Total Governance

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Everyone has values which conflict with the sheer maximization of profit. When those conflicts occur, virtually no one will consistently choose profit over conflicting values, especially when the potential profit is small or conflicts with other economic values, promoting the common good or preserving a functioning ecosphere. This Article explores a multi-stakeholder approach that will increase the quantum of humanity in the governance of American large public companies in the era of social media and online communication. We dub this crowd-based strategy of steering public corporations "total governance." Total governance recognizes that individuals can engage with public corporations from multiple angles, as investors, employees, online activists, community members, and consumers. While we often think in terms of monolithic roles, imputing interests to shareholders, for example, on the assumption that shareholders are only shareholders, this is never true. Every shareholder, whether human or institutional, also inhabits other roles and has other interests and values. Moreover, role-players can ally with other role-players with the same or different stakes in the firm to participate in the governance of the corporation.

The diffusion of technologies and social media, facilitating online communications on a global scale, enables coordination and stakeholder coalitions. As digitally native Millennials and GenZ'ers move into positions of influence, the system of passive and disenfranchised human stakeholders is about to change. Human stakeholders of different categories can act collectively to pursue and promote values that resonate with them as shareholders, employees, customers, members of communities, or inhabitants of a shared planet.

As human shareholders join forces with employees, consumers or others, they will overcome the two key myths of traditional taxonomy of stakeholders' interests. First, we often assume that the interests of individuals in a corporation's performance and practices depend solely on the type of stake that they have in a corporation. According to this myth, shareholders have a monolithic interest as shareholders, generally assumed to be maximization of the economic value of their investment. But human shareholders hold and rank numerous values that speak to their human nature: some shareholders are prosocial, some are greedy, some prioritize the environment, some care more about social justice.

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** Professor of Law, Maurice A. Deane School of Law at Hofstra University. The authors would like to thank Eric Chaffee, Ben Edwards, Monika Ehrman, Jill Fisch, Caleb Griffin, Akshaya Kamalnath, Steve Kourabas, Tom Lin, Will Moon, Alan Morrison, Kish Parella, Asaf Raz, Barak Richman, Christina Sautter, Nick Sinanis, James Fallows Tierney, Massimiliano Vatiero, and the participants at the 2024 BYU Deals Conference, at the Washington & Lee School of Law Workshop *Global Conversations in International Business Transactions*, and at the AALS 2025 Annual Meeting, Section on Internet & Computer Law's *Financial Regulation in Cyberspace* Session, for their insightful conversations and comments.

Second, it is a myth that stakeholders of different categories (e.g., shareholders, consumers, employees, etc.) carry different interests defined by their stakeholder role. On the contrary: many individuals occupy multiple roles with respect to particular corporations (employees, for example, often are also shareholders, consumers, neighbors and potential pensioners). Moreover, individuals have interests and commitments beyond their roles. Some employees, shareholders, and consumers prioritize social justice over anything else. Other employees, shareholders, and consumers rank first the environment, economic-driven choices, or other values.

This Article explores an innovative corporate governance paradigm that rejects fictitious assumptions about shareholders and other stakeholders, considers how online communication facilitate cooperation across stakeholders of different categories, and recognizes that the key common denominator of human stakeholders is their humanity. Human stakeholders can coordinate on a global scale to exert leverage on corporations to make them answerable to human beings. They can cooperate and coordinate across stakeholder categories to pursue common goals that depend on the values they prioritize, not on to which stakeholder role they are assigned.

INTRODUCTION 355
I. LIBERAL REPUBLICAN THEORY AND CORPORATE GOVERNANCE 359
A. *In Recognition of Disagreement* 362
B. *Systemic, Standardized Governance* 363
C. *Centralized Management of the Firm and Concentrated Power* 365
II. THE COMPLEXITY OF GOVERNANCE 367
A. *Corporate Governance Beyond Profits and Monitoring & the Tech-Enabled Opportunity* 370
B. *Plurality in Corporate Governance* 372
C. *The Limits of Relying Exclusively on Shareholder Franchise* 373
III. NEW GENERATIONS AND STAKEHOLDER ENGAGEMENT: A PATH TOWARD TOTAL GOVERNANCE 376
A. *Who Are Millennials and GenZ'ers?* 378
B. *New Generations and Career Choices* 379
C. *New Generations as Corporate Consumers* 381
D. *New Generations and Investing* 383
IV. TOTAL GOVERNANCE AND THE MULTI-STAKEHOLDER APPROACH'S INTRICACIES 385
A. *The Total Governance Paradigm* 388
B. *Total Governance in Competitive Markets* 389
C. *Cross-Category Collective Action* 391
D. *The Limits of Total Governance* 392
E. *Risks & Guardrails* 393
CONCLUSION 394

INTRODUCTION

Imagine Joanna. Joanna might be a shareholder, a consumer, a supplier, and a member of the community proximate to a production plant of a corporation, its suppliers, or its pollution and other garbage. She may also have, or hope to have, children and grandchildren, or others both contemporary and future, about whom she cares. She may see herself as a guardian of the natural world or as responsible for doing what she can to eliminate injustice or misery in her country, even beyond her own narrowly defined community. She might even care about the well-being of people in "far away countr[ies], . . . people of whom we know nothing,"[1] but who might be affected by the company's policies or behavior.

Joanna can engage with the corporation in all of her stakeholding capacities.[2] If she has personal investable wealth, as half or so of us do, Joanna can invest or disinvest in the corporation depending on whether the corporation's actions, policies, and practices resonate with her human values.[3] Similarly, she may decide whether to purchase the corporation's products and services based on similar considerations (although if she is a purchasing manager for a business that buys from the corporation, she may be inhibited by pressures from her superiors to focus on cost and quality). If she is in the job market or supplying other inputs the corporation needs, she may decide to contract with the corporation depending on similar considerations; at least when supply markets are competitive and job markets relatively tight, she is likely to have other choices. In her role as an active citizen, she may decide to join initiatives in support or against the corporation, depending on the degree to which she views it as a source of good jobs for her fellow citizens or a dangerous polluter.

Everyone has values that sometimes are more important than profit, especially when—as for virtually all human investors—the potential profit is quite small relative to other economic values, let alone saving one's soul, promoting the common good, or

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1. Prime Minister Neville Chamberlain, Radio Address to the Nation on German Annexation of the Sudetenland (Sept. 27, 1938), https://www.oxfordreference.com/display/10.1093/acref/9780191826719.001.0001/q-oro-ed4-00002794 (on file with the *Journal of Corporation Law*).

