACTICE § 1:9 (rev. 3d ed. 2010) (“[C]lose corporations often unite the decision-making function and the risk-bearing function in one group, the shareholder-managers.”).

182. *Cf. Engel, supra* note 20, at 22 (contending that the justifications for individual and corporate altruism must be different, because if all other justifications were removed “there would remain one vitally important justification applicable only to individual giving: the pleasure taken from it by the

Third, locally owned businesses strengthen the communities in which they reside. A local business not only provides goods and services, and sometimes employment opportunities, but, at the same time, builds social networks. Thus, even under a skeptical view of corporate responsibility in which “a corporation should only engage in philanthropy when it is efficient for it to do so, that is, when it has a comparative advantage over other corporations and, importantly, nonprofit organizations and the government,”¹⁸³ we might conclude that locally owned businesses have an indispensable role to play in their communities.

Nor is there a serious concern about democratic legitimacy. Locally owned businesses are not even arguably competitors with the nation state in terms of size and influence. They aggregate capital and may benefit from limited liability but do not have concentrated economic power.¹⁸⁴ When ownership and control are united, the use of corporate resources reflects the preferences of the residual beneficiaries of the firm’s profits and not a quasi-governmental redistribution of their wealth.¹⁸⁵

IV. RESTORING NORMALCY

In the context of disaster, the arguments against a progressive vision of corporate social responsibility lose much of their force.¹⁸⁶ Disasters can involve harms of the most serious order, potentially including loss of life,

donors themselves—the aspect of charitable giving that resembles any consumption expenditure. The analogous rationale, with respect to corporate donations could not, as a practical matter, rest on any pleasure taken by the shareholders. Rather, it would have to involve the gratification felt by management. And as soon as the matter is put that way it becomes apparent, as a question of both law and policy, that this ‘consumption’ justification just does not work.”)

183. Henderson & Malani, *supra* note 136, at 576. Professors Henderson and Malani focus on public corporations and offer the example of “Starbucks [which] can offer its coffee consumers the ability to help . . . farmers by purchasing fair trade coffee. Economists call this ‘economies of scope,’ and it is something corporations likely have that most nonprofits do not.” *Id.* at 575.

184. Thus, political influence must usually be gained through trade associations or community politics.

185. For purposes of this argument, we assume that the owners are all in agreement. However, when majority owners use corporate resources for community purposes, it can at least be said that they are spending their own money as shareholders.

186. Finally, although it is not the argument we explore here, we note that even assuming that some management decisions work against corporation’s own profitability, major disasters may be a special case and support a different standard for corporate responsibility. See Robert J. Rhee, *Crisis, Rescue, and Corporate Social Responsibility Under American Corporate Law*, in REFRAMING CORPORATE SOCIAL RESPONSIBILITY: LESSONS FROM THE GLOBAL FINANCIAL CRISIS 127 (William Sun et al. eds., 2010) (contending that management’s usual authority to pursue socially responsible goals should be enhanced in “exigent circumstances”); Robert J. Rhee, *Fiduciary Exemption for Public Necessity: Shareholder Profit, Public Good, and the Hobson’s Choice During a National Crisis*, 17 GEO. MASON L. REV. 661 (2010) (same).

a sudden, total disruption of community order, and destruction of homes and essential infrastructure.¹⁸⁷ Private assistance in restoring basic services and providing food, water, and shelter should require no authorizing official action.¹⁸⁸ Nor is a complete account of the corporation's role in society necessary to support corporate philanthropy, because the immediate needs are clear and deserving of aid on any plausible theory of the corporation's role.¹⁸⁹ Even assuming a strong connection between an exclusive focus on shareholder wealth maximization and an overall increase in societal liberty,¹⁹⁰ the role for voluntary corporate giving in the wake of disaster would remain compelling.¹⁹¹ Needless to say, there has been no outcry over Wal-Mart's role in helping disaster victims after Hurricane Katrina or elsewhere.

