Corporate Governing: Understanding Corporations as Agents of Socioeconomic Change

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Large corporations in America shape critical societal issues, including racial equity, women's rights, LGBTQ+ rights, and climate change. They are major political players, sometimes aligning with or opposing government initiatives. For instance, corporations have advocated for gun regulation after mass shootings and clashed with politicians over legislation, as Disney did with Florida over the "Don't Say Gay" bill. Corporations also take on quasi-governmental roles when the government is inactive, such as extending health benefits to same-sex couples or launching initiatives for marginalized communities. I call this involvement in public affairs—through political speech or providing traditional government services—"corporate governing."

Opinions vary on corporations as agents of socioeconomic change. Many politically engaged individuals encourage corporations to partner with social activists. However, academics, policymakers, and politicians are divided on this role. One 2024 Republican presidential candidate opposes corporate governing, and red states have passed laws against "woke capitalism."

This Article contributes to the literature by mapping corporate reforms in the socioeconomic sphere and providing legal and policy frameworks for corporate governing. It analyzes the conduct under current corporate laws and evaluates its multifaceted normative merits: Is there a business case for corporate governing? Is it strategically wise for corporations? Does it help social advocacy and society at large? Does it undermine government and democratic institutions? This Article also assesses corporate governing's promises and risks from both corporate and societal perspectives, highlighting two risks. First, corporate governing may fail in areas where corporations have conflicting interests, like antitrust, tax, labor, privacy, financial, and corporate reform. Second, with corporations playing a greater role in policymaking, citizens may rely less on traditional politics,

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risking democratic values and institutions. Addressing this requires efforts from citizens, civil society, and politicians—corporate governance can help but cannot be the driving force.

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:

> 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

1. H.B. 1557, 2022 Leg. (Fla. 2022) (codified at FLA. STAT. ANN. § 1001.42(8)(c)(3) (West 2024).
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 (on file with the *Journal of Corporation Law*).
3. Upon presentation of the bill, Disney faced immediate scrutiny for financially supporting some of its sponsors. Simeone v. Walt Disney Co., 302 A.3d 956, 960 (Del. Ch. 2023).
4. *Id.*
5. *Id.* at 960–61.
6. *Id.* at 961.
7. *Id.*
8. *Simeone,* 302 A.3d at 961–62.

Disney's stock price declined,[9] the company was sued, albeit unsuccessfully, by one of its shareholders to access 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 The 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 featuring Pride merchandise in-store.[13] The outcry impacted stock prices and resulted in downgraded ratings for Target and Anheuser-Busch—Target now being subject to ongoing securities litigation that recently survived a motion to dismiss.[14] Both companies were also criticized by the LGBTQ+ community.[15]

9. *Id.* at 962–63 (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 956–57. For more detail on the *Simeone* case, see *infra* text accompanying notes 181–194.

11. *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, ACLU (2023), https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2023 [https://perma.cc/7MBT-6THF] (counting, as of July 21, 2023, 228 bills in 2023 alone).

12. Christina Cheddar 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 [https://perma.cc/9ZZS-XWK6].

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 (on file with the *Journal of Corporation Law*); 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 [https://perma.cc/X9NH-K6B7]. Craig v. Target Corp., No. 2:23-cv-599-JLB-KCD (M.D. Fla. Dec. 4, 2024) (denying defendants' motion to dismiss securities fraud claims, holding that plaintiffs adequately plead material misrepresentations, scienter, and loss causation regarding Target's alleged failure to disclose risks associated with ESG/DEI initiatives and a 2023 Pride Month campaign).

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), https://www.vox.com/politics/2023/5/25/23737338/target-abprallen-pride-boycott-bud-light-trans-controversy-stock-price [https://perma.cc/TS5N-AJS7]. Anheuser-Busch was called out by Dylan Mulvaney, the transgender 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 (June 30, 2023), https://www.latimes.com/entertainment-arts/story/2023-06-30/dylan-mulvaney-bud-light-transphobic-backlash-trans-rights [https://perma.cc/GRA8-C9GE].

Recently, after the U.S. Supreme Court invalidated affirmative action as a school admission criterium,[16] conservative plaintiffs[17] and influential activist investors[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 and some larger corporations like Walmart have started to retreat.[19]

The stories above are part of a broader trend; corporations have been involved in public policy issues such as racial justice, gender parity, reproductive rights, LGBTQ+ rights, climate efforts, voting rights, and gun control. One phenomenon is well-known: corporations take political action to contrast, promote, or fine-tune governmental initiatives. Traditionally, this meant lobbying for corporate interests, but corporations have also been advocating for progressive causes and providing coordination and expertise to obtain political

16. *See generally* 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. 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," raising $44 million in 2022. *See* Emily Birnbaum, *Trump Adviser Stephen Miller's Legal Group Rakes in $44 Million*, BLOOMBERG (Nov. 17, 2023), https://www.bloomberg.com/news/articles/2023-11-17/stephen-miller-s-america-first-legal-group-raises-44-million (on file with the *Journal of Corporation Law*). The group challenged Kellogg Co. before the U.S. EEOC over the company's employment practices, which it views as unlawfully seeking to balance the workforce based on race, color, national origin, and sex. Rebecca Shabad, *Ex-Trump Aide Stephen Miller's Legal Group Files Complaint Against Kellogg's 'Woke' Programs*, NBC NEWS (Aug. 10, 2023), https://www.nbcnews.com/politics/politics-news/stephen-miller-group-files-complaint-kelloggs-woke-programs-rcna99210 [https://perma.cc/F32Z-EMHZ]. This group has also been involved in the Target securities litigation. *See supra* note 14 and accompanying text.

18. After a public campaign to denounce antisemitism at major Ivy League schools, which resulted in the resignation of the presidents of Penn and Harvard, activist investor Bill Ackman launched a full-blown attack on DEI policies and programs at schools and in the corporate world with a 4,000-word manifesto on 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/ (on file with the *Journal of Corporation Law*) (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. Siladitya Ray, *Walmart Is the Latest Major Company to Roll Back DEI Policies Amid Conservative Backlash*, FORBES (Nov. 26, 2024), https://www.forbes.com/sites/siladityaray/2024/11/26/walmart-is-the-latest-major-company-to-roll-back-dei-policies-amid-conservative-backlash/ (on file with the *Journal of Corporation Law*) (discussing Walmart's decision to scale back its diversity, equity, and inclusion policies in response to pressure from conservative groups and growing political backlash).

goals, a phenomenon I call "corporate socioeconomic advocacy."[20] While some applaud this, others are outraged.[21]

A 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 step in, 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 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."

Methodologically, 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's words, "corporations have structural power by being able to set the agenda and by their ability to shape the economic environment."[23] Importantly the two activities (government substitution and corporate socioeconomic advocacy) are tied together because "talk" is often a complement of action. In other words, corporate political messaging is a complement to pro-stakeholder measures,

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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. RELS. J., no. 3, 2014, at 1, 1 (describing how corporate social advocacy refers to an "organization making a public statement or taking a public stance on social-political issues"). For an attempt to differentiate this type of activity from traditional corporate social responsibility (CSR) and corporate political donations and lobbying, see Anna Toniolo, *Corporate Participation in Social Debates*, 3 U. CHI. BUS. L. REV. 368 (2024) (noting that CSR is generally non-partisan and consensus-driven, whereas corporate activism, unlike the discreet nature of corporate lobbying, is intentionally public and often polarizing, reflecting stakeholders' sociopolitical values.).

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

> [A]n 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.

Id.; *see also* Yashoda Bhagwat, Nooshin L. Warren, Joshua T. Beck & George F. Watson, IV, *Corporate Sociopolitical Activism and Firm Value*, 84 J. MKTG., no. 5, 2020, at 1, 1 ("Although [corporate social activism or] CSA may strengthen relationships with some stakeholders who agree with the firm, it will likely damage relationships with those who disagree."); *infra* note 29 and accompanying text.

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 due to the result of globalization, states can no longer guarantee the provision of traditional public goods).

23. *See* Martin Petrin, *Beyond Shareholder Value: Exploring Justifications for a Broader Corporate Purpose*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 345 (Elizabeth Pollman & Robert B. Thompson, eds., 2020).

initiatives, and activities that corporations have been doing for decades within the malleable boundaries of the business judgment rule. To get a sense of the phenomenon, 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 thirty-nine industries.[24]

Corporations are politically engaged to protect their own business interests in recruiting and preserving talent[25] and captivating customers,[26] and in responding to pressures from the workforce[27] and investors.[28] The public expects corporations to pursue and achieve public interest goals that traditional political action cannot secure, especially in the United States., where congressional paralysis often makes corporations a political ally of last resort. Corporations are at times expected, if not pressured, to take a stand on the hot-button political issue of the day. Some economists and legal scholars cautiously welcome

24. Bhagwat, Warren, Beck & Watson, *supra* note 21, at 16.

25. *See* Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 HARV. BUS. L. REV. 441, 444, 473–74 (2019) (discussing the factors pressuring corporations to engage in social activism); Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1544–45 (2018) (describing how social media places direct pressure on businesses to act).

26. "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. RSCH. 1, 1 (2022); *see also* Fan, *supra* note 25, at 453 (noting that "[e]mployees and consumers, particularly millennials, expect and may even demand that corporate leaders speak up"); *see infra* Part IV.A.3.

27. *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 noting mandatory arbitration was abandoned also for discrimination claims).

28. *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) (describing how index funds use their voting power to promote social values and give investors a reason to choose their fund); Dorothy S. Lund, *Asset Managers as Regulators*, 171 U. PA. L. REV. 77 (2023) (describing that investor advocacy groups place pressure on companies to increase shareholder rights).

this new role,[29] while others, including politicians, are skeptical or critical.[30] Opposing "woke" corporations is even a policy platform for some political candidates.[31]

This Article builds on the literature on corporate activism, which framed the phenomenon within social activism and movements.[32] Some authors view corporate involvement positively,[33] while others see it as problematic: they reckon that social activism may be aligned with the corporation's business interests, but have concerns about the political implications of such activism, due to managers acting as unelected policymakers who may alienate some of their stakeholders over divisive topics.[34] A recent book by Professor Stephen Bainbridge echoes these concerns[35] and casts doubts on the profitability of corporate social activism.[36] Somewhere in the middle, a recent article concludes that "[p]olitics

29. *See, e.g.*, Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247 (2017) (arguing that maximization of shareholder welfare is not the same a maximization of market value); 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 the Right Way*, 78 BUS. LAW. 329, 329 (2023) [hereinafter Strine, *Good Corporate Citizenship*] (with many caveats and lamenting that "[a] rancorous debate is raging"); Fan, *supra* note 25, at 441; Lin, *supra* note 25, at 1535; Aneil Kovvali, *Stark Choices for Corporate Reform*, 123 COLUM. L. REV. 693 (2023).

30. *See generally* STEPHEN M. BAINBRIDGE, THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION (2023) (criticizing corporate social activism); *see also* Jill E. Fisch & Jeff Schwartz, *How Did Corporations Get Stuck in Politics and Can They Escape?*, 3 U. CHI. BUS. L. REV 325 (2024). (criticizing corporate social activism and advocating for collective "voluntary disbarment" and better transparency). 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).

31. 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 [https://perma.cc/P9EW-MZ25] (describing the launch of the presidential campaign by Vivek Ramaswamy, author of "Woke, Inc."); *see generally* RAMASWAMY, *supra* note 30 (providing Ramaswamy's criticisms of woke corporations); Jessica Guynn, *'Woke Mind Virus'? 'Corporate Wokeness'? Why Red America has Declared War on Corporate America*, USA TODAY (Jan. 4, 2023), https://www.usatoday.com/story/money/2023/01/04/desantis-republicans-woke-big-business-war/10947073002 [https://perma.cc/5YW8-ZTYZ] (describing DeSantis' use of "anti-wokeism" as a political platform).

32. *See* Lin, *supra* note 25, at 1535 (framing the new reality of business and social activism in America); TOM C.W. LIN, THE CAPITALIST AND THE ACTIVIST: CORPORATE SOCIAL ACTIVISM AND THE NEW BUSINESS OF CHANGE 89 (2022); Fan, *supra* note 25, at 441 (arguing how corporate activism holds the promise of being a force for social change).

33. *See* LIN, *supra* note 32, 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 activist and capitalist—as a complete person."); Fan, *supra* note 25, at 445 ("[D]espite the perils associated with the involvement of corporate law within social movements, there is the promise of meaningful change.").

34. *See* Masconale & Sepe, *supra* note 30, at 305–11; Strine, *Good Corporate Citizenship*, *supra* note 29, at 357–58.

35. BAINBRIDGE, *supra* note 30, 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").

36. *Id.* at 105–24.

should not be avoided [by corporations] but managed in a nuanced way pursuant to effective board oversight of [enterprise risk management]."[37]

This Article expands the existing literature and makes several contributions.

First, this Article maps and categorizes various areas of corporate governing. It surveys selected instances in fields such as racial equity, women's rights, LGBTQ+ rights, climate, voting rights, and gun control, distinguishing between government substitution and corporate socioeconomic advocacy.[38]

Second, after a brief survey of the corporate and societal drivers of corporate governing, this Article offers doctrinal and normative frameworks for analyzing corporate governing in both its forms. After concluding that none violates existing corporate laws (but may have exposure to securities litigation),[39] it addresses the multifaceted merits of corporate governing. The debate has been contentious and inconclusive partly because it lumps separate normative dimensions together. This Article separates *four distinct normative questions*:[40] Is there a business case for corporate governing? Is it strategically wise for corporations? Does it help social advocacy and society at large? Does it undermine government and democratic institutions?

The answers to the first two questions are cautiously affirmative: corporate governing may enhance firm value and be strategically sound,[41] depending on factors like the specific policy issue, firm characteristics, perceived authenticity of the initiative and alignment with the firm's core mission and prior messaging, and the expectations of its stakeholders and the various markets in which the firm operates, such as product, labor, and stock markets. Corporate governing, like any initiative, is risky but potentially profitable, and most companies plan for these risks.

The other two questions are more problematic. Social activists are aware of the risk of corporate co-opting and can part ways if results are unsatisfactory.[42] However, whether corporate governing benefits society at large is tougher and often politically divisive.[43] Another risk is that delegating socioeconomic issues to corporations might lead to abandoning traditional politics and government.[44]

Third, this Article investigates the promises and risks of corporate governing based on the proposed normative framework. From the corporate perspective, if planned and executed well, corporate governing can benefit recruitment, employee morale, marketing, and profitability.[45] However, it may also alienate stakeholders with contrasting views, make shareholders uneasy, and the current corporate governance framework may struggle with broader agendas conflicting with shareholder and stakeholder desires.[46] These issues are not insurmountable with policy refinements.

37. Omari Scott Simmons, *Political Risk Management*, 64 WM. & MARY L. REV. 707, 781 (2023).
38. *See infra* Part I.
39. *See infra* Part III.
40. *See infra* Part IV.
41. *See infra* Parts IV.A–B.
42. *See infra* Part IV.C.1.
43. *See infra* Part IV.C.2.
44. *See infra* Part IV.D.
45. *See infra* Part V.A.1.
46. *See infra* Part 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 it achieves 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.[47] Yet, corporate governing raises several societal risks: 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.[48]

These risks include not doing enough for societal issues and being dangerous by weakening democratic institutions. First, corporations are unlikely to foster true social progress in areas where their interests conflict with society, like tax, antitrust, labor, privacy, and financial reform, among many others. This is an important cautionary tale to keep in mind before embarking in potentially perilous policy changes that would entrust executives with larger mandates and roles than they currently have. The other criticism is that corporate governing is dangerous for two main reasons: first, it can be undemocratic, sacrificing dissenters' rights over policies that bypass the democratic process, and second, it risks weakening politics and democratic institutions if corporations dominate the reform space. This Article argues that while the undemocratic nature of corporate governing may be less severe than some claim, the risk of undermining politics is significant. As no easy policy fixes exist, addressing this risk requires ambitious efforts from multiple actors to prevent the erosion of reform through traditional democratic institutions. This demands changes in norms, political goodwill, and possibly political reform—all areas where corporate governance can assist but not be the driving force.