2. A literature review of stakeholder management is beyond the scope of this Article. Contributions on the role of stakeholders and the related regulatory framework include: E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1984); KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES (2006); Kent Greenfield, *Defending Stakeholder Governance*, 58 CASE W. RES. L. REV. 1043 (2008); Hillary Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1012 (2013); Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REG. 499 (2020); Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401 (2020); Stavros Gadinis & Amelia Miazad, *A Test of Stakeholder Capitalism*, 47 J. CORP. L. 47 (2021); Flore Bridoux & JW Stolhorst, *Stakeholder Theory, Strategy, and Organization: Past, Present, and Future*, 20 STRAT. ORG. 797 (2022); GRANT M. HAYDEN & MATTHEW T. BODIE, RECONSTRUCTING THE CORPORATION: FROM SHAREHOLDER PRIMACY TO SHARED GOVERNANCE (2021); Kishanthi Parella, *Corporate Governance & International Law*, 76 ALA. L. REV 417 (2024).

3. Most middle-class investors hold most of their investments in employer-managed retirement accounts, which generally require beneficiaries to invest via mutual funds or similar professionally managed vehicles. If this is Joanna's situation, she likely does not even know in which corporations her funds are invested and has no option to divest from a particular company.

preserving a functioning ecosphere for the next generation.[4] Milton Friedman's doctrine that the sole legitimate purpose of corporations is private profit developed a hegemonic following in most business schools and law schools alike, despite trenchant criticism from legal, historical, and policy perspectives.[5] Delaware corporate law generally holds that corporate directors and officers have a fiduciary duty to operate the firm in the interests of "the corporation and its shareholders," but routinely grants directors wide discretion to determine what those interests might be while placing no weight on shareholders' own views.[6] Nonetheless, empirical evidence suggests that American human shareholders do

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4. Caleb Griffin, *Humanizing Corporate Governance*, 75 FLA. L. REV. 689, 706 (2023); *see generally* LYNN STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE (2010); Daniel J.H. Greenwood, *Person, State or Not: The Place of Business Corporations in Our Constitutional Order*, 87 U. COLO. L. REV. 101, 105–10 (2015). For a discussion on the role of human nature, conscience, and consciousness in investing and governance decision-making, see Sergio Alberto Gramitto Ricci, *The Vitruvian Shareholder*, 75 FLA. L. REV. F. 113 (2024) [hereinafter Gramitto Ricci, *Vitruvian*]. On the distinction between value and values, see Robert G. Eccles & Jill Fisch, *The Politics of Values-Based Investing*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 7, 2022), https://corpgov.law.harvard.edu/2022/09/07/the-politics-of-values-based-investing/ [https://perma.cc/D7P2-XBXP]. On the shortcomings of a crowd-funding legal framework that limits or exclude governance rights, see Steve Kourabas*, Shareholder (Dis)empowerment through Crowd-Sourced Equity Funding*, 46 U. NEW S. WALES L.J. 143 (2023) (arguing that crowd-funding falls short to deliver real equity opportunities when it limits holders' interests to economic rights and thin governance influence).

5. For the view that Friedman's is the proper goal of corporate law, see, e.g., STEPHEN M. BAINBRIDGE, THE PROFIT MOTIVE: DEFENDING SHAREHOLDER WEALTH MAXIMIZATION (2023); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001); ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993). While Delaware courts have sometimes suggested that the law requires boards and managers to place shareholder interests ahead of all others, they also have erected many barriers to enforcing this duty, if indeed it exists at all outside the narrow *Revlon* circumstances. *Compare*, *e.g.*, Malone v. Brincat, 722 A.2d 5, 9 (Del. 1998) ("The board of directors has the legal responsibility to manage the business of a corporation for the benefit of its shareholder owners."), *and* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) (upholding shareholder primacy), *with* Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1989) (holding that board has virtually unreviewable discretion to set manner and timing of profit maximization). Since nearly any corporate policy arguably furthers long-term profit, *Time* deference allows a well-advised board to pursue virtually any policy other than pure looting, so long as it is willing to invoke long-term profit maximization as a goal. *Cf.* Franklin A. Gevurtz, *Getting Real About Corporate Social Responsibility: A Reply to Professor Greenfield*, 35 U.C. DAVIS L. REV. 645, 649 (2002) (pointing out that *Dodge v. Ford*, often cited as the primary source of shareholder primacy, barely interfered with managerial discretion). Stock market pressures exert a more powerful influence than fiduciary duty: companies that aim to please the stock market are likely to have higher stock prices, which top managers can readily translate into both extraordinary pay and job security, while obvious disregard for the financial markets predictably leads to attempted hostile takeovers or payments to induce managers to change their policies.

6. *See, e.g.*, McRitchie v. Zuckerberg, 315 A.3d 518 (Del. Ch. 2024). This massive opinion contends that Delaware's refusal to create a fiduciary duty to act in the actual financial, let alone broader, interests of shareholders is compelled by the word "its" in the phrase "corporation and its shareholders," before appealing to metaphors of ownership and a false economic claim that shareholders are the residual claimants of corporate wealth. *Id.* at 547. Nothing in the word "its," of course, requires that the law ignore all the actual interests of actual shareholders in favor of a purely legal construct contending that the interest of all shareholders, regardless of their other commitments, is always for the corporation to maximize profit even if, for example, it renders the world less just or habitable in the process. The opinion's metaphorical arguments are no stronger than its linguistic claim. Shareholders are not owners, and their actual interests are structurally irrelevant to the operation of the firm—indeed, the law rarely provides firm managers with any practical method to determine those interests even if they wished. Moreover, the central point of Delaware corporate law is that shareholders, unlike owners, may not operate the firm or treat its assets as their own. Instead, they elect directors who are then obligated to exercise

not always seek profit maximization at the expense of everything else.[7] The same may be true of at least some institutional investors. For example, the New York City Employees Retirement Fund recently adopted minimum tenant protection standards for landlord companies in which it invests.[8] Further, large majorities of Americans apparently disagree with significant corporate policies.[9]

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independent judgment even when shareholder views are clear. *See, e.g.*, Smith v. Van Gorkum, 488 A.2d 858 (Del. 1985) (holding directors personally liable for allowing shareholders to vote on proposed merger). Nor, in the ordinary course, are shareholders the residual claimants of a corporation: in times of trouble, firm managers far more often choose layoffs over dividend reductions, and in times of plenty, they are just as likely to give themselves pay increases or expand the business as to increase payouts to equity.