187. *What is a disaster?*, INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES, <http://www.ifrc.org/en/what-we-do/disaster-management/about-disasters/what-is-a-disaster> (last visited May 12, 2012) (stating that a disaster is "a sudden, calamitous event that seriously disrupts the functioning of a community or society and causes human, material, and economic or environmental losses that exceed the community's or society's ability to cope using its own resources").

188. *Cf.* Engel, *supra* note 20, at 27 (defending "proposition that any social goal to be pursued by public corporations should have two closely related characteristics: first, a broad social consensus should support corporate pursuit of the particular goal in question; and second, some kind of reasonably clear social signal should be available to help each corporation figure out what actions are in furtherance of the goal." (citations omitted)). According to Professor Engel, profit maximization is the goal most likely to satisfy his proposed test. *Id.* at 28.

189. *See* AMARTYA SEN, RATIONALITY AND FREEDOM 558 (2002) (observing that "incompletely theorized agreements' may be quite important for agreed public decisions" and that "[a] consensus on public decisions may flourish so long as the exact grounds for that accord are not very precisely articulated") (citing CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996)). Thus, in the wake of disaster, there seems to be little basis for Professor Engel's assertion that "I think no one would claim we have any very satisfactory ways—whether by philosophical inquiry or social scientific research—of ever saying with certainty that 'Society wants *this* done, even though the legislature hasn't gotten around to it.'" Engel, *supra* note 20, at 59. This is by no means a thoroughgoing rebuttal of Professor Engel's argument, only a suggestion that there are, in fact, situations that command a broad consensus concerning the need for all responsible actors to help in whatever fashion they are able.

190. *See, e.g.*, Bainbridge, *supra* note 128, at 898 ("Economic liberty, in turn, is a necessary concomitant of personal liberty; the two have almost always marched hand-in-hand. . . . Accordingly, it seems fair to argue that the economic liberty to pursue wealth is an effective means for achieving a variety of moral ends.").

191. Moreover, although specific disasters may occur with little warning; there are a series of disaster plans in place at the national, state, and local level that embody society's commitment to come to the aid of disaster victims. Further, there is general consensus, and some legislation, prohibiting "price gouging." *See* MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? 4–5 (2009). These laws offer specific guidance to corporations and other businesses that the profit-maximization rules are, at least to that degree, suspended. *But see* John Shahar Dillbary, *Emergencies, Body Parts, and Price Gouging*, in LAW, POLITICS, AND SOCIETY (Cambridge Univ. Press, 2009) (contending that high prices help markets allocate goods and services efficiently and do not evidence a failure of market ordering).

The case for the active involvement of locally owned business in disaster relief is even stronger. Unlike large public corporations, local businesses largely sidestep objections to corporate social responsibility based on agency costs or democratic accountability. Further, there is less reason to worry about a misallocation of resources if corporate managers are empowered to pursue non-wealth-maximizing goals. Locally owned businesses and their managers will be attuned to the community's priorities in the wake of disaster and well positioned to act. Indeed, in some cases a disaster response spearheaded by locally owned businesses may have more perceived legitimacy than the efforts of outside government officials.¹⁹²

Our principal aim in this Article is more theoretical than practical: We contend that locally owned business is vital to disaster recovery. Although we do not offer specific policy guidance, we conclude with two general considerations. First, locally owned businesses must survive before they can help their communities. Therefore, disaster plans should recognize a need to provide financial assistance to help locally owned businesses surmount short-term cash flow problems. Also, disaster planning should include tools to help local businesses cope with bureaucratic obstacles to restoring a previous business plan or developing a new strategy in response to changed needs in the community. As a general principle, legal rules should be designed to encourage local businesses to adapt entrepreneurially to the post-disaster landscape.