This Article proceeds as follows: Part I outlines recent corporate governance initiatives, differentiating between government substitution and corporate socioeconomic advocacy. Part II explores the drivers behind corporate activism, including corporate-level factors (workforce and investor pressure, stakeholderism, corporate lobbying) and macro-level determinants (social and economic reckonings amplified by social media and political paralysis). Part III examines the legal implications of corporate governing under existing fiduciary duty doctrines in corporate law. Part IV evaluates the normative merits of corporate governing from various perspectives: business case, strategic case, impact on social advocacy and society, and implications for democratic institutions. Part V discusses the promises and risks of corporate governing, focusing separately on the corporation and society at large.

I. MAPPING CORPORATE GOVERNING: GOVERNMENT SUBSTITUTION AND CORPORATE SOCIOECONOMIC ADVOCACY

This Part explores areas where corporations have been particularly active in socioeconomic policymaking. As mentioned above, corporate governing consists of two broad types of activity. One is when corporations engage in political action to promote, contrast, or finetune official governmental initiatives, which I call *corporate socioeconomic*

47. *See infra* Part V.B.1.
48. *See infra* Part V.B.2.

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*. 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 involve corporate actions to protect constituencies when the government is inactive due to political decisions or political paralysis. Here are some notable examples:

Racial Equity: Following the murder of George Floyd, companies pledged about $340 billion towards racial equality.[49] Apple created a coding camp for Black coders and set aside $100 million for its Racial Equity and Justice initiative, while Google committed $175 million to support African American entrepreneurs and job seekers.[50] PepsiCo's $400 million pledge to increase Black representation in management.[51] Retailers like Sephora pledged to source 15% of products from Black-owned businesses.[52] Financial institutions such as JPMorgan Chase committed $30 billion to close the racial wealth gap.[53]

Women's Rights: After a Supreme Court memo leaked and indicated that *Roe v. Wade* was going to be overturned, companies like Starbucks, Amazon, and Netflix announced they would cover travel expenses for employees needing abortions.[54] Many other companies soon adopted similar policies.[55]

LGBTQ+ Rights: Since Lotus Development extended corporate benefits to its employees' domestic partners in the early 1990s,[56] corporations have supported LGBTQ+

49. Megan Armstrong, Eathyn Edwards & Duwain Pinder, *Corporate Commitments to Racial Justice: An Update*, MCKINSEY & CO.: INST. FOR BLACK ECON. MOBILITY (Feb. 21, 2023), https://www.mckinsey.com/bem/our-insights/corporate-commitments-to-racial-justice-an-update [https://perma.cc/59F8-3M47].

50. *See Apple Commits $100 Million to Racial Equity Programs While Disclosing its Own Diversity Hiring Record*, THE DALL. MORNING NEWS (Jan. 18, 2021), https://www.dallasnews.com/business/technology/2021/01/18/apple-commits-100-million-to-racial-equity-programs-while-disclosing-its-own-diversity-hiring-record [https://perma.cc/WMU2-WQSQ] (noting that Apple said "53% of its new hires in the U.S. are from historically underrepresented groups in tech") *and* Jacob Kastrenakes, *Google Commits $175 Million to Racial Equity with Focus on Black-Owned Businesses*, THE VERGE (June 17, 2020), https://www.theverge.com/2020/6/17/21294692/google-175-million-racial-equity-black-businesses-entrepreneurs-commitment [https://perma.cc/DRV6-AT4X].

51. Lisa M. Fairfax, *Racial Rhetoric or Reality? Cautious Optimism on the Link Between Corporate #BLM Speech and Behavior*, 2022 COLUM. BUS. L. REV. 118, 140 (2022).

52. LIN, *supra* note 32, at 89.

53. *Id.* at 89–90.

54. 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 (on file with the *Journal of Corporation Law*).

55. *Id. See also* Toniolo, *supra* note 20 (describing corporate reactions in connection with the overturning of *Roe*).

56. CARLOS A. BALL, THE QUEERING OF CORPORATE AMERICA: HOW BIG BUSINESS WENT FROM LGBTQ ADVERSARY TO ALLY 105–12 (2019).

rights, significantly influencing public opinion.[57] In response to North Carolina's 2016 HB2, Target implemented a transgender bathroom policy.[58] Companies have also launched Pride Month campaigns, though some, like Target in 2023, faced backlash leading to public relations challenges.[59]

Climate Initiatives: Walmart partnered with the Environmental Defense Fund in 2005, committing to reduce one billion metric tons of greenhouse gas emissions by 2030.[60] Amazon aims to be net-zero carbon by 2040 and has invested $2 billion in decarbonization technologies.[61] United Airlines established a fund for sustainable aviation fuel, supported by companies like Air Canada and General Electric.[62]

Democratic Rights & Voting: After January 6, social media companies like Facebook and Twitter restricted Trump's accounts to prevent incitement of violence.[63] On the voting front, companies such as Apple and Twitter provide employees with paid time off to vote or volunteer at polling locations.[64] The Time to Vote movement, supported by companies like Uber, encourages voting by offering paid time off on Election Day.[65]

Gun Control: The 2018 Parkland shooting led to corporate involvement in gun control. Dick's Sporting Goods and Walmart instituted stricter policies than federal laws require, such as stopping the sale of assault-style rifles and high-capacity magazines.[66] Citigroup and Bank of America also implemented policies to restrict gun sales and financing for manufacturers of military-style firearms.[67]

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57. 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-evolution-on-l-g-b-t-rights [https://perma.cc/97XR-V6JR].

58. Nathan Layne, *Retailer Target Says Transgender People Can Use Bathroom of Their Choice*, REUTERS (Apr. 19, 2016), https://www.reuters.com/article/us-target-lgbt/retailer-target-says-transgender-people-can-use-bathroom-of-their-choice-idUSKCN0XG2VU [https://perma.cc/M5YC-Y6EB]. Because North Carolina's law did not affect private businesses, Target was free to set its own policy contradicting the state's bill. *Id.*

59. *See* Stewart, *supra* note 15 (explaining the backlash Target faced).

60. *Our Partnership with Walmart Brings Big Change*, ENV'T DEF. FUND, https://www.edf.org/partnerships/walmart [https://perma.cc/KB2K-WY7W].

61. *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 [https://perma.cc/2UV9-ZT8Z].

62. Amrith Ramkumar, *United Airlines Creates Fund for Sustainable Aviation Fuel*, WALL ST. J. (Feb. 21, 2023), https://www.wsj.com/articles/united-airlines-creates-fund-for-sustainable-aviation-fuel-1f24de23 (on file with the *Journal of Corporation Law*).

63. *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), https://www.businessinsider.com/capitol-siege-trump-company-responses-riots-political-donations-2021-1 (on file with the *Journal of Corporation Law*).

64. Lauren Frias, *Apple Joins Twitter in Policy Giving Employees Paid Time Off to Vote in the November Election*, BUS. INSIDER (July 24, 2020), https://www.businessinsider.com/apple-giving-employees-paid-time-off-vote-volunteer-election-day-2020-7 (on file with the *Journal of Corporation Law*).

65. *Id.*

66. Lin, *supra* note 25, at 1556.

67. *Id.*

B. Corporate Socioeconomic Advocacy

Corporate socioeconomic advocacy involves corporate messaging aimed at promoting, opposing, or refining governmental initiatives, often led by CEOs. This type of advocacy is done to complement and strengthen the actions under government substitution—for instance, corporations active on LGBTQ+ issues were vocal about countering bathroom bills.[68] This practice has significantly increased, with U.S. corporations engaging in advocacy rising from 1% to 38% between 2011 and 2019.[69] Here are some key examples:

Race/Immigration: Corporations strongly reacted to events that occurred during President Trump's first term. In the aftermath of the killings of George Floyd and Breonna Taylor, 86% of Fortune 100 companies and 66% of Fortune 500 companies issued public statements condemning racism, supporting the Black Lives Matter movement, and "pledging to help eradicate racist policies and practices both within their own institutions and the broader society.[70] With respect to Trump's polices, the 2017 Muslim Ban faced opposition from 153 companies,[71] with nearly 100 tech companies filing an amicus brief. [72] CEOs of companies like Netflix[73] and Microsoft[74] condemned the ban. Trump's termination of DACA also saw opposition from CEOs like Mark Zuckerberg and Tim Cook, [75] with leaders from Microsoft, Google, and Disney encouraging Congress to defend the program.[76] Public support for corporate involvement in racial issues is generally favorable but not in overwhelming terms.[77]

Women's Rights: The Supreme Court's decision to overturn Roe v. Wade saw limited public statements from companies, with only about 10% making statements.[78] However,

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68. *See infra* note 82 and accompanying text.

69. Swarnodeep Homroy & Shubhashis Gangopadhyay, *Strategic CEO Activism in Polarized Markets*, J. FIN. & QUANTITATIVE ANALYSIS, Dec. 5, 2023, at 1, 2.

70. Fairfax, *supra* note 51, at 120.

71. Lin, *supra* note 25, at 1550–52. Vanessa Fuhrmans, *A Watershed Moment in CEO Activism*, WALL ST. J. (Apr. 4, 2017), https://www.wsj.com/articles/a-watershed-moment-in-ceo-activism-1491310803 (on file with the *Journal of Corporation Law*) (indicating that, "[i]n 84% of instances, it was the CEO directly who took the stand").

72. Fan, *supra* note 25, at 459–61 (mentioning that Google and Lyft pledged or donated millions of dollars to the ACLU and other groups supporting immigrants and refugees).

73. *See* T.C. Sottek, *Netflix CEO: 'Trump's Actions Are So Un-American It Pains Us All'*, THE VERGE (Jan. 28, 2017), https://www.theverge.com/2017/1/28/14426536/netflix-reed-hastings-trump-immigration-executive-order [https://perma.cc/6KKU-MYPX] (reporting Netflix's response to the ban).

74. Fan, *supra* note 25, at 466.

75. Lin, *supra* note 25, at 1553–54.

76. *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 (on file with the *Journal of Corporation Law*).

77. David F. Larcker, Stephen A. Miles, Brian Tayan & Kim Wright-Violich, *The Double-Edged Sword of CEO Activism*, STAN. CLOSER LOOK SERIES, Nov. 8, 2018, at 4, https://www.ssrn.com/abstract=3283297 (finding that 54% of Americans support CEO activism about racial issues, while 29% do not).

78. *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 [https://perma.cc/N3N9-N24T]. *See also* Toniolo, *supra* note 20, at 367, 377 (finding only 117 U.S. public corporations issuing a statement and noting that the majority of such "issued statements that addressed the employees exclusively, while avoiding commenting on the decision or taking a stand on abortion.").

many companies adopted supportive policies for employees.[79] Public opinion on corporate stances on gender issues and abortion is mixed.[80]

LGBTQ+ Rights: 43% of surveyed Americans believe companies should support LGBTQ+ rights.[81] The backlash against North Carolina's HB2, which required transgender individuals to use restrooms matching their biological sex, led to significant corporate advocacy, resulting in a partial repeal of the law.[82] Disney's public feud with Florida Governor Ron DeSantis over the "Don't Say Gay" bill is a notable example, with Disney criticizing the law and DeSantis retaliating by removing some of Disney's privileges.[83] All the while, the Delaware Chancery Court denied a Section 220 of the Delaware General Corporation Law ("DGCL")[84] request for books and records that were seeking access to emails amongst Disney directors in connection with the dispute with the Governor.[85] Public support for corporate advocacy in LGBTQ+ rights is strong, but the issue remains controversial.[86]

Climate: Corporate leaders opposed President Trump's 2017 decision to withdraw from the Paris climate accord.[87] CEOs like Elon Musk and Bob Iger left advisory councils, and companies like Apple, Facebook, Google, and Microsoft ran public ads demonstrating their disagreement.[88] CEOs also expressed personal dissatisfaction on social media.[89] Public support for corporate activism on climate issues is generally positive.[90]

Democratic Rights & Voting: After January 6, many companies halted donations to politicians who opposed election certification.[91] Georgia's restrictive 2021 voting law

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79. *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 (June 30, 2022), https://fortune.com/2022/06/30/companies-supporting-abortion-rights-roe-v-wade-first-movers (on file with the *Journal of Corporation Law*).

80. Larcker, Miles, Tayan & Wright-Violich, *supra* note 77, at 4 (finding that while gender issues score a net-favorable position (40% in favor versus 37% unfavorable), abortion does not (37% versus 39%)).

81. *Id.*

82. *See* Lin, *supra* note 25, at 1547–50.

83. *See supra* notes 1–10 and accompanying text. *See also* Masconale & Sepe, *supra* note 30, at 271 (providing descriptions of accounts critical of "woke corporations"); Elizabeth Blair, *After Protests, Disney CEO Speaks out Against Florida's 'Don't Say Gay' Bill*, NPR (Mar. 10, 2022), https://www.npr.org/2022/03/08/1085130633/disney-response-florida-bill-dont-say-gay [https://perma.cc/6XRU-SM3A] (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").

84. DEL. CODE ANN. tit. 8, § 220(b) (West 2023).

85. *See infra* text accompanying notes 187–99.

86. Larcker, Miles, Tayan & Wright-Violich, *supra* note 77, at 4 (finding that "43 percent support activism about LGBTQ+ rights, while 32 percent do not").

87. *See* Daniel Victor, *'Climate Change Is Real': Many U.S. Companies Lament Paris Accord Exit*, N.Y. TIMES (June 1, 2017), https://www.nytimes.com/2017/06/01/business/climate-change-tesla-corporations-paris-accord.html (on file with the *Journal of Corporation Law*).

88. *Id.*

89. *Id*.

90. *See* Larcker, Miles, Tayan & Wright-Violich, *supra* note 77, at 4 (noting public support for clean air or water at 78%, renewable energy at 68%, sustainability at 65%, and climate change at 65%).

91. Melinda Fakuade, *A Running List of Corporate Responses to the Capitol Riot*, VOX (Jan. 14, 2021), https://www.vox.com/the-goods/22227717/brands-corporate-response-capitol-dc-riot-insurrection-mob-pac-donations [https://perma.cc/9TKD-8PAT].

sparked outrage among major corporations like Coca-Cola and Delta Airlines.[92] In 2021, a coalition of companies urged Congress to expand the Voting Rights Act.[93]

Gun Control: Following the 2022 Uvalde school shooting, over 200 CEOs demanded congressional action on gun control.[94] Previous shootings, including incidents at Walmart, also prompted corporate leaders to advocate for stricter regulations.[95] Public support for corporate involvement in gun control exists but is not overwhelming.[96]

II. THE DRIVERS OF CORPORATE GOVERNING

This Part offers a brief sketch of the main reasons for corporate engagement in public policy issues. Section A addresses firm-level drivers, while Section B deals with sociopolitical drivers.

A. Corporate Drivers

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.

1. Workforce and Investor's Pressures

Employees, particularly in the tech industry, drive significant changes by pushing for DEI initiatives, influenced by movements like #MeToo and BLM.[97] These movements have led

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92. David Shepardson & Uday Sampath Kumar, *Delta, Coca-Cola Blast Home State Georgia's Voting Restrictions As 'Unacceptable'*, REUTERS (Apr. 1, 2021), https://www.reuters.com/article/us-usa-georgia-voting-companies/delta-coca-cola-blast-home-state-georgias-voting-restrictions-as-unacceptable-idUSKBN2BN1M9 [https://perma.cc/5SBC-MPBE]; 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 (on file with the *Journal of Corporation Law*) (mentioning that hundreds of other companies followed Frazier's lead and signed a statement opposing any legislation making it harder for people to vote).