Moreover, limited (i.e., entity) liability gives shareholders (or those seeking to maximize returns to undiversified shareholders) powerful incentives to gamble even when expected returns are negative: large (solvency-destroying) but unlikely risks are borne by non-shareholders. For example, if continued fossil fuel use leads to private profits in the short term but massive economic and social costs longer term, those costs are unlikely to be internalized by oil or coal producers. Even if the legal system somehow were to require fossil fuel producers to compensate the victims, the charges would bankrupt the corporations—and the shareholders of an insolvent company are free to keep their ill-gotten past dividends, even if the company's past "profits" were entirely due to underpricing future costs. Thus, "nexus of contracts" type theories, which acknowledge that shareholders do not "own" the corporation but contend that their interests are automatically aligned with other corporate stakeholders because, as residual claimants, they seek to maximize firm value, are built on a false premise. *See, e.g.*, William J. Moon, *Beyond Profit Motives*, 122 MICH. L. REV. 1059 (2024) (describing the argument and noting that, ideally, regulatory law would resolve the problem).

In any event, the basic Delaware law is board autonomy, not shareholder primacy. *See, e.g.*, *Paramount Commc'ns*, 571 A.2d at 1140 (finding no breach of duty where board rejected a deal supported by an overwhelming majority of shares). Thus, in 100 pages, the *McRitchie* court cites no Delaware cases holding that a court may second-guess a board's judgment of the corporation's interests, however contrary to expressed shareholder views or profits, absent self-dealing or the "Revlon mode" final period. *See generally McRitchie,* 315 A.3d at 518. As for the meaning of "shareholder" (not "its"), Delaware opinions often include ritual incantations explaining the duty of loyalty as a duty to act in the "interests" of shareholders (usually meaning high stock prices or dividends, rather than actual interests of actual shareholders). Nevertheless, the holdings invariably allow the board to define the corporate interests (including so-called shareholder interests) almost without constraint, absent clear self-dealing or a final period in which shares will lose any interest in the continuing organization. The actual interests of shareowners, let alone the beneficiaries of institutional shareholders, are usually structurally irrelevant (corporate leaders would have no way to determine them even if they wished to) and legally unenforceable even in the unusual situation where shareholders could express them.

7. Caleb Griffin, *Humanizing Corporate Governance*, 75 FLA. L. REV. 689, 706 (2023). For a systemic explanation of balancing interests as investors with interests as human beings who shared a common planet and have a stake in a healthy society, see generally Gramitto Ricci, *Vitruvian*, *supra* note 4.

8. H. Claire Brown, *A New York City Pension Makes Renters' Rights a Priority*, WALL ST. J. (July 17, 2024), https://www.wsj.com/articles/a-new-york-city-pension-makes-renters-rights-an-investment-priority-26534abd?mod=hp_minor_pos17 (on file with the *Journal of Corporation Law*) (noting that enforcement may be difficult, and some property managers will refuse to implement standards they view as conflicting with profit maximization).

9. The same is probably true of parallel governmental politics and policies. *See*, *e.g.*, Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. ON POL. 564 (2014) (describing evidence that popular opinion has no influence on political process after controlling for the influence of top 10%); BENJAMIN I. PAGE & MARTIN GILENS, DEMOCRACY IN AMERICA? WHAT HAS GONE WRONG AND WHAT WE CAN DO ABOUT IT (2020); JACOB S. HACKER, WINNER TAKE ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2010); Benjamin I. Page, Larry M. Bartels & Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSPS. ON POL. 52 (2013) (describing significant class-based differences in opinions on many salient issues).

The current corporate governance model fails to reflect either liberal republican theory or American values.[10] This systemic failure leaves many Americans dissatisfied with the corporate sector and exacerbates a sense of disenfranchisement. After analyzing the reasons and ramifications of the systemic failure to make corporate governance inclusive, this Article proceeds to introduce an innovative corporate governance paradigm, which we dub *total governance*.

We coined the term 'total governance' in honor of legendary soccer player Johan Cruyff's 'total football' tactic. Under Cruyff's 'total football', each player on a soccer team is responsible for playing each position on the pitch regardless of their prior assigned role or specialty.[11] Under total governance, each individual must play each position as a multi-role stakeholder. Total governance has people use the multi-stakeholder approach to play all positions of corporate governance.

Total governance is a multi-stakeholder, intersectional approach set to increase the quantum of humanity in the governance of large American public companies.[12] It is based on a new reality: business corporations' 'publicness' has achieved unprecedented levels, thanks to social media and online communications.[13] Total governance describes a crowd-oriented governance approach characterized by individuals inhabiting multiple identities engaging with public corporations from multiple angles: as investors, employees, online activists, members of communities that live near production plants and—in case of consumer-facing companies—as consumers. Online communications and social media allow individuals with different roles and stakes in a firm (e.g., employees, shareholders,

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10. LYNN STOUT, SERGIO GRAMITTO & TAMARA BELINFANTI, CITIZEN CAPITALISM: HOW A UNIVERSAL FUND CAN PROVIDE INFLUENCE AND INCOME TO ALL 9 (2019) (discussing the connection between sound and inclusive corporate governance models and American values); Greenwood, *supra* note 4, at 361.

11. As both a player and manager, Johan Cruyff "change[d] the world of football." J.M., *Remembering Johan Cruyff, Total Football's Chief Interpreter of Space*, THE ECONOMIST (Mar. 25, 2016), https://www.economist.com/game-theory/2016/03/25/remembering-johan-cruyff-total-footballs-chief-interpreter-of-space (on file with the *Journal of Corporation Law*) ("Controlling space is at the heart of total football."). Total football has been described as "the business of controlling your own destiny on the playing field. Total Domination of the game. You win or lose based on YOUR actions on the pitch. Not what the other team does or does not do." Crusadertsar, *Total Football Journeyman: Total Football Mentality Ladder*, DICTATE THE GAME (Nov. 21, 2021), https://dictatethegame.com/total-football-journeyman-total-football-mentality-ladder/ [https://perma.cc/2KX4-ENHV]. *See also Ted Lasso: The Strings That Bind Us* (Apple TV, Season 3 Episode 7 broadcast Apr. 26, 2023) (centering around team adopting total football tactic).

