Corporate Governing: Understanding Corporations as Agents of Socioeconomic Change

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Abstract

Large corporations in America influence and shape critical societal issues, including racial equity, women's rights, LGBTQ+ rights, and climate change efforts. On one hand, they are major players in politics, engaging in messaging that may either complement or counter governmental initiatives. For example, corporations have advocated for gun regulation in the wake of mass shootings, and clashed with politicians over legislation they oppose, as Disney did in its dispute with Florida over the "Don't Say Gay" bill. On the other hand, corporations often step in to fulfill quasi-governmental roles when the government is unable or unwilling to act, as they extend health benefits to same-sex couples or launch initiatives to uplift marginalized communities. I call corporate involvement in public affairs—whether through political speech or the provision of traditional government services—"corporate governing." Opinions vary on this role of corporations as agents of socioeconomic change. A growing number of the politically engaged are actively encouraging corporations to partner with social activists and take a stand. Yet, academics, policymakers, and politicians are split on whether corporations should embrace this role. One contender for the 2024 Republican nomination has even based a presidential campaign on opposing corporate governing. Meanwhile, red states have passed a flurry of legislation to oppose "woke capitalism," mostly to protect carbon emitters. This Article contributes to the literature in several ways. First, it maps various areas of reform by corporations in the socioeconomic sphere. Then, it provides legal and policy frameworks for corporate governing by analyzing the underlying conduct under our current corporate laws and by evaluating its multifaceted normative merits: Is there a business case for corporate governing? Is corporate governing strategically wise for corporations? Does it help social advocacy and society at large? Does corporate governing undermine actual government and imperil democratic institutions? Further, this Article assesses corporate governing by looking into its promises and risks from both a corporate and societal perspective and singles out two risks. On the one hand, corporate governing cannot help society in fields in which corporations have a conflicting interest, like on themes such as antitrust, tax, labor, privacy, financial and corporate reform. On the other hand, with corporations having a greater role in policymaking, citizens may become less accustomed to expecting reform via traditional politics: addressing this risk requires efforts from citizens, civil society, and politicians to preserve democratic values and institutions— corporate governance can help but cannot be the driving force.

Keywords: Corporations, Stakeholder Capitalism, Stakeholderism, ESG, CSR, Social Activism, Corporate Governance, Politics, Corporate Lobbying, Corporate Purpose, Corporate Law, Corporate Constituencies, Corporate Governance, Shareholder Primacy, Corporate Speech, Social Advocacy

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Understanding Corporations as Agents of Socioeconomic Change

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Large corporations in America influence and shape critical societal issues, including racial equity, women's rights, LGBTQ+ rights, and climate change efforts. On one hand, they are major players in politics, engaging in messaging that may either complement or counter governmental initiatives. For example, corporations have advocated for gun regulation in the wake of mass shootings, and clashed with politicians over legislation they oppose, as Disney did in its dispute with Florida over the "Don't Say Gay" bill. On the other hand, corporations often step in to fulfill quasi-governmental roles when the government is unable or unwilling to act, as they extend health benefits to same-sex couples or launch initiatives to uplift marginalized communities. I call corporate involvement in public affairs—whether through political speech or the provision of traditional government services—"corporate governing."

Opinions vary on this role of corporations as agents of socioeconomic change. A growing number of the politically engaged are actively encouraging corporations to partner with social activists and take a stand. Yet, academics, policymakers, and politicians are split on whether corporations should embrace this role. One contender for the 2024 Republican nomination has even based a presidential campaign on opposing corporate governing. Meanwhile, red states have passed a flurry of legislation to oppose "woke capitalism," mostly to protect carbon emitters.

This Article contributes to the literature in several ways. First, it maps various areas of reform by corporations in the socioeconomic sphere. Then, it provides legal and policy frameworks for corporate governing by analyzing the underlying conduct under our current corporate laws and by evaluating its multifaceted normative merits: Is there a business case for corporate governing? Is corporate governing strategically wise for corporations? Does it help social advocacy and society at large? Does corporate governing undermine actual government and imperil democratic institutions? Further, this Article assesses corporate governing by looking into its promises and risks from both a corporate and societal perspective and singles out two risks. On the one hand, corporate governing cannot help society in fields in which corporations have a conflicting interest, like on themes such as antitrust, tax, labor, privacy, financial and corporate reform. On the other hand, with corporations having a greater role in policymaking, citizens may become less accustomed to expecting reform via traditional politics: addressing this risk requires efforts from citizens, civil society, and politicians to preserve democratic values and institutions—corporate governance can help but cannot be the driving force.

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INTRODUCTION

In early 2022, Florida lawmakers presented the "Parental Rights in Education" bill,[1] better known as "Don't Say Gay," which restricts discussions on sexual orientation and gender identity in classrooms.[2] The bill ignited a public fight between the Sunshine State and one of the most important businesses operating there, The Walt Disney Company.[3] Unsatisfied with an internal memo expressing support for the LGBTQ+ community, Disney employees and creative partners demanded a public stand against the bill.[4] As Disney's CEO announced support for efforts to protect the LGBTQ+ community,[5] Florida Governor Ron DeSantis publicly criticized the company and signed the bill into law.[6] Disney then issued the following public statement:

[1] Fla. HB 1557 (2022) (codified at Fla. Stat. Ann. § 1001.42(8)(c)(3)).

[2] Dana Goldstein, *Opponents Call It the 'Don't Say Gay' Bill. Here's What It Says*, N.Y. TIMES (Mar. 18, 2022), https://www.nytimes.com/2022/03/18/us/dont-say-gay-bill-florida.html.

[3] Upon presentation of the bill, Disney faced immediate scrutiny for financially supporting some of its sponsors. Simeone v. The Walt Disney Company, C.A. No. 2022-1120-LWW (Del. Ch., Jun. 27, 2023), at *3.

[4] *Id.* at *5.

[5] *Id.* at *5–6.

[6] *Id.*

> Florida's HB 1557, also known as the "Don't Say Gay" bill, should never have passed and should never have been signed into law. Our goal as a company is for this law to be repealed by the legislature or struck down in the courts, and we remain committed to supporting the national and state organizations working to achieve that.[7]

Florida retaliated by revoking Disney's self-governance rights in certain districts, and DeSantis stated that Disney was accountable for certain prior taxes and debts.[8] After Disney's stock price declined,[9] the company was sued, albeit unsuccessfully, by one of its shareholders to get access to Disney's books and records.[10]

All the while, and in the wake of hundreds of anti-LGBTQ+ bills introduced in state legislatures,[11] several companies and brands, including Anheuser-Busch, Target, Kohl's, and North Face, have faced backlash from conservative groups and calls for boycotts for their support of the LGBTQ+ community during Pride Month.[12] These companies have been criticized for their partnerships with trans influencers or for featuring in store Pride merchandise.[13] The outcry impacted stock prices and resulted in downgraded ratings for Target and Anheuser-Busch.[14] Both companies were also criticized by the LGBTQ+ community.[15]

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[7] *Id.*

[8] *Id.* at *10–11.

[9] *Id.* at *11 (mentioning that "stock price fell during the summer [of 2022] from $145.70 per share on March 1 to $91.84 on July 14. On November 9—the day after Governor DeSantis was reelected—Disney's stock fell to $86.75 per share").

[10] *Id.* at*1–2. For more detail on the *Simeone* case, see *infra* text accompanying notes 260-273.

[11] American Civil Liberties Union, *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, 2023, https://www.aclu.org/legislative-attacks-on-lgbtq-rights (last updated Jul. 21, 2023) (counting, as of July 21, 2023, 228 bills in 2023 alone).

[12] Christina Chaddar Berk, *Boycotts hit stocks hard. Here's what might be next for Bud, Target and others caught in the anti-Pride backlash*, CNBC (June 3, 2023), https://www.cnbc.com/2023/06/03/anti-pride-backlash-what-target-anheuser-busch-and-others-should-expect-next-.html.

[13] *Id.*

[14] *See* Nick Halter, *Target, in the Crosshairs, is Taking a Beating on Wall Street*, AXIOS (June 2, 2023), https://www.axios.com/local/twin-cities/2023/06/02/target-stock-prices-tumble-pride-boycotts; Kristopher J. Brooks, *Bud Light gets stock downgrade just weeks after Dylan Mulvaney fallout*, CBS NEWS (May 12, 2023), https://www.cbsnews.com/news/bud-light-dylan-mulvaney-stock-downgrade-anheuser-busch-sales/. To be sure, during the drop of Target's stock, the whole retail sector experienced losses. *See* Michael King, *The Real Reason Target's Stock is Dropping Has Nothing to Do with Right-wing Protests Over Pride*, CBS NEWS (June 2, 2023, 11:53AM), https://www.cbsnews.com/atlanta/news/the-real-reason-targets-stock-is-dropping-has-nothing-to-do-with-right-wing-protests-over-pride/.

[15] Target was criticized for removing the Pride merchandise. Emily Stewart, *Target Giving in to Conservative Pressure on Pride Is Not a Great Sign*, VOX (May 25, 2023, 11:22 AM), https://www.vox.com/politics/2023/5/25/23737338/target-abprallen-pride-boycott-bud-light-trans-controversy-stock-price. Anheuser-Busch was called out by Dylan Mulvaney, the trans influencer with whom Bud Light had partnered, for neither standing by her publicly nor reaching out after the backlash. Carlos De Loera, *Dylan Mulvaney says Bud Light never contacted her after anti-trans backlash*, L.A. TIMES (Jun. 30, 2023), https://www.latimes.com/entertainment-arts/story/2023-06-30/dylan-mulvaney-bud-light-transphobic-backlash-trans-rights.

Recently, after the U.S. Supreme Court invalidated affirmative action as a school admission criterium,[16] conservative plaintiffs[17] and influential hedge fund activists[18] have vowed to eradicate corporate initiatives seeking to close the racial (or gender) gap. Corporate America's efforts on diversity, equity, and inclusion (DEI) are under attack.

* * *

These stories are hardly isolated, as corporations have been more and more involved in public affairs: racial justice, gender parity and reproductive rights, LGBTQ+ rights, climate efforts, voting rights, and gun control are just some examples from an increasing list of areas whereby corporations are active and vocal in the public discourse.

One phenomenon is well-known and very much in flux: as the examples above show, corporations take political action to contrast, promote, or finetune governmental initiatives. Traditionally this has coincided with lobbying to foster a corporation's own private interests.[19] But these days, corporations also embrace progressive causes and participate in policy initiatives by providing coordination and expertise to a political cause. When this phenomenon happens, which I dub "corporate socioeconomic advocacy,"[20] like-minded citizens applaud, while others are outraged.[21]

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[16] Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (holding that race-based affirmative action programs in college admissions processes violate Title VI of the Civil Rights Act of 1964 as well as the Equal Protection Clause of the Fourteenth Amendment).

[17] Former Trump aide Stephen Miller formed America First Legal, a group vowing to file lawsuits against corporations, school districts, and other institutions it considers too "woke." The group raised $44 million in 2022 and recently challenged Kellogg Co. before the U.S. Equal Employment Opportunity Commission over the company's employment practices, which it views as unlawfully seeking to balance the workforce based on race, color, national origin, and sex. *See* Emily Birnbaum, *Trump Adviser Stephen Miller's Legal Group Rakes in $44 Million*, Bloomberg (Nov. 17, 2023, 11:44 AM), https://www.bloomberg.com/news/articles/2023-11-17/stephen-miller-s-america-first-legal-group-raises-44-million; Rebecca Shabad, *Ex-Trump aide Stephen Miller's legal group files complaint against Kellogg's 'woke' programs*, NBC News (Aug. 10, 2023, 11:04 AM), https://www.nbcnews.com/politics/politics-news/stephen-miller-group-files-complaint-kelloggs-woke-programs-rcna99210.

[18] After a public campaign to denounce antisemitism at major Ivy League schools, which resulted in the resignation of the presidents of U. Penn. and Harvard, activist investor Bill Ackman launched a full-blown attack on diversity, equity, and inclusion (DEI) policies and programs at schools and in the corporate world with a 4,000-word manifesto on X (f/k/a Twitter). Paige McGlauflin & Azure Gilman, *Bill Ackman's manifesto is the latest high-profile attack on DEI but workplace experts say companies are resetting—not backtracking*, FORTUNE (Jan. 5, 2024), https://fortune.com/2024/01/05/bill-ackman-twitter-manifesto-attack-dei-diversity-programs/ (reporting that Ackman called DEI "inherently a racist and illegal movement in its implementation even if it purports to work on behalf of the so-called oppressed").

[19] *See infra* Section II.3.

[20] In the communications discipline, this phenomenon has been defined as "corporate social advocacy" *See e.g.* Melissa D. Dodd & Dustin W. Supa, *Conceptualizing and Measuring "Corporate Social Advocacy" Communication: Examining the Impact on Corporate Financial Performance*, 8 PUB. REL. J. (2014).

[21] Christine Moorman, *Commentary: Brand Activism in a Political World*, 39 J. PUB. POL'Y & MARKETING 388, 389 (2020) (noting that the partisan nature of sociopolitical issues is a key element for brand activism):

> an essential feature of political activism is the partisan nature of the issue on which the activities are focused. This means there will be firm stakeholders—consumers, partners, employees, policy makers, and so on—who want to maintain the status quo on these issues and those who seek a changed world. As a result, when brands engage on these topics, they need to pick a side and either challenge or defend the status quo.

See also Yashoda Bhagwat, Nooshin L. Warren, Joshua T. Beck & George F. Watson, IV, *Corporate Sociopolitical Activism and Firm Value*, 84:5 J. MARKETING 1 (2020).

Another similar phenomenon receives less attention but is as important: corporations perform quasi-governmental roles when the actual government cannot (because of its dysfunction) or does not want to (because of its political credo) perform such functions.[22] Corporations undertake actions that are traditionally carried out by governments in lieu of, or in addition to, governments. When corporations have the political will to step into the government's shoes, they use their skills and means to offer society, or at least a portion of it (typically a corporation's workforce), better or different conditions than those awarded or established by the government: for example, better access to healthcare or other benefits, improving the conditions of some underrepresented community, not selling firearms to those below twenty-one, and so on. I call this "government substitution" and the overall phenomenon, together with corporate socioeconomic advocacy, "corporate governing."[23]

Corporations are politically engaged to protect their own business interests in recruiting and preserving talent[24] and captivating customers,[25] and in responding to pressures from the workforce[26] and investors.[27] In addition, the *public* expects corporations to pursue and achieve public interest goals that cannot be secured via traditional political action. This is particularly true in the United States where congressional paralysis has de facto made corporations a political ally of last resort in a series of political battles. Corporations are now expected, if not pressured, to take a stand on the hot-button political issue of the day. Some economists and legal scholars have welcomed with more or less caution this new role played by corporations.[28] Some others, including

[22] *See e.g.* Dirk Matten & Andrew Crane, *Corporate Citizenship: Toward an Extended Theoretical Conceptualization*, 30 ACAD. MGMT. REV. 166, 172 (2005) (describing that corporations intervene because, as a result of globalization, states can no longer guarantee the provision of traditional public goods: "corporations have tended to partly take over (or are expected to take over) certain functions with regard to the protection, facilitation, and enabling of citizens' rights—formerly an expectation placed solely on governments.").

[23] I consider corporate socioeconomic advocacy a type of corporate governing activity, as opposed to mere advocacy, because of the political power of corporations in the policymaking process (especially at the state level). With corporate messaging, they send signals to markets and stakeholders about what to expect from their future internal and external actions. To use Professor Martin Petrin words, "corporations have structural power by being able to set the agenda and by their ability to shape the economic environment." *See* Martin Petrin, *Beyond Shareholder Value: Exploring Justifications for a Broader Corporate Purpose* 9 (November 1, 2020), https://ssrn.com/abstract=3722836.

[24] *See* Fan, *supra* note 25, at 444, 473–74; Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1544–45 (2018).

[25] According to a 2019 survey by Accenture, "62% of customers expect companies to take a stand on social issues, . . . with 53% of consumers likely to complain if they are unhappy with the brand's words or actions, while 47% will switch to other brands, and 17% may never come back." Abas Mirzaei, Dean C. Wilkie & Helen Siuki, *Woke Brand Activism Authenticity or the Lack of It*, 139 J. BUS. RES. 1, 1 (2022). *See also* Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 HARV. BUS. L. REV. 441, 453 (2019) (noting that "[e]mployees and consumers, particularly millennials, expect and may even demand that corporate leaders speak up"). *See infra* Section IV.A.3.

[26] *See e.g.* Anat Alon-Beck, *Times They Are A-Changin': When Tech Employees Revolt*, 80 MD. L. REV. 120 (2020) (discussing the role of tech workers in pushing for corporate policy changes). *See also* Jennifer S. Fan, *Employees as Regulators: The New Private Ordering in High Technology Companies*, 2019 UTAH L. REV. 973 (2020) (chronicling the concessions made by Big Tech companies after employees challenged existing social norms and also noting mandatory arbitration was abandoned also for discrimination claims).

[27] *See, e.g.* Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. Cal. L. Rev. 1243, 1250 (2020); Dorothy S. Lund, *Asset Managers as Regulators*, 171 U. PA. L. REV. 77 (2023).

[28] *See e.g.* Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247 (2017); Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock*, 76 BUS. LAW. 397 (2021) [hereinafter Strine, *Restoration*]; Leo E. Strine, Jr., *Good Corporate Citizenship We Can All Get Behind? Toward a Principled, Non-Ideological Approach to Making Money*

academics and politicians are more skeptical, if not overtly critical, of this approach.[29] In more than one case, opposing "woke" corporations is a policy platform to run for the highest office.[30]

This Article builds on the burgeoning literature on corporate social activism, which laid important blocks in describing the phenomenon and framing it within the broader context of social activism and social movements.[31] While some authors see corporations' involvement in the public sphere as a positive overall,[32] some other accounts in the literature find the phenomenon more problematic: while reckoning that social activism may be aligned with the corporation's business interests, their concern is on the political implications of such activism, given that managers act as unelected policymakers who may alienate some of their stakeholders over divisive topics.[33] A recent book by Professor Stephen Bainbridge echoes these concerns[34] and in fact cast doubts on the profitability of corporate social activism.[35] Somewhere in the middle, a recent article concludes that "[p]olitics should not be avoided [by corporations] but managed in a nuanced way pursuant to effective board oversight of [enterprise risk management]."[36]

This Article expands the existing literature on several dimensions and makes several contributions.

First, this Article maps and provides a taxonomy for various areas of corporate governing. It provides a high-level survey of selected instances of corporate governing in fields such as racial equity, women's rights, LGBTQ+ rights, climate, voting rights and preservation of democratic institutions, and gun control, whereby in each case I draw a distinction between initiatives of government substitution and of corporate socioeconomic advocacy.[37]

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the Right Way, 78 BUS. LAW. 329 (2023) [hereinafter Strine, *Good Corporate Citizenship*] (with many caveats and lamenting that "[a] rancorous debate is raging."); Fan, *supra* note 25; Lin, *supra* note 24; Aneil Kovvali, *Stark Choices for Corporate Reform*, COLUM. L. REV. (forthcoming, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4067505.

[29] For a description of accounts critical of "woke corporations," see Saura Masconale & Simone M. Sepe, *Citizen Corp.- Corporate Activism and Democracy*, 100 WASH. U. L. REV. 257, 260 & 278-81 (2022). For a popular book overtly critical of corporations' political involvement, see VIVEK RAMASWAMY, WOKE INC.: INSIDE CORPORATE AMERICA'S SOCIAL JUSTICE SCAM (2021). *See also generally* STEPHEN M. BAINBRIDGE, THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION (2023) (criticizing corporate social activism).

[30] Josh Kraushaar, *"Woke, Inc." author launches GOP presidential campaign*, AXIOS (FEB. 21, 2023), https://www.axios.com/2023/02/22/vivek-ramaswamy-2024-presidential-election (describing the launch of the presidential campaign by Vivek Ramaswamy, author of "Woke, Inc."—*see supra* note 12); Jessica Guynn, *'Woke mind virus'? 'Corporate wokeness'? Why red America has declared war on corporate America*, USA TODAY (Jan. 2023), https://www.usatoday.com/story/money/2023/01/04/desantis-republicans-woke-big-business-war/10947073002/ (describing DeSantis' use of "anti-wokism" as a political platform).

[31] *See* Lin, *supra* note 24; TOM C.W. LIN, THE CAPITALIST AND THE ACTIVIST: CORPORATE SOCIAL ACTIVISM AND THE NEW BUSINESS OF CHANGE 89 (2022); Fan, *supra* note 25.

[32] *See* LIN, *supra* note 31, at 163 ("Contemporary corporate social activism offers not only a new path to social progress, but also a new perspective for our roles in making this progress real. It offers us a way to see ourselves in a broader, more diverse, and more complete fashion—beyond narrow definitions of activt and capitalist—as a complete person."); Fan, *supra* note 25, at 445, ("despite the perils associated with the involvement of corporate law within social movements, there is the promise of meaningful change.").

[33] *See* Masconale & Sepe, *supra* note 29, at 305–11; Strine, *supra* note 28, at 357–58.

[34] BAINBRIDGE, *supra* note 29, at 149–51 (noting that "exercise of political power by undemocratically selected technocrats skilled predominately in business and finance amounts to authoritarianism by the wrong authorities.").

[35] *Id.*. at 105-24.

[36] Omari Scott Simmons, *Political Risk Management*, 64 WM. & MARY L. REV. 707, 781 (2023).

[37] *See infra* Section I.A.

Second, this Article offers doctrinal and normative frameworks for analyzing corporate governing in both its declinations, corporate socioeconomic advocacy and government substitution. After concluding that none amounts to a violation of existing corporate laws,[38] I address the multifaceted normative merits of corporate governing. One of the main reasons the current debate has been not only very contentious but also inconclusive is that the analysis has for the most part lumped separate normative dimensions. Instead, this Article poses *four distinct normative questions*:[39] Is there a business case for corporate governing? Is corporate governing strategically wise for corporations? Does it help social advocacy, that is, is it ultimately effective in advocating certain social causes and does it help society at large? Does corporate governing undermine actual government and imperil democratic institutions?

The answer to the first two questions is cautiously affirmative: there are no a priori reasons for negating that corporate governing may enhance firm value and is strategically sound.[40] The important caveat here is that the outcome of corporate governing is highly dependent on context: key factors are the policy issue at hand, firm characteristics, authenticity, adherence to the firm's core mission and prior messaging, and the expectations of its stakeholders and of the various markets in which the company operates (product, labor, stock, and so forth). Some initiatives turn out beneficial, some others do not: corporate governing must be conceptualized like any other initiative or project a corporation undertakes—risky but potentially profitable. Most companies are aware of the risks and rewards associated with corporate governing: in fact, they plan around and have structures in place to absorb such risks.

The other two normative questions (the social advocacy case and the risk that corporate governing might imperil democratic institutions) are more problematic. As to the former, one should not worry about social activists—they are adults and aware of the risk of corporate co-optation of their agenda for strategic purposes. If they see that partnering with a corporation is not yielding the desired results, they can part ways: it takes two to tango.[41] On the other hand, whether corporate governing is beneficial for society at large is a tougher question: while this is largely dependent on one's politics, it is inevitable to find dissenters along the way.[42] Just as problematic is the risk that we end up delegating vital socioeconomic issues to corporations and cease to pursue the main avenue of politics and actual government.[43]

Third, based on the proposed normative framework described above, this Article investigates the promises and risks of corporate governing. I analyze the trade-offs separately, first from the corporation's perspective and then from a societal standpoint. On the corporate front, if carefully planned and executed, corporate governing can benefit corporations in recruiting, employee morale, marketing, and ultimately profitability.[44] But as to the risks, corporations may alienate stakeholders with contrasting political views, shareholders may be uneasy with their firm funding causes they disagree with, and the current corporate governance framework may not be equipped to effectively manage broader agendas that may conflict with shareholder and stakeholder desires.[45] To be sure, none of these problems seems insurmountable with some policy refining.

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[38] *See infra* Part III.
[39] *See infra* Part IV.
[40] *See infra* Sections IV.A-B.
[41] *See infra* Section IV.C.1.
[42] *See infra* Section IV.C.2.
[43] *See infra* Section IV.D.
[44] *See infra* Section V.A.1.
[45] *See infra* Section V.A.2.

However, as far as society is concerned, the discussion gets trickier. True, corporate governing can be advantageous, especially in certain areas where corporate governing achieved goals difficult to secure through the ordinary avenues of politics. One example for all is how consequential corporate initiatives have been in attaining crucial political wins at the national level for the LGBTQ+ movement.[46] Yet, corporate governing raises several societal risks, including that it is undemocratic as it lacks accountability and representativeness; it is divisive and anti-pluralistic; its reach is partial; corporations might lose interest or, worse, be opportunistic, absent, or antagonistic to society's quests; and abandoning traditional politics is a risky proposition.[47] These risks can be lumped into two broad categories: one holds that corporate governing will not do enough for the societal ails that need fixing, and the other that corporate governing is plain dangerous.

As to the criticism that corporate governing does not go far enough for society, I warn that corporations are not going to foster true social progress, especially with respect to distributional matters (tax, antitrust, labor and employment, privacy, financial and corporate reform, and so on) in which they have interests that conflict with society's. This is an important cautionary tale to keep in mind before embarking in potentially perilous policy changes that would entrust executives of larger mandates and roles than they currently have.

The criticism that corporate governing is dangerous takes issue, on the one hand, with corporations being undemocratic tools that sacrifice dissenter's rights over policies that have failed to be approved via the democratic process, and on the other hand, with the risk that actual politics and democratic institutions will be weakened if the reformist space is occupied predominantly by corporations. While this Article explains the former set of problems is not as severe as some posit, the risk of abandoning politics can be devastating. Short of a blanket prohibition, which is not in the cards if only because of First Amendment jurisprudence, there do not seem to be handy policy fixes. Addressing this risk is hard and requires ambitious efforts from multiple actors to avoid atrophy of our quest for political change via traditional democratic institutions. All this requires change in norms, political goodwill, and possibly reform of politics itself—all areas in which corporate governance can help but cannot be the driving force.

This Article proceeds as follows. Part I describes some of the main corporate governing initiatives that corporations have taken over the last few years distinguishing between government substitution and corporate socioeconomic advocacy. Part II suggests that corporations have been active because of both firm-level drivers (workforce pressure, ESG, stakeholderism, corporate lobbying) and macro determinants (social and economic reckonings amplified by social media, and political paralysis). Part III tackles the positive law question of the consequences of corporate governing under applicable corporate laws. Part IV analyzes the normative merits of corporate governing from a plurality of angles: business case, strategic case, impact on social advocacy and society and large, and consequences for democratic institutions. Part V describes the promises of corporate governing and warns about its risks by separately focusing on the corporation and its stakeholders, on the one hand, and on society at large, on the other hand.

I. Corporations as Agents of Socioeconomic Change—Where Are We Now (and Why)?

This Part I explores areas where corporations have been particularly active in socioeconomic policymaking. As I mentioned above, corporate governing consists of two broad

[46] *See infra* Section V.B.1.
[47] *See infra* Section V.B.2.

types of activity. One is when corporations engage in political action to promote, contrast, or finetune official governmental initiatives, which I call *corporate socioeconomic advocacy*: in such circumstances, they take a public stand (often with the help of the "CEO megaphone") and offer views and expertise on, and in some cases even funding to, a pressing political issue. The other type of political action occurs when corporations step in with initiatives mimicking governmental action: I call this *government substitution*.

To be sure neither phenomenon is new. It is well known that corporations were initially used as special governmental arms to achieve public goods.[48] While corporations slowly but surely succeeded in becoming eminently private enterprises, amid the Progressive Era they found themselves pressured to implement the first employee benefits plans and pension systems.[49] It was during the 1960s that some corporations exemplified the type of social activism that has become more commonplace today.[50] At this historical juncture, corporate involvement is at an all-time high. In the subsections below, I survey selected instances of recent corporate governing initiatives and distinguish between government substitution and corporate socioeconomic advocacy.

A. Government Substitution

Government substitution initiatives consist of internal corporate actions that aim to directly protect one or more constituencies when the government is inactive—whether because of political decision or constitutional paralysis. The paragraphs below survey selected instances of such an activity.

1. Racial Equity. The aftermath of George Floyd's killing generated protests and racial reckoning in a magnitude unseen in decades and Corporate America was affected too. Corporate policies or programs designed to achieve racial equality are some of the most commonly adopted initiatives.[51] Between May 2020 and October 2022, companies pledged approximately $340 billion

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[48] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 110–112 (1977) (mentioning that by 1800 legal theory enabled judges and jurists to regard business enterprises such as banks, insurance companies and transportation facilities as arms of the state, and that "[t]he archetypal American corporation of the eighteenth century is the municipality, a public body charged with carrying out public functions." *Id.* at 112); John Coates IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 226 (2015) (noting that "corporations from their inception in English (and hence, American) history were extensions of government"); ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 4 (2018) (mentioning that when the Constitution was adopted there were few business corporations chartered: "two banks, two insurance companies, six canal companies, and two toll bridge operators."); CARLOS A. BALL, THE QUEERING OF CORPORATE AMERICA: HOW BIG BUSINESS WENT FROM LGBTQ ADVERSARY TO ALLY 10 (2019) ("The colonists and early Americans largely viewed corporations as entities whose function was to help society achieve public ends.").