Second, public officials can help locally owned businesses by respecting limits to the appropriate involvement of outside authorities. In particular, public relief efforts should strive to avoid duplication of tasks better left to local businesses and other community organizations.¹⁹³ Advance planning is important in this regard, because longer-term consequences may not seem as pressing, and yet those potential costs must be weighed against shorter-term benefits. For instance, providing free food over a long period of time and without need-based constraints could cripple the prospects for local grocery stores. Without a business sector, a

192. Admittedly, coordination problems can arise if businesses operate without any central supervision. In Haiti, for example, the weakness of the central government and its perceived corruption has led to a proliferation of Non-Governmental Organizations ("NGOs"). Yet, the relief agencies sometimes lack knowledge of community needs. *See, e.g.,* José De Córdoba, *Aid Spawns Backlash in Haiti*, WALL ST. J., Nov. 12, 2010, at A1 (noting that aid has largely bypassed a corrupt and incompetent local government but that "there is little coordination among the NGOs or between the NGOs and Haitian officials").

193. This point applies as well to non-profit aid workers and charitable organizations.

community cannot restore the jobs and income, to say nothing of the supply of goods and services that make recovery possible.

A. *Post-Disaster Entrepreneurship*

By sending signals about the health of the community and its ability to recover from disaster, rebuilding efforts led by locally owned businesses can accomplish more than well-intentioned programs implemented by government or outside relief agencies. As noted previously, strong community ties make local business more likely to stay and rebuild.¹⁹⁴ Even so, the decision to rebuild will not always be clear.¹⁹⁵ After Katrina, for instance, pure economic rationality might have led many restaurant owners to relocate. The choice to cut bait seemed right, for instance, to “[h]igh-end steakhouse chain Smith & Wollensky,” which decided “not [to] reopen its New Orleans restaurant.”¹⁹⁶ The chain is based in New York and its President, Eugene Zuriff, explained that the restaurant would “remain shuttered due to market conditions.”¹⁹⁷ Examining the same post-disaster environment as the local restaurant owners who chose to stay, Mr. Zuriff’s economic logic seemed impeccable: “There’s no lunch crowd, no substantial convention business. It’s going to be a while.”¹⁹⁸

The benefits of social capital can be gleaned, in part, from its apparent absence in Mr. Zuriff’s decision-making. Residents of communities with high levels of social capital are inclined to “work for a solution” rather than to leave, because they “have more at stake should the neighborhood

194. For instance, Michael Brown, Community Service Coordinator at the Church of the Advent Hope, New York, New York, told us that his church solicits contributions for disaster relief from church members who run small businesses. Interview with Michael Brown, Community Service Coordinator, Church of the Advent Hope, New York, N.Y. (Mar. 30, 2011). He further opined that larger businesses are sometimes reluctant to contribute because they want to avoid a sectarian affiliation, whereas local businesses will gladly contribute for community recognition. *Id.*

195. See, e.g., Kyung Lah, *Quake-hit Japanese City in Danger of Dying*, CNN.COM (Mar. 25, 2011, 4:43 PM EDT), available at <http://cnn.com/2011/WORLD/asiapcf/03/25/otsuchi.japan.quake/index.html?hpt2c1> (“[Y]ou can see the survivors making the choice as they walk through the debris-strewn main street of Otsuchi in Japan—stay or go?”). As the author observes, the “dilemma is the same for them all: do you stay and rebuild in a devastated small town, struggling economically even before the tsunami, or pull up stakes and start anew in a big city?” *Id.*

196. Russ Britt, *Smith & Wollensky to Close New Orleans Restaurant*, MARKETWATCH, Apr. 6, 2006.

197. *Id.*

198. *Id.* (internal quotation marks omitted). Zuriff added, “Things haven’t gotten back together. I mean, you have like 24 people running for mayor, what does that tell you?” *Id.* (internal quotation marks omitted). In part, Mr. Zuriff’s comments may reflect not only a lack of commitment on his part but a reciprocal community judgment that his business was not worth saving.

not recover successfully.”¹⁹⁹ However, local businesses will not stay to contribute unless they have a business plan that makes sense. The social context for economic activity does not obviate the need to bring in revenue and generate profits.