12. *See* Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Harnessing the Collective Power of Retail Investors*, *in* A RESEARCH AGENDA FOR CORPORATE LAW 207 (Christopher M. Bruner & Marc Moore, eds. 2023) (arguing that granular share ownership, facilitated by mobile investing apps, increases the quantum of society in corporate governance.).

13. For a definition of publicness, see Hillary A. Sale, *The New "Public" Corporation*, 74 LAW & CONTEMP. PROBS. 137 (2011). On the common understanding of corporate publicness, Andrew K. Jennings, *The Public's Companies*, 29 FORDHAM J. CORP. & FIN. L. 191 (2023). On the role of social media, smartphones, and mobile-first commission-free investing apps in augmenting publicness and establishing a shame-culture society, see Sergio Alberto Gramitto Ricci, *Corporate Governance & Public Opinion* (working paper) (on file with authors) [hereinafter Gramitto Ricci, *Corporate Governance & Public Opinion*]. On the role of public interest in the invention of the business corporation, see Sergio Alberto Gramitto Ricci, *Archeology, Language, and Nature of Business Corporations*, 89 MISS. L.J. 43, 78–81 (2019) [hereinafter Gramitto Ricci, *Archeology*]. On the debate on the role of public interest in the evolution and admissibility of the corporate form, see Giancarlo Anello, Mohamed Arafa & Sergio Alberto Gramitto Ricci, *Sacred Corporate Law*, 45 SEATTLE U. L. REV. 413, 431 (2021).

consumers, etc.) to coordinate with other individuals with stakes and roles in the firm, regardless of whether they belong to the same category of stakeholders. Human shareholders can join forces with employees, consumers, and members of communities that live near production plants of the firm, its headquarters, or its office buildings. This new paradigm of engagement defies the traditional stakeholder taxonomy, which assumes that the goals and interests of stakeholders are entirely role-based. Total governance posits that human stakeholders may coordinate their collective action to further the values that characterize them as human beings, not merely as occupants of a particular role.

Today, stakeholders can coordinate their efforts to engage with corporations by using online infrastructure.[14] This gives stakeholders unprecedented power. Shareholders can be—or coordinate with—consumers, employees, and members of involved communities. By coordinating across these different categories of stakeholders, stakeholders can bring the entirety of human nature to the core of the corporate sector. In *The Vitruvian Shareholder*, one of us theorized that human shareholders reposition humanity to the center of the corporate governance universe much as the Renaissance repositioned humankind to the center of the universe and of human interests.[15] Total governance extends that archetype to all human stakeholders, blurring the traditional stakeholder taxonomy in a corporate analogue to intersectionality.

I. LIBERAL REPUBLICAN THEORY AND CORPORATE GOVERNANCE

On simplistic views of competitive markets, there are no policy decisions for corporate constituents to make. In a fully competitive market, something that exists only in introductory economics courses, corporate managers have little discretion. They must provide what their customers want at the best possible price, i.e., with maximally efficient use of raw materials, capital, and human employees, or they will be forced out of business by a competitor that does. There is no room for anything but pursuit of profit.

Paradoxically, the pursuit of profit guarantees that, at equilibrium, there is no profit. In a fully competitive market, any surplus the firm creates must be given to consumers in the form of lower prices. Accordingly, there is no room for debate about distribution. No corporation could accumulate a surplus to pay out to shareholders in the form of dividends or managers in the form of salaries higher than their marginal contribution to the firm—some other firm would always be willing to work for slightly less surplus and therefore slightly lower prices.

In this model, constituent participation in decision-making appears otiose: unnecessary at best, pernicious at worst. The problems of running a firm are technical: determining what consumers want and providing it at the lowest possible price. Those issues are best left to managers, not outsiders. On basic Adam Smithian division-of-labor principles, investors are likely to be better at investing than at managing firms. The same

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14. Social media are emerging as a new venue for corporate governance. Christina M. Sautter, *Corporate Governance Through Social Media*, 75 FLA. L. REV. F. 89, 89 (2024). Social movements, including social movements that have heavily relied on the use of social media, have had a significant impact on corporate governance. Akshaya Kamalnath, *Social Movements, Diversity, and Corporate Short-Termism*, 23 GEO. J. GENDER & L. 449, 470 (2022) (discussing social movement and corporate activism).

15. Gramitto Ricci, *Vitruvian*, *supra* note 4, at 118 (arguing that Vitruvian Shareholding and its canons bring humankind to the center of the corporate governance universe).

can be said, *mutatis mutandis*, about consumers, employees, suppliers, members of communities, and all the other stakeholders.

Of course, our markets are not this competitive. If they were, the stock market could not exist, because any firm that declared a dividend would be outcompeted by one that instead promised one later and used the saved funds to reduce prices.[16]

In the real world, firms have a great deal of discretion. Moreover, it is quite clear that many firms routinely violate principles of profit maximization in favor of cultural imperatives—both internal to the company and reflecting larger societal views. Large American corporations pay their executives far more than they used to, and far more than comparable companies abroad do.[17] There is no evidence that this higher pay is correlated with higher returns, that similar talent could not be had for lower prices, or, indeed, that the Napoleonic insight that large social gaps between generals and subordinates reduce effective leadership has suddenly ceased to apply. Equally clearly, even after 60 years of anti-discrimination laws, firms still do not avail themselves of the talents and skills of vast segments of the American population.[18] Similarly, long-term thinkers might well see greater profit in accelerating a switch to climate-friendly technology than in burning the last tons of coal or barrels of oil, but the relevant companies have not adopted accounting rules that make clear the costs of the status quo.[19]

Our markets allow for a certain degree of discretion in allocating a corporation's surplus across stakeholders. The Team Production Theory explains this as a response to attract and retain stakeholders with incomplete contracts who provide firm-specific investments with low resale value.[20] Other observers point to effective monopoly power (or "franchises," in Warren Buffet's terminology) allowing firms to charge more than

16. *See* Daniel J.H. Greenwood, *The Dividend Puzzle: Are Shares Entitled to the Residual?*, 32 J. CORP. L. 103, 117, 124 (2006) (discussing economic theories which predict that in competitive markets there can be no dividends; the existence of public equity markets thus implies monopolistic pricing power).

17. Myriam Le Cannellier, *Addressing the Compensation Gap Between US and European Executive Positions*, DSML EXEC. SEARCH (Sept. 26, 2024), https://dsmlexecutivesearch.com/addressing-the-compensation-gap-between-us-and-european-executive-positions [https://perma.cc/9U78-X8EA].