[49] *Id.* at 13 (mentioning corporate disability benefits and retirement programs at Procter & Gamble as early as 1915).

[50] Lin, *supra* note 24, at 1541. While others remained uninvolved, some companies openly supported civil rights leaders and organizations. *Id* at 1541-42 (noting that businesses also directly assisted in the enactment of the Civil Rights Acts of 1964 and 1968).

[51] *See generally* Megan Armstrong, Eathyn Edwards & Duwain Pinder, *Corporate Commitments to Racial Justice: An Update*, MCKINSEY (Feb. 21, 2023), https://www.mckinsey.com/bem/our-insights/corporate-commitments-to-racial-justice-an-update(showing that as of October 2022, forty percent of Fortune 1000 companies have at least made statements in support of racial justice). A 2022 survey of around 300 U.S. public, private, and nonprofit corporations run by The Conference Board revealed that companies took a public stand on racial equality more frequently than any other issue. *See* Paul Washington, *The US Corporate Response to Recent Supreme Court Decisions*, THE CONF. BD. (July 19, 2022), https://www.conference-board.org/topics/civil-just-society/US-corporate-response-to-Supreme-Court-decisions (demonstrating that 61% of companies took a public stance on racial equity).

to achieve racial equality.[52] Apple created a coding camp for Black coders and computer engineers[53] and set aside $100 million to fund its Racial Equity and Justice initiative focusing on education, economic equality, and criminal justice reform.[54] Google followed suit by committing $175 million to various causes to improve the status of African American entrepreneurs, job seekers, students, and developers already working within its ecosystem.[55] Sephora and other national retailers made a pledge to source 15% of their product offerings from Black-owned businesses.[56] Target created a consulting service to assist Black-owned local small businesses.[57] Viacom and WarnerMedia started initiatives to fund and air more social justice content.[58] Netflix pledged to invest $100 million or 2% of its cash equivalents into banks that primarily work with Black communities.[59] JPMorgan Chase committed $30 billion to help promote racial equity and close the racial wealth gap by funding and investing in Black entrepreneurs.[60]

2. Women's Rights. Once the leaked Supreme Court memo warned that *Roe* was likely to be overturned, a small group of companies announced that they would cover travel expenses for any employees in need of abortions.[61] Starbucks, Tesla, Yelp, Airbnb, Netflix, Patagonia, DoorDash, JPMorgan Chase, Levi Strauss, PayPal, Amazon, and Reddit all indicated that they would reimburse their employees for travel expenses associated with transportation to an abortion-friendly state.[62] Shortly after, many more adopted the same policy, including Johnson & Johnson, Meta, and Disney.[63]

3. LGBTQ+ Rights. Since Lotus Development extended corporate benefits to its employees' domestic partners in the early 1990s,[64] the pursuit of LGBTQ+ rights via corporations has

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[52] Armstrong, Edwards & Pinder, *supra* note 51

[53] *Id.*

[54] *See* Kif Leswing, *Tim Cook Commits $100 million to Apple Program for Racial Justice After Killing of George Floyd*, CNBC (June 11, 2020, 12:55 PM), https://www.cnbc.com/2020/06/11/apple-racial-equity-and-justice-initiative-100m.html; *see also Apple Commits $100 Million to Racial Equity Programs While Disclosing its Own Diversity Hiring Record*, DALL. NEWS (Jan. 18, 2021, 12:00 PM), https://www.dallasnews.com/business/technology/2021/01/18/apple-commits-100-million-to-racial-equity-programs-while-disclosing-its-own-diversity-hiring-record/ (noting that Apple said 53% of its newly hired employees in the United States were from historically underrepresented groups).

[55]*See* Jacob Kastrenakes, *Google Commits $175 Million to Racial Equity with Focus on Black-owned Businesses*, THE VERGE (June 17, 2020, 5:22 PM), https://www.theverge.com/2020/6/17/21294692/google-175-million-racial-equity-black-businesses-entrepreneurs-commitment ().

[56] LIN, *supra* note 31, at 89; *see also* Melissa Repko & Lauren Thomas, *After George Floyd was Killed, Retailers Pledged to Put Black-owned Brands on Shelves. Here's How it's Going*, CNBC (May 25, 2021, 2:34 PM), https://www.cnbc.com/2021/05/25/retailers-diversity-pledges-put-more-black-owned-brands-on-shelves.html (describing other initiatives by companies like Lowes, Ulta Beauty, and Walmart and detailing the progress of the 15 Percent Pledge). .

[57] LIN, *supra* note 31, at 89.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 89–90.

[61] Emma Goldberg, *These Companies Will Cover Travel Expenses for Employee Abortions*, N.Y. TIMES (Aug. 19, 2022), https://www.nytimes.com/article/abortion-companies-travel-expenses.html.

[62] *Id.*

[63] These announcements came with serious risks. Lawmakers in Texas were quick to threaten Citigroup and Lyft for establishing such reimbursement policies. Daniel Wiessner, *Legal Clashes Await U.S. Companies Covering Workers' Abortion Costs*, REUTERS (June 27, 2022, 4:08 PM), https://www.reuters.com/world/us/legal-clashes-await-us-companies-covering-workers-abortion-costs-2022-06-26/. Like Texas, Oklahoma law allowed citizens to sue anyone aiding or abetting an abortion as early as six weeks into a pregnancy. Chris Marr & Robert Iafolla, *Can States Ban Employer Abortion Aid? Post-Roe Limits Explained*, BLOOMBERG L. (June 28, 2022, 10:17 AM), https://news.bloomberglaw.com/daily-labor-report/can-states-ban-employer-abortion-aid-post-roe-limits-explained.

[64] BALL, *supra* note 51, at 105–12.

effectively resulted in one of the main incubators of corporate governing: "companies have helped to spur a rapid evolution in public opinion in the United States, with a majority of Americans now supporting not only marriage equality but also laws to prevent discrimination against gay people."[65] For instance, in response to North Carolina's 2016 House Bill 2 (HB2), which required transgender individuals to use the public restrooms that corresponded with their biological sex,[66] Target introduced its transgender bathroom policy allowing transgender employees and customers to use the bathroom that corresponds with their gender identity.[67] The company later announced that it would also spend $20 million to add a private bathroom to each of its stores.[68] Instead of responding to specific government actions or laws, other companies have implemented their own policies to protect members of the LGBTQ+ community.[69]

In connection with Pride Month, some American corporations have decided to launch specific ad campaigns or product collections highlighting the theme.[70] Yet, in 2023, Target's LGBTQ+ merchandise was the subject of controversy, as conservative individuals and groups pushed back at the campaign and claimed that it was inappropriately directed at children.[71] According to Forbes, during the boycotts over the Pride Month collections, Target's stock declined at least 14% in a single month.[72] Target attempted to minimize the backlash by removing some of the products from its shelves,[73] but doing so subjected the company to more backlash from the LGBTQ+ community, which was upset that Target gave in to conservative pressure.[74] Bud Light and its parent company Anheuser-Busch experienced a similar cycle of PR fallouts and boycotts after launching an LGBTQ+ support campaign featuring Dylan Mulvaney, a transgender social media influencer.[75] Conservatives were extremely disgruntled to see Bud Light working with

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[65] Richard Socarides, *Corporate America's Evolution on L.G.B.T. Rights*, NEW YORKER (Apr. 27, 2015), https://www.newyorker.com/business/currency/corporate-americas-evolutionon-l-g-b-t-rights, cited by Fan, *supra* note 25, at 477). The Conference Board's 2022 study indicated that LGBTQ+ rights is the second most frequently addressed topic by corporations, trailing only racial equality. *See* Washington, *supra* note 51.

[66] *See* Lin, *supra* note 24, at 1547–50.

[67] Nathan Layne, *Retailer Target Says Transgender People Can Use Bathroom of Their Choice*, REUTERS (Apr. 19, 2016, 6:05 PM), https://www.reuters.com/article/us-target-lgbt/retailer-target-says-transgender-people-can-use-bathroom-of-their-choice-idUSKCN0XG2VU. Because North Carolina's law did not affect private businesses, Target was free to set its own policy contradicting the state's bill.

[68] Khadeeja Safdar, *Target Adds Private Bathrooms to Quell Transgender Debate*, Wall St. J. (Aug. 18, 2016, 5:53 PM), https://www.wsj.com/articles/target-to-spend-20-million-to-roll-out-private-bathrooms-to-all-stores-1471453630.

[69] For instance, in 2016, Airbnb adopted an "Open Doors" policy requiring all hosts and guests to agree to a non-discrimination code mandating that they "treat all fellow members of [the Airbnb] community, regardless of race, religion, national origin, disability, sex, gender identity, sexual orientation or age, with respect, and without judgment or bias." Shannon McMahon, *Airbnb Launches 'Open Doors' Policy to Combat Discrimination*, SMARTER TRAVEL (Sept. 9, 2016), https://www.smartertravel.com/airbnb-launches-policy-to-combat-discrimination/; *see also* Katie Benner, *Airbnb Adopts Rules to Fight Discrimination by Its Hosts*, N.Y. TIMES (Sept. 8, 2016), https://www.nytimes.com/2016/09/09/technology/airbnb-anti-discrimination-rules.html.

[70] *See* Stewart, *supra* note 15.

[71] *Id.*

[72] *See* Halter, *supra* note 14.

[73] *See* Stewart, *supra* note 15.

[74] *See* Anne D'Innocenzio & Dee-ann Durbin, *Target on the Defensive After Removing LGBTQ+-Themed Products*, L.A. TIMES (May 24, 2023, 4:38 PM), https://www.latimes.com/business/story/2023-05-24/target-on-the-defensive-after-removing-lgbtq-themed-products (mentioning that the president of the Human Rights Campaign criticized Target for pushing Pride Month displays "into the proverbial closet.")

[75] *See* Matthew Impelli, *Anheuser-Busch Stock Drops 20% as Bud Light Sales Struggle*, NEWSWEEK (May 31, 2023, 1:36 PM), https://www.newsweek.com/anheuser-busch-stock-drops-20-percent-bud-light-sales-struggle-1803680.

Mulvaney.[76] Boycotts led sales of Bud Light to fall by 20 percent, resulting in a reported $25 billion loss in market value,[77] and the marketing executives who led the campaign were put on leave of absence.[78]

4. Climate. Walmart set some of its first sustainability goals when it initially partnered with the Environmental Defense Fund back in 2005.[79] The company has committed to removing one billion tons of greenhouse gas emissions from its global supply chain by 2030.[80] One of its initiatives, "Project Gigaton," encourages its suppliers to decrease their carbon footprints.[81] Seventy percent of Walmart's suppliers are participating in the program and committing to reducing emissions.[82]Amazon has made similar efforts, committing to become net-zero carbon by 2040.[83] The company has also allocated $2 billion towards the development of decarbonization technologies and the deployment of renewable energy.[84] In 2023, United Airlines launched a fund for sustainable aviation fuel.[85] The fund was established to invest in startups working to produce sustainable fuel for commercial airplanes.[86] Companies like Air Canada, Boeing, JPMorgan Chase, Honeywell International, and General Electric have all contributed to the fund, giving it a total of $100 million as initial investments.[87]

5. January 6, Voting Rights. Democratic institutions in the U.S. experienced stress tests in recent times. After January 6, Facebook blocked President Trump and Twitter suspended his account.[88] Because Trump declined to condemn the rioters, social media companies restricted his access to their platforms based on his potential to incite violence and spread misinformation.[89] Furthermore, Twitter removed 70,000 accounts associated with the far-right conspiracy theory known as QAnon.[90] Many Trump acolytes were blocked as well.[91]

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[76] *Id.*

[77] Derek Saul, *Anheuser-Busch Faces 'Permanent' 15% Decline In Bud Light Sales—But Now May Be 'Attractive' Time To Buy Stock*, FORBES (June 6, 2023, 1:12 PM), https://www.forbes.com/sites/dereksaul/2023/06/06/anheuser-busch-faces-permanent-15-decline-in-bud-light-sales-but-now-may-be-attractive-time-to-buy-stock/?sh=4cf85895197c.

[78] Elizabeth Napolitano, *Bud Light executives put on leave after Dylan Mulvaney uproar, report says*, CBS NEWS (Apr. 25, 2023), https://www.cbsnews.com/news/bud-light-dylan-mulvaney-transgender-anheuser-busch/.

[79] *See Our Partnership with Walmart Brings Big Change*, ENV'T DEF. FUND (July 27, 2019), https://www.edf.org/partnerships/walmart.

[80] *Id.*

[81] Dieter Holger, *Walmart Makes Progress on Emissions Target By Winning Over Suppliers, CSO Says*, WALL ST. J. (Apr. 12, 2022, 12:55 PM), https://www.wsj.com/articles/walmart-makes-progress-on-emissions-target-by-winning-over-suppliers-cso-says-11649782501.

[82] *Id.*

[83] *See Amazon Announces $2 Billion Climate Pledge Fund to Invest in Companies Building Products, Services, and Technologies to Decarbonize the Economy and Protect the Planet*, AMAZON (June 23, 2020), https://press.aboutamazon.com/2020/6/amazon-announces-2-billion-climate-pledge-fund-to-invest-in-companies-building-products-services-and-technologies-to-decarbonize-the-economy-and-protect-the-planet.

[84] *Id.*

[85] Amrith Ramkumar, *United Airlines Creates Fund for Sustainable Aviation Fuel*, WALL ST. J. (Feb. 21, 2023, 8:00 AM), https://www.wsj.com/articles/united-airlines-creates-fund-for-sustainable-aviation-fuel-1f24de23.

[86] *Id.*

[87] *Id.*

[88] *See* Grace Dean, *From Cutting All Ties with Trump to Pulling Political Donations, Here's How Corporate America has Responded to the Capitol Insurrection*, BUS. INSIDER (Jan 17, 2021, 7:55 AM), https://www.businessinsider.com/capitol-siege-trump-company-responses-riots-political-donations-2021–1.

[89] *See id.*

[90] *Id.*

[91] *Id.*

On another front, Georgia leads the pack of states passing legislation making it more difficult for citizens to exercise their voting rights, with an expected negative effect that would disproportionately affect racial minorities.[92] All the while, companies have adopted initiatives to boost voting rights: Apple and Twitter have given their employees paid time off to vote in November elections or volunteer at a polling location.[93] Uber and hundreds of other companies also joined the Time to Vote movement, which was created to formally encourage workers to vote by offering paid time off on election day.[94]

6. Guns. The 2018 mass-shooting at Parkland's Marjory Stoneman Douglas High School in Florida led to corporate involvement in gun control initiatives.[95] After the tragedy, where seventeen people were killed with a semiautomatic AR-15 rifle, large retailers, banks, and investment firms all instituted new policies.[96] Dick's Sporting Goods and Walmart both changed their practices in order to establish stronger restrictions than those required by federal law.[97] After Parkland Dick's immediately stopped selling all assault-style rifles, removed high-capacity magazines from its inventory, and vowed to no longer sell them as well.[98] Mass shootings over the years also influenced Walmart to adopt similar policies: it terminated assault rifle sales in 2015 and raised the minimum age for gun purchases to 21 in 2018.[99] Citibank and Bank of America came up with new policies.[100] Citigroup restricted its client retailers from offering bump stocks and high-capacity magazines, and the sale of guns without a background check or to those below twenty-one.[101] Bank of America refused to give loans to gun manufacturers making military-inspired firearms for civilian use.[102]

B. Corporate Socioeconomic Advocacy

Corporate socioeconomic advocacy consists of various types of corporate messaging aimed at promoting, contrasting, or finetuning official governmental initiatives.[103] Typically but not

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[92] *See* Richard Fausset, Nick Corasaniti & Mark Leibovich, *Why the Georgia G.O.P.'s Voting Rollbacks Will Hit Black People Hard*, N.Y. TIMES (Mar. 25, 2021), https://www.nytimes.com/2021/03/25/us/politics/georgia-black-voters.html (identifying new restrictions like limited drop boxes for mail ballots, more rigid voter identification requirements for absentee balloting and prohibitions on providing food or water to people waiting in line to vote); *see also* Jane C. Timm, 19 States Enacted Voting Restrictions in 2021. What's Next?, NBC NEWS (Dec. 21, 2021, 7:02 AM), https://www.nbcnews.com/politics/elections/19-states-enacted-voting-restrictions-2021-rcna8342.

[93] Lauren Frias, *Apple Joins Twitter in Policy Giving Employees Paid Time Off to Vote in the November Election*, BUS. INSIDER (July 24, 2020, 8:02 PM), https://www.businessinsider.com/apple-giving-employees-paid-time-off-vote-volunteer-election-day-2020-7.

[94] *Id.*

[95] *See* Lin, *supra* note 24, at 1554–57; Masconale & Sepe, *supra* note 29, at 270.

[96] *See* Lin, *supra* note 24, at 1554–57.

[97] *See* Masconale & Sepe, *supra* note 29, at 270.

[98] Lin, *supra* note 24, at 1554–57. Not only did the store halt sales, but it also destroyed $5 million worth of rifles that it had in stock at the time. Laura M. Holson, *Dick's Sporting Goods Destroyed $5 Million Worth of Guns*, N.Y. TIMES (Oct. 8, 2019), https://www.nytimes.com/2019/10/08/business/dicks-sporting-goods-destroying-guns-rifles.html.

[99] Nandita Bose & Melissa Fares, *Walmart Faces Pressure to Stop Gun Sales After Latest U.S. Mass Shootings*, REUTERS (Aug. 5, 2019, 3:39 PM), https://www.reuters.com/article/us-walmart-guns-pressure/walmart-faces-pressure-to-stop-gun-sales-after-latest-u-s-mass-shootings-idUSKCN1UV22X. Although the Parkland shooting led to more drastic changes, Dicks Sporting Goods had previously established a policy to stop selling firearms or ammunition to anyone under 21 years of age.

[100] Lin, *supra* note 24, at 1556.

[101] *Id.* These limitations applied to any clients who used a variety of the bank's services.

[102] *Id.*

[103] For the explanation why I consider this a type of corporate *governing* activity (and not simply mere advocacy), see *supra* note 23.

necessarily, the CEO leads this type of effort. The phenomenon is on the rise: the share of U.S. corporations who engage in this type of advocacy has risen from roughly one percent to 38 percent between 2011 and 2019.[104] Below is a section of some high-profile instances of such type of advocacy.

a. *Racial Equity and Immigration*. Corporations were not shy in publicizing their reactions to events that defined President Trump's term in office.[105] The Trump Muslim Ban, an executive order that went into effect in January 2017, was met with serious opposition from U.S. corporations and their leaders.[106] At least 153 large and midsize companies spoke out against the travel ban.[107] Close to a hundred tech companies went a step further, filing an amicus brief protesting the order.[108] A Nike executive condemned President Trump's order in an email to employees.[109] The CEO of Netflix expressed his distaste with the policy on social media and indicated it would hurt their employees all over the world.[110] When the Supreme Court upheld a third version of the ban in 2018, the president of Microsoft and the CEO of Airbnb released public statements condemning the decision.[111] Also, corporate CEOs indicated their displeasure with Trump's handling of the August 2017 "Unite the Right" rally carried out by white nationalists in Charlottesville, Virginia,[112] and some of them resigned from presidential advisory councils.[113] Trump's termination of the Deferred Action for Childhood Arrivals (DACA) program inspired more corporate executives to get involved in the political arena.[114] Facebook's Mark Zuckerberg and Apple's Tim Cook were two of the most prominent CEOs to make public statements opposing Trump's decision.[115] Executives at Microsoft, Google, Goldman Sachs, Disney, and eBay also encouraged Congress to defend DACA.[116]

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[104] Swarnodeep Homroy & Shubhashis Gangopadhyay, *Strategic CEO Activism in Polarized Markets*, J. FIN. & QUANTITATIVE ANALYSIS 1, 2 (2023), doi:10.1017/S0022109023001382.

[105] Lin, *supra* note 24, at 1550–52.

[106] *Id.*

[107] Vanessa Fuhrmans, *A Watershed Moment in CEO Activism*, WALL STREET J. (Apr. 4, 2017, 9:00 AM), https://www.wsj.com/articles/a-watershed-moment-in-ceo-activism-1491310803 (indicating that, "In 84% of instances, it was the CEO directly who took the stand.").

[108] Fan, *supra* note 25, at 459 (mentioning that Google, Lyft, and Twitter pledged or donated millions of dollars to the American Civil Liberties Union (ACLU) and other groups supporting immigrants and refugees).

[109] Tony Connelly, *Nike's Mark Parker Condemns Trump's Muslim Travel Ban in Staff Email Rallying Support for Sir Mo Farah*, THE DRUM (Jan. 30, 2017, 9:31 AM), https://www.thedrum.com/news/2017/01/30/nikes-mark-parker-condemns-trumps-muslim-travel-ban-staff-email-rallying-support-sir (mentioning that the executive encouraged employees to stand up for the company's commitment to diversity).

[110] *See* T.C. Sottek, *Netflix CEO: 'Trump's Actions Are So Un-American It Pains Us All',* VERGE (Jan. 28, 2017, 5:14 PM), https://www.theverge.com/2017 /1/28/14426536/netflix-reed-hastings-trump-immigration-executive-order.

[111] Fan, *supra* note 25, at 466.

[112] Lin, *supra* note 24, at 1552–53.

[113] *Id.*

[114] *Id.* at 1553–54.

[115] *Id.*

[116] *See* Zach Wichter, *C.E.O.s See a 'Sad Day' After Trump's DACA Decision*, N.Y. TIMES (Sept. 5, 2017), https://www.nytimes.com/2017/09/05/business/chief-executives-see-a-sad-day-after-trumps-daca-decision.html#:~:text=%E2%80%9CThis%20is%20a%20sad%20day,then%20punish%20them%20for%20it.%E2%80%9D.

Data from a 2018 survey run by the Rock Center for Corporate Governance at Stanford (the "2018 Stanford Survey") shows that the public is generally in support of corporate involvement on racial issues, though a sizeable fraction of the population is against.[117]

b. *Women's Rights*. Although the *Dobbs*[118] case overturning *Roe v. Wade* dominated the headlines, survey data from The Conference Board showed that only around 10% of U.S. companies made any public statements about the Supreme Court decision.[119] On the other hand, Yale's School of Management conducted a study which summarized the policies adopted by 118 of the first companies to respond to the *Dobbs* decision, as the ensuing subsection illustrates.[120]

According to the 2018 Stanford Survey, public support on corporations taking a stand on gender issues and abortion is more mixed.[121]

c. *LGBTQ+ Rights*. Since the beginning of 2020, 44% of companies have expressed a public position about LGBTQ+ rights.[122] This area demonstrates how corporations are willing to challenge government actions through corporate socioeconomic advocacy. The response to HB2, which required transgender individuals to use the public restrooms that corresponded with their biological sex, displayed the efficacy of corporate intervention.[123] Companies like Apple, Bank of America, Facebook, General Electric, and Google voiced their disapproval of the North Carolina legislature's action.[124] More than two hundred corporations signed a letter with the Human Rights Campaign advocating for the law to be repealed.[125] When companies like PayPal and Deutsche Bank cancelled business expansion in the state, North Carolina's losses grew to over $3 billion.[126] Eventually, the law was partially repealed after a new governor took over in 2017.[127] The ongoing feud between Disney and Florida Governor Ron DeSantis described in the Introduction is possibly the most high-profile fight between a large corporation and an elected politician. After DeSantis signed into law an Act commonly referred to as the "Don't Say Gay" bill, Disney and its then-CEO publicly criticized the law and vowed to aid in its repeal.[128] As tensions escalated, DeSantis signed legislation removing some of Disney's special privileges, and litigation ensued with each side

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117 David F. Larcker, Stehen A. Miles, Brian Tayan & Kim Wright-Violich, *The Double-Edged Sword of CEO Activism* 4, Rock Center for Corporate Governance at Stanford University Closer Look Series: Topics, Issues and Controversies in Corporate Governance (2018), https://www.ssrn.com/abstract=3283297 (finding that fifty-four percent of Americans support CEO activism about racial issues, while 29 percent do not).

118 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (holding that since the Constitution makes no reference to abortion and no such right is therefore protected by any of its provisions, the authority to regulate abortion must be returned to the states and their elected representatives).

119 *See* Washington, *supra* note 51.

120 *See* Jeffrey Sonnenfeld, Steven Tian & Georgia Hirsty, *A List of Companies Supporting Abortion Rights After the Roe v. Wade Ruling Shows Which Firms are Stepping Up, and Why*, FORTUNE

121 Larcker, Miles, Tayan & Wright-Violich, supra note 117, at 4 (finding that while gender issues score a net-favorable position (40 percent in favor versus 37 percent unfavorable), abortion does not (37 versus 39 percent).

122 *Id.*

123 *See* Lin, *supra* note 24, at 1547–50.

124 *Id.* at 1548–49.

125 *Id.* at 1549.

126 *Id.*

127 *Id.*

128 *See supra* text accompanying notes 1–10. *See also* Masconale & Sepe, *supra* note 29, at 271; Elizabeth Blair, *After Protests, Disney CEO Speaks out Against Florida's 'Don't Say Gay' Bill*, NPR (Mar. 10, 2022, 9:10 AM), https://www.npr.org/2022/03/08/1085130633/disney-response-florida-bill-dont-say-gay (detailing then-CEO Bob Chapek's announcement that "Disney has signed the Human Rights Campaign's statement opposing similar legislative efforts. He also said the company will pledge five million dollars to organizations "working to protect" LGBTQ+ rights, including the Human Rights Campaign (HRC).").

suing the other.[129] All the while, the Delaware Chancery Court denied a Section 220 of the Delaware General Corporation Law ("DGCL")[130] request for books and records that was seeking access to emails amongst Disney directors in connection with the dispute with the Governor.[131]

The number of Americans who support corporations that engage in this area outnumber those who do not, but the issue is hardly uncontroversial.[132]

d. Climate. When President Trump announced his decision to withdraw the United States from the Paris climate accord in 2017, corporate leaders expressed disappointment and promised to continue their own efforts to tackle the effects of climate change.[133] Elon Musk and Bob Iger chose to leave President Trump's economic advisory council based on their disagreement with the choice.[134] Companies like Apple, Facebook, Google, and Microsoft published full-page advertisements in prominent newspapers in order to publicly demonstrate their resentment.[135] Many of the CEOs of those corporations and others also expressed their personal dissatisfaction on social media.[136]

Climate happens to be one of the less divisive socioeconomic issues on which corporations intervene: according to the Stanford 2018 Survey, the public generally supports CEO activism on environmental issues.[137]

e. January 6, Voting Rights. January 6 prompted a long list of companies to no longer donate to politicians or groups that refused to acknowledge the legitimacy of the election:[138] corporations like Amazon, AT&T, American Express, Coca-Cola, Deloitte, Facebook, Intel, Microsoft, Nike, and a host of other companies indicated that they would pause PAC contributions and other donations to lawmakers who voted against election certification.[139] Further, the discriminatory provisions of Georgia's 2021 SB 202 voting law sparked outrage among major Georgia-headquartered corporations and their executives.[140] Merck's CEO Ken Frazier called for companies to take a stand against government efforts to restrict voting rights.[141] Alongside Frazier were Coca-Cola and Delta, who also criticized their home state's new voting law.[142] In July of 2021, major

[129] *Id.*

[130] DEL. CODE ANN. tit. 8, § 220(b) (2023).

[131] *See infra* text accompanying notes 262–273.

[132] Larcker, Miles, Tayan & Wright-Violich, supra note 117, at 4 (finding that "43 percent support activism about LGBTQ+ rights, while 32 percent do not").

[133] *See* Daniel Victor, *'Climate Change Is Real': Many U.S. Companies Lament Paris Accord Exit*, N.Y. TIMES (June 11 2017), https://www.nytimes.com/2017/06/01/business/climate-change-tesla-corporations-paris-accord.html.

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *See* Larcker, Miles, Tayan & Wright-Violich, *supra* note 117, at 4 (noting public support on issues such as "clean air or water (78 percent), renewable energy (68 percent), sustainability (65 percent), and climate change (65 percent)").

[138] *See* Dean, *supra* note 91.

[139] Melinda Fakuade, *A Running List of Corporate Responses to the Capitol Riot*, VOX (Jan. 14, 2021, 11:45 AM), https://www.vox.com/the-goods/22227717/brands-corporate-response-capitol-dc-riot-insurrection-mob-pac-donations.

[140] Masconale & Sepe, *supra* note 29, at 271.