93. Tucker Higgins, *More than 150 Companies Call on Congress to Strengthen Voting Rights Act*, CNBC (July 14, 2021), https://www.cnbc.com/2021/07/14/companies-call-on-congress-to-strengthen-voting-rights-act.html [https://perma.cc/P453-5BLM].

94. 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), https://fortune.com/2022/06/09/ceos-demand-action-gun-control-senate-uvalde-shooting/ (on file with the *Journal of Corporation Law*).

95. Amelia Lucas, *Chief Executives of 145 Companies Urge Senate to Pass Gun Control Laws*, CNBC (Sep. 12, 2019), https://www.cnbc.com/2019/09/12/chief-executives-of-145-companies-urge-senate-to-pass-gun-control-laws.html [https://perma.cc/4SKJ-8J9H].

96. Larcker, Miles, Tayan & Wright-Violich, *supra* note 77, at 4 (finding that 45% of Americans are in favor of corporations taking a stand, while 35% view it unfavorably).

97. *See* Fan, *supra* note 27, at 1008–14 (discussing mandatory arbitration provisions and the elimination of the provisions by certain companies in the wake of the #MeToo Movement); Alon-Beck, *supra* note 27, at 131–38; *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-

companies to reevaluate their practices, creating new roles and policies. Employees' collective voices have pushed for tangible changes in policies, training programs, and organizational culture.[98] A recent empirical study by Reilly Steel reveals that a small but very influential component of the workforce in corporate America, senior management, has shifted ideologically leftward, with senior managers—but not CEOs—now more liberal.[99] His study suggests that the phenomenon is in part due to increased diversity, with more women and people of color in leadership.[100] Steel's work focuses specifically on directors and senior management, so it does not imply that the entire workforce has moved in the same direction, though it is plausible.[101] At a minimum, a more progressive senior management is likely more receptive to employee-driven activism,[102] reshaping expectations for employers and reinforcing the idea that workers can be agents of change within and beyond their organizations. Employees have shown their power to shape corporate agendas by collectively influencing policies, training, and organizational culture at some large organizations.

It is impossible to overstate the role of ESG in the last decade or so.[103] ESG matters have become crucial, with institutional investors demanding more from companies regarding social and environmental responsibility. Investors, particularly those from the millennial and Zoomer generations, have demonstrated a growing preference for companies that

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harassment.html (on file with the *Journal of Corporation Law*) (discussing employee walkouts inspired by the #MeToo movement and the response by employers); 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/ [https://perma.cc/SK5S-3M9K]; Toniolo, *supra* note 20, at 365 (noting that the strongest pressure to push corporations to speak out after the *Dobbs* decision came from employees, especially women).

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

99. *See generally* Reilly Steel, *The Political Transformation of Corporate America, 2001–2022* 4 (Columbia L. & Econ. Working Paper No. 4974868, Oct. 29, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4974868 (noting that CEOs remain more conservative).

100. *Id.* at 33–34 (suggesting that another important factor is that a growing number of corporate leaders come from liberal areas). That increased diversity spurs broader perspectives in the corporate world has long been a recurring stipulation. *See* DAVID VOGEL, KINDRED STRANGERS: THE UNEASY RELATIONSHIP BETWEEN POLITICS AND BUSINESS IN AMERICA 169–70 (1996).

101. The shift among corporate elites could indicate a broader trend in which many Americans—including many in the workforce—have adopted more progressive views. Steel's methodology assesses executives' ideologies based on the political leanings of their campaign contribution recipients, showing that senior managers have increasingly supported politicians like Bernie Sanders and Alexandria Ocasio-Cortez. Steel, *supra* note 99, at 13–14, 18–19. Whether a part of the country has shifted leftward because these politicians led the way or simply tapped into existing public sentiment is up for debate. What seems implausible is that this shift was prompted by senior executives, with politicians and segments of the country following suit. More likely, it reflects an organic, society-wide phenomenon in which senior executives are also participants.

102. This is confirmed by Steel's study, which shows that firms with more progressive directors and executives are much more likely to take public stances to support progressive causes. *Id.* at 5–6.

103. For a history of the term "ESG," see Elizabeth Pollman, *The Making and Meaning of ESG*, 14 HARV. BUS. L. REV. 403 (2024).

align with their values and prioritize social and environmental responsibility, and businesses have adapted.[104] The growth in importance and support of shareholder proposals on environmental and social matters documents the importance of ESG.[105] BlackRock's 2018 letter by Larry Fink emphasized long-term value and stakeholder service,[106] influencing competitors like State Street and Vanguard to prioritize sustainability.[107] This investor pressure has made companies more receptive to addressing social issues, leading large asset managers to be seen as regulators of last resort.[108] Studies show that the Big Three asset managers have successfully campaigned for gender diversity on corporate boards, demonstrating investor-driven policy initiatives.[109]

2. *Stakeholderism*

Given this pressure from investors, it is unsurprising that in recent years the corporate purpose debate has been revamped. In the United States, the scholarly debate traces to an exchange in the early 1930s.[110] In 1970, future Nobel prize winner Milton Friedman published a famous article in New York Times Magazine, dismissing corporate social

104. *See generally* Barzuza, Curtis & Webber, *supra* note 28. Ruby Brownen-Trinh & Ajan Orujov, *Corporate Socio-political Activism and Retail Investors: Evidence from the Black Lives Matter Campaign*, 80 J. CORP. FIN., no. 6, 2023, at 1, 1.

105. 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 [https://perma.cc/RU8K-J5GD]. The number of environmental and social proposals it tracked increased from 133 in 2021 to 142 in 2022. BROADBRIDGE, 2023 PROXY SEASON PREVIEW AND 2022 PROXY SEASON HIGHLIGHTS 6 (2023), https://www.broadridge.com/assets/pdf/broadridge-2023-proxypulse-report.pdf [https://perma.cc/WA8X-WYFF]. Such proposals earned "record levels of support" in the early 2020s. Marcel Kahan & Edward Rock, *The Emergence of Welfarist Corporate Governance* 19 n.87 (Eur. Corp. Governance Inst., L. Working Paper No. 683, 2023), http://ssrn.com/abstract_id=4328626 (noting that the percentage of proposals gaining more than 30% support rose from 0% in 2000 to 36% in 2018).

106. 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 28, at 1273.

107. *See* Barzuza, Curtis, & Webber *supra* note 28, at 1275.

108. *See generally* Lund, *supra* note 28, at 77.

109. 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 28, 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 [https://perma.cc/VYS9-HMMD]. 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 under the threat that they would vote against boards of corporations with poor performance in this area. Barzuza, Curtis & Webber, *supra* note 28, at 1266.

110. Adolph A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 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, 1147 (1932) (arguing that corporate powers "are held in trust" for the entire community).

responsibility theories and promoting maximizing shareholder wealth.[111] Over the next decades, mainstream financial economists and legal scholars endorsed shareholder wealth maximization;[112] in 2001 Professors Henry Hansmann and Reinier Kraakman declared the triumph of shareholder value.[113]

Nonetheless, other voices continued to advocate for a stakeholder approach, where managers and directors consider the interests of employees, creditors, customers, suppliers, and local communities.[114] While judges and scholars debated the legal requirements for directors,[115] the discussion gained momentum at the end of the last decade. Larry Fink's 2018 letter emphasized that "[c]ompanies must benefit all of their stakeholders."[116] In August 2019, the Business Roundtable, representing CEOs of major corporations, endorsed this approach in their "Statement on the Purpose of a Corporation."[117] This document, influenced by Professor Colin Mayer and Martin Lipton,[118] considers each stakeholder "essential."[119] This shift in perspective has made it easier for directors to justify corporate governing initiatives.[120]

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111. Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32.

112. *See generally* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); ROBERT C. CLARK, CORPORATE LAW 682 (1986); 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).

113. Hansmann & Kraakman, *supra* note 112, 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").

114. 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. L. 101 (1979); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 250–51 (1999).

115. *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).

116. Fink, *supra* note 106.

117. *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE (Aug. 19, 2019), https://www.business-roundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/YQ8C-XBRZ].

118. *See* COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES GREATER GOOD (2018) (proposing a new agenda for establishing the corporation as a force for societal prosperity); 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). *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/ [https://perma.cc/K47H-LT6T] (describing a new paradigm for corporate governance to overcome the risk that short-term financial activists impede long-term economic prosperity).

119. BUS. ROUNDTABLE, *supra* note 117.

120. *See infra* Part III. To be sure, many accounts are critical of the Business Roundtable's new position and of a shift in corporate purpose. *See e.g.* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of*

3. *Rent Protection: Corporate Lobbying and Politics at Work*

To grasp corporate governing, one cannot ignore the main game corporations play in politics: lobbying. Corporations spend considerable amounts each year to protect and advance their interests.[121] Especially after the *Citizens United* decision,[122] spending has increased,[123] and corporations have lobbied heavily to avoid disclosing their political spending.[124] Opacity is a strategy, with lobbying often conducted through intermediaries like the U.S. Chamber of Commerce and the Business Roundtable,[125] which do not disclose donors and direct funds to conservative candidates and committees.[126] Smaller organizations like

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Stakeholder Governance, 106 CORNELL L. REV. 91, 91 (2020); Matteo Gatti & Chrystin Ondersma, *Can A Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera*, 46 J. CORP. L. 1 (2020); Edward B. Rock, *For Whom Is the Corporation Managed in 2020?: The Debate over Corporate Purpose*, 76 BUS. LAW. 370, 370–78, 394 (2021); Holger Spamann & Jacob Fisher, *Corporate Purpose: Theoretical and Empirical Foundations/Confusions*, Eur. Corp. Governance Inst. L, Working Paper, No. 664/2022, at 4–5, http://ssrn.com/abstract_id=4269517.

121. For instance, in the United States, 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].

122. *See* Citizens United v. FEC, 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).

123. 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 in the years preceding *Citizens United*. *See* DANIEL I. WEINER, CITIZENS UNITED FIVE YEARS LATER 4 (2015), https://www.brennancenter.org/sites/default/files/2019-08/Report_Citizens_United_%205_%20Years_%20Later.pdf [https://perma.cc/3LXQ-MLKX].

124. Luigi Zingales, *Corporations Fight Push for Donation Disclosure*, GULF TIMES (June 3, 2013), https://www.gulf-times.com/story/355016/Corporations-fight-push-for-donation-disclosure [https://perma.cc/G24M-3USK]; *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) (discussing the political pressure the SEC chair faced to avoid rulemaking process on political spending transparency).

125. 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 J. Jackson, Jr., *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. *Id.*

126. 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 Downloadable Lobbying Databases*, U.S. SENATE, https://www.senate.gov/legislative/Public_Disclosure/database_download.htm [https://perma.cc/7YBS-YF6U] (providing the full list).

the American Legislative Exchange Council (ALEC) also raise money to lobby for pro-business legislation.[127]

Corporations sometimes create or fund faux grassroots organizations, known as "astroturf activism," to shape public perception by presenting themselves as acting for social causes.[128] This tactic includes creating fake citizen groups or scientific bodies to publish misleading articles.[129] Employers also mobilize their workers to lobby for business-friendly causes; workers are expected to support their employers not only with logistical help but also by helping to persuade public opinion.[130] Political scientists show how employer mobilization can 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."[131]

B. Sociopolitical Drivers

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

1. Shocks, Reckonings, Citizen's 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 that made 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 younger generations.[132] Millennials and Zoomers, both inside and outside corporations,

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127. 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 [https://perma.cc/Z5RZ-LG7S]. *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 (on file with the *Journal of Corporation Law*) (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).

128. *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 generally* Melissa J. Durkee, *Astroturf Activism*, 69 STAN. L. REV. 201 (2017) (discussing the ways in which businesses imitate grassroot organizations).

129. *See* George Monbiot, *The Denial Industry*, THE GUARDIAN (Sept. 19, 2006), https://www.theguardian.com/environment/2006/sep/19/ethicalliving.g2?INTCMP=SRCH [https://perma.cc/AD9R-G2QU]. Businesses also hire teams of individuals who pose as disinterested members of the public (often creating multiple profiles), but in fact promote corporate causes. *Id.*

130. *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).

131. *Id.* at 164.

132. *See* Lin, *supra* note 25, at 1547 (describing the effect of the movements on the American public); Barzuza, Curtis & Webber, *supra* note 28, at 1283–1303.

have played a significant role in driving social change in response to the movements mentioned above, as well as in reacting to Trump's first Presidency.[133] 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.[134] 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.[135]

Indeed, social media platforms have revolutionized social activism, empowering individuals to form movements and act on a larger scale.[136] This has impacted markets and businesses in significant ways,[137] facilitating the rapid spread of awareness and engagement through boycotts, marches, viral videos, and hashtag campaigns.[138] Platforms like Diet Prada and other brand watchdogs have emerged as influential forces in exposing wrongdoing and holding companies accountable for their actions.[139] 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.[140]

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 on pressing topics often debated on a national scale,[141] because in this new environment staying silent may have negative implications.[142]

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133. It is reported that 56% of millennials expect CEOs and other business leaders to speak out. *See* Fan, *supra* note 25, at 453–54 n.78 (citing WEBER SHANDWICK & KCR RESEARCH, CEO ACTIVISM IN 2017: HIGH NOON IN THE C-SUITE 5 (July 24, 2017), https://webershandwick.com/news/ceo-activism-in-2017-high-noon-in-the-c-suite) (on file with the *Journal of Corporation Law*)).

134. *See* Barzuza, Curtis & Webber, *supra* note 28, 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 Trump's first presidency).

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

136. Marcia Mundt, Karen Ross & Charla M. Burnett, *Scaling Social Movements Through Social Media: The Case of Black Lives Matter*, 4 SOC. MEDIA SOC'Y, no. 4, 2018, at 1.

137. *See e.g.*, Lund, *supra* note 28, at 81 (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).

138. Lin, *supra* note 25, at 1544–45.

139. 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 (on file with the *Journal of Corporation Law*).

140. Lin, *supra* note 25, at 1545; Jens Dammann & Daniel Lawrence, *CEOs' Endorsements of Stakeholder Values: Cheap Talk or Meaningful Signal? An Empirical Analysis*, 49 J. CORP. L. 577, 592 (2024) (noting that "'naming and shaming' matters since there is broad evidence to suggest that, by and large, CEOs care deeply about their public reputations").

141. Masconale & Sepe, *supra* note 30, at 269.

142. Disney's initial approach to the "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 v. Walt Disney Co., 302 A.3d 956, 960 (Del. Ch. 2023) (citations omitted). Corporations may also feel peer pressure to speak as other corporations are expressly denouncing silence. In the aftermath of the murder of George Floyd, Netflix issued a statement that said: "[t]o be silent is to be complicit." *See* Fairfax, *supra* note 51, at 121.

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.[143] Professors Kahan and Rock explain that as political gridlock impedes the effective regulation of activities that generate externalities (for example, through the imposition of a carbon tax), it is rational for investors to expect corporations to act.[144]

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.[145] To begin, citizens' polarization has played a key role in which media and social media have recently been playing a key aggravating factor.[146] The political media and social media run business models in which division, outrage, and the politics of anger pay off, as they drive higher ratings and engagement numbers.[147]

Of course, American constitutional design does not help, especially if one seeks to pass reform at the federal level.[148] 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.[149] The absence of a trifecta leads to gridlock and partisan stalemates, which further intensifies political polarization and impedes effective governance.[150] The composition and internal rules of the Senate play a very 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

143. *See, e.g.*, Fan, *supra* note 25, at 452, 471 (noting that "[the] institutional failure has created a vacuum which corporations are now filling"); Lund, *supra* note 28, at 95 ; Kahan & Rock, *supra* note 105, at 47–48; Strine, *Restoration*, *supra* note 29; Kovvali, *supra* note 29.