18. *See* GARY BECKER, THE ECONOMICS OF DISCRIMINATION 103 (1957) (contending that discrimination is impossible in competitive markets, since it is wasteful). Becker's theory sometimes is presented as suggesting that anti-discrimination law is unnecessary, but it is far more persuasive as evidence that truly competitive markets are essentially non-existent.

19. While extremist politicians have generated many headlines in recent years attacking 'woke' corporations, the reality is that corporate managers remain, as they always have been, well to the right of the median American voter on all economically relevant issues. Some examples include donating to the Republican party and opposing unionization, safety and competition regulation, and fair taxation, at rates considerably higher than the general population. One need not be a primitive Marxist to see the sociological imperatives underlying this. Moreover, competition for the top spot in corporate hierarchies may select for personality traits reducing the likelihood that top executives will feel strong fellowship with other Americans. *See, e.g.*, C.R. Boddy, *Psychopathic Leadership: A Case Study of a Corporate Psychopath CEO*, 145 J. BUS. ETHICS 141, 142 (2017) (summarizing scholarship reporting that 60–70% of employees describe their immediate supervisor as the worst aspect of the workplace, and that top executives are 3.5 times more likely to be psychopaths than the general population).

20. Margaret Blair & Lynn Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 288 (1999).

marginal cost.[21] Inframarginal pricing theories point to the pervasive reality of increasing returns to scale: declining marginal cost due to mass production, or increasing marginal utility due to lock-in and network effects, mean that the largest producer often has lower costs, or can charge higher prices, than its competitors.[22] Politically influential industries, whether due to economic importance, ideology, or contributions and employment opportunities, can use political influence to buy extra benefits: direct or tax subsidies, government-financed research or infrastructure; IP monopolies; exemptions from otherwise applicable zoning or liability rules; or market regulations which favor incumbent technologies, restrict employee bargaining, provide cheap financing, or allow capital to unify for greater market power.[23] Directors and officers then have broad discretion to distribute the resulting rents among corporate stakeholders; in recent decades, they have used them primarily to benefit top managers, shareholders, and those who control institutional shareholders such as hedge funds and private equity firms.

Today, many citizens, increasingly aware of environmental, social and governance issues (ESG), give significant importance to ESG matters.[24] Others, of course, are vehemently opposed, whether because they believe that ESG promotes a type of society they do not wish to live in (one "woke" to issues of injustice and discrimination), or because they believe that the costs of importing political conflict into the workplace are too high. Some ESG critics point out, correctly, that corporate directors and officers lack any democratic or political legitimacy to determine controversial social issues.[25] Unfortunately, there is no neutral stance for corporations to take. Profit or value maximization necessarily conflicts with other important values; indeed, they may conflict with even the basic notion of political community itself, that each of us is responsible for the welfare of all of us.[26] Regulatory legislation can be imperfect even when it is not the direct result of industry lobbying or politicking. Even in more nimble and responsive political systems than ours, those who wish to avoid or evade regulations, or even intentionally violate them, inevitably have the option of profiting at the price of environmental degradation, unjust wages, other externalizing of costs, or plain cheating. It is just as political (and often more unpopular) to take advantage of these opportunities for

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21. *See* Letter from Warren E. Buffet, Chairman, Berkshire Hathaway Inc, to the Shareholders of Berkshire Hathaway Inc. (Feb. 28, 1992), https://www.berkshirehathaway.com/letters/1991.html [https://perma.cc/K95P-PB9Z] (explaining Buffet's conceptualization of "franchises").

22. *See generally* TOWARD AN INFRAMARGINAL REVOLUTION: MARKETS AS WEALTH DISTRIBUTORS (Ramsi Woodcock ed., forthcoming 2024) (applying marginal pricing theory); Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937) (pointing out that in competitive market, most efficient producer will set its prices at costs of second-most efficient producer and will earn excess profits).

23. *See generally* Anne O. Krueger, *The Political Economy of the Rent-Seeking Society,* 64 AM. ECON. REV. 291 (1974) (discussing types of rent-seeking behavior and its implications).

24. On the relevance of the ESG in current business law, see Joan MacLeod Heminway, *The Materiality of ESG Information: Why It May Matter*, 84 LA. L. REV. 1366 (2024); Caley Petrucci & Guhan Subramanian, *Stakeholder Amnesia in M&A Deals*, 50 J. CORP. L. 87 (2024); Elizabeth Pollman, *The Making and Meaning of ESG*, 14 HARV. BUS. L. REV. 403 (2024).

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

26. Pollman, *supra* note 24, at 408–09.

private gain at the public expense than for corporate leadership to limit itself or make small steps in the direction of social responsibility.[27]

In this Article, we use liberal republican political theory to explore how corporate governance could evolve into a system that embraces disagreement as an opportunity to reorient corporate governance, involving thousands of human beings in their decisions. 'Total governance' provides a workable model that makes corporations answerable to people, not exclusively on the basis of individual wealth.

We begin with a simplified recapitulation of aspects of liberal republican democratic political theory relevant to our analysis. Liberal republican democratic political theory is based on two presumptions about the world.[28] First, disagreement is an inherent part of the human condition. Second, as Lord Acton succinctly summarized centuries of experience, "power corrupts and absolute power corrupts absolutely."[29]

A. In Recognition of Disagreement

Disagreement is a core of the human condition.[30] The liberal republican democratic political theories that underpin our political regime—and any call for corporate responsiveness—begin by recognizing this basic reality. We must learn to live with those with whom we disagree, preferably with some modicum of mutual respect, or we are doomed to perpetual war with them. Hobbes's war of all against all is not so much a state of nature as an accurate description of illiberal societies necessarily riven by political, ethnic, religious, national, and economic disagreements.

We share broad values—nearly everyone agrees that, *ceteris paribus*, it is better to be alive than dead, rich than poor, loyal than disloyal, and that injustice should be remedied and crime prevented. Nevertheless, we disagree on how and when to apply those fundamental principles, not to mention all the subsidiary ones that govern our lives. Life is not often *ceteris paribus*. When not everything is equal, we praise death with honor, righteous poverty, and disloyalty to those to whom no loyalty is deserved. Aesthetics are critical to human life, but we know that we will disagree on what is beautiful, tasty, or entertaining as much as on the proper way to worship (or not) god (or gods).