[141] Kevin Stankiewicz, *'There is No Middle Ground' — Black CEOs Urge Companies to Oppose Restrictive Voting Laws*, CNBC (Mar. 31, 2021, 4:28 PM), https://www.cnbc.com/2021/03/31/ken-frazier-black-ceos-urge-firms-to-oppose-restrictive-voting-laws.html.

[142] David Shepardson & Uday Sampath Kumar, *Delta, Coca-Cola Blast Home State Georgia's Voting Restrictions As 'Unacceptable'*, REUTERS (Mar. 31, 2021, 7:25 AM), https://www.reuters.com/article/us-usa-georgia-voting-

corporations again formed a coalition when they signed on to a letter specifically urging Congress to pass new legislation expanding the 1965 Voting Rights Act.[143] The companies asked Congress to enact an updated law restoring some of the provisions of the original Voting Rights Act and negating the *Shelby County v. Holder*[144] decision that eliminated portions of the law.[145]

f. Guns. After the 2022 mass shooting that killed 19 children and two adults at an elementary school in Uvalde, Texas, more than 200 CEOs sent a letter demanding that Congress pass gun control legislation.[146] Pointing to a study finding that incidents involving guns have become the number one cause of child deaths, business leaders from companies like Condé Nast and Levi Strauss expressed their desire for stronger firearm regulations.[147] Two separate shootings at Walmart stores in 2019 had sparked a similar outcry from corporate executives.[148] The CEOs of Uber, Gap, Lyft, and Twitter were just some of the powerful figures who signed a letter urging the Senate to pass a law requiring background checks on all gun sales.[149]

Corporate involvement on gun control issues is supported by the public but not by wide margin.[150]

II. Corporations as Agents of Socioeconomic Change —Why Now?

Corporations' business has been intertwined with public affairs for a long time. In the 1980s and 1990s the consensus had it that corporations could not only work in parallel tracks with the public sector but that they could take over several functions of the former and run them as eminently private enterprises.[151] But the shrinking of the public sector[152] and dysfunction in politics[153] created a vortex in which corporations got sucked into having to deal with broader

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companies/delta-coca-cola-blast-home-state-georgias-voting-restrictions-as-unacceptable-idUSKBN2BN1M9; David Gelles & Andrew Ross Sorkin, *Hundreds of Companies Unite to Oppose Voting Limits, But Others Abstain*, N.Y. TIMES (May 27, 2021), https://www.nytimes.com/2021/04/14/business/ceos-corporate-america-voting-rights.html (mentioning that hundreds of other companies followed Frazier's lead and signed a statement opposing any legislation making it harder for people to vote.).

143 Tucker Higgins, *More than 150 Companies Call on Congress to Strengthen Voting Rights Act*, CNBC (July 14, 2021, 12:46 PM), https://www.cnbc.com/2021/07/14/companies-call-on-congress-to-strengthen-voting-rights-act.html.

144 Shelby Cnty., Ala. v. Holder, 570 U.S. 529 (2013) (holding that the Voting Rights Act's original coverage formula used to determine which states were subject to preclearance when amending voting regulations or passing voting laws was outdated, therefore rendering the provision unconstitutional).

145 Higgins, *supra* note 142.

146 Colin Lodewick, *Over 200 CEOs Demand Action on Gun Control Not Just Because it's the Right Thing to Do: They Say it Costs $280 Billion a Year for Taxpayers*, FORTUNE (June 9, 2022, 2:52 PM), https://fortune.com/2022/06/09/ceos-demand-action-gun-control-senate-uvalde-shooting/.

147 *Id.*

148 *See* Amelia Lucas, *Chief Executives of 145 Companies Urge Senate to Pass Gun Control Laws*, CNBC (Sep. 12, 2019, 2:25 PM), https://www.cnbc.com/2019/09/12/chief-executives-of-145-companies-urge-senate-to-pass-gun-control-laws.html.

149 *Id.*

150 Larcker, Miles, Tayan & Wright-Violich, *supra* note 117, at 4 (finding that 45 percent of Americans are in favor of corporations taking a stand, while 35 percent are unfavorable).

151 John B. Goodman & Gary W. Loveman, *Does Privatization Serve the Public Interest?*, HARV. BUS. REV. (Nov.-Dec. 1991), https://hbr.org/1991/11/does-privatization-serve-the-public-interest.

152 Lin, *supra* note 24, at 1558–61 (noting at 1559 that "[c]ontemporary corporations and businesses exert their influence on traditional, public government functions like never before. Privately-owned for-profit schools, prisons, utilities, and military forces—once hard to imagine—are now common. The U.S. government regularly uses private contractors affiliated with major corporations for combat missions, intelligence affairs, and diplomatic efforts. Furthermore, large corporations today operate akin to private nation-states.").

153 *See infra* Section II.C.2.

societal problems.[154] Social activists took notice.[155] Below, I offer a brief sketch of the main moving parts of corporate engagement in public policy issues. Section A addresses firm-level drivers, while Section B deals with macro sociopolitical phenomena.

A. Firm-level Drivers for Corporate Involvement

Some drivers for corporate involvement derive from firm-level dynamics: these include bottom-up pressures from the workforce or investors (especially those who care about ESG matters), as well as top-down interventions from directors embracing stakeholderism. In the background, corporate lobbying is a phenomenon that provides good context as to why and how corporations find it easy to intervene on socioeconomic issues. The ensuing subsections succinctly illustrate these dynamics.

1. Workforce and Investor Bottom-up Demands

a. Workforce Composition and Pressure

Employees, especially but not uniquely in the tech industry, have played a crucial role in driving change within organizations.[156] Movements like #MeToo and BLM have sparked conversations about workplace culture and compelled employers to reevaluate their practices and create new roles within their organizations to lead efforts in diversity, equity, and inclusion.[157] Employees have become more eager and felt more empowered to speak up, shedding light on instances of misconduct and holding employers accountable. Through their collective voices, they have pushed for tangible changes in policies, training programs, and overall organizational culture; their activism has reshaped the expectations placed on employers, especially in their role as agents of change inside and outside their organizations.

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[154] Marcel Kahan & Edward Rock, *The Emergence of Welfarist Corporate Governance* (Eur. Corp. Governance Inst. Law Working Paper, No. 683/2023), http://ssrn.com/abstract_id=4328626 (arguing that we are in a welfarist era of corporate governance.).

[155] Lin, *supra* note 24, at 1561 (noting that "[a]s the spheres of government and business converge, social activists will understandably seek change not only through the traditional avenues of government and public policy, but also through the private boulevards of business and corporate policy.").

[156] *See* Fan, *supra* note 26, at 1008–14 ; Alon-Beck, *supra* note 26; *see also* Daisuke Wakabayashi & Jessica Silver-Greenberg, *Facebook To Drop Forced Arbitration in Harassment Cases*, N.Y. TIMES (Nov. 9, 2018), https://www.nytimes.com/2018/11/09/technology/facebook-arbitration-harassment.html; Jena McGregor, *Google and Facebook Ended Forced Arbitration for Sexual Harassment Claims. Why More Companies Could Follow.*, WASH. POST (Nov. 12, 2018), https://www.washingtonpost.com/business/2018/11/12/google-facebook-ended-forced-arbitration-sex-harassment-claims-why-more-companies-could-follow/.

[157] Mary Brooke Billings, April Klein & Yanting (Crystal) Shi, *Investors' Response to the #MeToo Movement: Does Corporate Culture Matter?*, Eur. Corp. Gov. Inst. Fin. Working Paper No. 764/2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3466326; Geri Strengel, *Black Lives Matter Protests Moves Corporate D&I Initiatives Center Stage*, FORBES (JUN. 17, 2020), https://www.forbes.com/sites/geristengel/2020/06/17/black-lives-matter-protests-moves-corporate-di-initiatives-into-the-spotlight/?sh=7429f6327a0d.

b. ESG Investing and Engagement

It is impossible to overstate the role of ESG in the last decade or so.[158] Corporations have faced increasing pressure from institutional investors on ESG matters. Investors have played such an important crucial role especially because their industry has undergone a significant transformation in response to the rise of social activism and emergence of the ESG movement. Investors, particularly those from the millennial and Zoomer generations, have demonstrated a growing preference for companies that align with their values and prioritize social and environmental responsibility, and businesses have adapted.[159] The importance of ESG is documented by the growth in importance and support of shareholder proposals on environmental and social matters.[160]

Of course the surge of ESG as a massive investment and corporate governance phenomenon traces back to a famous 2018 letter by BlackRock's CEO Larry Fink to CEOs, in which he emphasized corporations should strive to create long-term value and serve all stakeholders.[161] Importantly, Fink announced that BlackRock, an institution holding shares of some 14,000 companies worldwide, would display its commitment to these principles through engagement and voting.[162] State Street and Vanguard made similar announcements that sustainability and climate issues are at the forefront of their engagement efforts.[163] While the phenomenon appears in contraction,[164] investor-driven policy initiatives on the social activism front are well documented.[165] A study by Professors Barzuza, Curtis and Webber shows how aggressively and successfully the Big Three have waged high-profile public campaigns on matters,

158 For a history of the term "ESG," see Elizabeth Pollman, *The Making and Meaning of ESG* (Eur. Corp. Governance Inst. Law Working Paper, No. 659, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4219857.

159 *See generally* Barzuza, Curtis & Webber, *supra* note 27. Ruby Brownen-Trinh & Ajan Orujov, *Corporate socio-political activism and retail investors: Evidence from the Black Lives Matter campaign*, 80 J. CORP. FIN. 102417 (2023).

160 Albeit in slight contraction in 2023, until 2022 proposals related to environmental and social issues had kept growing. Environmental and social proposals constitute the majority of all shareholder proposals received by Russell 3000 companies (58% in 2022). Daniel Litowitz & Lara Aryani, *Trends in E&S Proposals in the 2022 Proxy Season*, HARV. L. SCH.: F. ON CORP. GOVERNANCE (Nov. 28, 2022), https://corpgov.law.harvard.edu/2022/11/28/trends-in-es-proposals-in-the-2022-proxy-season/. The number of environmental and social proposals it tracked increased from 133 in 2021 to 142 in 2022. *2023 Proxy Season Preview and 2022 Proxy Season Highlights,* BROADRIDGE https://www.broadridge.com/_assets/pdf/broadridge-2023-proxypulse-report.pdf (last visited July 7, 2023). Such proposals earned "record levels of support" in the early 2020s. Kahan & Rock, *supra* note 154, at 19 (noting that the percentage of proposals gaining more than 30% support rose from 0% in 2000 to 36% in 2018).

161 Larry Fink, *2018 Letter to CEOs: A Sense of Purpose*, BLACKROCK (2018), https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter [https://perma.cc/3YYU-MAEL]. *See* Barzuza, Curtis & Webber, *supra* note 27, at 1273.

162 Sean Griffith & Dorothy Lund, *Conflicted Mutual Fund Voting in Corporate Law*, 99 B.U.L. REV. 1151, 1186 (2019). In 2022, Fink addressed investors' climate concerns, encouraging CEOs "to set short-, medium-, and long-term targets for greenhouse gas reductions." Kahan & Rock, *supra* note 154, at 18. In 2019, BlackRock backed its statements on climate by divesting its actively managed funds from all coal stocks. Barzuza, Curtis & Webber, *supra* note 27, at 1274.

163 *See id.* at 1275.

164 Alastair Marsch, *Global ESG Market Shrinks After Sizable Decline in US*, BLOOMBERG (Nov. 28, 2023), https://www.bloomberg.com/news/articles/2023-11-29/global-esg-market-shrinks-after-sizable-drop-in-us.

165 For a comprehensive study on the role of asset managers as regulators, see Lund, *supra* note 27.

especially gender diversity on corporate boards.[166] Because of investor pressure, corporations feel more receptive to such inputs and involve themselves in the same pressing social issues, which has led some legal commentators to describe large asset managers as regulators of last resort.[167]

2. Top-Down Recalibration of Corporate Purpose: Stakeholderism

Given this pressure from investors, it is unsurprising that in recent years the corporate purpose debate revamped. In the United States, the scholarly debate traces to an exchange in the early 1930s,[168] likely ignited by the famous *Dodge v. Ford* case of 1919.[169] In 1970, future Nobel prize winner Milton Friedman published a famous article in New York Times Magazine, dismissing corporate social responsibility theories because corporate executives would be spending "someone else's money" and promoting maximizing shareholder wealth.[170] Over the next several decades, mainstream financial economists and legal scholars endorsed shareholder wealth maximization[171]

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166 State Street made a big public statement on gender diversity with its 2017 Fearless Girl campaign, which involved the installation of a bronze statue of a girl in front of Wall Street's charging bull statute. *See* Barzuza, Curtis & Webber, *supra* note 27, at 1266; Bethany McLean, *The Backstory Behind That 'Fearless Girl' Statue on Wall Street*, THE ATLANTIC (Mar. 13, 2017), https://www.theatlantic.com/business/archive/2017/03/fearless-girl-wall-street/519393. The initiative was launched to promote one of State Street's investment funds that invested in companies with gender-diverse boards and influenced competitors BlackRock and Vanguard to publicly pressure companies to improve their gender diversity. Both firms also emphasized that they would vote against boards of corporations with poor performance in this area. Barzuza, Curtis & Webber, *supra* note 27, at 1266 (arguing that the efforts of the Big Three index funds (BlackRock, Vanguard, and State Street) were motivated by a desire to appeal to the social values of millennial investors). In fact, Larry Fink's 2019 letter to CEOs explained why understanding the ideals of millennials is so critical for American companies. *See* Bernard S. Sharfman, *Opportunism in the Shareholder Voting and Engagement of the 'Big Three' Investment Advisers to Index Funds* 25 (J. Corp. L. Working Paper, No. 3, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3995714 (foreshadowing what he termed the "largest transfer of wealth in history," Fink reasoned that around $24 trillion will flow from baby boomers to millennials).

167 *See generally* Lund, *supra* note 27.

168 Adolph A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931) (arguing that corporate powers were held in trust for shareholders); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932) (arguing that corporate "powers were held in trust for the entire community").

169 Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) (holding that the purpose of a corporation is to produce profits for shareholders). *See infra* notes 237–254 and accompanying text.

170 Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, NY TIMES MAG. 32, Sept. 13, 1970.

171 *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (arguing that managers of corporations should act as agents of shareholders and focus exclusively on their wealth); ROBERT C. CLARK, CORPORATE LAW 682 (1986) (noting that courts stand behind the idea that the purpose of the business corporation is to make profits for its shareholders); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 563 (2003) (noting that "most corporate law scholars embrace some variant of shareholder primacy"); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 280 (1998) ("The shareholder primacy norm is considered fundamental to corporate law."); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001); Ann Lipton, *What We Talk About When We Talk About Shareholder Primacy*, 69 CASE W.. L. REV. 863, 866 (2019) ("most commenters would likely agree that shareholder primacy, whatever its faults, accurately describes the legal regime today, either as a formal matter or in practical effect."). For the view that "the law does not *require* that managers maximize shareholder wealth," see Jonathan R. Macey, *The Central Role of Political Myth in Corporate Law* 22 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3435676 ("Officers and directors respond to incentives, and therefore are highly subject to powerful market constraints that lead them to maximize shareholder value even though the law does not.").

and in 2001 Professors Reinier Kraakman and Henry Hansmann declared the triumph of shareholder value.[172]

Nonetheless, other voices kept advocating for a stakeholder approach, which maintains that managers and directors should cater to the interests of employees, creditors, customers, suppliers, local communities, and so forth.[173] While judges and scholars continued to dispute what directors were required to do under the law,[174] the debate was revitalized at the end of the last decade. First, in his 2018 letter, Larry Fink warned that "[c]ompanies must benefit all of their stakeholders."[175] Moreover, in August 2019, the Business Roundtable, the lobbying organization of CEOs of America's largest corporations, embraced the stakeholder approach in a one-pager signed by its CEO members titled "Statement on the Purpose of a Corporation" (the BRT Statement).[176] In the document, which draws from works by Professor Colin Mayer and by Martin Lipton,[177] each stakeholder (including employees, suppliers, and customers) is considered "essential."[178] As Fink and the BRT Statement reignited the debate,[179] not only did politicians take

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172 Hansmann & Kraakman, *supra* note 171, at 440–41 (noting consensus amongst scholars, business officials, and policymakers that "managers of the corporation should be charged with the obligation to manage the corporation in the interests of the shareholders.").

173 Prominent proponents include Martin Lipton, who rebuked hostile takeovers in the 1980s by promoting stakeholder capitalism, and Professors Margaret Blair and Lynn Stout, who set forth a view of the corporation as a joint project comprised of various team members working together for mutual gain. *See* Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101 (1979) *and* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 250-51 (1999).

174 *Compare* Leo E. Strine, Jr., *The Dangers of Denial: The Need for A Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 768 (2015) (concluding that "directors must make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare.") *with* LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 31 (2012) (arguing that the business judgment rule and other judicial doctrines in Delaware allow boards broad latitude to make decisions for businesses).

175 Fink, *supra* note 161.

176 *Statement on the Purpose of a Corporation,* Bus. Roundtable (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.

177 For Mayer, see COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES GREATER GOOD (2018) (proposing a new agenda for establishing the corporation as a force for societal prosperity) *and* COLIN MAYER, FIRM COMMITMENT: WHY THE CORPORATION IS FAILING US AND HOW TO RESTORE TRUST IN IT (2013) (arguing the corporate structure is flawed and proposing several alternatives). For Lipton, see Martin Lipton, *Corporate Governance: The New Paradigm*, Harv. L. Sch. F. on Corp. Governance (Jan. 11, 2017), https://corpgov.law.harvard.edu/2017/01/11/corporate-governance-the-new-paradigm/#1.

178 *Statement on the Purpose of a Corporation*, *supra* note 176.

179 Most accounts were critical. *See e.g.* Edward B. Rock, *For Whom Is the Corporation Managed in 2020?: The Debate over Corporate Purpose*, 76 BUS. LAW. 370, 370–78, 394 (2021) ("The private lawyer's worry, of course, is that using private law to solve social problems will destroy the value generating potential of private law while failing to solve the social problems, leaving all of us worse off."); *see also* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 91 (2020) (criticizing the BRT Statement as opportunistic). *But see* Jens Dammann & Daniel Lawrence, *CEOs' Endorsements of Stakeholder Values: Cheap Talk or Meaningful Signal? An Empirical Analysis*, J. CORP. L. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4458576 (finding that corporations whose CEOs had signed the BRT Statement experienced statistically significant positive abnormal stock market returns relative to other corporations).

notice,[180] but the current draft of "*Restatement of the Law, Corporate Governance*" by the American Law Institute seemingly moves towards a stakeholderist direction.[181]

Undoubtedly, stakeholderism makes it easier for directors to justify corporate governing initiatives.[182]

3. Rent Protection: Corporate Lobbying and Politics at Work

This subsection provides additional context as to why corporate governing can be so effective. Corporations deploy considerable expenditures each year to protect and advance their interests.[183] Corporate money in U.S. politics reached an accelerated speed in the wake of the controversial *Citizens United* decision.[184] Not only has spending increased since then,[185] but corporations have also lobbied heavily to prevent any rule that would require them to disclose how much they spend on political campaigns.[186] Opacity is in fact a strategy: the lobbying effort typically occurs without the public even noticing, thanks to indirect lobbying via intermediaries such as the U.S. Chamber of Commerce and the Business Roundtable.[187] The Chamber of Commerce, which

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180 Senators Elizabeth Warren and Bernie Senders embraced the stakeholder approach in corporate law reform proposals they put forth while they were vying for the Democratic nomination in the 2020 presidential election. *See* Accountable Capitalism Act, S. 3348, 115th Cong. § 5 (2018)); Corporate Accountability and Democracy Plan, BernieSanders.com, https://berniesanders.com/issues/corporate-accountability-and-democracy/ [https://perma.cc/EF45-BPGV].

181 *Restatement of the Law, Corporate Governance*, Am. L. Inst., https://www.ali.org/publications/show/corporate-governance-rs/#drafts.

182 *See infra* Part III.

183 For instance, in the U.S., Fortune 100 companies spent $2 billion on lobbying efforts between 2014 and 2017, the U.S. Chamber of Commerce spent nearly $82 million in the first nine months of 2020 (and over $77 million in 2019), and the Business Roundtable spent around $17 million in the first nine months of 2020 (and almost $20 million in 2019). *See US Chamber of Commerce*, OPEN SECRETS, https://www.opensecrets.org/orgs/us-chamber-of-commerce/summary?id=D000019798 [https://perma.cc/3YCN-7727]; *Client Profile: Business Roundtable*, OPEN SECRETS, https://www.opensecrets.org/federal-lobbying/clients/summary?cycle=2019&id=D000032202 [https://perma.cc/6HZL-DWSU].

184 *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 336–66 (2010) (prohibiting the government from restricting independent expenditures for political communications by corporations, including nonprofit corporations, labor unions, and other associations, so long as such spending is independent of a party or a candidate).

185 In the five years after *Citizens United*, super PACs, corporations, labor unions, and other outside groups spent almost $2 billion on federal elections—two and a half times more than the in years preceding *Citizens United. See* DANIEL I. WEINER, CITIZENS UNITED FIVE YEARS LATER, BRENNAN CTR. FOR JUST. 4 (2015), https://www.brennancenter.org/sites/default/files/2019-08/Report_Citizens_United_%205_%20Years_%20Later.pdf [https://perma.cc/3LXQ-MLKX]..

186 *See* Luigi Zingales, *Corporations Fight Push for Donation Disclosure*, GULF TIMES (June 3, 2013, 11:24 PM), https://www.gulf-times.com/story/355016/Corporations-fight-push-for-donation-disclosure [https://perma.cc/G24M-3USK]; Lucian A. *See* Lucian A. Bebchuk, Robert J. Jackson Jr., James D. Nelson & Roberto Tallarita, *The Untenable Case for Keeping Investors in the Dark*, 10 HARV. BUS. L. REV. 1, 3–4 (2020).

187 John M. de Figueiredo & Brian Kelleher Richter, *Advancing the Empirical Research on Lobbying*, 17 ANN. REV. POL. SCI. 163, 165 (2014) (noting that large corporations are far more represented in these lobbying efforts than small business interests, with the latter typically using trade associations). In one study, industry intermediaries such as these spent over $1.5 billion in a six-year period. *See* Lucian A. Bebchuk & Robert Jackson, *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 931 (2013). In 2012, interest groups spent $3.5 billion to lobby the federal government, several times more than the roughly $750 million interest groups and that PACs (including super-PACs) were spending annually on campaign contributions at the time.

does not disclose the identities of its donors, [188] overwhelmingly directs its lobbying expenditures to conservative candidates and committees.[189] Smaller organizations—such as the American Legislative Exchange Council ("ALEC")—raise money from corporations and conservative foundations and then draft and lobby pro-business on matters, such as minimum wage, "right to work" bills, tort reform, and tax cuts.[190] Hence, in many cases, several corporations currently professing to support progressive causes in fact donate substantial sums to legislation that goes in the opposite direction.[191]

Similarly, sometimes corporations attempt to advance their self-interest by creating, or funneling money to, faux grassroots organizations that purport to be acting in pursuit of social causes. This lobbying is known as "astroturf activism"[192] and is used to shape public perception by creating fake citizens groups or scientific bodies to publish articles or ostensible "research" that undermines evidence on climate change or health science.[193] Employers also mobilize their workers to lobby for business-friendly causes: workers are expected to support their employers not only

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[188] DAN DUDIS, THE CHAMBER OF SECRETS: AN INVESTIGATION INTO WHO FUNDS THE NOTORIOUSLY OPAQUE U.S. CHAMBER OF COMMERCE, PUB. CITIZEN 3 (Sept. 13, 2017), https://chamberofcommercewatch.org/wp-content/uploads/2017/09/Chamber_of_Secrets_members_report.pdf.

[189] The lobbying activity of the U.S. Chamber of Commerce has included opposing minimum wage increases, labor and employment provisions of bills designed to enhance family and medical leave, bills designed to protect pregnant women from discrimination, occupational safety and health rights, and so forth. *See* the full list at *Downloadable Lobbying Databases*, U.S. SENATE, https://www.senate.gov/legislative/Public_Disclosure/database_download.htm [https://perma.cc/7YBS-YF6U].

[190] Andrew Prokop, *How ALEC Helps Conservatives and Businesses Turn State Election Wins into New Laws,* VOX (Mar. 27, 2015), https://www.vox.com/2014/11/17/7186057/american-legislative-exchange-council (last updated Mar. 27, 2015, 12:57 PM). *See also* Mike McIntire, *Conservative Nonprofit Acts as a Stealth Business Lobbyist*, N.Y. TIMES (Apr. 21, 2012), https://www.nytimes.com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-and-lobbyists.html?pagewanted=all (noting that some corporations donate over $100,000 a year to the organization and corporate representatives sit at ALEC conferences with legislators on various task forces that address topics like telecom, health care, and product liability).

[191] *See* Jacob S. Hacker & Paul Pierson, *Foreword* to BRUCE FREED, KARL SANDSTROM, PETER HARDIN, DAN CARROLL, CARLOS HOLGUIN & ANDREW FELDMAN, CONFLICTED CONSEQUENCES, Ctr. for Pol. Accountability 2 (2021), https://politicalaccountability.net/reports/cpa-reports/conflicted-consequences. Corporate funds were used to "seat candidates who have gerrymandered legislative districts and put in place ballot restrictions harming black people; opposed action to address climate change; opposed LGBTQ+ rights; attacked the Affordable Care Act, including during the pandemic; and sought to restrain women's reproductive rights." Strine, *Restoration*, *supra* note 28, at 422, n.84; *see also* Leo E. Strine, *Fiduciary Blind Spot: The Failure of Institutional Investors to Prevent the Illegitimate Use of Working Americans' Savings for Corporate Political Spending*, 97 WASH. U. L. REV. 1007, 1027–29 (2020) (documenting the difficulties of tracking such spending given that it is funneled through dark committees and thus neither investors nor the public can know how much is given by whom and to whom). Relatedly, for an account that superwealthy donors in the US are typically not conservative on social issues yet donate to conservative politicians because they support their economic policies, see *infra* note 482 and accompanying text.

[192] *See* JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 489 (2000) (providing examples of astroturf NGOs, including Consumers for World Trade, a pro-GATT industry coalition, Citizens for Sensible Control of Acid Rain, a coal and electricity industry coalition, and the National Wetlands Coalition, a coalition of US oil companies and real estate developers); *see also generally* Melissa J. Durkee, *Astroturf Activism*, 69 STAN. L. REV. 201 (2017) (discussing the ways in which businesses imitate grassroot organizations).

[193] *See* George Monbiot, *The Denial Industry*, GUARDIAN (Sept. 19, 2006, 10:45 AM), https://www.theguardian.com/environment/2006/sep/19/ethicalliving.g2?INTCMP=SRCH. Businesses also hire teams of individuals who pose as disinterested members of the public (often creating multiple profiles), but in fact promote corporate causes. George Monbiot, *The Need to Protect the Internet from 'Astroturfing' Grows Ever More Urgent*, GUARDIAN (Feb. 23, 2011, 7:01 AM), https://www.theguardian.com/environment/georgemonbiot/2011/feb/23/need-to-protect-internet-from-astroturfing.

with logistical help but also by helping to persuade public opinion.[194] Political scientists show how employer mobilization can actually shape congressional work, as legislative staffers find it helpful "especially when it involves having employees express their support for or opposition to particular policy proposals."[195]

B. Societal Drivers for Corporate Involvement

Corporations engage in corporate governing because of macro reasons as well. This Section II.B illustrates the two most significant ones: societal changes fueled by social media and political paralysis.

1. Shocks, Reckonings, Citizens Demand, and the Role of Social Media

With the Great Recession still in full swing, the 2010s gave rise to grassroots social movements that have questioned the socioeconomic status quo in ways unseen since the Sixties. Over the past years, the United States has witnessed a series of transformative social and political movements with a lasting impact on the nation. Movements like Occupy Wall Street, Black Lives Matter, Fight for $15, #MeToo, March for Our Lives, and climate protests have emerged and galvanized parts of the American public, particularly in younger generations.[196] Millennials and Zoomers, both inside and outside corporations, have played a significant role in driving social change in response to the movements mentioned above, as well as in reacting to Trump's presidency.[197] Challenging social expectations and advocating for a more inclusive and equitable society, younger generations have vocally pushed for workplace policies that address sexual harassment and discrimination.[198] Outside the corporate world, they have actively participated in protests, boycotts, and online campaigns, leveraging social media platforms to amplify their voices and hold both individuals and institutions accountable.[199]

Indeed, social media platforms have revolutionized social activism, empowering individuals to form movements and act on a larger scale.[200] This has impacted markets and businesses in significant ways,[201] by facilitating the rapid spread of awareness and engagement through boycotts,

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[194] *See* ALEXANDER HERTEL-FERNANDEZ, POLITICS AT WORK: HOW COMPANIES TURN THEIR WORKERS INTO LOBBYISTS 118 (2018) (noting that employers are increasingly recruiting their workers—sometimes in coercive ways—to help them run their causes).