Disasters upend existing businesses and require owners to “revisit activities typically associated with the start-up phase of the business life cycle.”²⁰⁰ To restore operations, a local business must reassemble its employees, its management team, its physical headquarters, and it must quickly establish a source of revenue.²⁰¹ Also, the business owners will engage in strategic planning to decide how to address new opportunities and the possible foreclosure of an existing business model.²⁰² In all these respects, the post-disaster context is analogous to the situation faced by a new, start-up business. In fact, “some businesses become quite entrepreneurial during a disaster response and surviving businesses can contribute quite early to assist in disaster recovery, if officials understand their needs.”²⁰³

FEMA has circulated for comment a draft National Recovery Framework that recognizes a role for locally owned business in disaster recovery.²⁰⁴ The Framework states that local businesses are “crucial in restoring the economic health of a community.”²⁰⁵ Also, the Framework asserts that disaster recovery requires more than the rebuilding of physical infrastructure: “It focuses on how best to restore, reconstruct and redevelop the social, natural, and economic fabrics of the community.”²⁰⁶ The Framework’s longer-term perspective builds upon a previous plan that

199. Aldrich, *Social, Not Physical, Infrastructure*, *supra* note 100, at 8. As Professor Aldrich observes, social capital explains why individuals choose the political mechanism of “voice” rather than the simpler, economic remedy: “exit.” *Id.* (citing HIRSCHMAN, *supra* note 83). Although Aldrich does not pursue the point, social capital theory seems promising as a way of giving content to Hirschman’s theory of loyalty, which a number of commentators have observed is less developed than his explanation of the voice and exit mechanisms.

200. Zolin & Kropp, *supra* note 49, at 185.

201. *See id.* (noting that “the ability to retain a revenue stream through a crisis” is crucial).

202. *See id.* at 188 (stating that Hurricane Katrina “changed the business environment and created new opportunities and challenges, plunging each business into a strategy revision, similar to that experienced by a new enterprise”).

203. *Id.* at 197.

204. *See* FEMA, *National Disaster Recovery Framework* (Draft, Feb. 5, 2010), available at <http://disasterrecoveryworkinggroup.gov/ndrf.pdf> [hereinafter *Framework*]. The Framework states that “[i]n September 2009, the President charged the Department of Homeland Security (DHS) and the Department of Housing and Urban Development (HUD) to establish a Long-Term Disaster Recovery Working Group . . . to provide operational guidance for recovery organizations, as well as to make recommendations for improving the nation’s approach to disaster recovery.” *Id.* at 2.

205. *Id.* at 16.

206. *Id.* at 5.

“anticipates the need for long-term recovery, [but] addresses primarily actions during disaster response.”²⁰⁷

However, despite its recognition of the importance of a community’s social fabric, the Framework appears to overlook the importance of local business to economic recovery. According to the Framework’s proposed timetable, disaster recovery efforts can be divided into stages: (1) immediate response; (2) stabilization activities; (3) intermediate recovery; and (4) long-term recovery.²⁰⁸ On this timetable, local business initiatives become significant only after intermediate-range recovery efforts take place, including population recovery.²⁰⁹ The long-term initiatives include as a goal, “Implementing economic and business revitalization strategies.”²¹⁰

Yet, if locally owned businesses can help the members of a disaster-affected community to overcome collective action problems, then signals sent by revitalized businesses could be an important factor in individual decisions to return.²¹¹ As one commentator observes, local commercial activity is a kind of “[m]utual assistance” in that it “serves as a source of material support, but, more important, it sends signals that members of a community are committed to recovery and helps to restore the fabric of communities torn apart by disaster.”²¹² Therefore, “[o]nce . . . immediate concerns are met, the reestablishment of working social and economic systems ought to take priority because they are the foundation on which long-term recovery must be constructed.”²¹³

Accordingly, the Framework’s intermediate goals would seem to benefit from earlier, more sustained attention to the needs of local businesses. For many such businesses, recovery must be early or not at all. If permission to rebuild cannot be acquired swiftly, a business may simply run out of operating capital or decide to relocate. The loss costs the community both economic and social resources, but the current Framework appears to assign only an economic value to locally owned businesses: “Businesses play a critical role in the stabilization and

207. *Id.* at 6.