This is why modern free societies begin by creating spaces free of collective decision-making, where individuals and the groups they affiliate with can set their own norms of taste, speech, religion, and conduct without undue pressure to conform to society-wide or

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27. On the multiple dimensions of the ESG debate, see *id.* For an important argument in favor of profit as the sole corporate directive, see STEPHEN BAINBRIDGE, THE PROFIT MOTIVE 148 (1st ed., 2023), reviewed by William J. Moon, *Beyond Profit Motives*, 122 MICH. L. REV. 1059 (2024) (noting that Bainbridge incorrectly attributes an old-fashioned "concession" theory to ESG supporters, and suggesting that a more realistic recognition of the embeddedness of corporations in our legal and social systems demands some form of social accountability).

28. This section builds on earlier work including Daniel J.H. Greenwood, *Corporations Are Organizations and Footnote 4, Too*, 54 N. ENG. L. REV. 49, 49–60 (2019).

29. Letter from John Emerich Edward Dalberg, First Lord Acton, to Archbishop Creighton (Apr. 5, 1887), https://oll.libertyfund.org/titles/acton-acton-creighton-correspondence [https://perma.cc/K95P-PB9Z].

30. Consider one of our oldest (mostly shared) myths: the exile from the Garden of Eden for eating the fruit of the tree of knowledge. Knowledge of good and evil—and disagreement about it—defines human existence between Eden and the messianic age. *See* Daniel J.H. Greenwood, *Beyond Dworkin's Dominions: Investments, Memberships, the Tree of Life and the Abortion Question*, 72 TEX. L. REV. 559, 612 (1994) (explicating the tree of knowledge story as the choice of mortality and morality that makes us human).

governmental norms. Our First Amendment and private property rights are best defended as defenses for individual flourishing without obeisance to collective control. A decent respect for the fallibility of human rationality provides the rest: we need disagreement to maintain our awareness of how likely we are to be wrong[31]—to prevent corruption in the broader sense as well as the narrow sense, which is bribery.

Americans are deeply divided.[32] By large majorities, we favor more generous Social Security, some form of guaranteed medical care, bodily autonomy, preserving the ecosphere in a form suitable for future generations, and higher taxes for the extremely wealthy.[33] Nonetheless, substantial minorities disagree. And the large majorities fracture as soon as we begin considering specific proposals. Moreover, on many other issues, we do not even have the beginnings of a consensus.

Since disagreement is core to the human condition, any corporate governance model that strives to embrace the human condition should embrace disagreement—at least as a crowd-based form of checks and balances. Nonetheless, the current American corporate governance denies the legitimacy of disagreement.

Delaware corporate law rejects basic eighteenth-century notions of limited government leaving a space for individual (or group) idiosyncrasy or dissent, as well as the anti-corruption devices of freedom to criticize, loyal opposition, and checks and balances.[34] Ultimate authority in a board elected solely by equity investors typically voting on a one-share-one-vote (not on a one-shareholder-one vote) basis; the destruction of unions; absence of German-style co-determination; institutional investors' concentrated ownership; the hegemonic governance influence of proxy advisory firms; and not-so-rational retail investor apathy[35]—these basic aspects of American corporate politics homogenize governance and conceal disagreement.

B. Systemic, Standardized Governance

At a systemic level, our corporate governance mechanism imposes homogeneity by its very mechanics. The primary checks on directors and officers of publicly traded corporations are the carrot of acquisition and the stick of takeover: if the stock market bids down the corporation's stock price, rival corporations or financial actors such as private equity or hedge funds, may be tempted to bid for the company, and shareholders may be tempted to sell their stock, and thus their votes, to an outsider. The result could be that top

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31. *See generally* JOHN STUART MILL, ON LIBERTY (1859).

32. Griffin, *supra* note 4, at 701.

33. *Americans' Views of Government Aid to Poor, Role in Health Care and Social Security*, PEW RSCH. CTR. (June 24, 2024), https://www.pewresearch.org/politics/2024/06/24/americans-views-of-government-aid-to-poor-role-in-health-care-and-social-security/ [https://perma.cc/N3B7-39RA].

34. Current constitutional law treats business corporations, however powerful, as if they were individuals requiring special protections against an overweening government. More realistically, however, major business corporations should be seen semi-sovereign bureaucratic agencies exercising state-like power over employees and other participants without the restraints of either fundamental rights or democratic answerability. Consequently, corporate law ought to incorporate the basic negative liberties of our Bill of Rights. *See* Greenwood, *supra* note 4.

35. Sergio Alberto Gramitto Ricci & Christina Sautter, *Wireless Investors & Apathy Obsolescence*, 100 WASH. U. L. REV. 1653, 1659–60 (2023) (arguing that apathy is no longer rational since the diffusion of online communication and coordination systems that allow retail investors to overcome traditional prisoner-dilemma shortcomings).

managers and directors lose control of the firm (potentially pocketing large personal gains along the way). Corporate officers, therefore, tend to manage with an eye to stock price (all the more so when, as is routine today, they receive much of their compensation in the form of company stock).

Voting, outside of the merger or sale context, is far less important. Shareholders—the only voters in U.S. corporate governance—are barred from directing the board, which must exercise its own judgment. Moreover, in exercising that judgment, the board is constrained by law to act in the interests of the corporation and its shareholders, even if shareholders or other corporate constituents might prefer, for example, that it subordinates those interests to justice or environmental care. Furthermore, many commentators and courts seek to disenfranchise shareholders entirely, by interpreting "interests" in the narrowest possible fashion, contending that directors are required to treat corporate profits or shareholder returns as their only goal, with all other considerations merely means to that sole legitimate end.[36]

Even to the extent that actual shareholders do have influence or power over corporations, here as well our finance system creates homogeneity out of heterogenous actors. Small investors, in particular, hold shares almost entirely via institutional shareholders which pass dividends and capital gains, but not votes, through to the human investors. Indeed, institutional investors generally lack any mechanisms for determining the views of their own investors even did they wish to represent them.[37]

Perhaps even more importantly, many of the institutional shareholders operate in tightly competitive markets which coerce them to focus on portfolio returns alone. While the Big Three dominate institutional shareholding, they have not succeeded in imposing entirely oligopolistic norms on the industry. In addition, mobile-first, commission free investing apps that easily allow retail investors to build diversified portfolios using fractional shares make the money-management market even more competitive.[38] Few retail investors have time or information to choose mutual funds or ETFs on any basis other than past returns or a few other reported data points. Accordingly, most mutual funds stand to lose their own investors if their financial returns trail their competitors, leaving little room for ethical or otherwise non-financial considerations. Individual portfolio managers may face even more extreme competitive pressure—many are evaluated based on quarterly

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36. *See supra* note 6 and accompanying text.