[195] *Id.* at 164 (describing survey work showing that 49% of congressional staffers find it "extremely or very useful" when employees "offer assistance with legislation"); *see also id.* at 163–72 (examining how employer mobilization can impact congressional decision-making). *Id.* at 164.

[196] *See* Lin, *supra* note 24, at 1547; Barzuza, Curtis & Webber, *supra* note 27, at 1283–1303.

[197] It is reported that 56% of millennials expect CEOs and other business leaders to speak out. *See* Fan, *supra* note 25, at 454 (citing WEBER SHANDWICK & KCR RESEARCH, CEO ACTIVISM IN 2017: HIGH NOON IN THE C-SUITE 5 (July 24, 2017), http://www.webershandwick.com/news/article/ceo-activism-in-2017-high-noon-in-the-c-suite).

[198] *See* Barzuza, Curtis & Webber, *supra* note 27, at 1296-97 (mentioning the Wayfair debacle, whereby its employees walked out because the company entered into and honored a contract to supply furniture to a migrant detention center during the Trump era).

[199] Fan, *supra* note 25, at 474 (discussing how in the aftermath of the Parkland shooting, "the students moved the corporations to action; they are also the ones sustaining the gun control movement").

[200] Marcia Mundt, Karen Ross & Charla M Burnett, *Scaling Social Movements Through Social Media: The Case of Black Lives Matter*, 4:4 SOCIAL MEDIA + SOC'Y (2018), https://journals.sagepub.com/doi/epub/10.1177/2056305118807911.

[201] *See e.g.* Lund, *supra* note 27, at 43 (mentioning that the Big Three have changed their traditionally passive stance on political contributions after bad press: BlackRock's shift occurred after pressure from academics and unfavorable press).

marches, viral videos, and hashtag campaigns.[202] Platforms like Diet Prada and other brand watchdogs have emerged as influential forces in exposing wrongdoing and holding companies accountable for their actions.[203] Executives fear damaging viral videos or negative trending hashtags more than a newspaper story for the potentially far deeper negative impact of these forms of communications on their brand reputation and stock prices.[204]

All this increased exposure has encouraged corporations to take a more active role in addressing and solving social issues. Today, most public companies no longer remain silent regarding pressing topics that are often debated on a national scale,[205] because in this new environment staying silent may have negative implications.[206] Thus, their involvement has significantly increased.[207]

2. Failure of Traditional Politics

Another important factor of corporate involvement is that politics is slow, captured, and in perennial gridlock, so corporations are seen as more reliable agents of change than traditional politics.[208] Professors Kahan and Rock explain that as political gridlock impedes the effective regulation of activities that generate externalities (for example, through imposition of a carbon tax), it is rational for investors to expect corporations to act since their investors' payoff increases from a multi-firm focus.[209]

What is it that makes it so difficult for American politics to work? This is an issue with various contributing factors that has kept political scientists and constitutional law scholars occupied for quite a while.[210] To begin, citizens' polarization has played a key role in which media and social media have recently been playing a key aggravating factor.[211] The political media and

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[202] Lin, *supra* note 24, at 1544.

[203] Jonah Engel Bromwich, *We're All Drinking Diet Prada Now*, N.Y. TIMES (Mar. 14, 2019), https://www.nytimes.com/2019/03/14/fashion/diet-prada.html.

[204] Lin, *supra* note 24, at 1545; Dammann & Lawrence, *supra* note 179, at 16 (noting that "'naming and shaming' matters since there is broad evidence to suggest that, by and large, CEOs care deeply about their public reputations." (Citing Matthew S. Johnson, *Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws*, 110 AM. ECON. REV. 1866, 1866 (2020))).

[205] Masconale & Sepe, *supra* note 29, at 269.

[206] Disney's initial approach to "Don't Say Gay" bill was to stay silent. Its stakeholders did not take it well:

> [Disney CEO]'s memo was met with pervasive disappointment and frustration from Disney employees and creative partners. Some—including actors, directors, writers, and animators—called the memo "weak" and "unacceptable." Others demanded that Disney take a public stand against HB 1557.

Simeone, C.A. No. 2022-1120-LWW, at *5 (footnotes omitted). Corporations may also feel peer pressure to speak as other corporations are expressly denouncing silence. In the aftermath of George Floyd's killing, Netflix issued a statement that said: "To be silent is to be complicit." *See* Lisa M. Fairfax, *Racial Rhetoric or Reality? Cautious Optimism on the Link Between Corporate #BLM Speech and Behavior*, 2022 COLUM. BUS. L. REV. 118, 121 (2022).

[207] Masconale & Sepe, *supra* note 29, at 269.

[208] *See e.g.* Fan, *supra* note 25, at 452, 471 (noting that "[the] institutional failure has created a vacuum which corporations are now filling." *Id.*); Lund, *supra* note 27, at 9; Kahan & Rock, *supra* note 154, at 47–48; Strine, *Restoration*, supra note 28; Kovvali, *supra* note 28.

[209] Kahan & Rock, *supra* note 154, at 17. *See also id.* at 47: "the political system has proven unable to deal with the problems facing society in an effective way."

[210] *See generally* Richard H. Pildes, *The Age of Fragmented Politics*, 32 J. DEMOCRACY 146 (2021) (describing how social media and other novel ways of communication exacerbated polarization and fragmentation in politics, making it extremely hard to govern and pass reforms).

[211] *Id.*.

social media run business models in which division, outrage, and the politics of anger pay-off: they drive to higher ratings and engagement numbers.[212]

Of course, American constitutional design does not help, especially if one seeks to pass reform at the federal level.[213] But passing laws at the federal level is notoriously hard and thus rare. In theory, to pass an agenda, one political party must hold the Presidency and the two legislative chambers of Congress. This so-called trifecta in federal politics is rare.[214] The absence of a trifecta leads to gridlock and partisan stalemates, which further intensifies political polarization and impedes effective governance. The composition and internal rules of the Senate play a significant role. The Senate's structure, where each state is represented by two senators regardless of population, gives disproportionate power to smaller, less populous states. This can result in the Senate being unrepresentative of the broader population and can hinder the implementation of popular policies that seemingly enjoy support from citizens.[215] To make things even worse, the filibuster rule at the Senate adds to political dysfunction.[216] This practice prevents the majority party from implementing its policy agenda and perpetuates the gridlock.[217]

All this makes it hard to envision that significant changes will happen via traditional politics—this is why the corporate route is considered a feasible second best to achieve socioeconomic policy goals.

III. CAN CORPORATIONS ENGAGE IN CORPORATE GOVERNING? ASSESSING LEGAL RISK

In this Part III, I analyze the legal aspects of corporate governing: Do corporate governing actions and initiatives raise any significant legal issues for corporations and their directors and

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212 Paul Barrett, Justin Hendrix & Grant Sims, *How tech platforms fuel U.S. political polarization and what government can do about it*, BROOKINGS (SEPT. 27, 2021), https://www.brookings.edu/blog/techtank/2021/09/27/how-tech-platforms-fuel-u-s-political-polarization-and-what-government-can-do-about-it/.

213 Socioeconomic reforms are more impactful if passed at the federal level, especially those aimed at protecting weaker constituencies. Otherwise, in the best case, the beneficiaries of such reform will be only those who live in a blue state, and, in the worst case, a race to the bottom will ensue *Cf.* Matteo Gatti & Chrystin Ondersma, *Can A Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera*, 46 J. CORP. L. 1, 14 (2020).

214 Wikipedia, *Control of the U.S. Senate and House of Representatives: 1855-2025*, (last visited, Jul. 27, 2023), https://upload.wikimedia.org/wikipedia/commons/7/72/Combined--Control_of_the_U.S._House_of_Representatives_-_Control_of_the_U.S._Senate.png (showing that a government trifecta at the federal level has been achieved only for 12 of the last 42 years).

215 On several issues, there is consensus among *voters* of the necessity of reform: for example, labor reform, minimum wage, and gun control are measures that, when polled, garner overwhelming approval from voters. According to a 2020 Gallup poll, 65% of Americans approve of unions (83% of registered Democrats, 45% of registered Republicans, and 64% of independents). Megan Brenan, *At 65%, Approval of Labor Unions in U.S. Remains High*, Gallup (Sept. 3 2020), https://news.gallup.com/poll/318980/approval-labor-unions-remains-high.aspx. Similarly, six out of ten Americans support a federal $15 minimum wage (Amina Dunn, *Most Americans support a $15 federal minimum wage*, PEW RESEARCH CENTER (Apr. 22, 2021), https://www.pewresearch.org/fact-tank/2021/04/22/most-americans-support-a-15-federal-minimum-wage/), and seven out of ten American support gun control legislation (Sara Burnett, *AP-NORC poll: Most in US say they want stricter gun laws*, AP NEWS (Aug. 23, 2022), https://apnews.com/article/gun-violence-covid-health-chicago-c912ecc5619e925c5ea7447d36808715).

216 The filibuster allows a minority party in the Senate to obstruct legislation by requiring a supermajority of 60 votes to proceed. While initially intended to protect minority rights and foster compromise, the filibuster has increasingly been used as a tool for partisan obstructionism. Catherine Fisk & Edward Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997).

217 Tim Wu, *The Oppression of the Supermajority*, N.Y. TIMES (Mar. 5, 2019), https://www.nytimes.com/2019/03/05/opinion/oppression-majority.html.

officers? From a corporate law perspective, caselaw and legal scholarship answer the question in the negative: corporate governing is not particularly problematic.

To begin, corporate governing is a non-issue from an authority standpoint, considering that ultra vires doctrines have long been discarded.[218] Issues relating to corporate purpose are in fact litigated under fiduciary duties doctrines.[219] When it comes to such doctrines, it is useful to run separate analyses for the two types of corporate governing activities: I address government substitution in Section III.A and then turn my attention to corporate socioeconomic advocacy in Section III.B.

A preliminary note is in good order. Engaging in corporate governing is part of running a business. Some matters affect the corporation *directly*. For example, when Lotus Development extended corporate benefits to its employees' domestic partners,[220] it was pursuing a policy to grant equal pay for equal work to its employees and seeking to strengthen its relationship with members—actual and prospective—of its workforce. Similarly, initiatives to reimburse for travel expenses associated with transportation to states that do not have anti-abortion laws[221] seek to provide logistical help to female employees who might otherwise abandon their jobs and move to other states. All measures aimed at improving some plight of the workforce attempt to offer employees better protections than those coming from the state, especially when the government itself is challenging the workforce (and thus the corporation). Other matters affect the corporation only *indirectly*, for instance when the socioeconomic impact of a governmental policy (of lack thereof) somehow reverberates into the company's operations without addressing the company or its stakeholders directly. Many initiatives on climate are by design supposed to alleviate the impact of climate change for the collective benefit—this would in turn indirectly benefit the corporation if other firms took similar steps and climate disaster were averted.[222] As another example, consider the initiatives at Viacom and WarnerMedia aimed at increasing social justice content[223] or at Sephora with its pledge to source 15% of their product offerings from Black-owned businesses.[224] These initiatives foster communities that, despite doing business with the corporation, are outside of the firm's perimeter. Nevertheless, corporations expect indirect benefits in terms of enhanced relationships not only with the outside communities that are the beneficiaries of their initiatives, but also with consumers, workers, and ultimately shareholders who approve of the initiative.[225]

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[218] *See e.g.* BAINBRIDGE, *supra* note 29, at 13 ("at one time issues of corporate social responsibility were litigated under the *ultra vires* doctrine. Today, however, with the erosion of the ultra vires doctrine, questions of corporate purpose doctrine are litigated not under that doctrine but under that of fiduciary obligation."). *See also* Strine, *Good Corporate Citizenship*, *supra* note 28, at 340 (noting that "as a matter of statutory corporate law, corporations are typically empowered to conduct their affairs toward any lawful end by any lawful means.").

[219] *See* Dalia T. Mitchell, *From* Dodge *to* eBay*: The Elusive Corporate Purpose*, 13 VA. L. & BUS. REV. 155, 175 (2019).

[220] *See supra* text accompanying note 64.

[221] *See supra* note 62 and accompanying text.

[222] *Cf.* Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 5 (2020) (arguing that climate activism by some in the institutional investor industry is explainable as a way to tame systemic risk); John C. Coffee, Jr., *ESG, Common Ownership, and Systematic Risk: How They Intersect* (Eur. Corp. Governance Inst., Law Working Paper No. 541/2020, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678197 (arguing that large index funds have been pushing for mandating ESG disclosures to help reduce systemic risk); Jeffrey N. Gordon, *Systematic Stewardship*, 47 J. CORP. L. 627 (2022).

[223] *See supra* note 58 and accompanying text.

[224] *See supra* note 56 and accompanying text.

[225] *See infra* Section IV.A.

A. Government Substitution

This type of initiative occurs when a corporation takes on a quasi-governmental role when the actual government is dysfunctional or deliberately avoids certain functions for political reasons. To get a sense, corporate actions, as opposed to mere statements, represented 40% of the sample in a recent empirical study analyzing 293 events of corporate sociopolitical activism initiated by 149 firms across 39 industries.[226]

The adoption of measures to substitute government actions in achieving socioeconomic policy goals for the benefit of some corporate constituencies or society has long been analyzed by the corporate purpose literature[227] and case law.[228] The fundamental question this conduct raises is if it is consistent with profit maximization. Of course, whether profit maximization is *the* goal corporations must pursue is debated these days.[229] Thus, to address the legality of government substitution, it is best to perform separate analyses depending on the perspective taken with respect to corporate purpose—stakeholderism or shareholderism.

Under a *stakeholderist* view of the firm, there should be little questions on the legality of government substitution. Stakeholderism recognizes that corporations have a broader set of responsibilities beyond maximizing shareholder value, and performing quasi-governmental functions can be seen as fulfilling those responsibilities.[230] At a minimum, the legal recognition of government substitution may be less of a problem in jurisdictions that have adopted a constituency statute, whereby considerations for goals other than shareholder value are expressly permitted.[231]

Yet, even under a *shareholderist* approach, where the primary focus is on maximizing shareholder value, pointing to the long-term benefits of corporate actions can find the protection under the business judgment rule. The business judgment rule shields directors and officers from personal liability for their decisions so long as they can demonstrate that they had no interest in the subject matter and their actions were informed and rational.[232] Famously, establishing these prerequisites is not particularly hard.[233] In practical terms, so long as the long-term benefits of

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[226] Bhagwat, Warren, Beck & Watson, *supra* note 21, at 16.

[227] The debate was ignited by Milton Friedman in his famous 1970 article: see Friedman, *supra* note 170. Subsequent literature delved deeply into the issue. *See e.g.* CLARK, supra note 171, at 677–96.

[228] *See e.g.* AP Smith Mfg. Co. v. Barlow, 98 A.2d 581, 13 N.J. 145, 13 N.J. Eq. 145 (1953) (validating charitable contributions). For an analysis, see *infra* notes 234235 and accompanying text.

[229] *See supra* Section II.A.2.

[230] *See supra* text accompanying notes 173.

[231] *See* Strine, *Good Corporate Citizenship*, *supra* note 28, at 340 ("In a majority of American states . . . specific statutes empower boards to take action benefiting certain corporate constituencies, and thus enhance board discretion even further." Citing Lucian Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 94 S. CAL. L. REV. 1467, 1489 (2021) (finding thirty-three states with constituency statutes in force during the period from 2000 to 2019)). *See e.g.* Pennsylvania Statutes Title 15 Pa.C.S.A. Corporations and Unincorporated Associations § 1715 (allowing, but not obligating, directors to look after interests of non-shareholder constituencies).

[232] *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE (1994), Section 4.01(C). *See also* Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 107 (2004) (arguing that the rule is meant to incentivize responsible risk-taking for the benefit of the business and its investors); BAINBRIDGE, *supra* note 29, at 48; Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1323 (2021) (noting that "the proposition that existing law prohibits corporate decision makers from considering and incorporating the interests of stakeholders and society" is overstated); Gatti & Ondersma, *supra* note 213, at 10; Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *Does Enlightened Shareholder Value Add Value?*, 77 BUS. LAW. 731, 751 (2022); Strine, *Good Corporate Citizenship*, *supra* note 28, at 340.

[233] *See e.g.* Shlensky v. Wrigley, 237 N.E.2d 776, 779 (Ill. App. Ct. 1968) (not second guessing a decision to not install lights at Chicago Cubs' baseball stadium Wrigley Field, which according to the plaintiff resulted in the loss

corporate actions are articulated, and proper decision-making processes are followed, the business judgment rule will shield directors and managers from shareholder suits.

Legal precedents support the idea that actions of government substitution in which some stakeholders are being awarded better treatment than the bare minimum under applicable law can be treated as business decisions and thus qualify for the protections of the business judgment rule. For instance, courts have engaged with, and effectively validated, corporate philanthropy: the *AP Smith Manufacturing*[234] case established that decisions regarding philanthropy are no different from any other decisions entrusted to the board of directors and, therefore, their decisions should be subject to the same degree of judicial deference.[235] If devoting some resources to charity does not amount to a violation of fiduciary duties, neither does selecting a course of action that on its face does not prioritize profits in the immediate term. Decision-makers who forego potential profits out of concern for some long-term implications of the underlying project enjoy the protection of the business judgment rule: in *Shlensky v. Wrigley* the court was satisfied with finding that directors resolved not to install lights in a baseball stadium—which meant no nighttime games and less revenue/profits—because directors did not want to alienate residents in the surrounding neighborhood.[236]

Other cases, such as the famous *Dodge v. Ford*[237] and its more recent iteration *eBay v. Newmark*,[238] which on their face would seem to limit directors' freedom to depart from strict profit maximization, can also be reconciled with judicial deference as described above: several commentators of *Dodge* and of *eBay* maintain that such cases had an adverse outcome for the directors because during deposition the directors explicitly admitted their goal was to *not* benefit shareholders.[239] But the consensus among courts and scholars has it that, in the absence of such an admission, directors can still enjoy the deference of the business judgment rule if they are wary enough to show in the deliberative process that they reasonably believe the action in question, say a benefits expansion for some members of the workforce, is also *rationally related* to the long-term

of potentially significant revenue and establishing that "the authority of the directors in the conduct of the business of the corporation must be regarded as absolute when they act within the law, and the court is without authority to substitute its judgment for that of the directors."); Kamin v. Am. Express Co., 383 N.Y.S.2d 807, 810–11 (Sup. Ct. 1976) (not second guessing a decision to forego a significant tax advantage to avoid a capital loss in the income statement and establishing that "[t]he directors' room rather than the courtroom is the appropriate forum for thrashing out purely business questions . . . .").

234 *AP Smith Mfg.*, 98 A.2d 581, at 160–61.

235 *See* BAINBRIDGE, *supra* note 29, at 45 (quoting Nancy J. Knauer, *The Paradox of Corporate Giving*, 44 DEPAUL L. Rev. 1, 19–20 (1994): "corporate managers and fundraisers agree that corporate transfers to charity represent a calculated purchase of advertising services or goodwill"). *See also* David Rosenberg, *Delaware's "Expanding Duty of Loyalty" and Illegal Conduct: A Step towards Corporate Social Responsibility*, 52 SANTA CLARA L. REV. 81, 103 n.16 (2012) ("Corporate philanthropy or altruism is certainly protected from review in most cases by the business judgment rule."). Geoffrey Miller, *Narrative and Truth in Judicial Opinions: Corporate Charitable Giving Cases*, 2009 MICH. ST. L. REV. 831, 839 (2009).

236 *Shlensky*, 237 N.E.2d 776, at 180–81.

237 *Dodge*, 170 N.W. 668, at 684 (holding that the purpose of a corporation is to produce profits for shareholders but adding that a judge will not second-guess decisions stemming from the business judgment of directors).

238 eBay Domestic Holdings, Inc. v. Newmark, 16 A. 3 d 1, 11 (Del. Ch. 2010).

239 *See* BAINBRIDGE, *supra* note 29, at 46; Strine, *supra* note 174, at 777 (labeling *Dodge* and *eBay* as "confession cases").

interest of the shareholders.[240]—for example, on the grounds that happier employees are more productive and can lead to better innovation.[241]

In sum, even if a jurisdiction does not adhere to stakeholderism, the broad protection warranted by the business judgment rule makes government substitution-type activity very hard to challenge on corporate law grounds.

Of course, this is not to say that *all* government substitution initiatives automatically comply with all applicable laws the corporation is subject to, which is an issue that transcends my corporate law analysis. Certainly, following the Supreme Court's invalidating affirmative action as a school admission criterium,[242] whether certain corporate actions seeking to close the racial (or gender) gap may also be invalidated is something open to debate;[243] in the meanwhile corporations are treading lightly,[244] especially after attacks on DEI initiatives by activist investors like Bill Ackman.[245]

B. Corporate Socioeconomic Advocacy

Whilst corporate socioeconomic advocacy raises similar issues,[246] it has generated more emotional responses from its detractors. The refrain is normally that corporations should worry more about their results of operations and less about politics.[247] Notably, the conduct of Disney's board in its criticism towards Florida's "Don't Say Gay" legislation was challenged by a plaintiff in a books and records request under Section 220 DGCL, which was denied by the Delaware Chancery Court in *Simeone v. The Walt Disney Company*.[248]

To wit, corporate socioeconomic advocacy represents a particular form of lobbying whereby corporations advocate for societal causes that at first glance may not seem to directly align with their immediate business interests. Unlike traditional lobbying, which typically pursues

240 BAINBRIDGE, *supra* note 29, at 60 (quoting Revlon Inc. v. MacAndrews & Forbes Hldgs., Inc., 506 A.2d 173, 182). *See also* Rock, *supra* note187, at 379 ("[I]n managing the business, the board of directors may consider the interests of other stakeholders, so long as there is some 'rational relation' to shareholder value." Cited by *Simeone*, C.A. No. 2022-1120-LWW, at *28 n.138); Strine, *Good Corporate Citizenship*, *supra* note 28, at 338. *See infra* note 269 and accompanying text.

241 *See infra* Section IV.A.2.b.

242 *Students for Fair Admissions v. President & Fellows of Harvard*., 600 U.S. 181 (2023) (holding that race-based affirmative action programs in college admissions processes violate Title VI of the Civil Rights Act of 1964 as well as the Equal Protection Clause of the Fourteenth Amendment).

243 Daniel Wiessner, *Affirmative action ruling could place target on US corporate diversity programs*, REUTERS (Jun. 30, 2023), https://www.reuters.com/legal/affirmative-action-ruling-could-place-target-us-corporate-diversity-programs-2023-06-30/. *See also* Kelsey Butler & Patricia Hurtado, *Affirmative Action's End Will Crush the Diversity Talent Pipeline*, BLOOMBERG (Oct. 30, 2022), https://www.bloomberg.com/news/features/2022-10-30/supreme-court-may-end-affirmative-action-crushing-diversity-at-us-colleges#xj4y7vzkg.

244 Jeff Green, *US Companies Caught in Diversity Crossfire Are Frozen by Uncertainty*, BLOOMBERG (Jul. 29, 2023), https://www.bloomberg.com/news/articles/2023-07-29/us-companies-worry-they-could-face-legal-action-over-dei-initiatives?sref=DIvsyJQr.

245 *See supra* note [17

246 "Under existing corporate law rules, political speech decisions are by default governed by the same rules as ordinary business decisions." Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 87 (2010).

247 Stephen Bainbridge, *Investors Want Returns, Not Political Fights*, BARRON'S (Jul. 6, 2023), https://www.barrons.com/articles/investors-wants-returns-not-political-fights-c0dc18b; Phil Gramm & Mike Solon, *Keep Politics out of the Boardroom*, WALL ST. J. (Jul. 19, 2018), https://www.wsj.com/articles/keep-politics-out-of-the-boardroom-1531952912.

248 C.A. No. 2022-1120-LWW (Del. Ch., Jun. 27, 2023). *See infra* text accompanying notes 260-273.

interests solely related to the corporation and its bottom line,[249] this type of lobbying seeks to advance broader socioeconomic goals.

Given the significant expansion of corporate political speech stemming from *Citizens United*[250] and *Hobby Lobby*,[251] few would question in the abstract the legality of corporate lobbying.[252] While at first glance such expansion would seem to indicate that a corporation may use its clout and purse to push a socioeconomic agenda, certain speech can still theoretically generate director or officer liability if it is contrary to director fiduciary duties: one could hypothesize a CEO's reckless twitter rant so incendiary and offensive that it alienates the bulk of a corporation's customer base and results in significant lost revenue. The question is under which circumstances lobbying for socioeconomic goals could trigger breaches of fiduciary duties. Rarely. For companies not subject to the duty of care pursuant to Section 102(b)(7) of the DGCL (around 90% of Delaware corporations),[253] only bad faith could trigger liability.[254] That is a high bar for plaintiffs who must establish a conscious disregard for one's duties.[255] It is unclear how expressing views on policy matters that, at least on their face, affect various stakeholders of the corporation can ever amount to that. Again, even under a strict shareholderist approach, defendants could point that the policy matters the corporation is advocating would benefit the long-term welfare of the corporation and its stockholders.[256] Under a stakeholderist approach even the faintest doubts would dissipate.

But even if directors *are* subject to the duty of care, the analysis hardly changes because of how broad director and officer discretion is pursuant to the business judgment rule, as the previous

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[249] *See supra* Section II.C.

[250] *Citizens United*, 558 U.S. 310 (2010). *See supra* note 184 and accompanying text.

[251] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (allowing exemptions for close from a regulation that its owners religiously object to if there is a less restrictive means of furthering the law's interest).

[252] In fact, social advocates are said to have taken advantage of this expansion of corporate powers. Lin, *supra* note 24, at 1573. *See also* Strine, *Good Corporate Citizenship*, *supra* note 28, at 350 (noting the contradiction in criticizing corporations for endorsing progressive causes after having rallied in favor, and being the principal beneficiary of, corporate political speech).

[253] Roberta Romano, *Corporate Governance in the Aftermath of the Insurance Crisis*, 39 EMORY L.J. 1155, 1160-61 (1990) (mentioning that, by 1990, more than 90% of 180 randomly sampled Delaware corporations had amended the charter to adopt the exculpatory provision).

[254] Virtually all U.S. states allow corporations to include in their charter provisions that aim at either limiting or eliminating directors' personal liability for breaching duty of care. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2023), a provision that was passed in 1986 in the aftermath of *Smith v. Van Gorkom*, 488 A.2d 858, which shattered the calm waters of the business judgment rule to impose monetary liability for failure to comply with the duty of care in the sale of the company. Under Section 102(b)(7) of the DGCL, the certificate of incorporation of a Delaware corporation may contain a "provision eliminating … the personal liability of a director … for monetary damages for breach of fiduciary duty …, [except]: (i) [f]or any breach of the director's duty of loyalty …; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law … ." Corporations routinely include charter provisions of this kind. Holger Spamann, *Monetary Liability for Breach of the Duty of Care?*, 8 J. LEG. ANALYSIS 337, 338 (2016). Thus, directors of most corporations are only subject to claims arising from a violation of the duty of loyalty or of the duty to act in good faith, neither of which is waivable. For corporations with a Section 102(b)(7) waiver, the main issue is to determine whether directors failed to act in good faith and courts equate bad faith with "utter dereliction of duty:" Bad faith is triggered whenever a "fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties." *See* Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 243 (Del. 2009) (citing Brehm v. Eisner (In re Walt Disney Co. Derivative Litig.), 906 A.2d 27, 67 (Del. 2006)).

[255] *See Lyondell*, 970 A.2d, at 243.

[256] For more detail, see *infra* Section IV.A.3.c.

subsection indicates. So long as directors can show that their actions are disinterested, informed, and rational,[257] which is not a hard thing to do,[258] they will find a liability shield.[259]

This analysis is confirmed by the Chancery Court *Simeone* decision in June 2023, which denied a Section 220 claim on Disney's books and records concerning its decision to criticize Florida's "Don't Say Gay Bill."[260] One of the reasons for such denial was that the shareholder did "not provide[] a credible basis from which to infer possible wrongdoing."[261]

In *Simeone,* the plaintiff claimed that Disney's public opposition" to HB 1557 amounted to a possible breach of fiduciary duty by the Board and certain Disney officers, because the company lost rights and powers associated with the RCID, its self-governance rights in some districts in Florida, which in turn resulted in a drop in the stock price.[262] But the court rejected this assertion on the grounds that the plaintiff was *merely disagreeing* with a board decision, something that absent decision-making pathologies warrants judicial deference even if "the decision turned out poorly in hindsight."[263]

On the one hand the Chancery Court recognized the challenges a corporation faces when addressing divisive topics, especially given that shareholders have diverse preferences beyond the "shared goal of corporate profitability[, which] may not align with the company's position on political, religious, or social matters."[264] On the other hand, the court noted that shareholders understand that "the board is empowered to direct the corporation's affairs"[265] and that the board "held the sort of deliberations that a board should undertake when the corporation's voice is used on matters of social significance."[266] Disney's public stand wasn't aprioristic. In fact, the company opted for silence at first, and only after discussing at the board "the communications plan,

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[257] *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE (1994), Section 4.01(C).