208. *Id.* at 9–11.

209. *Id.* at 10. The only exception is the stated goal of “[r]eturning . . . displaced populations and businesses if appropriate.” *Id.* The Framework does not elaborate on the concept of business return, though it may be significant if it involves “a plan that helps businesses get to their physical locations to recover key records and equipment.” Zolin & Kropp, *supra* note 49, at 198.

210. *Framework*, *supra* note 204, at 11.

211. *See supra* Part II.

212. Chamlee-Wright, *supra* note 82, at 239.

213. *Id.* at 253.

revitalization of the local economy as employers, service and goods providers, investors, developers, planners and in other economic roles needed to achieve a sustainable recovery and prosperous community.”²¹⁴ Disaster-planning officials should recognize that the economic importance of locally owned business is inseparable from its social importance.

This Article does not assess the relative merits of various economic incentives that might be used to support the entrepreneurial efforts of locally owned businesses. In remarks delivered in New Orleans on September 15, 2005, then-President George W. Bush outlined a number of economic proposals that formed the basis for subsequent legislation:

Tonight, I propose the creation of a Gulf opportunity zone, encompassing the region of the disaster in Louisiana and Mississippi and Alabama. Within this zone, we should provide immediate incentives for job-creating investment; tax relief for small businesses; incentives to companies that create jobs; and loans and loan guarantees for small businesses, including minority-owned enterprises, to get them up and running again. It is entrepreneurship that creates jobs and opportunity. It is entrepreneurship that helps break the cycle of poverty. And we will take the side of entrepreneurs as they lead the economic revival of the Gulf region.²¹⁵

While the reviews of the Gulf Zone Opportunity Act of 2005 (“GO ZONE”)²¹⁶ have been mixed, the general principle seems correct.²¹⁷ Government assistance, whether in the form of tax incentives, loans, or direct payments, can give locally owned businesses a chance to succeed in the aftermath of disaster. In turn, the viability of local business strengthens a community’s social networks and has a multiplier effect on the overall prospects for recovery.

Recognizing the importance of the business community, “states are beginning to create business emergency operations centers within their emergency management teams, which increases communications between the private and public sectors during emergencies and strengthens overall

214. *Framework*, *supra* note 204, at 16.

215. Remarks of President George W. Bush, New Orleans, LA, in *President Bush Delivers Remarks on Hurricane Katrina Recovery*, WASH. POST. (Sept. 15, 2005), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/15/AR2005091502252.html>.

216. Gulf Zone Opportunity Act, Pub. L. No. 109-35, 119 Stat. 2577 (2005).

217. See, e.g., Kimberly E. Smith, *The GO ZONE Act: An Innovative Mechanism for Promoting Economic Recovery for the Gulf Coast*, 77 MISS. L.J. 807 (2008).

disaster response and recovery efforts.”²¹⁸ These efforts appear to focus on the establishment of public-private partnerships rather than on the standalone value of local business. However, both FEMA and the Small Business Administration (“SBA”) provide materials to help local businesses plan for disaster.²¹⁹ Moreover, disaster recovery loans are available from the SBA for qualifying businesses.²²⁰ By providing information and financial resources, governments at the federal, state, and local level can help businesses make entrepreneurial investments in community recovery.