144. Kahan & Rock, *supra* note 105, at 17. *See also id.* at 47 ("[T]he political system has proven unable to deal with the problems facing society in an effective way.").

145. *See generally* Richard H. Pildes, *The Age of Political Fragmentation*, 32 J. DEMOCRACY, no. 4, Oct. 2021, at 146 (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).

146. *Id.*

147. 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 [https;//perma.cc/9ULD-2Z8Q].

148. 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.* Gatti & Ondersma, *supra* note 120, at 14 (discussing the greater impact of reforms at the federal level).

149. *Control of the U.S. Senate and House of Representatives: 1855-2025*, WIKIPEDIA, https://upload.wikimedia.org/wikipedia/commons/7/72/Combined—Control_of_the_U.S._House_of_Representatives_-_Control_of_the_U.S._Senate.png [https://perma.cc/3TGA-QUQJ] (showing that, before the 2024 elections, a government trifecta at the federal level has been achieved only for 12 of the last 42 years).

150. For a discussion of increased political polarization, see generally Rachel Kleinfeld, Polarization, Democracy, and Political Violence in the United States: What the Research Says (Sept. 5, 2023) (Carnegie Endowment for International Peace unpublished manuscript), https://carnegie-production-assets.s3.amazonaws.com/static/files/Kleinfeld_Polarization_final_3.pdf [https://perma.cc/A7F6-HNRU].

seemingly enjoy support from citizens.[151] To make things even worse, the filibuster rule in the Senate adds to political dysfunction.[152] This practice prevents the majority party from implementing its policy agenda and perpetuates the gridlock.[153] Finally, even when reforms are passed, judicial review often intervenes to the rescue of big private interests.[154]

As significant change via traditional politics gets harder, the corporate route becomes a feasible second best to achieve similar socioeconomic policy goals.

III. CORPORATE GOVERNING AND FIDUCIARY DUTIES

This Part ponders whether corporate governing raises significant issues for corporations and their directors and officers. From a corporate law perspective, case law and legal scholarship answer the question in the negative. Corporate governing is a non-issue from an authority standpoint, considering that ultra vires doctrines have long been discarded: issues relating to corporate purpose are litigated under fiduciary duties doctrines.[155]

This Part gives two separate analyses for the two types of corporate governing under a fiduciary duty lens. I address government substitution in Part III.A and corporate socioeconomic advocacy in Part III.B. An important disclaimer: while this Part concludes that neither is particularly problematic from a corporate law standpoint, I do not suggest that corporations will act free of legal challenges. For instance, the securities fraud lawsuit against Target over its Pride campaign has recently survived a motion to dismiss and,

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151. 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 [https://perma.cc/99BM-6C7M]. Similarly, six out of ten Americans support a federal $15 minimum wage. Amina Dunn, *Most Americans Support a $15 Federal Minimum Wage*, PEW RSCH. CTR. (Apr. 22, 2021), https://www.pewresearch.org/fact-tank/2021/04/22/most-americans-support-a-15-federal-minimum-wage [https://perma.cc/Q8GC-BP3L]. Additionally, seven out of ten Americans 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 [https://perma.cc/34MH-2DF3].

152. 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, 182 (1997).

153. Tim Wu, *The Oppression of the Supermajority*, N.Y. TIMES (Mar. 5, 2019), https://www.nytimes.com/2019/03/05/opinion/oppression-majority.html (on file with the *Journal of Corporation Law*).

154. *See, e.g.*, Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 223 (2021) (noting that the U.S. Supreme Court has developed a "pro-business" reputation, often expanding corporate rights while narrowing corporate liability and accountability); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. 1703, 1703 (2021) (noting how the Supreme Court, with its conservative majority, is likely to obstruct progressive efforts by striking down or undermining legislation aimed at social, economic, and environmental changes).

155. *See, e.g.*, BAINBRIDGE, *supra* note 30, at 13 ("[W]ith 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 29, 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"). *See* Dalia T. Mitchell, *From* Dodge *to* eBay*: The Elusive Corporate Purpose*, 13 VA. L. & BUS. REV. 155, 175 (2019) (discussing lawsuits relating to corporate purpose which were litigated under fiduciary duties doctrines).

though the litigation may not ultimately succeed, it could shape corporate approaches to governing initiatives, encouraging boards to weigh litigation risks against strategic priorities and possibly recalibrate their focus until disclosures are refined to address such risks.[156]

A. Government Substitution

The concept of government substitution, where corporations take on roles traditionally held by the government to achieve socioeconomic policy goals, raises important questions about its alignment with profit maximization. and has long been analyzed by the corporate purpose literature[157] and case law.[158] This issue is best examined from two different perspectives: stakeholderism and shareholderism.[159]

Under a *stakeholderist* view of the firm, there should be few 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.[160] At a minimum, jurisdictions with constituency statutes, which allow for considerations beyond shareholder value, should be particularly accommodating of government substitution.[161]

Even under a *shareholderist* approach, where the primary focus is on maximizing shareholder value, pointing to the *long-term benefits* of government substitution actions would lead to protection under the business judgment rule, which shields directors and officers from personal liability for their decisions so long as they can demonstrate that they are disinterested and their actions are informed and rational.[162] Establishing these

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156. The recent decision in *Craig v. Target* to allow securities fraud claims to proceed raises important questions about corporate governing and associated disclosures. Craig v. Target Corp., No. 2:23-cv-599-JLB-KCD (M.D. Fla. Dec. 4, 2024). At issue is whether Target adequately addressed the reputational and financial risks of potential backlash and boycotts stemming from its Pride campaign and the court found that the plaintiffs had sufficiently plead material misstatements, scienter, and loss causation, enabling the case to move forward. A key aspect of the ruling was the court's view that Target's general ESG-related risk disclosures may not have adequately accounted for the specific risks linked to the campaign's heightened visibility. For a critique, see Benjamin P. Edwards, *Merchandise Placement as Securities Fraud*, BUS. L. PROF BLOG (Dec. 5, 2024), https://www.businesslawprofessors.com/2024/12/merchandise-placement-as-securities-fraud [https://perma.cc/KQZ7-8URQ]. Professor Edwards argues that Target's prior disclosures on boycott risks were likely sufficient and cautions that this decision could establish a precedent requiring granular risk disclosures for routine business choices, such as product placement. He suggests that such an interpretation might expand securities fraud liability, complicating corporate decision-making, particularly concerning ESG and DEI initiatives. *Id.*

157. The debate was ignited by Milton Friedman in his famous 1970 article. *See* Friedman, *supra* note 111, at 32. Subsequent literature delved deeply into the issue. *See, e.g.*, CLARK, *supra* note 112, at 677–96.

158. *See, e.g.*, AP Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953) (validating charitable contributions). For an analysis, see *infra* notes 163–64 and accompanying text.

159. *See supra* Part II.A.2. (explaining shareholderism and stakeholderism, their qualities, and their origins).

160. *See supra* note 110 and accompanying text.

161. *See* 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.*, 15 PA. CONS. STAT. § 1715 (2024) (allowing, but not obligating, directors to look after interests of non-shareholder constituencies).

162. *See* PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01(c) (AM. L. INST. 1994) (stating how the business judgment rule shields board members from liability). *See also* Stephen M.

prerequisites is not particularly hard.[163] In practical terms, so long as the long-term benefits of corporate actions are articulated, and proper decision-making processes are followed, the business judgment rule will protect directors and managers from liability.

Legal precedents support the idea that actions of government substitution can be treated as business decisions and thus qualify for protection under the business judgment rule. For instance, courts have engaged with and effectively validated corporate philanthropy. The *AP Smith Manufacturing*[164] 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.[165] 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.[166]

Other cases, such as the famous *Dodge v. Ford*[167] and its more recent iteration *eBay v. Newmark*,[168] 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

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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 30, 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 120, 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 29, at 340; Spamann & Fisher, *supra* note 120, at 10 (arguing that "fiduciary duties are not enforceable with this level of precision, i.e., the shareholder/stakeholder distinction makes no practical legal difference")

163. *See, e.g.*, Shlensky v. Wrigley, 237 N.E.2d 776, 779 (Ill. App. Ct. 1968) (not second guessing a director decision to not install lights at the Chicago Cubs' baseball stadium Wrigley Field, which, according to the plaintiff, resulted in the loss 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." (quoting Toebelman v. Missouri-Kansas Pipe Line Co., 41 F. Supp. 334, 339)); Kamin v. Am. Express Co., 383 N.Y.S.2d 807, 810–11 (N.Y. Sup. Ct. 1976) (refusing to second guess a director 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").

164. AP Smith Mfg. Co. v. Barlow, 98 A.2d 581, 589–90 (N.J. 1953).

165. *See* BAINBRIDGE, *supra* note 30, at 45 (quoting Nancy J. Knauer, *The Paradox of Corporate Giving*, 44 DEPAUL L. REV. 1, 19–20 (1994) ("[C]orporate 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.

166. In *Shlensky*, 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. *Shlensky*, 237 N.E.2d at 779–80.

167. 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 but adding that a judge will not second-guess decisions stemming from the business judgment of directors).

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

above. Several commentators of *Dodge* and *eBay* maintain that such cases had a negative outcome for the directors because during depositions the directors explicitly admitted their goal was *not* to benefit shareholders.[169] But the consensus is that, in the absence of such an admission, directors can still enjoy the deference of the business judgment rule if the record can show 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 interest of the shareholders.[170]

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, an issue that transcends my corporate law analysis. Following the Supreme Court's invalidation of affirmative action in school admissions,[171] the legality of corporate actions aimed at closing racial or gender gaps is now open to debate.[172] Consequently, corporations are treading lightly,[173] particularly in light of attacks on DEI initiatives by activist investors like Bill Ackman and others.[174]

169. *See* BAINBRIDGE, *supra* note 30, at 46 (explaining that controlling shareholders lost because they admitted that their end goal was not "stockholder wealth maximization"); Strine, Jr., *supra* note 115, at 777 (labeling *Dodge* and *eBay* as "confession cases"). *See also* Spamann & Fisher, *supra* note 120, at 12 (noting that a close read of *eBay* stands only for not allowing to deploy a pill to defend a business strategy that overtly does not embrace profit maximization and adding that "the defendant directors and controlling shareholders . . . won another count and thus the war because [the Court] allowed them to keep eBay off of the company's . . . board.").

170. BAINBRIDGE, *supra* note 30, at 60 (quoting Revlon Inc. v. MacAndrews & Forbes Holdings., Inc., 506 A.2d 173, 182 n.10); *see also* Rock, *supra* note 120, 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."); Spamann & Fisher, *supra* note 120, at 11 (noting that the shareholder/stakeholder distinction is not enforceable because of the business judgment rule and arguing there is not a single case of managers or directors being held personally liable for furthering stakeholder interests over shareholder interests); Simeone v. Walt Disney Co., 302 A.3d 956, 971 n.138; Strine, *Good Corporate Citizenship*, *supra* note 29, at 337–38. *See infra* note 195 and accompanying text.

171. Students for Fair Admissions v. President & Fellows of Harvard., 600 U.S. 181, 225–31 (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).

172. Daniel Wiessner, *Affirmative Action Ruling Could Place Target on US Corporate Diversity Programs*, REUTERS (June 30, 2023), https://www.reuters.com/legal/affirmative-action-ruling-could-place-target-us-corporate-diversity-programs-2023-06-30 [https://perma.cc/86DS-Q8EK]. *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 (on file with the *Journal of Corporation Law*) (warning that without affirmative action, major U.S. companies will "lose access to 'a pipeline of highly qualified future workers and business leaders'" and struggle to meet diversity goals).

173. Jeff Green, *US Companies Caught in Diversity Crossfire Are Frozen by Uncertainty*, BLOOMBERG (July 29, 2023), https://www.bloomberg.com/news/articles/2023-07-29/us-companies-worry-they-could-face-legal-action-over-dei-initiatives?sref=DIvsyJQr (on file with the *Journal of Corporation Law*).

174. *See supra* notes 17–18 and accompanying text.

B. Corporate Socioeconomic Advocacy

While corporate socioeconomic advocacy raises similar issues,[175] it often faces more passionate responses from its detractors. The refrain is normally that corporations should focus on their business operations rather than political matters.[176] Corporate socioeconomic advocacy represents a particular form of corporate speech. Unlike traditional forms of corporate speech like lobbying, which typically pursues interests related to the corporation and its bottom line,[177] corporate socioeconomic advocacy seeks broader goals.

Given the significant expansion of corporate political speech after *Citizens United*[178] and *Hobby Lobby*,[179] few question the legality of corporate lobbying.[180] 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 the directors' fiduciary duties. One could hypothesize a CEO's reckless rant on social media 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 under Section 102(b)(7) of the DGCL (around 90% of Delaware corporations),[181] only bad faith could trigger liability[182]—a high bar for plaintiffs who must establish a conscious

175. "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).

176. *See generally* Fisch & Schwartz, *supra* note 30 (criticizing the phenomenon on a normative basis, but not challenging its legality under current laws); Stephen Bainbridge, *Investors Want Returns, Not Political Fights*, BARRON'S (July 6, 2023), https://www.barrons.com/articles/investors-wants-returns-not-political-fights-c0dc18b [https://perma.cc/87A3-6V62]; Phil Gramm & Mike Solon, *Keep Politics Out of The Boardroom*, WALL ST. J. (July 19, 2018), https://www.wsj.com/articles/keep-politics-out-of-the-boardroom-1531952912 (on file with the *Journal of Corporation Law*).

177. *See supra* Part II.A.3.

178. Citizens United v. FEC, 558 U.S. 310 (2010). *See supra* note 122 and accompanying text.

179. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 730–32 (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).

180. In fact, social advocates are said to have taken advantage of this expansion of corporate powers. Lin, *supra* note 25, at 1573. *See also* Strine, *Good Corporate Citizenship*, *supra* note 29, 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).

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

182. 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) (West 2022). 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 . . . .

Id.

disregard for one's duties.[183] 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 out that the policy matters the corporation is advocating would benefit the long-term welfare of the corporation and its stockholders.[184] 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, again, the business judgment rule. So long as directors can show that their actions are disinterested, informed, and rational,[185] they will find a liability shield.[186] This analysis is confirmed by the Delaware Court of Chancery's *Simeone v. Disney* decision in June 2023, which denied a Section 220 claim on Disney's books and records concerning the company's decision to criticize Florida's "Don't Say Gay Bill."[187] 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.[188] But the court rejected this assertion because the plaintiff was *merely disagreeing* with a board decision, something that absent decision-making pathologies warrant judicial deference even if "the decision turned out poorly in hindsight."[189]

On the one hand, the 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

Corporations routinely include charter provisions of this kind. Holger Spamann, *Monetary Liability for Breach of the Duty of Care?*, 8 J. LEGAL 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 *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 67 (Del. 2006)).

183. *See Lyondell*, 970 A.2d at 243.

184. *See infra* Part IV.A.3c.

185. *See* PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01(c) (AM. L. INST. 1994).

186. Brief for Corporate Law Professors as Amici Curie Supporting Respondents at 8, Friedrichs v. California Teachers Ass'n, 578 U.S. 1 (2016) (No. 14-915) (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).

187. Simeone v. Walt Disney Company Co., 302 A.3d 956, 966 (Del. Ch. 2023) (establishing "plaintiff does not meet the standard for a Section 220 inspection for three independent reasons[:] First, the purposes described in the demand are not the plaintiff's own purposes [but rather of his counsel doing work for the Thomas More Society][;] Second, the plaintiff has not provided a credible basis from which to infer possible wrongdoing[;] Third, the defendant has provided the plaintiff with all necessary and essential documents").

188. *Id.* at 969.