[258] *See supra* note 233.

[259] John C. Coates et al, Brief of Corporate Law Professors as Amici Curie in Support of Respondents, *Friedrichs v. California Teachers Ass'n* No. 14-915 (U.S. Nov. 2015), at 8 https://scholarship.law.duke.edu/faculty_scholarship/3546 (noting that fiduciary "duties do not compel directors to use corporate funds to speak, or avoid speaking, in political controversies as they believe shareholders would prefer, because the most basic of corporate law doctrines—the 'business judgment rule'—precludes judicial review of board decisions, absent evidence of a conflict of interest or a complete failure to exercise any care."). *See also* Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 257-58 (1981).

[260] *Simeone*, C.A. No. 2022-1120-LWW, at *18 (establishing that "plaintiff does not meet the standard for a Section 220 inspection for three independent reasons[:] [f]irst, the purposes described in the demand are not the plaintiff's own purposes [but rater of his counsel doing work for the Thomas More Society][;] [s]econd, the plaintiff has not provided a credible basis from which to infer possible wrongdoing[;] [t]hird, the defendant has provided the plaintiff with all necessary and essential documents").

[261] *Id.*

[262] *Id.* at *23–24.

[263] *Id.* at *24-25.

[264] *Id.* at *25.

[265] *Id.* (citing 8 *Del. C.* § 141(a) and noting that the Disney shareholders were on notice because of a publicly available internal policy on political engagement). *Cf.* The Walt Disney Company, *Political Giving and Participation in the Formulation of Public Policy in the United States* at 1 (July 2020), https://thewaltdisneycompany.com/app/uploads/2020/07/Political-Giving-and-Participation-in-the-Formulation-of-Public-Policy-2020.pdf. *But see*, for a response to this line of arguing, Bebchuk & Jackson, *supra* note 246, at 113 (referring to "generic objections that may be raised in response to the many existing mandatory corporate law rules that protect minority shareholders from diversions of value by the majority").

[266] *Simeone*, C.A. No. 2022-1120-LWW, at *26.

philosophy and approach regarding Florida legislation and employee response,"[267] did the CEO announce opposition to the bill.[268]

The Chancery Court confirmed long-standing Delaware case law allowing boards, in the exercise of business judgment, to pursue interests of corporate stakeholders as "rationally related" to building long-term value.[269] Quoting *eBay*, the court abstained from questioning "rational judgments about how promoting non-stockholder interests . . . ultimately promote stockholder value."[270] Further, the Chancery Court also denied, quite correctly, that Disney "'ignored a known risk' of negative consequences from opposing the legislation[,]"[271] by noting that while the board "could have avoided political blowback by remaining silent on HB 1557[,] . . . doing so could have damaged the company's corporate culture and employee morale."[272] For the court, "the weighing of these key risks by disinterested [directors did] not evidence a potential lack of due care, let alone bad faith."[273]

IV. Should Corporations Engage in Corporate Governing? The Different Normative Angles

If corporate governing is generally permissible under existing corporate law regimes, it remains an open question whether corporate governing is valuable from a normative standpoint—whether it is appropriate to entertain corporate governing activities. In fact, even if directors avoid legal liability, corporate governing can still have serious negative consequences not only for corporate strategy and value,[274] but also for society and democratic institutions.

To appreciate whether corporate governing is normatively sound for both corporations and society, one must investigate the issue under a plurality of angles. I thus split the normative discussion into four separate questions, the first two dealing with the corporate dimension, and the last two covering broader societal and political themes that transcend the single firm.

On the corporate front, I wonder if there is a business case for corporate governing: Does corporate governing enhance firm's value? Also, assuming there is a business case, does it make sense for a corporation to pursue corporate governing from a strategic point of view?

More broadly, does corporate governing help the cause of social activists and does society benefit from it? Also, are democratic institutions imperiled by corporations being active on the political front?

Raising these normative questions is essential for examining, in Part V, promises and risks associated with corporate governing. This Part IV tackles each of these questions.

A. The Business Case for Corporate Governing: Does It Enhance Firm Value?

An analysis of the normative merits of corporate governing must start with the business case: Are corporate governing initiatives good for the business? This is eminently an empirical question, which a burgeoning literature in various disciplines, including marketing, management,

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[267] *Id.* at *27.

[268] *Id.*

[269] *Id.* (citing, among other things, Revlon, 506 A.2d 173, at 182: "A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders."). *See also supra* note 238.

[270] *Id.* at *28. *Cf. eBay*, 16 A.3d 1, at 34.

[271] *Id.* at *29.

[272] *Id.* at *29-30.

[273] *Id.* at *30.

[274] Simmons, *supra* note 36, at 713–14 (framing corporate governing as a risk management issue).

and corporate finance, has been addressing in recent years. I survey the most important findings in the following pages.

Importantly, the empirical literature does not reach an unequivocal conclusion on the desirability of corporate engagement with broader socioeconomic issues. What emerges instead is that the economics of corporate governing are case specific: some corporate governing may benefit, and some may hurt. For every Patagonia[275] and Ben & Jerry's,[276] which have been leading the pack of those doing well by doing good,[277] there may well be an Anheuser-Busch[278] and a P&G[279] miscalculating risks and benefits around a corporate governing initiative.

Corporations elicit different reactions from their engagement on social policies. Yet, this is not something to be particularly surprised of. An article by Bhagwat, Warren, Beck and Watson frames what I describe as corporate governing in risk/reward terms; corporate governing is more of a feature than a bug of running a business: "while . . . a risky marketing strategy that investors are generally wary of, [corporate governing] may also be advantageous."[280] This is why it works for some companies and brands but not for others.

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[275] Patagonia has a market reputation of a values-driven company that adopts practices seeking to progress social change in terms of sustainability, equity, and transparency. It is regarded as a model in pursuing such goals while at the same time being a very successful business. *See* Jessica Vredenburg, Sommer Kapitan, Amanda Spry & Joya A. Kemper, *Brands Taking a Stand: Authentic Brand Activism or Woke Washing?*, 39 J. PUB. POL'Y & MARKETING 444, 450 (2020); Ron Carucci, *How Patagonia's Purpose Is Once Again Raising The Bar On Doing The Right Thing*, FORBES (Apr. 21, 2021), https://www.forbes.com/sites/roncarucci/2021/04/21/how-patagonias-purpose-is-once-again-raising-the-bar-on-doing-the-right-thing/?sh=7d0e110f777c.

[276] Jordyn Holman & Thomas Buckley, *How Ben & Jerry's Perfected the Delicate Recipe for Corporate Activism*, BLOOMBERG (Jul. 22, 2020), https://www.bloomberg.com/news/features/2020-07-22/how-ben-jerry-s-applied-its-corporate-activism-recipe-to-blm#xj4y7vzkg; Alison Beard, *Why Ben & Jerry's Speak Out*, HARV. BUS. REV. (Jan. 13, 2021), https://hbr.org/2021/01/why-ben-jerrys-speaks-out.

[277] Joon S. Lim & Cayley Young, *Effects of Issue Ownership, Perceived Fit, and Authenticity in Corporate Social Advocacy on Corporate Reputation*, 47.4 PUB. REL. REV. (2021) (analyzing Ben & Jerry's social media activity and finding that perceived authenticity and perceived fit are positive predictors for corporate reputation).

[278] *See supra* text accompanying notes 75–78. To be clear, I am only saying that Anheuser-Busch miscalculated its customers response, but not inferring that its actions constituted a breach of applicable corporate law because that's beyond my expertise: Bud Light's parent company AB-InBev is incorporated in Belgium and subject to its corporate law. Note that Florida Governor Ron DeSantis attracted attention for threatening to sue via one of the Florida state pension funds the board of Anheuser-Busch. For a description and rebuttal, see Benjamin Edwards, *Ron DeSantis' Legal Threats Against Bud Light's Parent Company Are Dumb and Bad for Florida*, THE DAILY BEAST (updated Jul. 24, 2023, 4:13PM EDT), https://www.thedailybeast.com/ron-desantis-legal-threats-against-bud-lights-parent-company-are-dumb-and-bad-for-florida.

[279] In January 2019, P&G's brand Gillette released an ad to address toxic masculinity, which replaced the brand's tagline "The Best a Man Can Get" with "The Best a Man Can Be." Backlash on social media ensued immediately with twice as many "dislikes" than "likes" on YouTube, the ad agency received death threats, and boycott campaigns were launched. While the CEO defended the campaign, this episode is one of the textbook examples of failed brand messaging—key to the failure, according to marketing experts, was the sharp departure from the brand's traditional product-focused and men-centered advertising. *See* Susan Fournier, Shuba Srinivasan & Patrick Marrinan, *Turning Socio-Political Risk to Your Brand's Advantage*, 13.2 NIM MARKETING INTEL. REV. 18, 24 (2021).

[280] Bhagwat, Warren, Beck & Watson, *supra* note 21, at 16 (adding that "[i]nvestors on average react negatively to [corporate social activism or] CSA, especially when it deviates from the values of key stakeholders and signals the firm's resource-intensive commitment to activism. However, they also reward activism when it closely aligns with stakeholders. In addition, . . . customers reward CSA when it resonates with their personal values and attest that it can be an effective means for firms to appeal to their target markets.

1. Indicators from the Empirical Literature: Divisiveness of the Issue, Firm Priors, and Authenticity.

The empirical literature is at best mixed: there is no unequivocal study showing that corporate governing is, even on average, positive or negative. But even if it is not possible to establish whether in the aggregate corporate governing is advantageous, the literature suggests that certain variables correlate with certain outcomes. Such variables include the divisiveness of the area of intervention, the specific history of the corporation, and the perceived authenticity of the firm (including its executives), its message, or intervention.

a. Divisiveness.

To be sure, certain issues divide less than others—as a result, taking a public stand on an issue that is generally embraced by public opinion will not be detrimental but can rather create value. On the one hand, a paper by Bondi, Burbano and Dell'Acqua finds that "when [public] opinion is symmetrically divided, communication of a stance in either ideological direction is on average negatively received[; but] . . . when opinion is (sufficiently) asymmetric, firms can benefit from pandering to popular stakeholder opinion."[281] On the other hand, how closely the underlying issue relates to the business or workplace is a determinant of the success of the initiative: some research suggests that favorable employee reactions to CEO activism are predominantly associated with positions taken on workplace-related issues, such as diversity and pay equality; conversely, CEO stances on topics like politics, the environment, or other social issues generally result in an employee response considered insignificant.[282]

To be sure, determining what divides society (and by how much) is not necessarily always easy, because society's political beliefs derive from historical context and always evolve (and sometimes resolve) through time.[283] Moreover, if well played, *some* degree of controversy can in fact help a brand.[284]

b. Firm Priors, Goals, and Authenticity.

The specific history of the corporation and its broader goals matter significantly, as the Patagonia, Ben & Jerry's, Procter & Gamble, and Anheuser-Busch stories illustrate. Moreover, studies by scholars in the marketing and management disciplines posit that it is crucial that the corporation's message is perceived as authentic by the public.[285] For instance, Nike's bold political

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[281] Tommaso Bondi, Vanessa Burbano & Fabrizio Dell'Acqua, *When to Talk Politics in Business: Theory and Experimental Evidence* 32, Working Paper (Feb. 13, 2023), https://drive.google.com/file/d/13yKVkP-B-YAuehCWmxMPgKtKHuthXEt9/view?pli=1.

[282] Anahit Mkrtchyan, Jason Sandvik & Da Xu, *Employee Responses to CEO Activism* 3-4, Working Paper (Jul. 11, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4506862.

[283] Bhagwat, Warren, Beck & Watson, *supra* note 21, at 2.

[284] Christine Moorman, *Commentary: Brand Activism in a Political World*, 39 J. PUB. POL'Y & MARKETING 388, 389 (2020) (noting that "an essential feature of political activism is the partisan nature of the issue on which the activities are focused").

[285] Henri Servaes & Ane Tamayo, *The Impact of Corporate Social Responsibility on Firm Value*, 59 MANAGEMENT SCIENCE 1045, 1058-59 (2013) (finding that certain firms are better positioned than others in translating CSR initiatives into wealth creation and noting in particular that "firms with poor reputations are unlikely to reap any immediate benefits (in terms of shareholder value creation) from engaging in CSR . . . [and i]n fact, such activities may appear disingenuous and may well have the opposite effect."). *See also* Aaron K. Chatterji & Michael W. Toffel, *The New CEO Activists*, HARV. BUS. REV. (Jan.-Feb. 2018), https://hbr.org/2018/01/the-new-ceo-activists, at 14 ("To influence public policy, the message has to be authentic to both the individual leader and the business. There should be a compelling narrative for why *this* issue matters to *this* CEO of *this* business at *this* time." (emphasis in

stances attract less attention than other companies' because of the company's long history of tackling hot-button issues.[286] A study shows that, for the period following Blackout Tuesday in June 2020—when social media users (including brands) posted black screens to protest racism and police brutality—"true ally" brands performed better than "performative ally" brands and neutral brands that stayed silent.[287] According to another study, while more than half of consumers believe involvement in social issues is for the most part a marketing ploy, if consumers actually trust the brand on social issues, they will buy the products and seven out of ten will also advocate for the brand.[288] Other studies show somewhat similar results: while market-driven companies are better off abstaining from taking a stand, for companies that are generally considered as *values*-driven, staying silent on a pressing social issue carries more risk in terms of market perception.[289] I argue that staying silent on a pressing issue is, in itself, a de facto statement—I call this "passive corporate governing." To be sure, authenticity matters not only to consumers but also to retail investors: a study finds that "retail investors' reactions depend on the credibility of the [corporate social advocacy] engagement and on the credibility of the company itself[and] . . . that the positive reaction of retail investors to [such engagement] is more likely to be influenced by moral sentiment rather than by fundamentals or attention bias."[290] Unsurprisingly, perceived authenticity of CEO activism is found to positively influence young consumers' relationships with the organization and their intent to purchase.[291]

All in all, some brands match activist messaging, purpose, and values with prosocial corporate practice, and engage in authentic brand activism, thus creating potential for social change and gains in brand equity; in contrast, brands that detach their activist messaging from their purpose, values, and practice, enact inauthentic brand activism through the practice of "woke washing."[292]

original)); Hanh Song Thi Pham, Hien Thi Tran, *CSR Disclosure and Firm Performance: The Mediating Role of Corporate Reputation and Moderating Role of CEO Integrity*, 120 J. BUS RES. 127, 135 (2020) (finding that firm reputation and CEO integrity respectively mediates and moderates the effect of CSR disclosure on financial performance); Vredenburg, Kapitan, Spry & Kemper, *supra* note 275; Joon S. Lim & Cayley Young, *Effects of Issue Ownership, Perceived Fit, and Authenticity in Corporate Social Advocacy on Corporate Reputation*, 47.4 PUB. REL. REV. (2021) (describing Ben & Jerry's social media strategy and its perception by the public); Holger J. Schmidt, Nicholas Ind, Francisco Guzmán & Eric Kennedy, *Sociopolitical Activist Brands*, 31 J. PROD. & BRAND MGMT 40 (2022); Jie Jin, Renee Mitson, Yufan Sunny Qin, Marc Vielledent & Linjuan Rita Men, *Enhancing young consumer's relational and behavioral outcomes: The impact of CEO activism authenticity and value alignment*, 49 PUB. REL. REV. 49 102312 (2023).

286 Susan Fournier, Shuba Srinivasan & Patrick Marrinan, *Turning Socio-Political Risk to Your Brand's Advantage*, 13.2 NIM MARKETING INTEL. REV. 18, 22–24 (2021).

287 Nathalie Spielmann, Susan Dobscha, & L. J. Shrum, *Brands and Social Justice Movements: The Effects of True versus Performative Allyship on Brand Evaluation*, 8 J. ASSOCIATION CONSUMER RES. 83 (2023).

288 *See* Mirzaei, Wilkie & Siuki, *supra* note 25, at 1 (citing Edelman research and noting that advocating for the brand is more than 20 percentage point higher than just trusting the brand on product quality (five out of ten)).

289 Daniel Korschun, Hoori Rafieian, Anubhav Aggarwal & Scott D. Swain, *Taking a Stand: Consumer Responses when Companies Get (or Don't Get) Political* 34, Working Paper (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2806476.

290 Ruby Brownen-Trinh & Ajan Orujov, *Corporate socio-political activism and retail investors: Evidence from the Black Lives Matter campaign*, 80 J. CORP. FIN. 102417 (2023).

291 Jin, Mitson, Qin, Vielledent & Men, *supra* note285.

292 Vredenburg, Kapitan, Spry & Kemper, *supra* note 275. *See also* Mirzaei, Wilkie & Siuki, *supra* note 25, at 1); Gaia Melloni, Andrea Patacconi & Nick Vikander, *Cashing in on the culture wars? CEO activism, wokewashing, and firm value*, 44 STRATEGIC MGMT J. 3098 (2023); Andrew C. Baker, David F. Larcker; Charles G. McClure, Durgesh Saraph & Edward M. Watts, *Diversity Washing*, Chicago Booth Working Paper 22-18 (2023), http://ssrn.com/abstract=4298626.

Thus, some firms are better positioned than others in translating initiatives into wealth creation, while "firms with poor reputations are unlikely to reap any immediate benefits (in terms of shareholder value creation) from engaging in [corporate social responsibility] . . . [and i]n fact, such activities may appear disingenuous and may well have the opposite effect."[293] Unsurprisingly, many PR fallouts stem from initiatives perceived as opportunistic.[294]

2. Indicators from the Empirical Literature: Understanding the Markets in which the Corporation Operates.

Another important theme emerging from the literature is that, to be value creating, the corporate governing initiative must align with the expectations and political beliefs of the various stakeholders of the corporation. In this latter regard, on several occasions corporations have intervened *precisely* because of bottom-up pressures from their stakeholders, typically their customers (see the long history of consumer boycotts from LGBTQ+ groups)[295] or employees (see the Disney/DeSantis feud).[296]

Therefore, directors and managers who evaluate a corporate governing initiative from a firm value perspective must have a good understanding of the corporation's operations, and especially of the expectations of the markets in which the corporation operates: product market, labor market, and stock market.

a. Product Market.

With respect to the product market, a study by Hirst, Kastiel and Kricheli-Katz finds that individuals "are willing to forgo some monetary gains to promote social interests and that individuals are willing to forgo greater amounts when *consuming* . . . than when investing."[297] Bhagwat, Warren, Beck and Watson echo that "[c]ustomers pay attention to and make long-lasting purchase decisions based on [corporate sociopolitical activism]").[298] For instance, a field study by Chatterji and Toffel finds that consumers were more inclined to buy Apple products among

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293 Henri Servaes & Ane Tamayo, *The Impact of Corporate Social Responsibility on Firm Value*, 59 MANAGEMENT SCIENCE 1045, 1058-59 (2013).

294 *Id. See also* Daniel Victor, *Pepsi Pulls Ad Accused of Trivializing Black Lives Matter*, NY TIMES (Apr. 5, 2017), https://www.nytimes.com/2017/04/05/business/kendall-jenner-pepsi-ad.html; Melloni, Patacconi & Vikander, *supra* note 292, at 3103.

295 While this should not surprise corporate governance scholars who are aware of the impact of the ESG movement on corporate behavior, this is not a recent pattern. Take LGBTQ+ rights, which have been among the first that got bolstered by corporate governing, especially in terms of government substitution (see BALL, *supra* note 48, at 95-125 (describing corporate domestic partnership benefits in the 1990s)). There, corporations took initiative only after being called out for decades by various activists' campaigns. *Id.* at 31-58 (chronicling boycotts and other actions in the 1970s against phone companies for their discriminatory hiring, TV networks for their depiction of queer people, and Coors for their discriminatory and anti-union positions).

296 For instance, Disney's initial reaction to the "Don't Say Gay" bill was silence, until it got pressured to speak by workers and its creative partners. *See supra* text accompanying note 4.

297 Scott Hirst, Kobi Kastiel & Tamar Kricheli-Katz, *How Much Do Investors Care About Social Responsibility?* 50, BU Sch. of L. Research Paper No. 4115854 (2022).

298 Bhagwat, Warren, Beck & Watson, *supra* note 21, at 16. *See also* Elena-Mădălina Vătămănescu, Dan-Cristian Dabija, Patrizia Gazzola, Juan Gabriel Cegarro-Navarro & Tania Buzzi, *Before and After the Outbreak of Covid-19: Linking Fashion Companies' Corporate Social Responsibility Approach to Consumers' Demand for Sustainable Products*, J. CLEANER PROD. 321 (2021) 128945 (presenting survey data relating to Italian consumers' reactions to social and environmental sustainability practices of fashion companies in the aftermath of Covid-19 and finding that consumers attach great importance to such practices).

participants exposed to Cook's CEO activism compared to those who were not exposed.[299] Their study shows that individuals supporting same-sex marriage were the driving force behind this effect and there was no indication that Cook's statements influenced the purchase intent of those opposing same-sex marriage.[300]

Clearly, to avoid fiascos such as the ones experienced by P&G and Anheuser Busch,[301] it is crucial for executives to understand the value alignment between the corporation and its consumer base. Interestingly, according to one study, consumers are relatively tolerant of political stands by values-driven companies (like Patagonia) as opposed to market-driven ones (like P&G).[302] Also, some evidence suggests negative reactions are more memorable than positive ones: according to a 2018 survey by the Rock Center for Corporate Governance at Stanford University, the public is "significantly more likely to remember products they stopped using or use less because of the position the CEO took than products they started using or use more."[303]

But how big is the penalization if corporations aggravate non-likeminded consumers? Apparently neither too big nor persistent. A study by Hou and Poliquin on consumer responses to gun control initiatives that corporations adopted after mass shooting shows a small but potentially significant decline in store visits, which is especially pronounced in conservative counties (liberal counties show no significant decline); however, the same study finds these reputational effects dissipate rather quicky in the span of three-to-four weeks.[304] A similar study by Jin, Merkley, Sharma and Ton analyzes consumer reactions to firm's stands against Georgia's voting reform laws[305] and finds that customer visits, visitors, and consumer spending decreased at stores of companies that spoke out (relative to stores of other companies).[306] Yet, their results show that the decrease in traffic (attributable to less-frequent customers who spend less time shopping) is offset by loyal customers who increase their shopping time.[307] This offsetting effect also explains, according to the authors, the lack of evidence of changes in firm-level financial performance or stock market reactions.[308] A third study reviewing consumer reactions to activism statements by CEOs of S&P 500 corporations in the 2014-2019 period reaches different findings: drawing on information from 190,000 stores of more than 200 corporations (of which 81 made a social statement with their CEO), the authors find "that store visits increased by 3% in the month after CEO activism relative

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299 Aaron K. Chatterji & Michael W. Toffel, *Assessing the Impact of CEO Activism*, 32 ORG. & ENVIRONMENT 159, 161 (2019).

300 *Id.* (noting that CEO activism can function as a signal, informing consumers about where a company leader stands on a controversial issue and potentially mobilizing support and fostering positive sentiments for the company, particularly among those who already align with the CEO's perspective.).

301 *See supra* notes 278-279.

302 Korschun, Rafieian, Aggarwal & Swain, *supra* note 289, at 32.

303 David F. Larcker, Stehen A. Miles, Brian Tayan & Kim-Wright-Violich, *The Double-Edged Sword of CEO Activism* 4, Rock Center for Corporate Governance at Stanford University Closer Look Series: Topics, Issues and Controversies in Corporate Governance (2018), https://www.ssrn.com/abstract=3283297 (noting that "35 percent of the public could think of a product or service they use less, while only 20 percent could think of a product they use more.").

304 Young Hou & Christopher W. Poliquin, *The effects of CEO activism: Partisan consumer behavior and its duration*, 44 STRATEGIC MGMT. J. 672, 697-98 (2022).

305 *See supra* Section I.A.2.e.

306 Hengda Jin, Keneth Merkley, Anish Sharma & Karen Ton, *Customers' Response to Firms' Disclosure of Social Stances: Evidence from Voting Reform Laws* 4, Working Paper (Nov. 2023), https://ssrn.com/abstract=4124518 (finding that the decrease in customer traffic is stronger for stores in the state of Georgia, in Republican counties, and for corporations that got targeted by conservative media).

307 *Id.*

308 *Id.* at 5–6.

to otherwise identical stores of non-announcing firms."[309] The authors conclude that CEOs engage in activism not because of political belief, but for strategic reasons to gain market share in consumer markets characterized by political polarization and identity-based consumption.[310]

If corporations match well with the values of their consumer base, they can benefit significantly. For instance, Nike's Kaepernick ad is said to have generated sales of more than $163 million before the ad was even aired.[311] As pointed out by Tom Lin, corporate governing initiatives at Walmart and JPMorgan Chase allowed the two companies to expand into new markets.[312]

The upside of getting the corporate governing initiative right can be significant. According to U.S. Bureau Labor Statistic data, ninety million Americans self-identify as "conscious consumers," with the overall conscious consumer market in the United States reaching $3.2 trillion in 2017.[313]

b. Labor Market.

On the labor market front, "[s]ocial demand has made executing on ESG issues essential to attracting and retaining talent."[314] Corporate socioeconomic advocacy can enhance employees' connection to their organizations and reinforce shared beliefs among the workforce. A study by Alex Edmans finds that employee satisfaction predicts positive returns.[315]

Furthermore, a recent study by Anahit Mkrtchyan, Jason Sandvik and Da Xu finds that employee satisfaction sees an uptick when CEOs actively advocate for diversity and pay equality.[316] Additionally, companies with CEOs engaged in activism tend to attract more productive inventors, signaling an enhanced reputation in the labor market.[317] Another study finds strong evidence that LGBTQ-supportive policies create openness amongst LGBTQ+ employees and fairly strong evidence that these policies lead to less discrimination in the workplace, augment health results, improve job satisfaction, and greater job commitment.[318]

Yet, on the flip side, if the corporation's stance clashes with employees' ideologies, it could lead to alienation. A study by Burbano finds an asymmetrical response from the workforce: "a

309 Homroy & Gangopadhyay, *supra* note 104, at 7-8 (noting that the "increase is driven by higher consumer visits to Democrat-county stores (share of votes to Donald Trump less than 40%), while consumer visits to Republican counties show a significantly smaller decline" and that "store visits in Republican counties almost fully recovered to pre-activism levels within 8 weeks, but store visits in Democrat counties continued to be elevated."). Their study also shows that "sales turnover of firms increases in the first two quarters following CEO activism, but the effect subsides thereafter." *Id.* at 9.

310 *Id.* at 45.

311 Melloni, Patacconi & Vikander, *supra* note 292, at 3103 (citing Apex Marketing calculations).

312 *See* Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1580 (2018) (mentioning Walmart's partnership with the Environmental Defense Fund, which "helped the company launch new sources of revenue via environmentally-friendly products and cost-savings via smarter energy practices" and JPMorgan Chase's commitment to investing one hundred million dollars into Detroit, which created a new market of clients for the bank).

313 *See* Fan, *supra* note 25, at 454.

314 Michal Barzuza, Quinn Curtis & David H. Webber, *The Millennial Corporation: Strong Stakeholders, Weak Managers* 21-22, Eur. Corp. Governance Inst., Law Working Paper No. 687, 2023, http://ssrn.com/abstract_id=3918443 (citing empirical literature).

315 Alex Edmans, *Does the Stock Market Fully Value Intangibles? Employee Satisfaction and Equity Prices*, 101 J. FIN. ECON. 621 (2011).

316 Mkrtchyan, Sandvik & Xu, *supra* note 282.

317 *Id.*

318 M.V. LEE BADGETT, LAURA E. DURSO, ANGELIKI KASTANIS & CHRISTY MALLORY, THE BUSINESS IMPACT OF LGBT-SUPPORTIVE WORKPLACE POLICIES (2013), https://escholarship.org/uc/item/3vt6t9zx.

significant demotivating effect if the employer takes a stance with which the employee disagrees but no statistically significant motivating effect if the employer takes a stance with which the employee agrees, compared with the employer not taking a stance."[319] In Burbano's field experiment, the demotivating effect resulted in both less quality and quantity of work for the employer.[320] A study by Wowak, Busenbark and Hambrick focusing on employee reactions to CEOs political messaging following North Carolina's "Bathroom Bill"[321] reaches partially similar results. Similar to Burbano, when the employee population is not aligned, say it is less liberal than the CEO, the response can be negative in terms of organizational commitment.[322] Unlike Burbano, the authors find that, when the employee population is aligned with a CEO's politics, the response to CEO activism is generally positive and in fact strengthens the employee's affiliation to the underlying political cause.[323]

But even this latter outcome isn't always a negative feature. In fact, CEO activism "may help reduce the information asymmetry and search costs that job-seekers bear in learning about an organization's less-observable characteristics,"[324] facilitating the attraction-selection-attrition process and thus attracting more like-minded talent, with positive effects on firm commitment and cohesion.[325]

c. Stock Market.