B. Market-Distorting Signals

Current disaster law and policy often misses opportunities to help locally owned businesses restore their communities after catastrophe and sometimes actually works at cross-purposes, diminishing their social capital.²²¹ Top-down relief efforts are necessary in the immediate aftermath of a disaster, but care should be taken to avoid stifling local recovery efforts, including the repair of social networks: “Noise emanating from policies can muffle [recovery] signals, however—or squelch them altogether by failing to provide and enforce the rules of the game for rebuilding or by creating rules that forbid or delay such reopenings”²²² Thus, locally owned businesses should not only be recognized in the broader context of corporate social responsibility, but should also be included in disaster planning.

In particular, public relief efforts should take care to avoid squelching the efforts of locally owned businesses. If the ultimate goal of disaster relief efforts is to help a community recover fully from disaster, then a particular “hazard of in-kind charitable or volunteer activity is that it will compete with and harm still viable commercial enterprises, undermining

218. FEMA Release No. HQ-11-213, FEMA Administrator: Business Community is Critical Partner in Disaster Response and Recovery, *available at* <http://www.fema.gov/news/newsrelease.fema?id=59308> (Nov. 4, 2011). The FEMA Release states that FEMA has launched a similar liaison program. *Id.*

219. See *Disaster Planning*, READY.GOV, <http://www.ready.gov/business>; <http://www.sba.gov/content/disaster-planning> (last visited May 12, 2012).

220. See *Disaster Assistance*, SBA.GOV, <http://www.sba.gov/content/disaster-assistance> (last visited May 12, 2012).

221. See CHAMLEE-WRIGHT, *supra* note 23, at 170 (contending that “[i]f policy makers have the wrong paradigm in mind—if they believe that it is primarily government that rebuilds communities . . . [w]e end up fostering an environment in which private decision makers have less and less ability to tap their capacity as property owners, service providers, and community leaders”).

222. Chamlee-Wright, *supra* note 82, at 240.

the community's long-term economic viability."²²³ Thus, according to one scholar, the slow pace of recovery in New Orleans may have been attributable to an excess of "orchestrated and centralized government effort" rather than a "lack of government resources."²²⁴ On this view, by taking over recovery efforts, "public policy is distorting the signals emerging from markets and civil society that would otherwise foster a swift and sustainable recovery."²²⁵

Whether this criticism of post-Katrina recovery efforts is warranted, we contend that government-sponsored disaster relief should acknowledge the vital role of social capital in longer-term community life recovery and should include locally owned businesses in comprehensive disaster planning:

Not only the built environment matters in people's assessment of whether their community is rebounding, but also the return of social systems that connect individuals and their families to one another through formal and informal neighborhood groups and through the services and social spaces created by schools, businesses, religious groups, and nonprofit organizations. In such a context, the signals coming out of civil and commercial society—signals about who is coming back and when, and what services will be provided—play a critical role in the recovery process.²²⁶

Social systems are not a secondary consideration: once government officials have coordinated immediate rescue and relief measures to save lives and mitigate ongoing safety hazards, the longer-term recovery plan should include efforts to strengthen any signals of recovery that the community can generate and, at a minimum, should avoid stifling those signals.

FEMA's draft Framework explicitly recognizes the importance of inclusive planning and that "non-governmental partners in the private and non-profit sectors (i.e., local businesses, owners and operators of critical

223. See George Horwich, *Economic Lessons of the Kobe Earthquake*, 48 *ECON. DEV. & CULTURAL CHANGE* 521, 532 (2000). Professor Horwich offers an example of this from his study of the Kobe earthquake. *Id.* (noting that "private for-profit medical clinics complained that the Red Cross hospitals were providing relief care well past the time it was justified.")

224. Chamlee-Wright, *supra* note 82, at 237 (arguing "that government policy and programs are the principal source of the problem"). Given the overall climate of neglect in some of the poorest neighborhoods, there would seem to be room for an argument that aid programs were also misdirected. However, a full analysis of the allocation of relief resources in New Orleans and the Gulf Coast is beyond the scope of our current project.