189. *Id.* at 969–70.

position on political, religious, or social matters."[190] On the other hand, the court noted that shareholders understand that "the board is empowered to direct the corporation's affairs"[191] 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."[192] Disney's public stand wasn't aprioristic. The company opted for silence at first, and only after discussing with the board "the communications plan, philosophy and approach regarding Florida legislation and employee response,"[193] did the CEO announce opposition to the bill.[194]

The Delaware Court of Chancery confirmed long-standing Delaware case law allowing boards, in the exercise of business judgment, to pursue the interests of corporate stakeholders as "rationally related" to building long-term value.[195] Quoting *eBay*, the court abstained from questioning "rational judgments about how promoting non-stockholder interests . . . ultimately promote stockholder value."[196] Further, the Chancery Court also denied that Disney "'ignored a known risk' of negative consequences from opposing the legislation[,]"[197] 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."[198] 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."[199]

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

If corporate governing is generally permissible under existing corporate law regimes, its value from a normative standpoint remains an open question. Even if directors avoid legal liability, corporate governing can have serious negative consequences for corporate strategy, value,[200] society, and democratic institutions. To determine if corporate governing is normatively sound for both corporations and society, the issue must be examined from multiple angles. The normative discussion can be divided into four questions: the first two focus on the corporate dimension, and the last two on broader societal and political themes.

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190. *Id.*

191. *Id.* (citing 8 Del. Code Ann. § 141(a) (West 2020) and noting that the Disney shareholders were on notice because of a publicly available internal policy on political engagement); *cf.* The Walt Disney Co., *Political Giving and Participation in the Formulation of Public Policy in the United States* 1 (2020), https://thewaltdisneycompany.com/app/uploads/2020/07/Political-Giving-and-Participation-in-the-Formulation-of-Public-Policy-2020.pdf [https://perma.cc/WF29-827E]. For a response to this line of arguing, see Bebchuk & Jackson, *supra* note 175, 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").

192. Simeone v. Walt Disney Co., 302 A.3d 956, 970 (Del. Ch. 2023).

193. *Id.*

194. *Id.* at 969–70.

195. *Id.* (citing, among other things, Revlon Inc. v. MacAndrews & Forbes Holdings., Inc., 506 A.2d 173, 182 (Del. 1986): "[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 159.

196. *Id.* at 971. *Cf.* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010).

197. *Simeone*, 302 A.3d at 972.

198. *Id.*

199. *Id.*

200. Simmons, *supra* note 37, at 713–14 (framing corporate governing as a risk management issue).

(1) On the corporate front, is there a business case for corporate governing—i.e. does it enhance a firm's value? (2) If so, does it make strategic sense for a corporation to pursue corporate governing?

(3) More broadly, does corporate governing help social activists' causes, and does society benefit from it? (4) Are democratic institutions endangered by corporate political activity?

Part IV addresses these essential normative questions while Part V addresses the promises and risks associated with corporate governing.

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 ultimately an empirical question, which a burgeoning literature in various disciplines, including marketing, management, 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[201] and Ben & Jerry's,[202] which have led the way in doing well by doing good,[203] there may be an Anheuser-Busch[204] or a P&G[205] miscalculating risks and benefits around a corporate governing initiative.

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201. 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 & MKTG. 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 (on file with the *Journal of Corporation Law*).

202. Jordyn Holman & Thomas Buckley, *How Ben & Jerry's Perfected the Delicate Recipe for Corporate Activism*, BLOOMBERG (July 22, 2020), https://www.bloomberg.com/news/features/2020-07-22/how-ben-jerry-s-applied-its-corporate-activism-recipe-to-blm (on file with the *Journal of Corporation Law*); Alison Beard, *Why Ben & Jerry's Speak Out*, HARV. BUS. REV. (Jan. 13, 2021), https://hbr.org/2021/01/why-ben-jerrys-speaks-out [https://perma.cc/C4UP-5J6E].

203. Joon Soo Lim & Cayley Young, *Effects of Issue Ownership, Perceived Fit, and Authenticity in Corporate Social Advocacy on Corporate Reputation*, 47.4 PUB. RELS. REV., no. 4, 2021, at 1 (analyzing Ben & Jerry's social media activity and finding that perceived authenticity and perceived fit are positive predictors for corporate reputation).

204. *See supra* notes 12–15 and accompanying text.

205. 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 NIM MKTG. INTEL. REV., no. 2, 2021, at 18, 24.

Corporations elicit different reactions from their engagement in the social front. Yet, this is not something to be particularly surprised by. 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."[206] This is why it works for some companies and brands but not for others.

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.

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."[207] 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.[208]

In any event, determining what divides society (and by how much) is not necessarily always easy because society's political beliefs derive from historical context and always

206. 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").

207. Tommaso Bondi, Vanessa Burbano & Fabrizio Dell'Acqua, *When (Not) to Talk Politics in Business: Theory and Experimental Evidence*, STRATEGIC MGMT. J. (forthcoming 2024) (manuscript at 32), https://www.tommasobondi.com/_files/ugd/31323e_8bcfa417e3e140deb5cd3d6a3c878e93.pdf [https://perma.cc/QKL4-WJ3R].

208. Anahit Mkrtchyan, Jason Sandvik & Da Xu, *Employee Responses to CEO Activism*, 78 J. ACCT. & ECON., no. 1, 2024, at 101701, 34. *See also* Toniolo, *supra* note 20, at 364 (mentioning that PR firm Zeno advised corporate clients against making statements on abortion, arguing it to be a "no-win" scenario where any position taken could risk alienating 15–30% of stakeholders).

evolve (and sometimes resolve) through time.[209] Moreover, if well played, *some* degree of controversy can help a brand.[210]

The specific history of the corporation and its broader goals matter significantly, as the Patagonia, Ben & Jerry's, P&G, and Anheuser-Busch stories illustrate. Moreover, according to studies by scholars in the marketing and management disciplines, the corporation's message must be perceived as authentic by the public.[211] For instance, Nike's bold political stances attract less attention than other companies because of the company's long history of tackling hot-button issues.[212] 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.[213] 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 trust the brand on social issues, they buy the products—seven out of ten customers even advocate for the brand.[214] Other studies show similar results: while market-driven companies are better off abstaining from taking a stand, companies face greater risk in terms of market perception if they remain silent on pressing social issues.[215] This Article argues that staying silent on a pressing issue is, in

209. Bhagwat, Warren, Beck & Watson, *supra* note 21, at 2.

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

211. Henri Servaes & Ane Tamayo, *The Impact of Corporate Social Responsibility on Firm Value*, 59 MGMT. SCI. 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, at 78 ("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."); 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 201, at 450; Lim & Young, *supra* note 203, at 2 (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, 48 (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., no. 2, 2023., at 49. For the argument that stakeholder's ability to "distinguish genuine dedication from marketing slogans" can create value for a firm that commits not to exploit its stakeholders, see Spamann & Fisher, *supra* note 120, at 8.

212. Fournier, Srinivasan & Marrinan, *supra* note 205, at 22–24.

213. Nathalie Spielmann, Susan Dobscha & L. J. Shrum, *Brands and Social Justice Movements: The Effects of True versus Performative Allyship on Brand Evaluation*, 8 J. ASS'N CONSUMER RES. 83, 84 (2023).

214. *See* Mirzaei, Wilkie & Siuki, *supra* note 26, at 1 (citing Edelman research and noting that advocating for the brand is more than 20 percentage points higher than just trusting the brand on product quality (five out of ten)).

215. Daniel Korschun, Hoori Rafieian, Anubhav Aggarwal & Scott D. Swain, Taking a Stand: Consumer Responses when Companies Get (or Don't Get) Political 34 (July 5, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2806476. *See also* Fairfax, *supra* note 51, at 137 (describing corporate statements in the aftermath of the killings of George Floyd and Breonna Taylor and noting that such statements serve as a rejection of silence, which many interpret as complicity in systemic racism).

itself, a de facto statement—i.e. "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."[216] Unsurprisingly, the perceived authenticity of CEO activism is found to positively influence young consumers' relationships with the organization and their intent to purchase.[217]

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."[218] As a result, 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] such activities may appear disingenuous and may well have the opposite effect."[219] Unsurprisingly, many PR fallouts stem from initiatives perceived as opportunistic.[220]

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

Another key theme from the literature is that corporate governing initiatives must align with stakeholders' expectations and political beliefs to create value. Corporations often intervene due to bottom-up pressures from stakeholders, such as customers (e.g., consumer boycotts from LGBTQ+ groups)[221] or employees (e.g., the Disney/DeSantis feud).[222] Therefore, directors and managers must understand the corporation's operations

216. Ruby Brownen-Trinh & Ayan Orujov, *Corporate Socio-Political Activism and Investors: Evidence from the Black Lives Matter Campaign*, 80 J. CORP. FIN., Apr. 2023, at 5.

217. Jin, Mitson, Qin, Vielledent & Men, *supra* note 211.

218. Vredenburg, Kapitan, Spry & Kemper *supra* note 201. *See also* Mirzaei, Wilkie & Siuki, *supra* note 26, 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* (Eur. Corp. Governance Inst., Fin. Working Paper No. 868, 2023), http://ssrn.com/abstract=4298626.

219. Henri Servaes & Ane Tamayo, *The Impact of Corporate Social Responsibility on Firm Value: The Role of Customer Awareness*, 59 MGMT. SCI. 1045, 1058–59 (2013).

220. *Id.*; *see also* Daniel Victor, *Pepsi Pulls Ad Accused of Trivializing Black Lives Matter*, N.Y. TIMES (Apr. 5, 2017), https://www.nytimes.com/2017/04/05/business/kendall-jenner-pepsi-ad.html (on file with the *Journal of Corporation Law*); Melloni, Patacconi & Vikander, *supra* note 218, at 3103.

221. 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 56, 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).

222. 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* notes 4–10 and accompanying text.

and the expectations of the product, labor, and stock markets when evaluating a corporate governing initiative from a firm value perspective.

a. Product Market

On 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."[223] Bhagwat, Warren, Beck and Watson echo that "[c]ustomers pay attention to and make long-lasting purchase decisions based on [corporate sociopolitical activism]").[224] For instance, a field study by Chatterji and Toffel finds that consumers were more inclined to buy Apple products among participants exposed to Cook's CEO activism compared to those who were not exposed.[225] 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.[226]

To avoid fiascos such as the ones experienced by P&G and Anheuser Busch,[227] 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).[228] 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."[229]

But how big is the penalization if corporations aggravate non-likeminded consumers? It is, apparently, neither too big nor persistent. A study by Hou and Poliquin on consumer responses to gun control initiatives that corporations adopted after a 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

223. Scott Hirst, Kobi Kastiel & Tamar Kricheli-Katz, *How Much Do Investors Care About Social Responsibility?*, 2023 WIS. L. REV. 977, 1024.

224. 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*, 321 J. CLEANER PROD. 128945 (2021) (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).

225. Aaron K. Chatterji & Michael W. Toffel, *Assessing the Impact of CEO Activism*, 32 ORG. & ENV'T 159, 161 (2019).

226. *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).

227. *See supra* notes 204–05.

228. Korschun, Rafieian, Aggarwal & Swain *supra* note 215, at 32.

229. Larcker, Miles, Tayan & Wright-Violich, *supra* note 77, at 4 (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").

study finds these reputational effects dissipate rather quickly in three-to-four weeks.[230] A similar study by Jin, Merkley, Sharma, and Ton analyzes consumer reactions to firm's stands against Georgia's voting reform laws[231] and finds that customer visits, visitors, and consumer spending decreased at stores of companies that spoke out (relative to stores of other companies).[232] 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.[233] This offsetting effect also explains, according to the authors, the lack of evidence of changes in firm-level financial performance or stock market reactions.[234] A third study reviewing consumer reactions to activism statements by CEOs of S&P 500 corporations from 2014–2019 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 to otherwise identical stores of non-announcing firms."[235] The authors conclude that CEOs engage in activism not because of political beliefs but for strategic reasons to gain market share in consumer markets characterized by political polarization and identity-based consumption.[236]

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.[237] As pointed out by Professor Tom Lin, corporate governing initiatives at Walmart and JPMorgan Chase allowed the two companies to expand into new markets.[238]

The upside of getting the corporate governing initiative right can be significant. According to U.S. Bureau of Labor Statistics 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.[239]

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230. Young Hou & Christopher W. Poliquin, *The Effects of CEO Activism: Partisan Consumer Behavior and Its Duration*, 44 STRATEGIC MGMT. J. 672, 697–98 (2022).

231. *See supra* Part I.B.

232. Hengda Jin, Keneth Merkley, Anish Sharma & Karen Ton, *Customers' Response to Firms' Disclosure of Social Stances: Evidence from Voting Reform Laws*, REV. ACCT. STUD. (forthcoming) (manuscript at 4) (available at 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).

233. *Id.* at 5.

234. *Id.* at 5–6.

235. Homroy & Gangopadhyay, *supra* note 69, at 4–5 (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 5.

236. *Id.* at 34–35.

237. Melloni, Patacconi & Vikander, *supra* note 218, at 3103 (citing Apex Marketing calculations).

238. *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).

239. *See* Fan, *supra* note 25, at 454 (citing empirical literature).

b. Labor Market

On the labor market front, "[s]ocial demand has made executing on ESG issues essential to attracting and retaining talent."[240] Corporate socioeconomic advocacy can enhance employees' connection to their organizations and reinforce shared beliefs in the workforce. A study by Alex Edmans finds that employee satisfaction predicts positive returns.[241] Furthermore, a recent study by Mkrtchyan, Sandvik, and Xu finds that employee satisfaction increases when CEOs actively advocate for diversity and pay equality.[242] Companies with CEOs engaged in activism tend to attract more productive inventors, signaling an enhanced reputation in the labor market.[243] 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.[244]

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 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."[245] In Burbano's field experiment, the demotivating effect resulted in less quality and quantity of work for the employer.[246] A study by Wowak, Busenbark, and Hambrick focusing on employee reactions to CEO's political messaging following North Carolina's "Bathroom Bill"[247] reaches partially similar results. Similar to Burbano's findings, when the employee population is less liberal than the CEO, the response can negatively impact organizational commitment.[248] However, unlike Burbano, the authors find that when the

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240. Michal Barzuza, Quinn Curtis & David H. Webber, *The Millennial Corporation: Strong Stakeholders, Weak Managers*, 28 STAN. J.L. BUS. & FIN. 255, 275–76 (2023) (citing empirical literature).

241. Alex Edmans, *Does the Stock Market Fully Value Intangibles? Employee Satisfaction and Equity Prices*, 101 J. FIN. ECON. 621, 623 (2011).

242. Mkrtchyan, Sandvik & Xu, *supra* note 208.

243. *Id.*

244. *See generally* M.V. LEE BADGETT, LAURA E. DURSO, ANGELIKI KASTANIS & CHRISTY MALLORY, THE BUSINESS IMPACT OF LGBT-SUPPORTIVE WORKPLACE POLICIES 1 (2013), https://williamsinstitute.law.ucla.edu/publications/impact-lgbt-supportive-workplaces [https://perma.cc/6V7G-WRWY].

245. 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

> [I]ndividuals 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 (citations omitted).

246. *Id.* at 1020. Workers were surveyed on sociopolitical topics at the end of each of two translation jobs on an online work platform called Upwork. At the end of the second job, they were told of the employer's own positions on such topics. *Id.*

247. 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 ADMIN. SCI. Q. 553 (2022).

248. *Id.* at 574 ("[T]he more conservative the employee population, the greater the decrease in organizational commitment.").

employee population aligns with the CEO's politics, the response to CEO activism is generally positive and strengthens the employees' affiliation with the underlying political cause.[249]

In any event, some studies suggest that CEO/employee ideological clash isn't necessarily negative. 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."[250] This can facilitate the attraction-selection-attrition process, attract more like-minded talent, and positively impact firm commitment and cohesion.[251]

c. Stock Market

The stock market may reward corporations that pick the fitting corporate governing strategy. To begin, studies show that investors are attracted to high-sustainability investments.[252] Yet, the bigger question is whether good social performance impacts or at least correlates with good financial performance. This Article found no studies that support a causation claim from the former to the latter, but some 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.[253] Similarly, Ferrell, Liang, and Renneboog find correlation between social responsibility scores and firm valuation.[254] 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.[255]

Another set of studies tracks cumulative abnormal returns after corporate actions or announcements with pro-social goals and finds a correlation between corporate governing and stock returns. A 2023 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[256] and "an increase in institutional ownership, especially among investors with a higher Democratic-leaning and greater inequality aversion, who rebalance

249. *Id.* at 574–75, 580–81.