The stock market itself may reward corporations that pick the fitting corporate governing strategy. To begin, studies show that investors are attracted toward high-sustainability investments.[326] Yet, the bigger question is whether good social performance impacts or at least correlates with good financial performance. While no studies that I am aware of support a causation claim from the former to the latter, several studies find correlation between these two variables. In his 2022 book "Grow the Pie," Alex Edmans surveys empirical studies that show correlation between social and financial performance.[327] Similarly, Ferrell, Liang and Renneboog find

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[319] Vanessa C. Burbano, *The Demotivating Effects of Communicating a Social-Political Stance: Field Experimental Evidence from an Online Labor Market Platform*, 67 MGMT. SCIENCE 1004, 1005 (2021). Burbano argues that this asymmetrical effect is attributable to the fact that "individuals tend to perceive a 'false consensus' with regard to the relative commonness of their own opinions and to overestimate the degree to which others share their beliefs[;] . . . if workers already expect their colleagues and employers to share their views because of a false consensus effect, no updating takes place when it is revealed that the employer shares their perspective." *Id.* at 1019.

[320] *Id.* at 1020. Workers were surveyed on sociopolitical topics at the end of each of two translation jobs on online work platform Upwork. Only at the end of the second job they were told of the employer's own positions on such topics.

[321] *See supra* Section I.A.2.c.; Adam J. Wowak, John R. Busenbark & Donald C. Hambrick, *How Do Employees React When Their CEO Speaks Out? Intra- and Extra-Firm Implications of CEO Sociopolitical Activism*, 67 ADMINISTRATIVE SCIENCE QUARTERLY 553 (2022).

[322] Wowak, Busenbark & Hambrick, *supra* note 321, at 574 ("the more conservative the employee population, the greater the decrease in organizational commitment.").

[323] *Id.* at 574–75 & 580–81.

[324] Mkrtchyan, Sandvik & Xu, *supra* note 282, at 4.

[325] *See generally* Donald C. Hambrick & Adam J. Wowak, *CEO Sociopolitical Activism: A Stakeholder Alignment Model*, 46 ACADEMY MGMT. REV. 33 (2021).

[326] Samuel M. Hartzmark & Abigail B. Sussman, *Do Investors Value Sustainability? A Natural Experiment Examining Ranking and Fund Flows*, 74 J. FIN. 2789, 2831–32 (2019) (looking at mutual funds and finding that "funds with the highest globe ratings receive more than $24 billion greater fund flows, while those with the lowest globe ratings face a reduction in fund flows of more than $12 billion").

[327] ALEX EDMANS, GROW THE PIE: HOW GREAT COMPANIES DELIVER BOTH PURPOSE AND PROFIT 105-06, 112 (2022).

correlation between social responsibility scores and firm valuation.[328] Some studies focusing on specific corporate initiatives have found that firms with supportive sexual orientation equality policies tend to have a lower cost of equity capital.[329]

Another set of studies uses a different methodology, which tracks cumulative abnormal returns following a corporate action or announcement with pro-social goals, and finds a correlation between corporate governing and stock returns. A recent article by Mkrtchyan, Sandvik and Zhu tests stock reactions following "CEO activism" and finds, on average, that such activism is associated with positive market returns[330] and "an increase in institutional ownership, especially among investors with a higher Democratic leaning and greater inequality aversion, who rebalance their portfolios to place greater weight on firms with activist CEOs."[331] They suggest that a company's activist position on social responsibility and sustainability can capture the interest of institutional investors and influence equity valuations by leveraging investor demand as a conduit.[332] Similarly, a study by Homroy and Gangopadhyay analyzing activism statements by CEOs of S&P 500 corporations in the 2014-2019 period shows that investors react positively to CEO activism: "in the three-day event windows around CEO social activism, the average cumulative abnormal return is 0.12%."[333] The study also finds that firms that speak out face a lower risk of shareholder activism on ESG issues than the other firms.[334] Dammann and Lawrence explore price reaction to the Business Roundtable Statement on Corporate Purpose[335] and find that signatories to the Statement experienced abnormal returns compared to other corporations.[336]

However, these conclusions are not universally accepted. Bhagwat, Warren, Beck and Watson find that, on average, corporate sociopolitical activism elicits an adverse short-term reaction from investors.[337] Durney, Johnson, Sinha and Young have run an experiment to show that investors purchase more stock when they agree with CEO's activism and less stock when they disagree.[338] Chen, Dechow and Tan find that firm activism surrounding Black Lives Matter has had little impact on shareholder value.[339]

A survey of studies between 2015 and 2020 on ESG investing covering thousands of underlying studies displays mixed results: the survey finds that "the financial performance of ESG

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[328] Allen Ferrell, Hao Liang & Luc Renneboog, *Socially Responsible Firms*, 122 J. FIN. ECON. 585, 586 (2016).

[329] Mostafa Monzur Hasan, Adrian (Wai Kong) Cheung & Trevor Marwick, *Corporate Sexual Orientation Equality Policies and the Cost of Equity Capital*, 34 J. BEHAV. & EXPERIMENTAL FIN. (2022) 100664.

[330] Anahit Mkrtchyan, Jason Sandvik & Vivi Zhu, *CEO Activism and Firm Value*, MGMT. SCIENCE (2023), https://pubsonline.informs.org/doi/10.1287/mnsc.2023.4971.

[331] *Id.* at 31.

[332] *Id.* (noting, however, that the price reaction is quite modest).

[333] Homroy & Gangopadhyay, *supra* note 104, at 9 (finding that "[a]bnormal returns to CEO activism are higher for companies operating in polarized environments and when the CEO statements are Democrat leaning").

[334] *Id.*

[335] *See supra* Section I.A.2.

[336] Dammann & Lawrence, *supra* note 179.

[337] Bhagwat, Warren, Beck & Watson, *supra* note 21, at 11–12, 16 (though the study concedes that in some instances such activism proves quite advantageous).

[338] Michael T. Durney, Joseph A. Johnson, Roshan K. Sinha & Donald Young, *CEO (In)Activism and Investor Decisions*, Working Paper (Jun. 2022), https://ssrn.com/abstract=3604321 (finding also that CEO activism causes participants to focus more on the CEO and the CEO's position and less on the firm's financial performance).

[339] A.J. Chen, Patricia M. Dechow & Samuel T. Tan, *Beyond shareholder value? Why firms voluntarily disclose support for Black Lives Matter*, Working Paper (2021), https://ink.library.smu.edu.sg/soa_research/1952 (finding also that the activism is driven less by woke-washing than by managers who are acting in the interests of a broader set of stakeholders).

investing has on average been indistinguishable from conventional investing (with one in three studies indicating superior performance)."[340]

Despite lack of consensus on whether on average corporate governing increases share value, a preponderance of the evidence seemingly finds a positive correlation. At the very least, corporate governing is value enhancing if well planned and executed. As I mentioned earlier, this follows a basic risk/reward proposition: despite the risk of backlash, some firms manage to create value out of corporate governing. This is commonsensical: it does make business sense for, say, Nike to endorse anti-racist messaging that appeals to younger generations and racial minorities (crucial constituencies in Nike's consumer base), and for tech companies to lure talent in the LGBTQ+ community showing support for their causes. Conversely, it makes less business sense for a brand catering to a consumer base with a significant conservative component (say, Bud Light) to adopt similar strategies.

In sum, depending on context, corporate governing can add value to corporations by improving their ability to attract top talent or maintain strong relationships with customers.[341]

3. Who Knows Better than Managers?

By being actively engaged in the field, corporations are supposed to have a good understanding of their own operations and of the associated risks and rewards. When it comes to assessing the implications of corporate governing initiatives, we should expect corporations to be aware of the underlying risks. Professional senior executives possess knowledge and expertise necessary to navigate risks and rewards in connection with such initiatives. Of course, many casual observers routinely disagree with a corporate governing initiative, whether because of their political preference or as a mere business matter. In fact, as is the case with many other business decisions, with hindsight a corporate governing initiative might backfire.[342] Yet, when the decision to undertake an initiative is made, one would assume management has gathered sufficient information to value the pros and cons and decided accordingly. Mistakes do happen, but companies are better situated than external actors to assess the underlying risk/reward proposition.

Disney CEO Bob Iger summarized this quite eloquently when, in the 2023 annual shareholder meeting of Disney, he responded to a shareholder who inquired why Disney was engaging in cultural/social disputes when their mission, in such shareholder's view, should just be entertainment:

> Iger: I think my job is to strive to do what I think is best for our business, and that includes doing what's best for our cast members—our employees—and what will enable both to flourish. I don't think we should or can weigh in on every issue, and I also understand there are going to be gray areas. There are going to be times when we decide to weigh in on an issue that we believe is worthy of debate because of its relevance and importance to our business or to our employees. And there are times when I actually believe we shouldn't. But I strongly feel that we alone have to determine whether, when

[340] Urlich Atz, Tracy Van Holt, Zongyuan Zoe Liu & Christopher Bruno, *Does Sustainability Generate Better Financial Performance? Review, Meta-analysis, and Propositions* 1, Working Paper (Jul. 22, 2022) (forthcoming J. SUSTAINABLE FIN. & INV.), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3708495 (reviewing 1,141 primary peer-reviewed papers and 27 meta-reviews based on around 1,400 underlying studies).

[341] Bhagwat, Warren, Beck & Watson, *supra* note 21, at 16 ("Customers pay attention to and make long-lasting purchase decisions based on [corporate sociopolitical activism]").

[342] *See infra* Section IV.B.

> or how to weigh in on an issue, whether it's private or public, of course with the standard that, when we take a position on those matters, there's a true reason why we have. And in almost all cases, it has to be because it directly affects our business or our people.[343]

Ultimately, the evaluation of the business merits of corporate governing should be based on an analysis of the corporation's specific circumstances, its intended outcomes, and the knowledge and expertise of the decision makers. It is within this context that the potential benefits and drawbacks of corporate governance practices can be properly assessed.

4. Two Objections.

While corporate governing can make business sense in a variety of circumstances, the practice can still be questioned under two high-level objections: first, executives use corporate funds to finance their political pet projects; second, corporate governing implies endorsing stakeholderism or enlightened shareholder value, which can both be at odds with shareholder value maximization.

a. The Use of Corporate Funds for Political Pet Projects.

A critic may see the use of corporate funds for corporate speech and political activities as problematic, on the argument that "most individual shareholders cannot obtain full information about corporate speech or political activities, even after the fact, nor can they prevent their savings from being used to speak in ways with which they disagree."[344]

While the critique is correct in the abstract, it does not change the current analysis. True, shareholders might not be aligned with the underlying policy, but that has nothing to do with whether adopting a certain policy internally or advocating for a statutory adoption of a policy can benefit or hurt the bottom line. Sometimes directors will be right and some other times they will not. Yet, there is little difference from a corporate governance perspective between these decisions and, say, entering a new market, launching a new product line, hiring a particular individual for a marketing campaign.[345] All are matters where shareholders can neither obtain "full information" on the underlying decision-making process (unless they litigate), nor prevent their funds from being used to implement the underlying project.

To be clear, I do not ignore that corporate political speech and engagement raise delicate issues if compared to pure business decisions—first and foremost, executives may have political preferences and interests diverging from those of shareholders.[346] But such issues relate less to a

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[343] Quoted in Doug Chia, *Guardians of the VSM Galaxy, Vol. 2*, SOUNDBOARD GOVERNANCE (May 2023), https://www.soundboardgovernance.com/post/guardians-of-the-vsm-galaxy-vol-2 (emphasis added).

[344] Coates et al, *supra* note 259, at 8. To be fair, the Brief by John Coates and other corporate law professors is less about advocating against the use of corporate funds for political goals than about confuting the idea—stemming from *Citizens United*, 558 U.S. 310, 370—that investors currently have tools to resist such initiatives, which is in fact a sensible critique that I briefly address it the Conclusion where I mention some policy options to minimize the risks raised by corporate governing.

[345] *Cf.* Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1105 (2002).

[346] Bebchuk Jackson, *supra* note 246, at 90 (noting that, compared to straight lobbying, in which corporations and shareholders are aligned in seeking rules that would benefit the business, with some political spending and speech a divergence of interests may arise with respect to many political issues that corporations may choose to influence). *See also id.* at 96 (noting that "shareholders may attach expressive significance to corporate political speech that goes far beyond the amount spent.").

firm's financial profitability than to the underlying risks for our democracy of an abuse of corporate governing—Section D below addresses such risks.

Moreover, recent empirical literature shows that CEO activism has less to do with executives' politics than with strategic reasons: Homroy and Gangopadhyay review social activism statements from CEOs of S&P 500 corporations in the 2014-2019 period and find that, even though 67 percent of the sampled CEOs are Republican donors, a staggering 97 percent of the 1,188 activism statements that were made in the period align with Democratic causes and values.[347] The authors ascribe this asymmetry to growing political polarization and identity-based consumption amongst customers,[348] as their data show that "[c]onsumer visits to stores following CEO activism increased in Democrat counties without significantly falling in Republican counties" and that "[s]hare prices also reflect the gains in the product market."[349] Thus, the idea that the overall phenomenon can be explained with coastal elitism is inconsistent with the data.

b. Stakeholderism, Enlighted Shareholder Value, or Simply the Market?

Some might object that embracing the business case of corporate governing implies endorsing stakeholderism or, at a minimum, enlightened shareholder value (ESV), which stands for considering "stakeholder interests 'instrumentally,' as means for advancing the goal of long-term shareholder value maximization."[350]

ESV has in turn been subject to recent criticism by some commentators who argue that ESV would at best make a small difference, would hardly make a significant one, would imply massive trade-offs for the most important corporate decisions, and would therefore come with some costs in terms of confusion for executives and impediment or delay of reforms that could truly protect stakeholders.[351]

In fact, I concur with these remarks,[352] including that trade-offs exist. But then again, *firms too are aware of such trade-offs* and have been operating under the assumption that they exist. It is in the job description of executives to balance all various stakeholders' expectations and pressures as regards to highly divisive socioeconomic issues.[353] To be sure, such balancing act exists irrespective of what corporate purpose credo one subscribes to because, no matter what their ultimate goal is, firms need to operate in markets, and it is in markets that these expectations and pressures emerge.

In any event, for current purposes of framing the normative question of whether there can be a business case for corporate governing, irrespective of how we name the conduct (whether stakeholderist, shareholderist or a combination of the two), firms engage in corporate governing *because they have to*. Corporate governing is a response to a business risk/opportunity that firms *must* navigate in the 2020s.[354] Negating that there is a risk/opportunity in corporate governing and calling for policies that prohibit or substantially limit corporate governing on the grounds that such an

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[347] *See* Homroy & Gangopadhyay, *supra* note 104, at 3–4.

[348] *Id.* at 45.

[349] *Id.*

[350] Bebchuk, Kastiel & Tallarita, *supra* note 232, at 735 (citing Virginia Harper Ho, *Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. CORP. L. 59 (2010)).

[351] Bebchuk, Kastiel & Tallarita, *supra* note 232 at 733-34.

[352] *See* Gatti & Ondersma, *supra* note 213 at 9–10 (2020) (criticizing a stakeholderist corporate law reform as ineffective and potentially perilous for weaker constituencies).

[353] *See generally* Simmons, *supra* note 36.

[354] *See generally id.* (arguing that political risk is a crucial function of enterprise risk management).

activity represents a distraction or, worse, an ideological pet project of executives[355] is akin to ignoring reality. To criticize corporate involvement on public policy issues, Professor Stephen Bainbridge recently wrote that "as making business decisions becomes more like political decisions, we not only ask managers to step outside of their wheel house but to juggle increasing demands by increasing numbers of constituencies."[356] While his descriptive analysis is in fact correct (this is what it takes to run a business nowadays), the normative takeaway that we should not expect or tolerate that management get involved does not grasp the fact that this is precisely what the *marketplace* expects corporations to do:[357] a 2018 survey by the Rock Center for Corporate Governance at Stanford University shows that as many as 65% of the public expects CEOs to take a stand on major social issues.[358] Especially for corporations that have an image of values-driven firms, *not* engaging on social issues will likely attract the ire of stakeholders.[359] This explains the steep rise in this type of activity: in the 2011-2019 period, the share of U.S. corporations who engage in this type of advocacy has grown from roughly one percent to 38 percent.[360]

In fact, the critics of ESV do concede that even under a strict shareholder value norm, stakeholder concerns may and should be taken into account.[361] These days, such concerns are often satisfied by corporate governing activity.

5. Summary

Whether corporate governing helps a corporation's business case cannot be answered once and for all in the abstract. Determining whether corporate governing is sound corporate policy depends on what the single corporation does and what are, with respect to the policy issue at hand, the expectations in the various markets in which it operates—especially the product, labor, and capital markets. It may well be that *some* corporations will benefit (from recruiting, firm commitment, consumer loyalty, and so forth), while some others will not. But there is no reason to assume that a corporation operating in this field does not know the associated risks. As a recent study pointed out, "CEO activism—which is often viewed as an act of self-indulgence or an agency cost—can, in the right context, be a highly effective leadership behavior that serves shareholders well."[362]

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[355] *See e.g.* Leo E. Strine, Jr., *Good Corporate Citizenship We Can All Get Behind? Toward a Principled, Non-Ideological Approach to Making Money the Right Way*, 78 BUS. LAW. 329, 353 (2023) (noting that "[w]hen, rather than making a decision based on profit, a board uses the corporation's resources to advance a social or a political cause, conservative thinkers balk . . . because there is no basis on which to presume a convergence of social and political beliefs on the part of investors, or that they invested to advance those beliefs.").

[356] BAINBRIDGE, *supra* note 29, at 96.

[357] Sometimes silence may in fact be riskier than being vocal. *See* Chatterji & Toffel, *supra* note 285, at 9 (noting that corporations that stayed silent in the aftermath of Charlottesville and the Trump immigration ban were exposed by news outlets like the New York Times, CNBC, and USA Today). Similarly, in a study analyzing employee reactions to their CEOs signing a letter in opposition to North Carolina's Bathroom Bill, the authors point out that "the decision not to sign the letter carried its own implications, as CEOs who chose to stay silent ran the risk of disappointing stakeholders who opposed the bill and wanted to see their CEOs take a stand against it." Wowak, Busenbark & Hambrick, *supra* note 321, at 554.

[358] *See* Larcker, Miles, Tayan & Violich, *supra* note 303, at 4.

[359] Korschun, Rafieian, Aggarwal & Swain, *supra* note 289, at 30.

[360] Homroy & Gangopadhyay, *supra* note 104, at 2.

[361] Bebchuk, Kastiel & Tallarita, *supra* note 232, at 744 (mentioning that this was also the approach by Friedman, *supra* note 170, whom they quote: "providing amenities to [the local] community or to improving its government ..... may make it easier to attract desirable employees, it may reduce the wage bill or lessen losses from pilferage and sabotage or have other worthwhile effects.").

[362] Wowak, Busenbark & Hambrick, *supra* note 321, at 581.

While this should settle the debate on the business merits, the newfound risk of political backlash requires supplementing the analysis with further inquiry on the *strategic* merits, which I address below.

B. The Strategic Case for Corporate Governing: Does It Give Rise to Strategic Risk?

Could there be a downside for the corporation to act even when there is a business case? One could argue that even when there is *potentially* a business case, some initiative may result in a strategic mistake. Some actions might backfire and generate resentment from a segment of the consumer, employee, or investor bases. In a way, the distinction between the business and the strategic echoes the short- and long-termism dichotomy, which is well-known to corporate governance scholars.[363] The risk is that corporate governing may result in a short-lived gain but backfire in the long term.

Such a risk is very much apparent to anyone observing the recent "anti-ESG" campaign by conservatives, which culminated in passing legislation of various sorts seeking to thwart ESG efforts.[364] Also, as I illustrate below, cases such as Disney, Bud Light, and Target, not to mention backlash to corporate responses in the aftermath of October 7 and the war in Gaza, show how long negative repercussions can go—in some cases they can tarnish a brand's reputation.

Often, the backlash is orchestrated by those sitting on the opposite side of the ideological spectrum,[365] as is the case with the Disney/DeSantis quarrel.[366] When politicians perceive that corporations are invading their lane, they react, especially against corporate socioeconomic advocacy that criticizes measures passed by their legislatures.

Thus, the gain from the corporate governing initiative may ultimately be illusory. Even when it makes sense from a business and financial point of view for a company to take a stand on an issue, (a) political backlash can cause more harm than benefits (think of increased regulatory fervor fueled by opposing politicians),[367] and (b) the very policy goal pursued via corporate governing may be jeopardized because of the distraction generated by the corporation pursuing it and politicians fighting against it.

Take the Bud Light and Target episodes, which spurred boycotts and even violent threats.[368] No matter how unfairly exploited for political gain, these cases show how this type of risk is potentially greater than the one concerning the business case: though corporations and executives may have a good handle of what happens in their (and their stakeholders') spheres, they may not foresee broader societal changes, especially in terms of sentiment towards certain causes.[369]

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363 *See generally* MARK. J ROE, MISSING THE TARGET: WHY STOCK-MARKET SHORT-TERMISM IS NOT THE PROBLEM (2022) (deconstructing the short-termism critique).

364 For a survey of recent anti-ESG legislation, see Stefan J. Padfield, *An Introduction to Anti-ESG Legislation*, 24 TRANSACTIONS 291 (2023).

365 For a description of the risks associated with alienating politicians, especially state governments and legislatures, see Bhagwat, Warren, Beck & Watson, *supra* note 21, at 5.

366 *See supra* text accompanying notes 1–10.

367 Florida retaliated against Disney by revoking special tax and other benefits the company had been enjoying for over 50 years. *See supra* note 8 and accompanying text. A Section 220 DGCL claim ensued lamenting, among other things, that the company "fail[ed] to appreciate the known risk that [its] political stance would have on its financial position and the value of Disney stock." *Simeone*, C.A. No. 2022-1120-LWW, at *11-12.

368 *See supra* notes 12-15 and accompanying text.

369 *Cf.* Bridget Bowman, *'A country on fire': New poll finds America polarized over culture, race and 'woke'*, NBC NEWS (Apr. 26, 2023), https://www.nbcnews.com/meet-the-press/first-read/-country-fire-new-poll-finds-america-polarized-culture-race-woke-rcna81592.

More recently, the Israel/Gaza war has highlighted the strategic risk for corporations to get involved in complex geopolitical disputes.[370]

Nevertheless, at closer look, even accounting for strategic risk, the normative merits of corporate governing do not differ much from what has been observed with respect to the business case. The fact that some political or other longer-term backlash may harm *some* corporations, does not imply that the overall corporate governing activity is doomed to experience this outcome. Issues matter: while some are more divisive and thus problematic, others are more straightforward and do not pose particular risk. Similarly, some corporations are better positioned than others to engage in corporate governing.

Besides, even if affected by some backlash, it is plausible (and definitely preferable) that corporations (i) have factored in, and decided to assume, the risk associated with the controversy,[371] and/or (ii) have prepared counternarratives or other contingency plans.[372] Corporations are run by professional senior executives who (should) know, or supervise people who (should) know, how to handle this type of reputational risk[373] and reap the rewards associated with handling properly the underlying corporate governing initiative. Contrary to the idea that such initiatives are rushed decisions to score cheap political points, they are planned by companies with structures and safeguards in place to absorb the related risks.[374]

In fact, controversy itself may come at a premium, at least according to some scholars. Melloni, Patacconi and Vikander posit that some degree of controversy is essential for firms to be credible and not be considered as "wokewashing."[375] In their view, CEO activism has become

[370] In the aftermath of the October 7, many businesses voiced their solidarity to the victims, their relatives, and Israel. This ignited backlash from those angered that these businesses were siding with Israel and ignoring the plight of Gazans. Following Israel military response in Gaza, many brands doing business in and with Israel faced boycotts. On the other side, brands supporting the Palestinian cause faced accusations from Israel and its political allies. In the middle, businesses who chose to stay silent were criticized for being hypocritical from both sides, which noted how in the past these businesses took public stands on political issues. *See* Paul Musgrave, *Brands Are the First Causality of War*, FOREIGN POLICY (Nov. 24, 2023), https://foreignpolicy.com/2023/11/24/war-coke-brands-mcdonalds-palestine-israel/. *The controversies of company activism: How are businesses responding to the Israel Hamas war?*, EURONEWS (Nov. 1, 2023), https://www.euronews.com/business/2023/11/01/the-controversies-of-company-activism-how-are-businesses-responding-to-the-israel-hamas-wa; Andrew Ross Sorkin, Ravi Mattu, Bernhard Warner, Sarah Kessler, Michael J. de la Merced, Lauren Hirsch & Ephrat Livni, *Companies Are Caught in the Israel-Hamas War's Crossfire*, N.Y. TIMES (Oct. 23, 2023), https://www.nytimes.com/2023/10/23/business/dealbook/companies-israel-hamas-war-statements.html; Caroline O'Donovan, Taylor Telford & Gerrit De Vynck, *Israel-Gaza war prompts U.S. employees to demand companies take a side*, Wash. Post (Oct. 22, 2023), https://www.washingtonpost.com/technology/2023/10/22/google-amazon-meta-gaza-israel-contracts/.

[371] *See e.g.* Ann Lipton, *The Revolution Will Be Marketed*, BUSINESS LAW PROF. BLOG (Sept. 8, 2018), https://lawprofessors.typepad.com/business_law/2018/09/therevolution-will-be-marketed.html (discussing Nike's endorsing deal with Colin Kaepernick and finding "difficult to believe that [Nike CEO] Knight was unaware this is a controversial move; it seems *designed* to be controversial."). *See supra* text accompanying note 311.

[372] Chatterji & Toffel, *supra* note 285, at 17 (suggesting corporations prepare adequate responses to critics and pointing out that certain businesses—mass market retail stores like Target—are more vulnerable than others—upscale retail stores like Nordstrom—to conservative backlash). This is consistent with the empirical data in Homroy & Gangopadhyay, *supra* note 104. *See supra* text accompanying notes 347-349.

[373] Simmons, *supra* note 36, at 714. *Cf. also* Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1401 (2020) (arguing that "ESG serves shareholders' interests, not because of its upside potential to increase profits, but because it helps companies identify and manage social risks to their business.").

[374] Simmons, *supra* note 36, at 734. Even when politicians at the highest office decide to retaliate, businesses might avoid significant repercussions. *See* Chatterji & Toffel, *supra* note 285, at 15 (describing Merck's CEO's fallout with Trump in the aftermath of Charlottesville and noting "there's no evidence that this has hurt Merck's business.").

[375] Melloni, Patacconi & Vikander, *supra* note 292, at 3116.

increasingly widespread for three concomitant reasons: high polarization, the importance of sociopolitical factors to consumers, and low profit margins.[376] As appealing to the middle ground has lost attractiveness in this reality, eliciting strong responses of both awe and indignation is a viable market strategy to grab the public's attention.[377]

All in all, commentators should be wary of advocating for wholesale approaches simply because corporate governing alienates some politicians. In fact, upsetting state or local politics may precisely be the goal corporations have in mind when they do public policy advocacy.[378] Furthermore, while sometimes corporations see a potential opportunity they decide to take a chance on, some other times they have no choice but to navigate a risk when asked to take a position over a pressing issue—Disney for example escalated tensions with DeSantis because of pressures from stakeholders.[379] In other words, in some circumstances, staying silent is not even an option or, at least, is not cost-free: silence can equate to taking a position, hence the label of passive corporate governing.[380]

C. The Social Advocacy Case for Corporate Governing: Do Social Activists and Society Ultimately Benefit?

The merits of corporate governing become harder to decipher when one considers its impact on society, a vast topic beyond the confines of traditional corporate governance. Because corporate governing is geared to make an impact on society, it is essential to understand its normative implications for social activists, on the one hand, and for civil society, on the other hand.

1. Social Activists.

The implications for social activists are easier to address. If they decide to partner up with corporations, it is because they expect to obtain goals they would not otherwise achieve alone.[381] From their perspective, corporate governing is a strategic partnership to obtain results in high-stakes issues.[382] So long as they perceive the bargain is advantageous, they will engage with corporations and solicit their involvement. If social activists find corporate governing counterproductive, they have the power to stop the collaboration with the corporation. While fake grassroots movements are routinely engaged by corporations to build misleading narratives,[383] "true" social activists can keep corporations honest and disavow initiatives they consider

[376] *Id.*

[377] *Id.* at 3116–17 (noting that "in industries where profit margins are lower, such as the apparel or food industries, sociopolitical differentiation may pay off").

[378] *See supra* note 21 and accompanying text. *See also supra* note 371.

[379] *See supra* text accompanying note 4.

[380] *See supra* note 357.