225. *Id.*

226. *Id.* at 238.

infrastructure and key resources; and voluntary, faith-based and community organizations, foundations, philanthropic groups and academic institutions) play a significant role in meeting local needs.²²⁷ This is a key issue and worth emphasizing. In providing disaster relief, there is a fine line between the supply of necessary assistance and the dampening of organic recovery efforts. The first, overriding priority is to save lives and to mitigate suffering. However, well-intentioned aid can produce unintended consequences. Humanitarian assistance may actually undermine long-term development goals. Poorly thought through aid can have unfortunate consequences for locally owned businesses.

For example, one study of small business recovery after Hurricane Katrina reported the negative reaction of business owners to outside relief efforts coordinated by FEMA.²²⁸ These reconstruction efforts focused on physical infrastructure and “exacerbate[d] the shortage of workers in the area by providing ‘too much’ financial assistance to persons displaced by the storm, and ‘poach[ed]’ workers from local construction firms.”²²⁹ Short-term recovery efforts and disaster mitigation thus displaced longer-term rebuilding by starving local business of resources.²³⁰

The problem is that disaster planning and response tends to focus on physical infrastructure.²³¹ Government, insurance, and other large businesses contribute resources to repair and rebuild roads, replace housing, and otherwise address physical damage in disaster-ravaged areas. Recent studies, however, show that social networks—as opposed to amount of aid or damage—are key to recovery.²³² Accordingly, in order to

227. *Framework*, *supra* note 204, at 13.

228. Rodney C. Runyan & Patricia Huddleston, *Small Business Recovery from a Natural Disaster: Lessons from Katrina*, in *LAW AND RECOVERY FROM DISASTER: HURRICANE KATRINA* 127 (Robin Paul Malloy ed., 2009). Although they focus on small business rather than locally owned business, the distinction does not appear significant as their definition of small business requires that it be “independently owned and operated” and their surveys were limited geographically to areas damaged by Katrina.

229. *Id.*

230. See Chamlee-Wright, *supra* note 82, at 253 (“[I]f markets are to rebound robustly, employers must be able to attract employees. Employment of local workers by relief agencies should not be undertaken with the aim of creating jobs.”). Professor Chamlee-Wright further recommends that financial relief be offered in “the form of one-time payments . . . regardless of employment status” in order to “reduce the distortions in the local labor market, and avoid the politically difficult decision to cut off the stream of unemployment benefits.” *Id.*

231. If adopted, the draft *Framework* would represent a significant improvement over the status quo.

232. See Mayumi Sakamoto & Katsuya Yamori, *A Study of Life Recovery and Social Capital Regarding Disaster Victims: A Case Study of Indian Ocean Tsunami and Central Java Earthquake Recovery*, 31 *J. NAT. DISASTER SCI.* 13, 14 (2009) (contending that, “[o]n a long-term basis, the most

take advantage of social capital and to foster bottom-up rebuilding, policymakers must reorient problem solving to include social infrastructure. A plan that excludes local businesses may damage existing community strengths and hamper rebuilding.

City planners in Tuscaloosa, Alabama have struggled with these issues in the aftermath of extensive tornado damage as they formulate a comprehensive rebuilding plan to create “multi-use corridors within the tornado recovery zone.”²³³ Local business owners have been vocal in their opposition to a plan that could pose impediments to rebuilding damaged or destroyed businesses and that does not adequately clarify zoning issues.²³⁴ On the other hand, Tuscaloosa has an opportunity to address vulnerabilities, physical and social, for the longer term. Thus, plan advocates “see it as paving the way for a better city business district, more cohesive neighborhoods and an enhancement to the Tuscaloosa quality of life.”²³⁵ However, setting the Tuscaloosa recovery plan aside, improvements to existing uses can become Utopianism if planners too readily give themselves over to an imagined future dotted with green spaces, organic grocery stores, and boutiques well stocked with artisanal crafts. To put the point gently, the priorities of those charged with city planning may not work equally well for every demographic group. Further, like any Utopian project, there is a danger that insufficient attention will be paid to the transitional dislocations that will ensue.