37. As detailed in *The Vitruvian Shareholder*, pass-through voting raises a number of issues both for beneficiaries and for issuers. First, pass-through voting seems to provide voice to beneficiaries, but beneficiaries do not choose the shares held in the funds' portfolios. Second, as proposed now, pass-through voting offers only a limited selection of relatively unclear voting paradigms. Third, issuers with share held in funds' portfolios but voted by beneficiaries end up being governed by beneficiaries who never chose to buy shares in the stocks of those issuers and could potentially have adverse interests. Gramitto Ricci, *Vitruvian*, *supra* note 4, at 114 n.2 and accompanying text. The essential mechanics of pass-through voting are described in Lynn Stout & Sergio Gramitto, *Corporate Governance as Privately-Ordered Public Policy: A Proposal*, 41 SEATTLE U. L. REV. 551, 557–58, 571–73 (2018), and in LYNN STOUT ET AL., CITIZEN CAPITALISM: HOW A UNIVERSAL FUND CAN PROVIDE INFLUENCE AND INCOME TO ALL 58–60 (2019). On the shortcomings of the pass-through voting options, *see also* Caleb N. Griffin, Open Proxy (July 12, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4887974 (criticizing the current pass-through voting model).

38. Gramitto Ricci & Sautter, *supra* note 12 (discussing the role of mobile-first, commission-free investing apps in democratizing direct investing in company shares).

returns, so taking a long-term approach, let alone accounting for non-financial considerations, may cost them their bonuses or their jobs.

Moreover, the law explicitly requires some institutional managers to ignore current shareholder views.[39] Other funds have no human beneficiaries to ask: most endowment funds, for example, are dedicated to supporting an institution, not its current personnel or beneficiaries. The Harvard Endowment, for example, supports Harvard, not its current students, faculty, alumni, board, or even the beneficiaries of the university's research; were the members of the Harvard Corporation inclined to poll those constituents and follow their will, they would be betraying their fiduciary duty to future Harvard. Similarly, Foreign Public Investment funds, such as the Norwegian or Saudi funds, hold a material part of the American stock market on behalf of persons who may not yet be born and, in any event, are not Americans. The values and will of these not-yet-in-being people cannot be determined; traditional theories, instead, simply assume that they would prefer the fund to be larger rather than smaller. Few of us are committed misers to that extent, even if many of us fail to embrace Jesus's teaching that it is futile to have assets.[40] Corporate law and our financial system simply exclude our other values, creating an institution dedicated to private accumulation *uber alles*.[41]

Other key corporate governance players exacerbate homogeneity as well. For example, proxy advisory services promote boilerplate governance principles, and common owners such as the Big Three heavily rely on proxy advisory services in determining how to vote the shares they hold in their mega-portfolios. As a result, on a systemic level, many of the most important governance issues are on autopilot, determined by a handful of people from a highly limited menu of options.[42]

C. Centralized Management of the Firm and Concentrated Power

At a macro level, corporate governance is dictated by the law, the legally determined incentives of the finance markets, and a small number of institutions and wealthy individuals, which impose homogeneous—rather than granular and diverse—visions.[43] That is at least equally evident at a firm level.

The doctrine of employment at will means that most employees have no protected rights to individual expression, let alone substantive dissent (absent a union contract). Instead, employees are expected to parrot the beliefs of upper managers and to speak only

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39. Jill E. Fisch & Jeff Schwartz, *Corporate Democracy and the Intermediary Voting Dilemma*, 102 TEX. L. REV. 1 (2023); Griffin, *supra* note 37 (criticizing the current pass-through voting model).

40. Matthew 6:19 (NRSV) ("Do not store up for yourselves treasures on earth, where moth and rust consume and where thieves break in and steal."); Matthew 6:28-30 (NRSV) ("Consider the lilies of the field, how they grow, they neither toil nor spin . . ."); Luke 12:33 (NRSV) ("Sell your possessions and give alms.").

41. Delaware law requires corporate directors to put in place a system to give them reasonable assurance that the corporation is not violating the law. A glance at the business pages of any newspaper, which are routinely filled with accounts of corporate lawlessness, should show that this requirement is far from adequate to ensure that firms obey the law. In any event, corporations are free to use their enormous resources to lobby to change the law in their favor; as the aphorism goes, the scandal is what is legal even more than the extraordinary disregard for law of our corporate classes.

42. For a more comprehensive discussion of these issues, see STOUT, GRAMITTO & BELINFANTI, *supra* note 10, at 29–34.

43. Sergio Alberto Gramitto Ricci, Daniel Greenwood & Christina M. Sautter, The Shareholder Democracy Lie (unpublished manuscript) (on file with authors).

as directed, enforced both by their fiduciary duty of loyalty and by the threat of sanctions or firing from superiors, whose discretion is limited only by whatever process the corporation itself creates.[44] Corporate governance does not have any equivalent to the ordinary political protections of a loyal opposition, checks and balances, or a civil service protected from spoils system interference. There is no equivalent to a free press, to open records acts, or to an independent judiciary. HR makes the rules, prosecutes perceived offenders, and adjudicates claims, all while under the direct control of incumbent managers. Sycophancy is always encouraged, and disagreement is always dangerous. We have not even abolished sumptuary laws at work: many firms require formal uniforms for lower-level employees and tightly conformist dress codes for others, so that rank is visible at a glance, just as in pre-modern sumptuary rules.[45]

The CEO is answerable only to the board, but the CEO generally retains nearly complete control over the board's access to company information or employees. Ordinarily, the incumbent board controls the nomination process, support of the incumbent CEO is assumed, and board dissidents are expected to resign. Moreover, the incumbent board is free to use corporate resources to preserve its policies (and therefore its incumbency). Candidates who do not emerge from the board's nomination committee have massive handicaps, starting with corporate funding for the board's nominees. As a result, as a practical matter, contested elections are rare except when part of a takeover attempt.

Only shareholders, not employees, bondholders, or other stakeholders, vote for board members.[46] Once elected, directors are required by law to act according to their own judgment of the interests of the corporation as a whole.[47] It would be a breach of a director's fiduciary duty to make a decision simply because the electors (or any other corporate constituency) wanted the director to do so—and any shareholder (but not other constituents) may enforce that duty by litigation no matter how popular the proposal.