[381] *See* Lin, *supra* note 24, at 1574 ("By using the resources and expertise of businesses, activists can have a broader, more diverse reach and a more effective impact than they otherwise could on their own").

[382] Corporations and their CEOs help social causes make headlines, which is valuable to social activists. *See* Chatterji & Toeffel, *supra* note 299, at 161: "Because the media often widely report CEO statements . . . —especially on contentious topics—our results imply that when CEOs frame public discourse, they have the potential to shape public policy." (citation omitted). In addition, CEO's help persuade the public, which is also valuable to social activists: "We find that exposure to [Apple CEO Tim] Cook's statement that [Indiana's Religious Freedom Restoration Act] may allow discrimination resulted in 40% of respondents supporting the law, substantially less than the 50% support reported by respondents who were not prompted with this statement; this was a statistically significant difference." *Id.*

[383] *See supra* note 192.

misaligned with their mission. It takes two to tango. If social activists don't stop the dance, it's because in their strategic calculous, corporate governing works.

Whether corporate governing works for social activism is something to test based on its effectiveness in the past, by looking at the solutions corporations managed to offer to pressing policy issues. Some corporations have demonstrated a commitment to certain social causes and showed their ability to deliver some results. In these cases, corporate governing did serve as a mechanism for promoting social change. Similar cases may follow the same path. Past tangible achievements bolster the argument for corporations as potential allies in addressing societal concerns and assessing the track record of corporate governing can provide insights into its capacity to drive meaningful change. Both anectodical and empirical evidence show that corporate governing has in fact been successful in winning public support for policy purposes on LGBTQ+ rights[384] and adjacent issues.[385]

True, as noted by Professor Lund with respect to asset manager's policymaking efforts, the sensitivity and divisiveness of some issues may limit the effectiveness of corporate engagement in the public sphere.[386] While corporations may have the intention to address societal issues, their actions may fall short due to fear of political backlash or for calculus.[387] Especially in this age of overt "anti-woke" sentiment by many on the right, corporations might prefer to play it safe to avoid attracting the ire of politicians and their electorate. This limitation raises questions about the sufficiency of corporate efforts to bring about meaningful change and whether relying on corporate governing is adequate to address complex social challenges. While I come back to these concerns in Part V, for current purposes I note, again, that social activists can decide for themselves if they want to collaborate with corporations in seeking to achieve socioeconomic change.

2. Civil Society and the Dissenter Rights Issue.

Assessing whether civil society benefits from corporate governing is much trickier given the difficulty to define with precision the category (should it entail the immediate stakeholders of the corporation or also larger swaths of the population?) and take its pulse (how to measure the impact of a corporate governing initiative on civil society?). That said, and to begin, one's political views inevitably influence the perception of corporate governing on society: as former Chief Justice Leo Strine wrote, people tend "to like corporate conduct that echoes their beliefs and to call corporate conduct discordant with their beliefs illegitimate."[388] Also, one's philosophy as to the role of corporations in society matters. On the one hand, advocates of market-based solutions may view corporate governing as an effective means to address societal issues without pervasive governmental intervention.[389] On the other hand, critics of corporate political expression rebut that, when shareholders disagree with the corporation's political orientation, they have no opt-out mechanisms.[390]

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[384] *See e.g.* BALL, *supra* note 48, at 95–125 (describing the extension of corporate benefits to domestic partnership in the 1990s); Fan, *supra* note 25, at 476–83; Sanjukta Brahma, Konstantinos Gavriilidis, Vasileios Kallinterakis, Thanos Verousis, Mengyu Zhang, *LGBTQ and finance*, 86 INT'L. REV. FIN. ANALYSIS 8-9 (2023) 102547.

[385] Chatterji & Toeffel, *supra* note 285, at 7 (citing initiatives to thwart religious bills in various states).

[386] Lund, *supra* note 27, at138–40 (2023).

[387] *Id.*

[388] Strine, *Good Corporate Citizenship*, *supra* note 28, at 346.

[389] *See e.g.* Lipton, *supra* note 177 (supporting stakeholderism as a recipe to avoid more pervasive governmental regulation).

[390] *See e.g.* Coates et al, *supra* note 259, at 5; Bebchuk & Jackson, *supra* note 246.

Of course, it is inevitable that *some* in society will fret about a corporate governing initiative,[391] no matter how popular among citizens—after all, unanimity is impossible to achieve.[392] Yet this raises understandable concerns, which I dub "dissenter's rights."[393] For any corporate governing action, there will be some in the shareholder base, in the workforce, or in broader society who will disagree with such an action or message and feel uncomfortable with the corporation's using its levers to achieve the underlying socio-political goal. To exemplify, I use the following roadmap to track the impact of corporate governing on various constituencies:

i) Investors. The analysis in the previous subsections has mainly focused on shareholders (particularly those who prioritize wealth maximization)[394] and indicated that, though no firm answer can be offered in the abstract, there are circumstances in which shareholders can be well-served by corporate governing.[395] Still, even with an action that results in some verifiable financial gain, it is quite possible that some in the shareholder base might still object based on political or religious beliefs. Corporate scholarship has elucidated that in many cases beneficial owners (like investors in a 401(k) plan) cannot really use the Wall Street rule and sell the stock to invest into an issuer more aligned with their beliefs.[396] This is eminently a corporate governance problem for which some in the literature have proposed solutions.[397]

ii) Employees and Stakeholder Communities. Similarly, while the preceding subsections describe how corporate governing can positively impact employees and similar stakeholder communities (such as business partners or gig workers),[398] a similar dissenter issue arises: the typical example is that of a conservative who works at a corporation whose CEO publicly embraces one or more liberal causes (but of course examples can go in the opposite direction). The concern is that contrarian employees would feel less free when they perceive they are expected to conform to the

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391 *See e.g.* Stephen Bainbridge*, Woke Business: Putting the Nike-Kaepernick Ad Controversy into Context: The Problem of Social Justice Warrior CEOs*, PROFESSORBAINBRIDGE.COM (Sept. 5, 2018), https://www.professorbainbridge.com/professorbainbridgecom/2018/09/woke-business-putting-the-nike-kaepernick-ad-controversy-into-context-the-problemof-social-justice-.html (lamenting that "it simply would not occur to [social justice warriors] . . . like [Nike CEO Phil] Knight that there are folks who would take offense from the Kaepernick ad.").

392 Strine, *Good Corporate Citizenship*, *supra* note 28, at 334:

> Encouraging corporations to act on society when you like the policies they support but arguing that they should not act when you oppose the policies is a natural human tendency, of course. But, until the world is comprised solely of people and thus corporations exactly like you, it does not chart a principled path forward.

For a discussion on possible unanimous shareholder approval as requirement for political speech, see Bebchuk & Jackson, *supra* note 246, at 115.

393 The following description is indebted to a recent article by former Chief Justice Leo Strine, in which he lays out the risks for a pluralistic society when corporations push a policy agenda to its various stakeholders and employees. *See* Strine, *Good Corporate Citizenship*, *supra* note 28, at 355–60.

394 However, there are also shareholders, such as the shareholders described by Hart & Zingales who are interested in "values" and seek to balance financial and non-financial goals. For the latter group, corporate governing may be seen as a way to align corporations with the broader societal objectives they care about. *See* Hart & Zingales, *supra* note 28.

395 *See supra* Sections A (discussing the business case) and B (discussing the strategic case). *Cf.* Masconale & Sepe, *supra* note 29, at 305 ("Corporate activism increases, rather than reduces, shareholder value.").

396 *See e.g.* Coates et al., *supra* note 259.

397 *See generally* Bebchuk & Jackson, *supra* note 246 (discussing corporate political spending and proposing various measures including disclosures, independent director approval, and shareholder approval). *See also* Strine, *Good Corporate Citizenship*, *supra* note 28 (proposing a series of measures as guardrails against executive abuses).

398 Lin, *supra* note28, at 1573. *See also* the literature cited *supra* in Section IV.A.2.b. *See* Section I.A I for a description of selected initiatives that benefit such categories.

view of the employer.[399] For employees, who are typically dependent on the corporation for their livelihood and may lack viable exit strategies, this is considered a far bigger risk than for dissenting shareholders.[400]

iii) Broader Society. The analysis above is also useful if we look at broader society. Corporate governing can reverberate outside the corporation with positive impact on citizens and society at large. Effective corporate governing can contribute to a more sustainable and inclusive economic system in ways that may have not been achieved as effectively by politics alone.[401] Additionally, corporations that embrace social responsibility through their initiatives can influence societal values, norms, and ultimately policymakers.[402] But again, some citizens will be outraged by corporations for using their powers to influence society in this manner.[403]

I address this dissenter's rights objection in Part V.[404]

D. The Political Case for Corporate Governing: Does It Imperil Democratic Institutions?

Finally, a crucial dimension of the normative analysis revolves around the implications of corporate governing on our democratic institutions. The overarching question one should ask is how imperiled society is by corporations being active on the political front and becoming crucial catalyzers for social change. As an observer put it, "[t]he fact that companies, rather than Congress or the courts, are shifting in response to political activism in the United States says something profound—about American tribalism, the demise of political cooperation, and the rise of a sort of liberal corporatocracy."[405]

Before addressing in Part V some of the risks associated with this problematic issue, I lay out some key aspects to help frame the analysis. First, the presence of unelected policymakers raises concerns. Legal scholars such as Lin,[406] Masconale and Sepe,[407] and Bainbridge,[408] echoing fund

[399] Masconale & Sepe, *supra* note 395, at 265.

[400] *Id. See also* Strine, *supra* note 28, at 356-57 (same). *See generally* ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) (2017) (arguing that Americans who are employed in the private sector lose their fundamental freedoms not only when they are at work but also off-work).

[401] Lin, *supra* note24, at 1574–79 (mentioning the deeper social impact that corporations could help attain, along with improving operations and funding at social activist organizations); Fan, *supra* note 25, at 490 (noting that corporations have the ability to, among other things, "increase public attention on particular social issues" and "provide funding to the social movement organization").

[402] *Cf.* Kahan & Rock, *supra* note 154, at 53:

> we see the promise of welfarism as playing out in the political realm by potentially changing the political economy of social regulation and thereby facilitating needed regulatory change. While welfarism looks to the corporate sector to make up for the regulation of externalities that political dysfunction blocks, it may, somewhat ironically, ultimately have a greater impact on improving our politics than on changing private enterprise.

[403] The corporate literature has shown unease not only in finding satisfactory solutions but also in participating to the discussion. Leo Strine described the underlying debate as "rancorous." Strine, *Good Corporate Citizenship*, *supra* note 28, at 329 & 344.

[404] *See infra* Section V.B.2.

[405] Derek Thompson, *Why Are Corporations Finally Turning Against the NRA?*, ATLANTIC (Feb. 26, 2018), https://www.theatlantic.com/business/archive/2018/02/nra-discounts-corporations/554264/ (cited by Fan, *supra* note 313, at 471).

[406] Lin, *supra* note 26, at 1588 (mentioning corrosion of democratic values).

[407] *See generally* Masconale & Sepe, *supra* note 29, at 305–11.

[408] BAINBRIDGE, *supra* note 29, at 150.

literature by Coates[409] and Lund,[410] have emphasized the potential risks arising from the significant political power of unelected actors such as corporations and their decision makers. This phenomenon challenges democratic principles by concentrating authority in the hands of individuals who lack the legitimacy that elected representatives possess and who are not representative of society at large.[411]

Second, corporate money in politics and corporate influence in policymaking go hand in hand. The influence of corporate contributions and lobbying efforts on political campaigns and policymaking processes is a hot button issue.[412] The substantial financial resources at the disposal of corporations can potentially distort the democratic decision-making process, favoring the interests of those with significant financial power over the broader public interest.[413] In this regard, the concept of "supercitizens" introduced by Masconale and Sepe inserts another layer to the normative analysis.[414] It highlights the increasing influence of corporations to pick and choose areas of policy intervention—a game ordinary individual citizens play in much lower leagues. This power asymmetry can undermine democratic foundations and potentially diminish the ability of ordinary citizens to shape public policy outcomes.

Finally, delegating too much to corporations while giving up on traditional politics requires careful consideration. If corporations increasingly take on roles traditionally reserved for government bodies, accountability, and transparency mechanisms, which are inherent to democratic governance, might be eroded. The ensuing Part V, which analyzes the trade-offs associated with corporate governing, delves deeply into this issue.

E. Summary

This Part IV has normatively assessed corporate governing from different analytical viewpoints. Some relate to value judgments that are typical of a corporate governance analysis: think of shareholder value (or *values*) maximization in the short- and, when strategic issues are assessed, long-term (Sections IV.A and IV.B, respectively). Yet, other crucial analytical dimensions transcend traditional corporate governance frameworks—whether social advocacy and society benefit from corporate governing or whether such an activity imperils democratic institutions are not issues that corporate governance scholars normally grapple with.

Though the business and strategic cases are not particularly hard to navigate (corporations deal with corporate governing as a risk and an opportunity), the other two raise bigger questions. The social advocacy issue is less problematic than the broader societal implications of corporate governing. Put simply, if social activists believe corporate governing is counterproductive, they have the power to stop the dance. But broader societal and political implications of corporate governing are genuinely harder to assess. While the goal of this Part IV is to frame the relevant questions, to address them more fully, I further dissect the main risks of corporate governing in Part V.

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409 John C. Coates, IV, *The Future of Corporate Governance Part I: The Problem of Twelve*, 1, 5–6 (Harv. Pub. L. Working Paper No. 19-07, Sept. 20, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247337.

410 Lund, *supra* note 27, at 140–42.

411 *See infra* Section V.B.

412 *See supra* Section II.A.3.

413 *See e.g.* Bebchuk & Jackson, *supra* note 246; Strine, *Good Corporate Citizenship*, *supra* note 28.

414 *See* Masconale & Sepe, *supra* note 29, at 282–85.

V. The Promises and Risks of Corporate Governing

With the groundwork laid out in Part IV, I turn to analyze the promises and risks associated with corporate governing in this Part V. Importantly, I hold separate analyses by looking from a corporation perspective first (Section V.A) and then from a societal one (Section V.B).

A. The Promises and Risks of Corporate Governing for Corporations

1. Promises to Corporations

From a corporation's perspective, corporate governing initiatives can in the abstract yield benefits.[415] Social initiatives that align with the values of current and potential customers can enhance loyalty and expand the customer base. While companies such as Patagonia and Ben & Jerry's are the first that normally come to mind,[416] many other companies have benefited from positioning themselves as virtuous actors on key social issues: Walmart's partnership with the Environmental Defense Fund has helped the company launch new sources of revenue via environmentally friendly products and cost saving through smarter energy practices;[417] the Big Three managed to lure younger generations into responsible investing;[418] Lyft swayed clients from Uber in the immediate aftermath of Trump's Muslim ban;[419] Nike's market share soared after offering an endorsement deal to Colin Kaepernick.[420] Likewise, initiatives promoting sustainability or diversity, equity, and inclusion (DEI) can impress job candidates, facilitate talent recruitment, and improve the level of the workforce.[421] Such initiatives also boost morale among existing employees who support them[422]—in some cases, existing employees are the actual initiators of the initiatives.[423] The above advantages, which may cumulate, are expected to reverberate in the results of the corporation for the benefits of shareholders, as empirical studies suggest.[424]

2. Risks to Corporations

While there may be advantages to corporate governing, businesses also face risks, which are the flip side of the promises above. One of the primary risks of corporate governing is the alienation of a corporation's own stakeholders who hold political views opposite to the corporate action in question. This can lead to unhappy workers and potential backlash from other

[415] As indicated *supra* in Section IV.A, whether potential benefits translate into actual one is an empirical question that can only be answered with the benefit of context and hindsight. The same applies to potential and actual risks. Thus, from a corporation's perspective, corporate governing represents a risk that can yield either to a reward or to PR or other damage.

[416] *See supra* notes 275-276

[417] LIN, supra note 31, at 113–14.

[418] *See generally* Barzuza, Curtis & Webber, *supra* note 27.

[419] Marisa Kendall, *In Trump backlash, Lyft ends up on top*, MERCURY NEWS (Jan. 31, 2017), https://www.mercurynews.com/2017/01/31/lyft-scores-first-ever-app-store-win-over-uber/.

[420] *See* Kovvali, *supra* note 28, at 46–47.

[421] Justin McCarthy, *Environmental Record a Factor for Most U.S. Job Seekers*, GALLUP (Apr. 13, 2021) https://news.gallup.com/poll/346619/environmental-record-factor-job-seekers.aspx; DELOITTE, 2023 GEN Z AND MILLENNIAL SURVEY 7, HTTPS://WWW.DELOITTE.COM/GLOBAL/EN/ISSUES/WORK/CONTENT/GENZMILLENNIALSURVEY.HTML. *See supra* Section IV.A.3.b.

[422] *See* Edmans, *supra* note 315.

[423] *See supra* Section II.A.1.a.

[424] *See* the literature cited *supra* Section IV.A.3.c.

stakeholders.[425] Examples of these fallouts abound: from Bud Light and Target,[426] to companies whose executives took an advisory role during Trump's presidency.[427] This risk is ever greater now that conservative groups are targeting corporations they consider too "woke" with online campaigns and boycotts.[428]

Of course, among stakeholders we have shareholders. Some of them may be reluctant to see "their money" spent on causes they do not believe in.[429] Some others may be wary of actions that carry strategic risks and might ultimately backfire, as described in Section IV.B. These shareholders may argue that it is not in the corporation's best interest to be distracted by politics,[430] let alone to make enemies among politicians, as this could result in increased regulatory scrutiny, investigations, and counter-activism.[431] The Disney/DeSantis feud is an example of how the risk of becoming a prominent target for regulation and counter-activism can escalate.[432]

Depending how popular a given policy is among voters, corporations may or may not decide to act upon it if they anticipate that they will likely embark in a zero-sum or negative-sum initiative. Public opinion preferences on polarizing policy issues are of course everchanging and corporations might have a hard time recognizing what will best serve their interests ex ante.

More generally, the existing corporate law and governance ecosystem may not be well-suited for handling the complexities and potential conflicts associated with corporate governing.[433] When a corporation pursues a broader agenda or mandate that goes against the preferences of shareholders or stakeholders, existing governance mechanisms may struggle to hold corporate executives and boards accountable, especially when it is not exactly clear to whom they should be. As lines of accountability become hazier, the system may lack necessary checks and balances to ensure transparency[434] and responsible decision-making.[435]

In summary, the risks corporations face when they engage in corporate governing are multi-faceted. Corporations risk alienating stakeholders with contrasting political views, shareholders

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[425] *See supra* notes 398-400 and accompanying text.

[426] *See supra* notes 12–15 and accompanying text.

[427] Tanya Dua, *Under Armour is the latest brand facing backlash after CEO praises Trump*, DIGIDAY (Feb. 8, 2017), https://digiday.com/marketing/armour-latest-brand-facing-backlash-ceo-praises-trump/ (mentioning backlash at Under Armour, LL. Bean, and New Balance for their CEO's associations with Trump).

[428] *See supra* Section IV.B.

[429] *See e.g.* Friedman, *supra* note 170; Bebchuk & Jackson, *supra* note 246, at 112; Coates et al., *supra* note 259, at 4–5; Strine, *Good Corporate Citizenship*, *supra* note 28, at 331; BAINBRIDGE*, supra* note 29, at 92.

[430] *See* Bainbridge, *supra* note 247.

[431] *See* Lin, *supra* note 24, at 1582-83:

> Politicians could subject businesses that take social positions adverse to their political interests to greater scrutiny, negative commentary, and possibly punitive actions, like cancellations of tax subsidies and government contracts. And likewise, those politicians could heap favors onto those that adhere to social positions aligned with their own in a corrupt manner, leading to cronyism in the marketplace.

[432] *See supra* notes 1-10 and accompanying text.

[433] *See generally* Bebchuk & Jackson, *supra* note 246 *and* Coates et al., *supra* note 259. *See also* Strine, *Good Corporate Citizenship*, *supra* note 28, at 351–52.

[434] For instance, because the corporate and securities law system does not offer adequate remedies for misleading statements that do not meet a materiality test (Basic Inc. v. Levinson, 485 U.S. 224, 231–32 (1988)), we may not be equipped to respond to "a worrying increase in the amount of misleading information produced by companies, including information on environmental and social aspects" (Federica Balluchi, Arianna Lazzini & Riccardo Torelli, *CSR and Greenwashing: A Matter of Perception in the Search of Legitimacy* 1 (Dec. 15, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3721199 (quoted by BAINBRIDGE, *supra* note 29, at 87)). *See also* Baker, Larcker; McClure, Saraph &. Watts, *supra* note 292.

[435] *See infra* the Conclusion for a sketch of some corporate governance fixes to improve corporate governing.

may be uneasy with their firm funding causes they disagree with, and the current corporate governance framework may not be equipped to effectively manage broader agendas that may conflict with shareholder and stakeholder desires. These risks highlight the need for careful consideration and accountability when corporations engage in political action or perform quasi-governmental functions.

B. The Promises and Risks of Corporate Governing for Society at Large

1. Promises to Society

Corporate governing presents some unique qualities in achieving the underlying socioeconomic goals.

Feasibility of "Reform." Corporate governing offers a feasible avenue for addressing pressing policy issues when the government is dysfunctional or unwilling to act due to political constraints. With their resources and expertise, corporations can step in and fill the void left by the government, providing practical solutions to societal challenges.[436]

Flexibility and Speed. Corporations have the advantage of being nimble and adaptable in their decision-making processes. Unlike the often slow and bureaucratic nature of politics, corporate entities can quickly respond to emerging issues and adjust their strategies accordingly. This flexibility enables them to address pressing concerns with agility and innovation, bypassing the delays often associated with legislative and regulatory processes. Timely responses to societal demands ensure that pressing issues are addressed.[437]

Knowledge. Compared to the public sector, corporations may have superior expertise and be in possession of greater data in certain areas, especially technology.[438] In addition, they can leverage that knowledge though their powerful advertising arms to shape public opinion.[439] Furthermore, corporations possess diverse workforce and management teams, which brings together individuals with assorted backgrounds, expertise, and perspectives. Many of these individuals champion social and economic causes and reforms.[440] With their knowledge, corporations can better navigate the intricacies of contemporary and complex social issues. The ability to harness the collective intelligence of the workforce enhances the quality and effectiveness of corporate governing initiatives.[441]

Amplifying Grassroot Activism. From the perspective of grassroot activists, engaging with corporations can be an effective means of exerting "prime time" pressure and gaining media coverage for their causes.[442] By partnering with corporations, activists can draw attention to specific issues and amplify their voices, benefiting from corporate influence and reach.

Conduit to Actual Reform. Some view corporations' initiatives as first, almost necessary steps, to finally get to a full-blown reform. One reason is that first mover corporations expect a levelled

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[436] Fan, *supra* note 25, at 471; Lin, *supra* note 24, at 1574-75; Kovvali, *supra* note 28, at 23–34; Kahan & Rock, *supra* note 154, at 52; Strine, *Restoration*, *supra* note 28, at 434.

[437] *See e.g.* Kovvali, *supra* note 28, at 23–24.

[438] Simmons, *supra* note 36, at 766.

[439] *Id.*

[440] *Cf.* Barzuza, Curtis & Webber, *supra* note 27, at 21–22; DELOITTE, *supra* note 421.

[441] Lin, *supra* note 24, at 1574–78.

[442] *Id.* at 1575-76.

playing field to force their competitors to adhere to the norms they had first introduced.[443] Others believe that, once corporations move in a certain direction, opposing politicians would take notice and recalibrate their priors.[444] In addition, drawing on Professor Dorothy Lund's take on asset manager's influence on corporate policy, corporate governing of multinational companies could bypass international coordination issues in policymaking and set forth transnational practices.[445]

Private Sector in America. In the United States, the private sector is perceived as a more fertile avenue for change compared to traditional politics. This perception stems from a combination of factors, including the ideology of a more individualistic society,[446] but also a changing workforce composition, particularly in high-profile industries like technology.[447]

Only Game in Town. For liberals and progressives, corporations can represent the only viable avenue of reform in some conservative states or when national politics tilt to the right as during the Trump presidency: whenever political support for their causes is lacking, allying with Corporate America might mean securing (or protecting) some fundamental rights.[448]

In general, the vocation of corporate governing is fixing some ails affecting society that politics cannot or will not fix. If one looks at its advantages from a societal standpoint, corporate governing helps address pressing policy issues when Congress fails to act swiftly or to act at all. In this regard, corporate governing has managed to achieve important results: corporate initiatives were instrumental in attaining crucial wins at the national level for the LGBTQ+ movement;[449] JPMorgan Chase's commitment to revitalize Detroit resulted in increases in real per capita income and "gross city product" and, given the success, JPM Morgan is insisting with similar initiatives in other cities;[450] though ending the gun violence epidemic is unfortunately nowhere near, Corporate America's response to the Parkland (and subsequent) shooting(s) represented a sea change on the overall perception of the gun industry not just in public opinion but within the capitalist establishment;[451] the aftermath of George Floyd's murder prompted several businesses to pledge

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443 Kahan & Rock, *supra* note 154, at 52 (arguing that the more corporations engage in ESG the more they will push lawmakers to embrace ESG reforms to level the playing field between ESG-prone companies and holdouts).

444 Kovvali, *supra* note 28, at 34.

445 Lund, *supra* note 27, at 7. True, Lund's observation relates to the influencing power of the Big Three which, all else being equal, would be much more centralized than several multinationals adopting their own initiatives. Yet, even without large funds' input, corporations have internationally converged on certain macro initiatives, such as the push for DEI.

446 *Cf.* Kovvali, *supra* note 28, at 34.

447 *See supra* note 26. *See also* Lund, *supra* note 27, at 37 (noting that though intellectual support for privatization has somewhat receded in recent times, it remains an important part of the policymaking toolkit).

448 *Cf.* Dorothea Roumpi, Panagiotis Giannakis & John E. Delery, *Adoption of LGBT-friendly practices: The effect of institutional pressures and strategic choice*, 30 HUM. RESOUR. MANAG. J. 604, 617 (2019) (finding that organizations with liberal CEOs in states that do not have laws protecting LGBTQ+ employees are more likely to adopt LGBT-friendly practices). *See supra* Section I.A.2 for examples of salient corporate governing actions during the Trump presidency.

449 *See generally* BALL, *supra* note 48 (chronicling how big business became an important ally to promote marriage equality and rebuke discriminatory laws and regulations).

450 LIN, supra note 31, at 110–13 (citing data collected by the Chicago Fed).

451 *Id.* at 3–4.

an aggregate of $50 billion to help fight racial inequality;[452] corporate boards are more diverse now than they were only a few years ago.[453]

True, none of the above initiatives by themselves can be problem-solving, but a pragmatist might reckon that incremental improvements of this sort are better than no improvements. Of course, there are associated risks as the ensuing subsection illustrates.

2. Risks to Society

Corporate governing raises several societal risks, including that it is undemocratic as it lacks accountability and representativeness; it is divisive and anti-pluralistic; its reach is partial; corporations might lose interest or, worse, be opportunistic, absent, or antagonist to society's quests; corporations contribute to the gridlock; and abandoning traditional politics is a risky proposition. The paragraphs below describe such risks and this Section V.B.2 closes with an assessment of the most problematic among them.

Undemocratic for Lack of Accountability and of Representativeness. The most recurring concern in the literature is the lack of political accountability of the executives and managers who make policy choices. Some see this as fundamentally undemocratic because the decision-makers are unelected by the polity:[454] those who want to make policy impact should run for office, the argument goes; surreptitiously passing what detractors call divisive politics defies the rules of the democratic game.[455] Some others point out that the decision-makers, who are said to mostly come from privileged backgrounds, and to skew white and male, are not representative of society at large.[456]

Divisiveness and Lack of Pluralism. As noted, picking the wrong political battle, and alienating various stakeholders are corporate-level risks.[457] Of course, such an action can have a broader impact on society at large. This is the case for corporate governing initiatives that can alienate significant parts of the workforce and reinforce the idea that many Americans lose their fundamental freedoms when they are at work.[458] Sadly, in many cases, corporations (and thus

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452 However, whether the pledges translated into real progress is unclear given the lack of transparence on the implementation of the various initiatives; also, the bulk of the pledged money (around $45 billion) is for home ownership programs at JPM Morgan Chase and Bank of America, which non-Black citizens can apparently tap into. *See* Tracy Jan, Jena McGregor & Meghan Hoyer, *Corporate America's $50 Billion Promise*, WASH. POST (Aug. 23, 2023), https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice/.

453 Fairfax, *supra* note 206, at 166–68.

454 *See e.g.* Masconale & Sepe, *supra* note 29, at 305–11; Coates, *supra* note 48 (discussing the implications of *Citizens United*). Note that similar concerns have been raised with respect to the related issue of the influence exerted by large asset managers on corporations. *See* Coates, *supra* note 409, at 5–6; Lund, *supra* note 27, at 44–45.