250. Mkrtchyan, Sandvik & Xu, *supra* note 208, at 4.

251. *See generally* Donald C. Hambrick & Adam J. Wowak, *CEO Sociopolitical Activism: A Stakeholder Alignment Model*, 46 ACADEMY MGMT. REV. 33 (2021). *See also* Toniolo, *supra* note 20, at 365 (mentioning that Melissa Hobley, Match Group's global chief marketing officer, emphasized the economic and competitive implications of speaking out against the *Dobbs* decision, particularly for industries like tech, law, and finance, which rely heavily on competing for female professionals).

252. 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").

253. ALEX EDMANS, GROW THE PIE: HOW GREAT COMPANIES DELIVER BOTH PURPOSE AND PROFIT 105–06, 112 (2022).

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

255. *See generally* 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. 100664 (2022).

256. Anahit Mkrtchyan, Jason Sandvik & Vivi Zhu, *CEO Activism and Firm Value*, 70 MGMT. SCI. 6519 (2023).

their portfolios to place greater weight on firms with activist CEOs."[257] 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.[258] Similarly, a study by Homroy and Gangopadhyay analyzing activism statements by CEOs of S&P 500 corporations from 2014–2019 shows that investors react positively to CEO activism: "[I]n the three-day event windows around CEO social activism, the average cumulative abnormal return is 0.12%."[259] The study also finds that firms that speak out face a lower risk of shareholder activism on ESG issues than the other firms.[260] Dammann and Lawrence explore price reaction to the Business Roundtable Statement on Corporate Purpose[261] and find that signatories to the Statement experienced abnormal returns compared to other corporations.[262]

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.[263] Durney, Johnson, Sinha, and Young have run an experiment to show that investors purchase more stock when they agree with the CEO's activism and less stock when they disagree.[264] Chen, Dechow, and Tan find that firm activism surrounding Black Lives Matter has had little impact on shareholder value.[265]

A survey of studies between 2015 and 2020 on ESG investing covering thousands of underlying studies displays mixed results: "[T]he financial performance of ESG investing has on average been indistinguishable from conventional investing (with one in three studies indicating superior performance)."[266]

Despite the lack of consensus on whether, on average, corporate governing increases share value, a preponderance of the evidence does not find a negative 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 antiracist messaging that appeals to

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257. *Id.* at 6539.

258. *Id.* (noting, however, that the price reaction is quite modest).

259. Homroy & Gangopadhyay, *supra* note 69, 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").

260. *Id.*

261. *See* Dammann & Lawrence, *supra* note 140, at 590–91.

262. *Id.*

263. Bhagwat, Warren, Beck & Watson, *supra* note 21, at 11–12, 16 (conceding that in some instances such activism proves quite advantageous).

264. Michael T. Durney, Joseph A. Johnson, Roshan K. Sinha & Donald Young, CEO (In)Activism and Investor Decisions (Dec. 22, 2022) (unpublished manuscript), 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).

265. A.J. Chen, Patricia M. Dechow & Samuel T. Tan, *Beyond Shareholder Value? Why Firms Voluntarily Disclose Support for Black Lives Matter* 19 (Rsch. Collection Sch. of Acct., Working Paper No. 10.2139, 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).

266. Urlich Atz, Tracy Van Holt, Zongyuan Zoe Liu & Christopher Bruno, *Does Sustainability Generate Better Financial Performance? Review, Meta-analysis, and Propositions*, 13 J. SUSTAINABLE FIN. & INV. 802 (2022) (reviewing 1,141 primary peer-reviewed papers and 27 meta-reviews based on around 1,400 underlying studies).

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 any event, corporate governing as described throughout this Article is voluntary in nature and seems to work for some of its adopters—the absence of strong evidence pointing to its undesirability across the board, makes it a hard sell to propose limitations based on business grounds.[267]

In sum, depending on context, corporate governing can add value to some corporations by improving their ability to attract top talent or maintain strong relationships with their customers. None of this should be too controversial, as Alex Edmans neatly pointed out:

> Finance 101 has always stressed how a company's worth is the present value of all its cash flows, including those in the very distant future. A company's relationships with its employees, customers, communities, suppliers, and the environment are highly value relevant; there's nothing particularly cultish, liberal, or—dare I say it—"woke" in considering them.[268]

3. Who Knows Better than Corporations?

By being actively engaged in the field, corporations are supposed to have a good understanding of their operations and 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 the knowledge and expertise necessary to navigate risks and rewards in connection with such initiatives. Of course, many 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, a corporate governing initiative might backfire in hindsight.[269] Yet, when the decision to undertake an initiative is made, one would assume disinterested management has gathered reasonably sufficient information to value the pros and cons and decide accordingly. Mistakes do happen, but companies are better situated than external actors to assess the underlying risk/reward proposition—this is why the business judgment rule ultimately exists.[270]

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267. To be sure, I am aware of the general caution warranted in interpreting empirical studies in such a charged field (*see* Spamann & Fisher, *supra* note 120, at 16, discussing factors contributing to the "widespread awareness of a credibility problem in empirical research in the social sciences"); however, it is incumbent upon critics of the phenomenon to present empirically tested reasons for curbing the voluntary adoption of corporate governing initiatives. *Cf. id.* at 17 (hypothesizing that policies like purpose statements may only work for the firms that have adopted them voluntarily)

268. Alex Edmans, *The End of ESG*, 52 FIN. MGMT. 3, 5 (2023).

269. *See infra* Part IV.B.

270. *Cf.* Gagliardi v TriFoods Int'l, Inc., 683 A.2d 1049, 1051–52 (Del. Ch. 1996). In this decision, Chancellor Allen famously explained that shareholders prefer directors to undertake all positive net present value projects, including those with higher risks, as this maximizes their investment interests. Consequently, corporate officers or directors should not be held personally liable for losses from decisions made in good faith without self-dealing or improper motives, to encourage rational risk-taking.

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:

> 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 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.[271]

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 governing practices can be properly assessed.

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 initiatives 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/long-term dichotomy, which is well-known to corporate governance scholars.[272] 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/DEI" campaigns by conservatives, which culminated in passing legislation of various sorts seeking to thwart ESG efforts and in litigating DEI initiatives.[273] Also, as I illustrate below,

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271. Doug Chia, *Guardians of the VSM Galaxy, Vol. 2*, SOUNDBOARD GOVERNANCE (May 19, 2023), https://www.soundboardgovernance.com/post/guardians-of-the-vsm-galaxy-vol-2 [https://perma.cc/U52P-8HZA] (emphasis added).

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

273. *See generally* Lisa Fairfax, *For Corporate Hypocrisy*, 50 J. CORP. L. (forthcoming 2025) (arguing that a company's decision to remain silent on social and political issues may reflect a calculated cost-benefit analysis,

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,[274] as with the Disney/DeSantis quarrel.[275] 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,[276]) 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 litigation, boycotts and even violent threats.[277] 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.[278] More recently, the war in Gaza has highlighted the strategic risk for corporations to get involved in complex geopolitical disputes.[279]

Nevertheless, at a closer look, although strategic risk is considered, the normative merits of corporate governing remain similar to those seen in the business context. While certain issues may cause political or long-term backlash, not all corporate governing activities will face such outcomes, as some issues are less risky, and some corporations are better equipped to handle them.

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deeming the risks of backlash too significant to justify taking a stance). *See also* Fairfax, *supra* note 51, at 201-202 (noting that a political and cultural backlash against diversity and equity initiatives, including opposition to critical race theory and DEI policies, has created significant challenges for corporations in sustaining their commitments to racial equity and inclusion). For a survey of recent anti-ESG legislation, see generally Stefan J. Padfield, *An Introduction to Anti-ESG Legislation*, 24 TENN. J. BUS. L. 291 (2023). For anti-DEI efforts, see *supra* note 17 and accompanying text.

274. 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. *See also* Fisch & Schwartz, *supra* note 30, at 344–45.

275. *See supra* notes 1–10 and accompanying text.

276. Florida retaliated against Disney by revoking special tax and other benefits the company had been enjoying for over 50 years. *See supra* note 9 and accompanying text. A Section 220 DGCL claim by a Disney Stockholder 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 v. Walt Disney Co., 302 A.3d 956, 962–63 (Del. Ch. 2023).

277. *See supra* notes 12–15, 156 and accompanying text.

278. *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 [https://perma.cc/LHU6-5D2U].

279. *See* Paul Musgrave, *Brands Are the First Causality of War*, FOREIGN POL'Y (Nov. 24, 2023), https://foreignpolicy.com/2023/11/24/war-coke-brands-mcdonalds-palestine-israel/ [https://perma.cc/4QKG-CAVL] (providing a historical overview of how different international brands have navigated their associations during war times).

Moreover, even if some backlash occurs, it is likely that corporations have either accounted for and accepted the associated risks[280] or prepared counternarratives and contingency plans.[281] Professional senior executives, or those they oversee, are equipped to manage reputational risks and capitalize on successful corporate governing initiatives.[282] Contrary to the notion of hasty, politically motivated actions, these initiatives are carefully planned with structures and safeguards to mitigate risks.[283]

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."[284] In their view, CEO activism has become increasingly widespread for three reasons: high polarization, the importance of sociopolitical factors to consumers, and low profit margins.[285] 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.[286]

Overall, commentators should avoid advocating for blanket approaches simply because corporate governance alienates some politicians. Sometimes, upsetting state or local politics may precisely be the goal corporations have in mind when they do public policy advocacy.[287] Additionally, 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 Governor DeSantis because of pressures from stakeholders.[288] 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.

280. *See, e.g.*, Ann Lipton, *The Revolution Will Be Marketed*, BUS. L. PROF BLOG (Sept. 8, 2018), https://www.businesslawprofessors.com/2018/09/the-revolution-will-be-marketed [https://perma.cc/K83D-CR5B] (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").

281. Chatterji & Toffel, *supra* note 211, 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 69.

282. Simmons, *supra* note 37, at 714. *Cf. also* Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1410 (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").

283. Simmons, *supra* note 37, at 734. Even when politicians at the highest office decide to retaliate, businesses might avoid significant repercussions. *See* Chatterji & Toffel, *supra* note 211, 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").

284. Melloni, Patacconi & Vikander, *supra* note 218, at 3116.

285. *Id.*

286. *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").

287. *See supra* note 21 and accompanying text. *See also supra* note 276.

288. *See supra* note 3 and accompanying text.

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 straightforward. If they decide to partner with corporations, it's because they expect to achieve goals they couldn't otherwise reach alone.[289] From their perspective, corporate governing is a strategic partnership to obtain results in high-stakes issues.[290] As long as activists see the collaboration as beneficial, they will engage with corporations and seek their involvement. Should they find corporate governing counterproductive, they have the power to end it. While corporations often employ fake grassroots movements to build misleading narratives,[291] genuine social activists can keep corporations honest and reject initiatives misaligned with their mission. It takes two to tango, and if activists continue the partnership, it's because they believe corporate governing works in their strategic calculus.

The effectiveness of corporate governing for social activism can be assessed based on past successes in addressing pressing policy issues. Some corporations have shown a commitment to social causes and have delivered results, suggesting that corporate governance can promote social change. Examining past achievements can provide insights into the potential of corporate governing to drive meaningful change. Both anecdotal and empirical evidence demonstrate that corporate governance has successfully garnered public support for policy purposes, such as LGBTQ+ rights[292] and related issues.[293]

2. Civil Society and the Dissenter Rights Issue

Assessing whether civil society benefits from corporate governing is challenging due to the difficulty in precisely defining the category (immediate stakeholders vs. the broader

289. *See* Lin, *supra* note 25, 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.").

290. Corporations and their CEOs help social causes make headlines, which is valuable to social activists. *See* Chatterji & Toeffel, *supra* note 225, 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."). In addition, CEO's help persuade the public, which is also valuable to social activists. *See id.* ("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.").

291. *See* BRAITHWAITE & DRAHOS, *supra* note 128.

292. *See, e.g.,* BALL, *supra* note 56, at 95–125 (describing the extension of corporate benefits to domestic partnership in the 1990s); Fan, *supra* note 25, at 476–83; Sanjukta Brahma, et al.Konstantinos Gavriilidis, Vasileios Kallinterakis, Thanos Verousis, Mengyu Zhang, *LGBTQ and Finance*, 86 INT'L. REV. FIN. ANALYSIS, Feb. 7, 2023, at 8–9.

293. Chatterji & Toeffel, *supra* note 211, at 82 (citing initiatives to thwart religious bills in various states).

population) and measuring the impact of corporate governance initiatives on civil society. Political views inevitably influence perceptions of corporate governance: as former Chief Justice Leo Strine noted, people tend "to like corporate conduct that echoes their beliefs and to call corporate conduct discordant with their beliefs illegitimate."[294] Also, one's philosophy as to the role of corporations in society matters. Advocates of market-based solutions may see corporate governance as an effective way to address societal issues without extensive government intervention,[295] while critics argue that shareholders lack opt-out mechanisms when they disagree with a corporation's political stance.[296]

Some in society will inevitably oppose a corporate governing initiative, regardless of its popularity[297]—after all, unanimity is impossible to achieve.[298] Yet this raises understandable concerns, which this Article refers to as "dissenter's rights."[299] Just like with any other corporate action, there will be shareholders, employees, or broader societal members who disagree and feel uncomfortable with a corporate governing initiative. To illustrate this, I use the following roadmap to track the impact of corporate governing on various constituencies:

i) Investors. While some shareholders, even those prioritizing only wealth maximization,[300] may benefit from corporate governing,[301] others might 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 use the Wall Street rule and sell the stock to invest in an issuer more aligned with their beliefs. This is eminently a corporate governance problem for which some in the literature have proposed solutions.[302]

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294. Strine, *Good Corporate Citizenship*, *supra* note 29, at 346.

295. *See, e.g.*, Lipton, *supra* note 118 (supporting stakeholderism as a recipe to avoid more pervasive governmental regulation).

296. *See, e.g.*, Brief for Corporate Law Professors as Amici Curie Supporting Respondents, *supra* note 186, at 5; Bebchuk & Jackson, *supra* note 175.

297. *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-problem-of-social-justice-.html [https://perma.cc/C4QX-7JWR] (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.").

298. Strine, *Good Corporate Citizenship*, *supra* note 29, 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.").

299. 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 id*. at 355–60.

300. 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 29.

301. *Compare*, *supra* Part A (discussing the business case), *and supra* Part B (discussing the strategic case), *with* Masconale & Sepe, *supra* note 30, at 305 ("Corporate activism increases, rather than reduces, shareholder value.").

302. *See generally* Bebchuk & Jackson, *supra* note 175 (discussing corporate political spending and proposing various measures including disclosures, independent director approval, and shareholder approval). *See also* Strine, *Good Corporate Citizenship*, *supra* note 29, at 363–69 (proposing a series of measures as guardrails against executive abuses).

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),[303] 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 view of the employer.[304] 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.[305]

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.[306] Additionally, corporations that embrace social responsibility through their initiatives can influence societal values, norms, and ultimately policymakers.[307] But again, some citizens will be outraged by corporations for using their powers to influence society in this manner.[308] This Article addresses this dissenter's rights objection in Part V.[309]

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 catalysts 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

303. Lin, *supra* note 25, at 1573. *See also* the literature cited *supra* Part IV.A.2.B. *See supra* Part I.A for a description of selected initiatives that benefit such categories.