To be clear, our focus on bottom-up recovery efforts should not be confused with a blame-the-victim position or with a claim that government assistance programs are part of the problem.²³⁶ Nor do we contend that the

important factor [for life recovery] was characterized by the term ‘social ties,’ specifically referring to human networks”).

233. Jason Morton, *Zoning Changes Within Tornado Zone Unveiled*, TUSCALOOSA NEWS, Oct. 18, 2011, available at <http://www.tuscaloosaneews.com/article/20111018/NEWS/111019701?tc=obinsite>.

234. See Jason Morton, *Tuscaloosa Forward Plan Passes Unanimously*, TUSCALOOSA NEWS, Sept. 7, 2011, available at <http://www.tuscaloosaneews.com/article/20110907/NEWS/110909820> (“‘Small-business property owners . . . feel like they’ve been deleted from the (future of Tuscaloosa). . . .’” (quoting local-business owner) (first set of ellipses in original)).

235. *Id.* (“‘The consensus is that people want (small businesses) to come back’ ‘But no, we don’t want it to go back the way it was. These are changes that (residents) wanted to see.’”) (quoting Joan Barth, “secretary of Tuscaloosa Neighbors Together, a grassroots community group”). Mixed-use communities have many advantages over communities segregated into business and residential zones, and disasters create a need and an opportunity for longer-range planning. See ANDRES DUANY ET AL., *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* (2000).

236. See, e.g., Jamie Peck, *Liberating the City: Between New York and New Orleans*, 27 *URB. GEOGRAPHY* 681, 702 (2006) (reporting that one commentator had asserted that if “‘chronically craven and indolent’ local officials had the wit to announce that the next round of welfare checks would be issued in Baton Rouge, then no doubt ‘people would have somehow found a way to get out’”) (quoting G. Neumayr, *The Desolate City*, *AMERICAN SPECTATOR*, Nov. 2005, at 48–50).

answer to natural disaster in urban settings is to couple zero-tolerance policing “minimalist supply-side interventions” designed to “cater[] explicitly to business, taxpayers, and the middle classes, for whom the restructured city must be made safe and welcoming.”²³⁷ We reject a simplistic choice between identifying classes of victims and fostering individual responsibility.²³⁸ Rather, we contend that disaster planning and response should recognize that individuals and communities may be both susceptible to harm and resilient. Local business has an important role to play in sustaining and creating the social capital that makes full recovery possible.

CONCLUSION

Publicly traded corporations aggregate capital from investors across the nation and worldwide. However, the residual beneficiaries of the firm are unlikely to live in the same community and will be rationally ignorant concerning the firm’s activities. Dispersed shareholding may be a boon for efficient capital allocation, but it does not tend to build strong social ties between a national corporation and the communities where it operates. When the shareholders are local, they may have connections to the community through their business and through any number of other civic organizations.

Locally owned businesses are part of the community and contribute to the economic and social aspects of longer-term life recovery after disaster. Locally owned businesses will never match the Wal-Marts of the world in their ability to distribute vast quantities of blankets, portable generators, and, for that matter, Pop-Tarts, but they are essential to the disaster resilience of their communities.

237. Peck, *supra* note 236, at 704 (arguing that such policies represent “socially invasive interventions directed at a criminalized, feckless, and morally bankrupt class of the urban poor, from whom preferred citizens must be shielded at all costs”).

238. *Id.* at 706 (summarizing the argument: “It was therefore not a lack of resources, private transportation, or out-of-town support systems that placed some of the most-needy New Orleans residents in the storm’s path; it was the long-run consequences of urban welfarism—and its racialized cast of supported characters . . .”).