455 This line of criticism is a staple of Milton Friedman's famous opposition to corporate social responsibility. *See* Friedman, *supra* note 170 ("those who favor the taxes and expenditures in question have failed to persuade a majority of their fellow citizens to be of like mind and that they are seeking to attain by undemocratic procedures what they cannot attain by democratic procedures."). *But see* Kahan & Rock, *supra* note 154, at 53: "[welfarism] may ultimately have a greater impact on improving our politics than on changing private enterprise").

456 *See generally* Jill E. Fisch, *The "Bad Man" Goes to Washington*, 75 FORD. L. REV. 1593 (2006); Ronald J. Gilson, *Corporate Governance versus Real Governance*, 34 J. APPL. CORP. FIN. 8, 11 (2022); Strine, *Good Corporate Citizenship*, *supra* note 28, at 354.

457 *See supra* Section V.A.2.

458 Drawing on ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) (2017), see Strine, *Good Corporate Citizenship*, *supra* note 28, at 355–57 (noting at 357 that "a system that facilitates corporate inculcation of certain political and social values is disadvantageous for workers, because it could make them have to shop for red or blue companies, or just endure working hours in an atmosphere that lacks the pluralism and freedom that represents a key part of being an American.").

society) face lose-lose situations: "talk" and alienate some (or many, depending on the issue); "not talk" and alienate many (or some, depending on the issue).

Partial Reach of Corporate Governing. Another criticism is that corporate governing cannot do enough to cure society's ails because it is partial by nature: the initiatives cover only stakeholders of a particular firm. One may speculate that it may well be a partial phenomenon that at best covers only large corporations,[459] mostly the public ones.[460] A theory in support is that firms want self-imposed regulation because it helps those with the bigger size.[461] Similarly, one can argue that corporate governing can only be "afforded" by those in non-competitive markets.[462] At a minimum, given its partial nature, corporate governing raises a hold-out problem: firms that truly opt to embrace pro-stakeholder values may expect to be punished with returns lower than those who have opted out.[463]

Flaky Corporate Governing. One could argue that even if partial, corporate governing is at least incrementally positive for those affected, no matter how limited the scope. Yet there still can be drawbacks. Corporations can lose interest in corporate governing. This could happen for several factors: for instance, conservative push-back becomes successful;[464] corporations could face less investor pressure to act on ESG matters, a trend that some have already observed in the apparent disengagement by some large asset managers;[465] socioeconomic activism could become less central in the discourse in the years to come and thus less "fashionable" for corporations to engage; activist shareholders and stock markets more generally might start to put pressure on corporations to drop social activism on the grounds that it alienates politicians or large swaths of the electorate.

Opportunistic Corporate Governing. Similarly, some fear corporations would only intervene when it's convenient to them or when they do not fear backlash. Professor Tom Lin noted that corporations do not typically take up religious or other social conservative causes.[466] Professor Dorothy Lund mentioned the tepid initiatives undertaken by corporations because of pressure

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459 *Cf.* Yaron Nili & Kobi Kastiel, *The Corporate Governance Gap*, 131 YALE L.J. 782 (2022).

460 Alperen A. Gözlügöl & Wolf-Georg Ringe, *Private Companies: The Missing Link on The Path to Net Zero* (Eur. Corp. Governance Inst., Law Working Paper No. 635, 2022, forthcoming J. CORP. L. STUDIES 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4065115.

461 JOHN BRAITHWAITE, REGULATORY CAPITALISM: HOW IT WORKS, IDEAS FOR MAKING IT WORK BETTER 22 (2008).

462 Mark J. Roe, *Corporate Purpose and Corporate Competition*, 99 WASH. U. L. REV. 233 (2021) (arguing that only firms operating in noncompetitive settings can afford to pursue a stakeholderist agenda, while those under the pressure of competitive markets might take a more cautious approach).

463 *Id.*; Matteo Gatti & Chrystin Ondersma, *Stakeholder Syndrome: Does Stakeholderism Derail Effective Protections for Weaker Constituencies?*, 100 N.C. L. REV. 167, 224 (2021) (discussing stakeholderism and noting that voluntary stakeholderism may be affected by a holdout problem); Kahan & Rock, *supra* note 154, at 41–43.

464 Jeff Green & Phil Kuntz, *Anti-LGBTQ Backlash Puts a Chill on Corporate America's Rhetoric*, BLOOMBERG (Jun. 29, 2023), https://www.bloomberg.com/news/articles/2023-06-29/us-companies-were-less-vocal-on-pride-month-during-anti-lgbtq-protests?leadSource=uverify%20wall&sref=DIvsyJQr#xj4y7vzkg (reporting that mentions of Pride Month were down on earnings calls and in filings for the first time in five years); Jeff Green, *Businesses Are Quietly Rethinking Their DEI Efforts: Equality*, BLOOMBERG (Jul. 27, 2023), https://www.bloomberg.com/news/newsletters/2023-07-27/businesses-are-quietly-rethinking-their-dei-efforts-equality; Green, *supra* note 244.

465 *See* William W. Bratton, *Shareholder Primacy versus Shareholder Accountability* 34 (Eur. Corp. Governance Inst. Law Working Paper, No. 726/2023), http://ssrn.com/abstract_id=4431055 (noting that asset managers have been implementing schemes for passing voting decisions to their clients in response to backlash from red state politicians opposing climate change mitigation).

466 Lin, *supra* note 24, at 1586.

from large asset managers, who try to appease most and not anger anyone:[467] Lund notes, for example, that containing sexual harassment has not been high on the agenda of the Big Three.[468] Similarly professors Barzuza, Curtis and Webber mention that index funds intervene aggressively when the cost of intervention is low (women on boards) and tread lightly when it is not (carbon footprint).[469]

Absent (or Antagonistic) Corporate Governing. There's worse: corporations will *not* intervene on matters where they have a conflicting interest. Whenever the underlying policies advocated by reform advocates are expected to have an adverse effect on a corporation's bottom line, corporations will not activate.[470] Therefore, in several fields of business law corporations will not cooperate. Consider labor and employment matters,[471] data protection,[472] antitrust,[473] tax,[474] financial reform,[475] corporate reform where management has rents to protect (e.g., proxy access, executive compensation),[476] lobbying and political spending.[477] Not only do corporations not help on such matters, but they in fact *lobby against*: for instance, some businesses that otherwise appear quite active in promoting progressive causes via corporate governing show unequivocal anti-union track records.[478] Perhaps corporate governing is useful to corporations because it lures enough

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[467] Lund, *supra* note 27, at 4 (noting that "the need to ensure client approval indicates that the Big Three will mandate only tepid changes in corporate behavior, and that their rules are not likely to bring about the sweeping changes that may be necessary to address pressing social problems").

[468] *Id* at 5.

[469] Barzuza, Curtis & Webber, *supra* note 27, at 1305–06.

[470] Gatti & Ondersma, *supra* note 463, at 229–30. *See also* BAINBRIDGE, *supra* note 29, at 109–111 (quoting at 109–110 Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *Stakeholder Capitalism in the Time of COVID* 55 (Feb. 9, 2022), https://ssrn.com/abstract=4026803) (discussing how corporations did (not) cater to stakeholders in the wake of the Covid-19 pandemic and arguing that "if corporate leaders chose not to protect the environment, employees, or other stakeholders in a time when stakeholders needed extraordinary protection and shareholders enjoyed a booming market, it is not reasonable to expect them to protect stakeholders in normal times.")).

[471] Gatti & Ondersma, *supra* note 463, at 216–19.

[472] Karl Evers-Hillstrom & Rebecca Klar, *Corporate lobbying could imperil sweeping data privacy bill*, THE HILL (Aug. 3, 2022), https://thehill.com/lobbying/3585322-corporate-lobbying-could-imperil-sweeping-data-privacy-bill/.

[473] Emily Birnbaum, *How big tech defeated the biggest antitrust push in decades on Capitol Hill*, L.A. TIMES (DEC. 20, 2022), https://www.latimes.com/business/technology/story/2022-12-20/how-big-tech-defeated-the-biggest-antitrust-push-in-decades-on-capitol-hill.

[474] Brian Kelleher Richter, Krislert Samphantharak & Jeffrey F. Timmons, *Lobbying and Taxes*, 53 AM. J. POL. SCIENCE 893 (2009) (finding that firms that spend more on lobbying in a given year pay lower effective tax rates in the next year); Mike Tanglis, THE PRICE OF ZERO: THE 55 CORPORATIONS THAT PAID ZERO IN FEDERAL INCOME TAXES SPENT $450 MILLION ON POLITICAL SPENDING (2021), https://www.citizen.org/wp-content/uploads/Price-of-Zero.pdf.

[475] Brian Slodysko, Ken Sweet & The Associated Press, *Army of lobbyists worked to water down bank rules that regulated SVB and Signature: 'You couldn't throw an elbow without running into one'*, FORTUNE (Mar. 21, 2023), https://fortune.com/2023/03/21/army-lobbyists-worked-water-down-bank-rules-regulated-svb-signature-dodd-frank/.

[476] Bebchuk & Jackson, *supra* note 246, at 91.

[477] *See* Lund, *supra* note 27, at 45:

> if the Big Three were to push the government to take steps to limit the influence of corporate spending in politics, and to regulate business to respond to the risk of climate change or improve workplace diversity, there would be less of a need for them to intervene to adopt rules. The fact that they have not done so suggests that they may benefit from playing the role of regulator of last resort.

[478] Gatti & Ondersma, *supra* note 463, at 216–19 (documenting corporations' union busting efforts at Walmart, Google, Amazon, and Starbucks); Strine, *Good Corporate Citizenship*, *supra* note 28, at 333 n.7 (arguing that

social activists to distract public opinion from what once was an undisputed assumption: that corporations are generally against pro-social measures. While the analysis in this Article shows that this may no longer be true in many fields, in other fields with a greater distributive component like labor, tax, antitrust, and so on, corporate governing might have perilous side-effects.[479] This analysis is also confirmed by studies on executives' political affiliation: CEOs' political contributions substantially skew Republican[480] and top executives voter registration skews Republican by a seven-to-three ratio.[481] How to reconcile this with the observation that corporate governing is for the most part fostering liberal goals? The literature on billionaires' politics has an explanation: while the extremely wealthy have liberal positions on social issues, they support Republican candidates because economic issues are more important to them.[482]

Corporations Are Contributing *to Gridlock in DC*. One can push this critique a step further and suggest that corporations are responsible for political gridlock, especially at the federal level. Lobbying and political contributions indicate that this is the case.[483] Bill Niskanen, former Reagan economic advisor and former chairman of the Cato Institute, famously praised gridlock on the argument that businesses flourish when legislative inertia persists because of less public spending and less chances of new legislation.[484] It comes as no surprise, that the bulk of political contributions is opaque and comes from the extremely wealthy.[485] In addition, because of gridlock, corporations' clout increases *precisely* because of corporate governing, with which they can direct society to places where they are comfortable while keeping at bay policies to which they object.

"[c]orporations often oppose laws that protect workers, consumers, or the environment" and providing a long list of examples). Corporations' opaque contributions to the U.S. Chamber of Commerce and ALEC confirm this suspicion. *See supra* notes 188-191 and accompanying text.

479 In other words, managers will be very careful in trading-off value with values when real money is on the table. "Managers' incentives are aligned more closely with the shareholders' interest in value maximization than with ESG concerns." BAINBRIDGE, *supra* note 29, at 97. *See also* Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2565–66 (2021) (arguing that "a vast array of institutional players—proxy advisors, stock exchanges, ratings agencies, institutional investors and associations—enshrine shareholder primacy in public markets.").

480 Alma Cohen, Moshe Hazan, Roberto Tallarita & David Weiss, *The Politics of CEOs*, NBER Working Paper, no. 2019, http://www.nber.org/papers/w25815).

481 Vyacheslav Fos, Elisabeth Kempfs & Margarita Tsoutsoura, *The Political Polarization of Corporate America* (Working paper June 29, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3784969.

482 BENJAMIN I. PAGE, JASON SEAWRIGHT & MATTHEW J. LACOMBE, BILLIONAIRES AND STEALTH POLITICS 86-87 (2019) (mentioning that both Robert Koch and Sheldon Alston went on record as pro-choice but nevertheless support Republicans for their policies on the budget and their anti-union stance).

483 Soo Rin Kim, *Just 12 megadonors accounted for 7.5% of political giving over past decade, says report*, ABCNEWS (Apr. 20, 2021), https://abcnews.go.com/Politics/12-megadonors-accounted-75-political-giving-past-decade/story?id=77189636.

484 William A. Niskanen, *Give Divided Government a Chance*, CATO INST. (Oct. 1, 2006), https://www.cato.org/commentary/give-divided-government-chance#. In a similar vein, see Phil Gramm & Mike Solon, *Keep Politics out of the Boardroom*, WALL ST. J. (Jul. 19, 2018), https://www.wsj.com/articles/keep-politics-out-of-the-boardroom-1531952912 ("Arguments for imposing political and social objectives on business often are little more than rationalizations for forcing businesses to abide by values that have been rejected in Congress and the courts.").

485 *See generally* PAGE, SEAWRIGHT & LACOMBE, *supra* note 482. *See also supra* 188-191 and accompanying text.

Under this lens, corporate governing can be seen as corporations responding to a crisis of their own making, from which they can benefit on a few different levels.[486]

"Death of Politics." Finally, if delegating to corporations means the potential abandonment of traditional politics, that is risky. If corporations increasingly take on roles traditionally reserved for government bodies, the accountability and transparency mechanisms inherent in democratic governance will be eroded.[487] This quasi-feudal delegation of power to non-state actors raises questions about whether corporate governing mechanisms are adequate to ensure the public interest is protected.[488]

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The above risks can be lumped into two broad categories: one is that corporate governing will not do enough for the societal ails that need fixing, and the other that corporate governing is plainly dangerous.

a) Corporate Governing Is Not Enough. Some of the risks above are warnings that corporate governing is not going to foster true social progress, especially with respect to distributional matters.[489] This is a cautionary tale for citizens more so than for social activists themselves (who one would assume must be already aware of that). But it is an important cautionary tale to keep in mind in policy circles before embarking in potentially perilous changes that would entrust executives of larger mandates and roles than they currently have. I am thinking of an official institutionalization of stakeholderism, that is, an express reform expanding fiduciary duties of directors and officers.[490] An express and official shift of fiduciary duties would be unhelpful because of the enhanced lobbying risk embedded in a broader stakeholderist agenda, which would likely implicate that executives will portray themselves as the experts on the underlying socioeconomic issue—that they know more about how to achieve societal goals than legislators and regulators.[491] This is especially true for the distributional reforms in which directors and management face penalizing tradeoffs on issues such as unionization, mandatory arbitration, rights of gig workers,

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486 For a similar point, but with respect to asset managers, see Lund, *supra* note 27, at 33 (noting that the Big Three "appear to enjoy exercising regulatory heft as a result of government dysfunction. Rather than using their power to alleviate rent-seeking by industry (which they also engage in), they choose to maintain the status quo, which positions them to attract new clients and satisfy existing ones." Footnote omitted.).

487 *See* former head of sustainable investing at BlackRock Tariq Fancy, *The Secret Diary of a "Sustainable Investor" — Part 1*, Aug. 21, 2021, MEDIUM (AUG. 21, 2021), https://medium.com/@sosofancy/the-secret-diary-of-a-sustainable-investor-part-1-70b6987fa139 (discussing ESG investing and warning about the peril that corporate initiatives may lead the public into accepting that business is the best-suited economic policy reformer). *See also* BAINBRIDGE, *supra* note 29, at 92; Lin, *supra* note 24, at 1585–86 (mentioning accounts that warn about plutocracy). *Cf. also* Jacob S. Hacker, *Privatizing Risk without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 AM. POL. SCI. REV. 243, 248 (2004) (pointing to the risk of a gradual shift in a policy due to a shift in those empowered to control its form and function).

488 For an assessment, see *infra* text accompanying notes 515-517.

489 This is because corporate governing reach is partial (see *supra* text accompanying notes 459-463), because corporations might lose interest (see *supra* paragraph accompanying note 459), corporations might be opportunistic (see *supra* text accompanying notes 466-469), or antagonize society's quests (see *supra* text accompanying notes 470-479).

490 *See* Gatti & Ondersma, *supra* note 213, at 10–11, 47–57 (warning that stakeholderism might do more harm than good in seeking the social goals it purports to achieve because it would further empower the very actors that have created the problems that stakeholderism seeks to solve—executives—and give them powers to pursue policies that benefit them and stop policies they perceive against their interests).

491 *Id.* at 19.

and so forth.[492] While as things stand, executives will not act in favor of workers if they have something to lose, with an official shift they might once and for all capture the whole legislative process.[493]

b) Corporate Governing Is Dangerous. The other main risks described above take issue with corporations being undemocratic tools[494] that risk suppressing actual politics and democratic governance (the "death of politics").[495] Typically, but not necessarily, these concerns come from conservative voices who lament that corporate governing (i) would sacrifice dissenter's rights[496] (ii) over policies that have failed to be approved via the democratic process.[497] I first take on these two arguments (in reverse order) and then deal with the death of politics argument.

Is It Truly Undemocratic? As to the argument that corporate governing is fundamentally undemocratic, Friedman's influential words are a useful starting point. In his famous remark, proponents of corporate social responsibility have "failed to persuade a majority of their fellow citizens to be of like mind and that they are seeking to attain by undemocratic procedures what they cannot attain by democratic procedures."[498]

I leave aside the counter that the American democratic process has shown some undisputable issues that led us to gridlock[499] and address Friedman's point with the institutional ecosystem we have. He seems to suggest that political messaging and action can (or should) only occur through some more or less official channels close to the corridors and halls of Capitol Hill (or similar state chambers). For the better or the worse, that is clearly not the case: nowhere is political action so constrained. Political speech can be expressed in multiple forms and forums. Citizens can choose between a bouquet of available forums to express their political preferences—this is what our whole political speech ecosystem is made of.[500] If we drop Friedman's idealism and pragmatically consider the American democratic process in its entirety, we would agree that citizens can use multiple political forums, which include putting *direct pressure on corporations* and *indirect pressure on politicians via corporations*.[501] Nothing in our laws prohibits such actions—in fact, the U.S. Supreme Court jurisprudence constrains limits to such actions.[502] Corporations must be regarded as a political forum that citizens can use, just like many other forums.

At this point one might still take Friedman's defense and counter that it is one thing when individual citizens (retail investors, employees, costumers) make use of their First Amendment prerogatives with a corporation, and it is quite another when a corporation's executives use the prerogatives of their office to push for their preferred agenda.[503] In fact, this objection, deeply rooted in the corporate literature, has merits. Yet, the objection is partial because it does not consider the broader scope of the relationship between executives and various stakeholders,

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492 *See* Gatti & Ondersma, *supra* note 463, at 216-22 (describing lobbying efforts by corporations in such fields).

493 *See supra* note 490.

494 *See supra* paragraphs accompanying notes 454-458.

495 *See supra* paragraph accompanying note 487.

496 *See supra* paragraph accompanying note 458.

497 *See supra* paragraph accompanying notes 454-456.

498 *See* Friedman, *supra* note 170.

499 *See supra* Section II.B.2.

500 *See generally* PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS (2013).

501 *Cf.* Roberto Tallarita, *Stockholder Politics*, 73 HASTINGS L.J. 1697, 1733 (2022) (arguing that corporate governance allows a connection between "shareholders with prosocial and expressive motives on one side and extra-corporate actors (stakeholders, activists, concerned citizens) on the other side.").

502 *See supra* notes 250-251 and accompanying text.

503 This is the "someone else's money" objection. *See supra* note 429 and accompanying text.

whereby often the former intervene because the latter press them to do so. Once executives are pinged by shareholders or other stakeholders to take a position on a pressing social issue, they surely have the option to stay silent and not act on it, which is what Friedman and those who subscribe to his remarks would prefer executives to do. However, in an environment that expects corporations to take a stand (whether or not they are solicited or pressured to), *staying silent and inactive could also be inferred as political speech*, which could have repercussions (political, business, financial) on the corporation and its stakeholders.[504] Disney sought to stay silent, and its stakeholders complained.[505] Wayfair stayed the course to not give in to stakeholder pressure and the related fallout grew out of proportion.[506] On many occasions, there is no way out for an executive to take a side—it is just the nature of the game.[507] If observers are puzzled by it they should find solace by realizing that there is no way to solve the dilemma in the abstract and that executives and directors are well paid to handle it (but when they do, they mostly have corporate interests at heart, not those of society).

What About Dissenter Rights? The dissenter rights issue is more delicate: corporate governing initiatives risk creating discontent amongst a subset of various corporate stakeholders and reinforcing the idea of "a system that facilitates corporate inculcation of certain political and social values".[508] This would result in a lack of "the pluralism and freedom that represents a key part of being an American."[509] While in purely idealistic terms this remark is sound, it also proves too much: outside of politics, many workers and Americans *already* silently dissent to several business practices of corporations, but for the better or the worse have to live with them: not only doesn't freedom extend to the private workplace,[510] but few capitalists (including the more progressive ones) have qualms about the fact that firms are hierarchies, as Coase illustrated.[511] More practically, if one delves into the issues that are said to generate dissent, the pluralist quest becomes less compelling. In an article that seeks to bridge the gap on corporate social activism between conservatives and liberals, former Chief Justice Leo Strine draws a line on certain issues he portrays as too divisive, which in his words occur "when corporations seek to tilt the social and political

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504 *See supra* note 206 and accompanying text.

505 *See supra* note 206.

506 *See supra* note 198 and accompanying text.

507 I am obviously not discussing whether corporations must speak as a matter of law. I note incidentally there is now a heated discussion on whether the proposed climate disclosures are compelled speech. *Compare* Hester M. Peirce, *We Are Not the Securities and Environment Commission—At Least Not Yet* (SEC Comm'r statement, Mar. 21, 2022), www.sec.gov/news/statement/peirce-climate-disclosure-20220321 (criticizing the SEC climate proposal) *and* Lawrence Cunningham, *Proposal on Climate-Related Disclosures for Investors*, Harv. L. Sch. F. on Corp. Governance (Jun. 23, 2022) https://corpgov.law.harvard.edu/2022/06/23/proposal-on-climate-related-disclosures-for-investors/ (summarizing the content of a comment letter by 22 academics against the SEC climate proposal) *with* Jill E. Fisch, *The SEC's Authority to Pursue Climate-Related Disclosure*, Harv. L. Sch. F. on Corp. Governance (Jun. 20, 2022), https://corpgov.law.harvard.edu/2022/06/20/the-secs-authority-to-pursue-climate-related-disclosure/ *and* John C. Coates, *Proposal on Climate-Related Disclosures Falls Within the SEC's Authority*, Harv. L. Sch. F. on Corp. Governance (June 22, 2022), https://corpgov.law.harvard.edu/2022/06/22/proposal-on-climate-related-disclosures-falls-within-the-secsauthority/ (summarizing his comment letter in support of the SEC climate proposal). Relatedly, for a current challenge on First Amendment grounds to the shareholder proposal regime under SEC Rule 14a-8, see Cydney Posner, *NAM seeks to challenge Rule 14a-8 regulatory process for shareholder proposals*, COOLEY (June 8, 2023), https://cooleypubco.com/2023/06/08/nam-challenge-14a-8-process/.

508 Strine, *Good Corporate Citizenship*, *supra* note 28, at 357.

509 *Id.*

510 For a (normative) critique, see ANDERSON, *supra* note 458.

511 Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 388 (1937).

value system."[512] He cites "[v]oting eligibility policies, reproductive rights, guns, policing procedures and tactics, criminal codes, and the like[,]" which "are the subject of passionate and legitimate disagreement in our society."[513] While Strine's intentions are commendable, the line he draws is arbitrary and partial: race (except for policing tactics), gender (except for reproductive rights), and sexual orientation are left out, yet raise passionate disagreement in our society and are at the very center of the ongoing culture war in Corporate America. In fact, *any* line would be unworkable: our society is divided on pretty much everything and expecting corporations to act or speak only on uncontroversial items is unrealistic. Besides, considering an issue off-limits only because it is divisive is questionable, if only for a reason I already stated: not speaking on an issue is often considered tantamount to taking a position and can thus be considered as divisive and anti-pluralistic as speaking. In other words, the genie is already out of the bottle. Besides, one should legitimately wonder whether a pluralistic ideal is better served by trying not to upset workers or shareholders with, say, anti-trans biases than by offering protection to those whose lives are affected by such biases. While, in this example, transgender people resort to corporations to seek protection for personal preferences about their own lives, those who oppose such quests are effectively expressing external preferences that someone else's welfare (trans people) be reduced.[514]

The Death of Politics. The growing influence of corporations in policy making poses significant risks to democratic governance.[515] With corporations wielding greater influence over policy, the balance of power between the state and private actors is shifting. Unlike the issues analyzed immediately above, this is a concern on the demand-side of policymaking: the increasing role of corporations as reformers may make citizens used to it and thus poses risks to democratic governance. As corporations assume more responsibilities traditionally reserved for government bodies, one may legitimately worry that citizens will be less attentive to accountability, transparency, and the protection of the public interest. This quasi-delegation of authority to non-state actors undermines democratic principles that depend on government accountability to its citizens and especially citizens' expectations, habits, and involvement in connection with policy reform. As mentioned above, in this game corporate interests, which are primarily driven by profit motives,[516] will always prevail and prioritize their own gains over the broader welfare of the public, potentially compromising the engagement of ordinary citizens in the political process.

Addressing these risks is hard and requires ambitious efforts from multiple actors. Citizens and civil society organizations must actively engage in the political process, demanding greater accountability from both corporations and elected officials. Politicians on their hand should prioritize the welfare of their constituents ensuring that they remain responsive to the needs of the public. All this requires change in norms, political goodwill, and possibly reform of politics itself—all areas in which corporate governance cannot be the driving force.

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512 Strine, *Good Corporate Citizenship*, *supra* note 28, at 360.

513 *Id.*

514 Per Dworkin, but I reckon this is disputed in political philosophy, in a utilitarian calculus, policymakers should not be concerned about external preferences. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 275-76 (1980). For an assessment, see Howard S. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 YALE L.J. 173, 183–96 (2002).

515 These paragraphs draw on the writings of economists and political scientists such as JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE (2012); BENJAMIN I PAGE, & MARTIN GILENS, DEMOCRACY IN AMERICA?: WHAT HAS GONE WRONG AND WHAT WE CAN DO ABOUT IT (2017); FRANCIS FUKUYAMA, POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY (2020); JACOB S. HACKER, & PAUL PIERSON, AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US TO FORGET WHAT MADE AMERICA PROSPER (2016).

516 *See generally* Lund & Pollman, *supra* note 479; BAINBRIDGE, *supra* note 31.

All in all, the potential consequences of abandoning traditional politics in favor of corporate governing are significant and warrant attention. By working collectively to strike a balance between corporate influence and democratic values, society can safeguard its democratic institutions and preserve the rule of law.[517]

CONCLUSION

Corporations have been active in the political sphere and their involvement is controversial. Based on the underlying policy they adopt or champion, corporations get praised by like-minded citizens and loathed by those on the other side of the political spectrum. In this Article, I posit that there are four normative angles to analyze the phenomenon: a business case, a strategic case, a social advocacy case, and a political case. While the first two suggest that under certain assumptions corporate governing can be beneficial for corporation and its stakeholders, the other two suggest that, despite some societal benefits from corporations as socioeconomic reformers, we cannot overlook the significant risks of corporate governing, especially that it will be unhelpful in distributional matters (labor, privacy, antitrust, tax) and that it might result in atrophy of our quest for political change via traditional democratic institutions.

While it's unclear whether tweaking the phenomenon will be at the top of a lawmaker's agenda anytime soon, there exist measures to mitigate risks of backlash against corporate governing. Clearly, one option is to prescribe (or voluntary offer) more disclosure: annual and periodic disclosures could for instance include specific sections revealing corporations' overall corporate governing agendas. More substantively, board empowerment and accountability could work as mechanisms to manage risks. While involvement and oversight by independent directors or dedicated committees could lead to better decisions, in practice we should keep a distinction between board authorization of overarching strategies and management's execution of day-to-day actions. Of course, corporations could borrow shareholder intervention, which is normally used as a cleansing mechanism for conflicted transactions, to make certain high-level corporate governing decisions subject to shareholder approval.

Yet, because legislative reforms are hard to attain, one should probably focus more on internal self-regulation. Corporations should implement internal policies or guidelines to navigate corporate governing initiatives transparently. To avoid controversy and backlash, they should better demonstrate an orderly process for engaging in corporate governing. This underscores the intricate balance required to meet societal expectations without disrupting market forces, emphasizing the importance of ongoing evaluation and adaptation in this complex landscape. Ultimately though, we should be mindful that internal regulation has limited mileage because in a corporate governance system in which shareholders elect directors, most of the typical fixes might come short in protecting other stakeholders and society at large.

[517] *See supra* note 515.

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