304. Masconale & Sepe, *supra* note 30, at 265; Fisch & Schwartz, *supra* note 30, at 349.

305. Masconale & Sepe, *supra* note 30, at 265. *See also* Strine, *Good Corporate Citizenship*, *supra* note 29, at 356–57. *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).

306. Lin, *supra* note 25, 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.").

307. *Cf.* Kahan & Rock, *supra* note 105, 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 substitute for the regulation of externalities blocked by political dysfunction blocks, it may, somewhat ironically, ultimately have a greater impact on improving our politics than on changing private enterprise.").

308. 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 29, at 329, 344.

309. *See infra* Part V.B.2.

in the United States says something profound—about American tribalism, the demise of political cooperation, and the rise of a sort of liberal corporatocracy."[310]

Before addressing in Part V some of the risks associated with this problematic issue, key aspects are helpful to frame the analysis. First, the presence of unelected policymakers raises concerns. Legal scholars such as Professors Lin,[311] Masconale & Sepe,[312] Bainbridge,[313] and Fisch & Schwartz,[314] echoing fund literature by Coates[315] and Lund,[316] 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.[317]

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.[318] 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.[319] In this regard, the concept of "supercitizens" introduced by Professors Masconale and Sepe inserts another layer to the normative analysis.[320] 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 the public to shape policy outcomes.

Finally, and most importantly, delegating too much to corporations while sidelining traditional politics demands careful consideration. If corporations increasingly assume roles traditionally reserved for government bodies, it could erode the accountability and transparency mechanisms inherent to democratic governance. Part V delves into this critical issue, along with all trade-offs associated with corporate governing.

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310. Derek Thompson, *Why Are Corporations Finally Turning Against the NRA?*, THE ATLANTIC (Feb. 26, 2018), https://www.theatlantic.com/business/archive/2018/02/nra-discounts-corporations/554264 [https://perma.cc/J6AS-QZSE]; Fan, *supra* note 25, at 471.

311. Lin, *supra* note 25, at 1588 (mentioning corrosion of democratic values).

312. *See generally* Masconale & Sepe, *supra* note 30, at 305–11.

313. BAINBRIDGE, *supra* note 30, at 150.

314. Fisch & Schwartz, *supra* note 30, at 343–46.

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

316. Lund, *supra* note 28, at 140–42.

317. *See infra* Part V.B.

318. *See supra* Part II.A.3.

319. *See, e.g.*, Bebchuk & Jackson, *supra* note 175, at 93 (describing who should have the power to decide how a corporation engages in political speech); Strine, *Good Corporate Citizenship*, *supra* note 29, at 332–33 (describing the processes corporations should have to work through to spend their money towards political ends).

320. *See* Masconale & Sepe, *supra* note 30, at 282–85 (describing the concept of supercitizens).

V. THE PROMISES AND RISKS OF CORPORATE GOVERNING

With the groundwork laid out in Part IV, this part analyzes the promises and risks associated with corporate governing. This Article applies separate analyses by looking from a corporation perspective first (Part V.A) and then from a societal one (Part 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.[321] 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,[322] 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-savings through smarter energy practices;[323] the Big Three managed to lure younger generations into responsible investing;[324] Lyft swayed clients from Uber in the immediate aftermath of Trump's Muslim ban;[325] Nike's market share soared after offering an endorsement deal to Colin Kaepernick.[326] Likewise, initiatives promoting sustainability or DEI can impress job candidates, facilitate talent recruitment, and improve the level of the workforce.[327] Such initiatives also boost morale among existing employees who support them[328]—in some cases, existing employees are the actual initiators of the initiatives.[329] The above advantages, which may cumulate, are expected to reverberate in the results of the corporation for the benefit of shareholders, as empirical studies suggest.[330]

2. Risks to Corporations

While corporate governing offers advantages, it also presents risks. One primary risk is the infringement of dissenter's rights, meaning the alienation of stakeholders who hold

321. As indicated in *supra* Part 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.

322. *See supra* notes 197–98.

323. Lin, *supra* note 25, at 1580.

324. *See generally* Barzuza, Curtis & Webber, *supra* note 28.

325. 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 [https://perma.cc/28FY-QUEN].

326. *See* Kovvali, *supra* note 29, at 742.

327. 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 [https://perma.cc/XTP8-79CZ]; 2023 GEN Z AND MILLENNIAL SURVEY, DELOITTE, https://www.deloitte.com/global/en/issues/work/content/genzmillennialsurvey.html [https://perma.cc/3X9U-FSVL]; *see supra* Part IV.A.3.b.

328. *See generally* Edmans, *supra* note 241.

329. *See supra* Part II.A.1.a.

330. *See* the literature cited *supra* Part IV.A.3.c.

political views opposite to the corporate action in question. This can lead to unhappy workers and potential backlash from other stakeholders.[331] Examples of these fallouts abound: from Bud Light and Target,[332] to companies whose executives took an advisory role during Trump's first Presidency.[333] This risk is even greater now that conservative groups are targeting corporations they consider too "woke" with online campaigns and boycotts.[334]

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.[335] 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,[336] let alone to make enemies among politicians, as this could result in increased regulatory scrutiny, investigations, and counter-activism.[337] The Disney/DeSantis feud is an example of how the risk of becoming a prominent target for regulation and counter-activism can escalate.[338]

Depending on 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 on a zero or negative-sum initiative. Public opinion preferences on polarizing policy issues are of course ever-changing 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.[339] When a corporation decides to pursue a broad agenda that goes against the preferences of shareholders or stakeholders, existing governance mechanisms may struggle to hold executives and boards accountable, especially when it is not exactly clear to whom

331. *See supra* notes 304–06 and accompanying text.

332. *See supra* notes 12–15 and accompanying text.

333. 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 [https://perma.cc/E2KB-8Z54] (mentioning backlash at Under Armour, LL. Bean, and New Balance for their CEO's associations with Trump).

334. *See supra* Part IV.B.

335. *See, e.g.*, Friedman, *supra* note 111; Bebchuk & Jackson, *supra* note 175, at 112; Brief for Corporate Law Professors as Amici Curie Supporting Respondents, *supra* note 186, at 4–5; Strine, *Good Corporate Citizenship*, *supra* note 29, at 331; BAINBRIDGE, *supra* note 30, at 92.

336. *See* Bainbridge, *supra* note 176; Fisch & Schwartz, *supra* note 30.

337. *See* Lin, *supra* note 25, 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.").

338. *See supra* notes 1–10 and accompanying text.

339. *See generally* Bebchuk & Jackson, *supra* note 175; Brief for Corporate Law Professors as Amici Curie Supporting Respondents, *supra* note 186. *See also* Strine, *Good Corporate Citizenship*, *supra* note 29, at 351–52.

they should be. As lines of accountability become hazier, the system may lack the necessary checks and balances to ensure transparency[340] and responsible decision-making.[341]

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

1. Promises to Society

Corporate governing offers unique benefits for achieving 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 resources and expertise, corporations can step in and offer practical solutions to societal challenges.[342]

Flexibility and Speed: Corporations can respond quickly and adaptively to emerging issues, unlike the slow, bureaucratic nature of politics. This agility allows them to address pressing concerns with innovation, bypassing legislative and regulatory delays.[343]

Knowledge. Corporations often possess superior expertise and data, particularly in technology.[344] They can leverage this knowledge through their powerful advertising arms to shape public opinion.[345] A diverse workforce and management team further enhance their ability to navigate complex social issues effectively.[346]

Amplifying Grassroots Activism. Engaging with corporations can help grassroots activists exert significant pressure and gain media coverage for their causes.[347] Corporate partnerships amplify activists' voices, benefiting from the corporations' influence and reach.

Conduit to Actual Reform: Corporate initiatives can serve as necessary steps toward broader reform. First movers can level the playing field, forcing competitors to adhere to new norms.[348] Corporate actions can also prompt politicians to recalibrate their

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340. For instance, because the corporate and securities law system does not offer adequate remedies for misleading statements that do not meet a materiality test. *See generally* 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*, *in* ACCOUNTING, ACCOUNTABILITY AND SOCIETY 151 (Mara Del Baldo et al. eds, 2020) (quoted by BAINBRIDGE, *supra* note 30, at 87). *See also* Baker et al., *supra* note 218.

341. *See infra* Conclusion (providing a sketch of some corporate governance fixes to improve corporate governing).

342. Fan, *supra* note 25, at 471; Lin, *supra* note 25, at 1574–75; Kovvali, *supra* note 29, at 23–34; Kahan & Rock, *supra* note 105, at 52; Strine, *Restoration*, *supra* note 29, at 434.

343. *See, e.g.,* Kovvali, *supra* note 29, at 23–24.

344. Simmons, *supra* note 37, at 766.

345. *Id.*

346. *Cf.* Barzuza, Curtis & Webber, *supra* note 28, at 21–22; DELOITTE, *supra* note 327. Lin, *supra* note 25, at 1574–78.

347. Lin, *supra* note 25, at 1575–76.

348. Kahan & Rock, *supra* note 105, 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).

positions,[349] and multinational companies can set transnational practices, bypassing international coordination issues.[350]

Private Sector in America: In the United States, the private sector is seen as a more fertile ground for change than traditional politics, driven by individualistic ideologies[351] and a changing workforce, especially in high-profile industries like technology.[352]

The Only Game in Town: For liberals and progressives, corporations may represent the only viable avenue of reform in some conservative states or when national politics lean right. Partnering with Corporate America can help secure or protect fundamental rights when political support is lacking[353]

In general, the purpose of corporate governing is to address societal issues that politics cannot or will not fix. From a societal standpoint, corporate governing helps tackle pressing policy issues when Congress fails to act swiftly or at all.

Corporate initiatives have achieved significant results, such as: Crucial wins for the LGBTQ+ movement at the national level;[354] JPMorgan Chase's commitment to revitalize Detroit, resulting in increases in real per capita income and "gross city product," with similar initiatives planned for other cities;[355] Corporate America's response to Parkland and subsequent shootings, which significantly changed the perception of the gun industry within public opinion and the capitalist establishment;[356] Businesses pledging an aggregate of $50 billion to fight racial inequality following the murder of George Floyd;[357] Increased diversity in corporate boards compared to a few years ago.[358]

While these initiatives alone cannot solve all problems, incremental improvements of this sort are better than no improvements.

349. Kovvali, *supra* note 29, at 34.

350. Lund, *supra* note 28, at 77. 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.

351. Kovvali, *supra* note 29, at 33–34.

352. *See,* Fan, *supra* note 27, at 983–84. *See also* Lund, *supra* note 28, at 131 (noting that "although intellectual support for privatization has somewhat receded somewhat in modern times, it remains an important part of the []policymaker's toolkit").

353. 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 LGBTQ+-friendly practices). *See supra* Part I.A.2 (providing examples of salient corporate governing actions during the first Trump presidency).

354. *See generally* BALL, *supra* note 56 (chronicling how big business became an important ally to promote marriage equality and rebuke discriminatory laws and regulations).

355. LIN, supra note 32, at 110–13 (citing data collected by the Chicago Federal Reserve).

356. *Id*. at 3–4.

357. However, whether the pledges translated into real progress is unclear given the lack of transparency on the implementation of the various initiatives; also, the bulk of the pledged money (around $45 billion) is for home ownership programs at JPMorgan 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 [https://perma.cc/5A8J-5NHT].

358. Fairfax, *supra* note 51, at 166–68.

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 Part closes with an assessment of the most problematic among them.

Undemocratic for Lack of Accountability and of Representativeness: A primary concern is the lack of accountability of corporate executives and managers who make policy choices without being elected.[359] This is seen as undemocratic because decision-makers are not representative of society,[360] often coming from privileged backgrounds and skewed white and male.[361]

Divisiveness and Lack of Pluralism: Corporate governing initiatives can alienate significant parts of the workforce and society[362] and reinforce the idea that many Americans lose their fundamental freedoms while at work.[363] This divisiveness creates lose-lose situations: either alienate some by speaking out or alienate others by staying silent.

Partial Reach of Corporate Governing: Corporate governing is inherently partial, often benefiting only the stakeholders of particular firms, mostly large and public corporations,[364] often with certain characteristics of their CEOs.[365]. A theory in support is that

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359. *See, e.g.*, Masconale & Sepe, *supra* note 30, at 305–11; John Coates IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223 (2015) (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 315, at 5–6; Lund, *supra* note 28, at 137.

360. *See* Friedman, *supra* note 111, at 17 ("[T]hose 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 105, at 53 ("[Welfarism] may ultimately have a greater impact on improving our politics than on changing private enterprise.").

361. *See generally* Jill E. Fisch, *The "Bad Man" Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593 (2006) (discussing how corporate executives often represent a narrow segment of society—privileged, white, and male—and as such lack broad representativeness, making their influence over public policy decisions disconnected from the diverse society they are meant to serve); Ronald J. Gilson, *Corporate Governance Versus Real Governance*, 34 J. APPL. CORP. FIN. 8, 11 (2022); Strine, *Good Corporate Citizenship*, *supra* note 29, at 354.

362. *See supra* Part V.A.2.

363. Drawing on ANDERSON, *supra* note 305; *see* Strine, *Good Corporate Citizenship*, *supra* note 29, at 355–57 (noting "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").

364. Yaron Nili & Kobi Kastiel, *The Corporate Governance Gap*, 131 YALE L.J. 782 (2022) (finding that larger corporations care more about corporate governance than smaller ones); Alperen A. Gözlügöl & Wolf-Georg Ringe, *Private Companies: The Missing Link on The Path to Net Zero*, 22 J. CORP. L. STUD. 887 (2023) (noting that while public corporations make and honor climate commitments, private ones generally do not); Toniolo, *supra* note 20, at 369-70 (summarizing empirical literature finding that firm characteristics such as larger size, higher CSR index, greater R&D expenses, stock volatility, market value, and more women on the board positively correlate with activism, while higher leverage is negatively associated with it).

365. *Id.* at 369 (summarizing empirical literature finding that CEOs who are powerful, younger, celebrity figures, narcissistic, or from underrepresented groups (e.g., women, BIPOC, LGBTQ) are more likely to engage in activism).

firms want self-imposed regulation because it helps those with the bigger size.[366] Similarly, one can argue that corporate governing can only be "afforded" by those in non-competitive markets.[367] 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.[368]

Flaky Corporate Governing: Corporations may lose interest and roll back corporate governing due to various factors, such as conservative push-back (like Walmart recently did with respect to DEI matters),[369] diminished investor pressure on ESG matters,[370] and changes in socioeconomic activism trends. Activist shareholders and market pressures might also drive corporations to drop social activism to avoid alienating politicians or large portions of the electorate.

Opportunistic Corporate Governing: Relatedly, corporations might only intervene when convenient or without fear of backlash, often avoiding religious or socially conservative causes.[371] They may take tepid initiatives to appease large asset managers while avoiding more contentious issues.[372] Professor Dorothy Lund notes, for example, that containing sexual harassment has not been high on the agenda of the Big Three.[373] Similarly Professors Barzuza, Curtis, and Webber mention that index funds intervene aggressively when the cost of intervention is low (e.g. women on boards) and tread lightly when it is not (e.g. carbon footprint).[374]

Absent (or Antagonistic) Corporate Governing: Worryingly, corporations will *not* intervene on matters where they have a conflicting interest. Whenever the underlying policies

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

367. *See* 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).

368. *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 105, at 41–43; Spamann & Fisher, *supra* note 120, at 6 (discussing substitution effects as a limit to pro-social actions in markets).

369. *See supra* note 19 and accompanying text. *See also* Jeff Green & Phil Kuntz, *Anti-LGBTQ Backlash Puts a Chill on Corporate America's Rhetoric*, BLOOMBERG (June 29, 2023), https://www.bloomberg.com/news/articles/2023-06-29/us-companies-were-less-vocal-on-pride-month-during-anti-lgbtq-protests (on file with the *Journal of Corporation Law*) (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 (July 27, 2023), https://www.bloomberg.com/news/newsletters/2023-07-27/businesses-are-quietly-rethinking-their-dei-efforts-equality (on file with the *Journal of Corporation Law*); Green, *supra* note 173.

370. *See* William W. Bratton, *Shareholder Primacy Versus Shareholder Accountability* 34 (Eur. Corp. Governance Inst., L. Working Paper No. 716, 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).

371. Lin, *supra* note 25, at 1586; Toniolo, *supra* note 20, at 367 (analyzing corporate reactions to *Dobbs* and noting that "corporate leaders are getting more cautious in wading into political matters"); Ray, *supra* note 19 (describing conservative efforts to thwart DEI).

372. Lund, *supra* note 28, at 84 (noting that "the need to ensure client approval indicates that the Big Three are likely to mandate only tepid changes in corporate behavior, and that their rules will not bring about the sweeping changes that may be necessary to address pressing social problems").

373. *Id.* at 5.

374. Barzuza, Curtis & Webber, *supra* note 28, at 1305–06.

advocated by reform advocates are expected to hurt a corporation's bottom line, corporations will not activate.[375] Therefore, in several fields of business law corporations will not cooperate. Consider labor and employment matters,[376] data protection,[377] antitrust,[378] tax,[379] financial reform,[380] corporate reform where management has rents to protect (e.g., proxy access, executive compensation),[381] lobbying and political spending.[382] Not only do corporations not help on such matters, but they in fact *lobby against them*. For instance, some businesses that otherwise appear quite active in promoting progressive causes via corporate governing show unequivocal anti-union track records.[383] Perhaps corporate governing is useful to corporations because it lures enough 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.[384]

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375. Gatti & Ondersma, *supra* note 368, at 229–30; *see also* BAINBRIDGE, *supra* note 30, at 109–11 (quoting Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *Stakeholder Capitalism in the Time of COVID*, 40 YALE J. ON REG. 60, 120 (2023) (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")).

376. Gatti & Ondersma, *supra* note 368, at 216–19.

377. 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/ [https://perma.cc/XN3R-WYMQ].

378. 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 [https://perma.cc/3C5D-9P6J].

379. Brian Kelleher Richter, Krislert Samphantharak & Jeffrey F. Timmons, *Lobbying and Taxes*, 53 AM. J. POL. SCIENCE 893, 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 [https://perma.cc/9228-J8At].

380. Brian Slodysko & Ken Sweet, *Army of Lobbyists Worked to Water Down Bank Rules that Regulated SVB and Signature: 'You Couldn't Throw an Ebow 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/ [https://perma.cc/X9QL-LWLP].

381. Bebchuk & Jackson, *supra* note 175, at 90–91.

382. *See* Lund, *supra* note 28, at 45 ("[I]f 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.").

383. Gatti & Ondersma, *supra* note 368, at 216–19 (documenting corporations' union busting efforts at Walmart, Google, Amazon, and Starbucks); Strine, *Good Corporate Citizenship*, *supra* note 29, at 333 n.7 (arguing that "[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* Part II.A.3.

384. 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 30, 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").

This analysis is also confirmed by studies on top executives' political affiliation: CEOs' political contributions substantially skew Republican[385] and top executives voter registration skews Republican by a seven-to-three ratio.[386] How is it possible 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.[387]

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.[388] 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.[389] It comes as no surprise, that the bulk of political contributions is opaque and comes from the extremely wealthy.[390] 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. 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.[391]

The 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

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385. Alma Cohen, Moshe Hazan, Roberto Tallarita & David Weiss, *The Politics of CEOs* (Nat'l Bureau of Econ. Rsch., Working Paper No. 25815, 2019), http://www.nber.org/papers/w25815. A recent study by Reilly Steel confirms that CEOs are the most conservative individuals in the C-suite and the board. *See* Steel, *supra* note 99, at 4.

386. Vyacheslav Fos, Elisabeth Kempf & Margarita Tsoutsoura, The Political Polarization of Corporate America (Aug. 15, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3784969.

387. 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).

388. Soo Rin Kim, *Just 12 Megadonors Accounted for 7.5% of Political Giving Over Past Decade, Says Report*, ABC NEWS (Apr. 20, 2021), https://abcnews.go.com/Politics/12-megadonors-accounted-75-political-giving-past-decade/story?id=77189636 [https://perma.cc/QXG6-TU6Z].

389. 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. (July 18, 2018), https://www.wsj.com/articles/keep-politics-out-of-the-boardroom-1531952912 (on file with the *Journal of Corporation Law*) ("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.").

390. *See generally* PAGE, SEAWRIGHT & LACOMBE, *supra* note 387.

391. For a similar point, but with respect to asset managers, see Lund, *supra* note 28, at 125 (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").

mechanisms inherent in democratic governance will be eroded.[392] This assumption of power by non-state actors raises questions about whether corporate governing mechanisms are adequate to protect the public interest.[393]

3. *Assessing the Biggest Risks*

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 is 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. This is because corporate governing reach is partial,[394] because corporations might lose interest,[395] corporations might be opportunistic,[396] or antagonize society's quests on truly distributional issues like labor, antitrust, data privacy, tax, and so forth.[397]

This is a cautionary tale for citizens more so than for social activists themselves (who one would assume must be already aware of that). It is important to keep in mind in policy before embarking on changes that would entrust executives with larger mandates and roles than they currently have—i.e. an official institutionalization of stakeholderism expanding the fiduciary duties of directors and officers.[398] 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.[399]

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, and so forth.[400] As things stand, executives will not act in favor of workers

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392. *See* former head of sustainable investing at BlackRock Tariq Fancy, *The Secret Diary of a "Sustainable Investor" — Part 1*, MEDIUM (Aug. 20, 2021), https://medium.com/@sosofancy/the-secret-diary-of-a-sustainable-investor-part-1-70b6987fa139 [https://perma.cc/VCE2-8SC3] (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 30, at 92; Lin, *supra* note 25, at 1585–86 (mentioning accounts that warn about plutocracy).

393. For an assessment, see *infra* text accompanying notes 422–24.

394. *See supra* notes 364–67 and accompanying text.

395. *See supra* note 368 and accompanying text.

396. *See supra* notes 370–73 and accompanying text.

397. *See supra* notes 375–83 and accompanying text.

398. *See* Gatti & Ondersma, *supra* note 120, 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).

399. *Id.* at 19.

400. *See* Gatti & Ondersma, *supra* note 368, at 216–22 (describing lobbying efforts by corporations in such fields).

if they have something to lose, with an official shift they might once and for all capture the whole legislative process.[401]

b. Corporate Governing Is Dangerous

The other main risks involve corporations acting as undemocratic tools,[402] pushing policies that have failed to be approved via the democratic process,[403] and sacrificing dissenter's rights along the way.[404] Additionally, corporate governing risks suppressing actual politics and democratic governance, leading to the "death of politics."[405]

i. 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."[406]

Leave aside the counter that the American democratic process has shown some undisputable issues that led us to polarization and gridlock,[407] and address the critique within the institutional ecosystem we have. Friedman suggests that political messaging and action should only occur through some more or less official channels close to the corridors and halls of Capitol Hill (or similar state chambers) but not via corporations.[408] For better or worse, this is not the case: nowhere is political action so constrained. Multiple forms and forums are available to convey the expression of political speech. Citizens can choose from a variety of forums to express their political preferences—this is what our whole political speech ecosystem is made of.[409] 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*.[410] Nothing in our laws prohibits such actions—in fact, Supreme Court jurisprudence constrains limits to such actions.[411] 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 (e.g. retail investors, employees, customers) make use of their First Amendment rights with or against a corporation, and it is quite another when a

401. *See* Gatti & Ondersma, *supra* note 120.
402. *See supra* notes 359–63 and accompanying text.
403. *See supra* notes 359–62 and accompanying text.
404. *See supra* note 360 and accompanying text.
405. *See supra* note 391 and accompanying text.
406. *See* Friedman, *supra* note 111.
407. *See supra* Part II.B.2.
408. *See* Friedman, *supra* note 111.
409. *See generally* PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS (2013).
410. *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").
411. *See supra* notes 171–74 and accompanying text.

corporation's executives use the prerogatives of their office to push for their preferred agenda.[412] 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. The former intervenes because the latter presses them to do so. Once shareholders or other stakeholders urge executives to take a position on a pressing social issue, they surely have the option to stay silent and not act, 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 political, business, or financial repercussions on the corporation and its stakeholders.[413] Disney sought to stay silent, and its stakeholders complained.[414] Wayfair stayed the course to not give in to stakeholder pressure, and the related fallout grew out of proportion.[415] On many occasions, there is no way out for an executive to take a side—it is just the nature of the game. If observers are puzzled by this, they should find solace in 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).

ii. Dissenter's Rights

The dissenter's rights issue is 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."[416] This would lack "the pluralism and freedom that represents a key part of being an American."[417] While this remark is sound in idealistic terms, it proves too much: outside of politics, many workers and Americans *already* silently dissent from several business practices of corporations but have to live with them: not only doesn't freedom extend to the private workplace,[418] but few capitalists (including the more progressive ones) have qualms about the fact that firms are hierarchies, as Coase illustrated.[419]

More practically, if one delves into the issues that are said to generate dissent, the pluralist quest becomes less compelling. In an article seeking to bridge the corporate social activism gap between conservatives and liberals, former Chief Justice Leo Strine draws a line on certain issues he portrays as too divisive, which occur "when corporations seek to tilt the social and political value system."[420] 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."[421] While Strine's intentions are commendable, the line he draws is arbitrary and partial: race (except

412. This is the "someone else's money" objection. *See supra* note 335 and accompanying text.
413. *See supra* note 138 and accompanying text.
414. *Id.*
415. *See supra* note 130 and accompanying text.
416. Strine, *Good Corporate Citizenship*, *supra* note 29, at 357.
417. *Id.*
418. For a (normative) critique, see ANDERSON, *supra* note 305.
419. Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 388 (1937).
420. Strine, *Good Corporate Citizenship*, *supra* note 29, at 360.
421. *Id.*

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 divided society disagrees on pretty much everything—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 because 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. The genie is already out of the bottle.

iii. The Death of Politics

The growing influence of corporations in policymaking poses significant risks to democratic governance. With corporations wielding greater influence over policy, the balance of power between the state and private actors is shifting.[422] 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 pose risks to democratic governance. As corporations assume more responsibilities traditionally reserved for government bodies, people may increasingly rely on them for societal change, losing interest in traditional politics.[423] The growing influence of corporations in policy reform risks normalizing their involvement, which could undermine participatory governance and democratic institutions.[424] By taking on responsibilities traditionally reserved for legislatures or government bodies, non-political entities like corporations may thus lead citizens to disengage from politics, diminishing and reducing the focus on transparency and public interest protections.[425] Over time, corporations could exploit this shift. As mentioned above, in this game corporate interests, which are primarily driven by profit motives,[426] will always prevail and prioritize their own gains over the broader welfare of the public,[427] potentially

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422. *Cf.* BENJAMIN I. PAGE & MARTIN GILENS, DEMOCRACY IN AMERICA?: WHAT HAS GONE WRONG AND WHAT WE CAN DO ABOUT IT 4 (2017) (discussing the fundamental concerns regarding the erosion of democratic governance due to, among other things, the increasing power of private interests); JACOB S. HACKER & PAUL PIERSON, AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US TO FORGET WHAT MADE AMERICA PROSPER 9 (2016) (describing how private interests have been pushing to depart from a mixed economy with strong public institutions and to weaken government action).

423. *Cf.* Robert B. Reich, *The Case Against Corporate Social Responsibility* 5 (Goldman Sch. Pub. Pol'y, Working Paper No. GSP08-003, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1213129 (admonishing that "[c]itizens of . . . big and powerful nations [in America and Europe] who assume they have more impact pushing corporations to be virtuous than working through the democratic process to require them to be so, are simply wrong").

424. *Cf.* JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE LI (2012).

425. For a critique of the limitations of civil society alone in fostering political unity, see CHRISTOPHER BEEM, THE NECESSITY OF POLITICS: RECLAIMING AMERICAN PUBLIC LIFE 218–47 (1999) (arguing for the necessity of political associations that engage in partisan debate to define public values and insisting that only politics and government can translate moral arguments into moral judgments, with the national government serving as the common moral authority). Beem's analysis of civil society movements suggests that non-governmental entities—whether driven by communal or private interests—cannot effectively substitute for formal political institutions in sustaining democratic governance.

426. *See generally* Lund & Pollman, *supra* note 384, at 2585–86 (noting that "voting decisions" on shareholder proposals are driven by profit motives and are also aimed "at obtaining risk-adjusted returns for beneficiaries," not benefits for the general public); BAINBRIDGE, *supra* note 30.

427. *See* Fisch & Schwartz, *supra* note 30, at 348 (arguing that corporate motivations vary and that "there is no reason to assume that they map onto what is best for society").

compromising the engagement of ordinary citizens in the political process.[428] In addition, this shift would deprive citizens of the unique strengths of state action—such as a coordinated, durable, and enforceable response on systemic issues that private actors alone cannot fix[429]—elements vital to strengthening political institutions and preserving democratic stability.[430]

All in all, the potential consequences of abandoning traditional politics in favor of corporate governing are significant and warrant attention.

CONCLUSION

Corporations' involvement in the political sphere is controversial, with praise from like-minded citizens and criticism from the opposite side of the political spectrum. This Article posits four normative angles to analyze the phenomenon: a business case, a strategic case, a social advocacy case, and a political case. The first two suggest that under certain conditions, corporate governing can benefit the corporation and its stakeholders. The other two, however, highlight significant risks, including the ineffectiveness in addressing distributional matters (labor, privacy, antitrust, tax) and the potential atrophy of political change through traditional democratic institutions.

While it's uncertain if lawmakers will prioritize adjusting this phenomenon, some measures can mitigate backlash risks. One option is to prescribe (or voluntary offer) more disclosure: annual and periodic disclosures could include specific sections revealing corporations' overall corporate governing agendas. More substantively, involvement and oversight by independent directors or dedicated committees could improve board empowerment and accountability and work as mechanisms to manage risks. Of course, corporations could even borrow shareholder approval, which is normally used as a cleansing mechanism for conflicted transactions, to make certain high-level corporate governing decisions subject to shareholder voice.

Yet, internal self-regulation seems more promising. 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

428. *Cf.* Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564 (2014) (finding that U.S. policymaking is largely dominated by economic elites and organized interest groups, while the views of average citizens have little to no independent impact on public policy); PAGE & GILENS, *supra* note 422, at 70 (noting that "on many important issues, affluent and wealthy Americans seriously disagree with average citizens"); HACKER & PIERSON, *supra* note 422, at 195–97 (discussing the prioritization of interests of the wealthy over public welfare and its detrimental effect on citizen trust in government and engagement in politics).

429. Fixing market failures and providing public goods are typical cases where state action is generally considered necessary, though there is no consensus on the optimal type and degree of intervention. Spamann & Fisher, *supra* note 120, at 6–7 (arguing that because of substitution effects, "major environmental and other issues are most effectively addressed through regulation." *Id.* at 7).

430. *Cf.* DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY 75–76 (2012) (listing several public constraint-type preconditions to the prosperity of economic institutions); and generally HACKER & PIERSON, *supra* note 422 (arguing that government action to create a mixed economy channeled growth and social development).

ongoing evaluation and adaptation in this complex landscape. Ultimately though, we should be mindful of the limited mileage of internal regulation: in a corporate governance machine that still mostly cater to shareholders,[431] most of the typical fixes might come short in protecting other stakeholders and society at large.

431. *See* Lund & Pollman, *supra* note 384, at 2578 (highlighting that the internal workings of a corporation cater most to shareholders, directors, and managers serving as their agents).