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44. *See generally* Joseph W. Yockey, *The Fiduciary Duty of Dissent*, 69 VILL. L. REV. 157 (2024) (discussing how despite organizations proclaiming dissent as a core value, employees consistently stay silent). The corporation's discretion is limited by civil rights law and, if the employee is unionized, union contracts.

45. *See, e.g.*, 16 Statutes of Elizabeth I (June 15, 1574), avail. at https://elizabethan.org/sumptuary/who-wears-what.html [https://perma.cc/5RJ8-5ZUC] (setting out dress rules for different ranks of society); III Nathaniel B. Shurtleff (ed.), RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 243 (1853) (Puritan statute of 1651 condemning "men or women of mean condition, educations, and callings [who] should take upon them the garb of gentlemen").

46. It is debated whether shareholders pursue goals that benefit other stakeholders. Roberto Tallarita is inclined to believe that they do. *See generally* Roberto Tallarita, *Stockholder Politics*, 73 HASTINGS L.J. 1698, 1700 (2022). Sergio Alberto Gramitto Ricci links the pursuit of prosocial goals to the human nature of retail investors. Gramitto Ricci, *Vitruvian*, *supra* note 4, at 124. On the critical role of human conscience and consciousness in corporate governance decision-making, see *id.* In their co-authored work, Sergio Alberto Gramitto Ricci and Christina Sautter place emphasis on the generational characteristics of retail investors in forming voting preferences. Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Corporate Governance Gaming: The Collective Power of Retail Investors*, 22 NEV. L.J. 51 (2021).

47. When a corporation has a single shareholder, the shareholder does exercise power close to ownership: a sole shareholder may discharge directors at any time for any reason, and while the directors are nominally bound by fiduciary duties, no one but the shareholder has standing to bring a lawsuit challenging director decisions.

Directors are barred from deferring to shareholder opinion,[48] let alone representing the views of non-voting stakeholders.[49] For the same reason, shareholders have no power to direct directors; while the statutes provide for a few fundamental changes, generally related to mergers, where the corporation may not act unless shareholders ratify board decisions, on all other issues, shareholder resolutions must be "precatory" or advisory. Directors, not shareholders, are the ultimate source of authority in Delaware corporations.[50]

II. THE COMPLEXITY OF GOVERNANCE

Governance is difficult. We've made it easier for our corporate managers by defining many of the most controversial issues out of their domain: it is not the job of a corporate CEO to model the good life, to promote a national culture, or to educate the next generation, let alone to determine whether women must cede control of their bodies to would-be religious enforcers or whether a nation of extraordinary wealth should provide basic economic security for its citizens. Adding controversial issues of environmental or employee protection to their jobs would leave most of our uber-paid executive class far out of its areas of competency.

Neoclassical corporate governance ideology can be summarized in a few simple precepts. It assumes that broad corporate goals and purposes are set and not subject to dispute. The issues for managers and directors are tactics: how best to maximize profits rather than whether to accommodate additional goals; the issue for shareholders is to police incompetence and corruption by voting out directors who fail to pursue profit appropriately.

Given that, neoclassical corporate governance ideology rejects the possibility of legitimate disagreement over corporate goals and purposes. Similarly, it has no mechanisms for respecting the rights of dissenters or assuring that majorities cannot use the power of office to retain office. On the contrary, it empowers incumbents and systematically disempowers dissidents except in economic distress. It limits voting to only one type of participant in the corporation—shareholders—and allocates votes, plutocratically, per share.[51]

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48. *See, e.g.*, Smith v. Van Gorkom, 488 A.2d 858, 893 (Del. 1985) (holding directors personally liable for deferring to judgment of shareholders regarding whether to sell company).

49. *Id.*

50. The power of Delaware directors is original and undelegated; they are not agents of the shareholders or the corporation. *See, e.g.*, Arnold v. Soc'y for Sav. Bancorp, 678 A.2d 533, 539–40 (Del. 1996) ("A board of directors, in fulfilling its fiduciary duty, controls the corporation, not vice versa." (emphasis omitted)); Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360 (Del. 1993) ("Our starting point is the fundamental principle of Delaware law that the business and affairs of a corporation are managed by or under the direction of its board of directors.").

51. Gramitto Ricci, Greenwood & Sautter, *supra* note 43. For a recent example of the undemocratic nature of even shareholder voting, consider the defeat of a shareholder proposal regarding Walmart's DEI policies, which received only 18% of the vote in 2023. However, approximately 46% of the shares (and votes) are held by members of the Walton family and another 35% are held by institutions, leaving only 19% of the votes in the hands of individual shareholders outside the founding family. The proposal received 42% of the non-Walton votes—implying that it had quite strong support indeed on a majoritarian basis. *See* Michael Sainato, '*A Huge Regression': Walmart's DEI Rollback Incites New Racial Equity Push*, THE GUARDIAN (Dec. 15, 2024), https://www.theguardian.com/business/2024/dec/15/walmart-dei-diversity-equity-inclusion-rollback [https://perma.cc/2PLZ-VXV2].

In short, it is hard to understand corporate law as it stands today without concluding that a guiding purpose of the law's rules is to disempower virtually all corporate constituents—not only small-holding shareholders but employees, customers, and other investors as well. Under current law and corporate governance mechanisms, large publicly traded corporations are top-down, command-and-control enterprises with extraordinary power in the hands of top executives. The current governance model fails to reflect the most basic notions of democracy or accountability.[52]

We reject the claim of neoclassical corporate law that corporations exist solely to maximize profit and therefore nothing is left for democratic debate. However, even within that narrow understanding of corporate governance, the current anti-democratic voting system and lack of protection for dissent lead to a problem well recognized in liberal republican public theory: as Lord Acton's famous aphorism puts it, "power corrupts and absolute power corrupts absolutely."[53]

In the corporate context, corruption carries two key senses: self-interest and lack of humility. The first is readily visible, even beyond traditional 'agency cost' problems. Some authority figures—whether managers, board members, or shareholders—are likely to exercise their power in their personal interest at the expense of the public. Some private equity firms, for example, have been known to use their power as shareholders to cause a firm to pay out vast sums to the private equity principals in fees, interest, and dividends, even at the cost of rendering the firm uncompetitive, destroying the product, layoffs, or even firm insolvency.

But corruption need not be in this form of bad-faith exploitation of the power of office. Perhaps equally as important is the problem of yes-man culture, the modern equivalent of traditional court sycophancy. Decisionmakers surrounded by people who tell them they are right—whether to accumulate influence or to avoid being fired or exiled from the centers of power—are bound to make lousy decisions.[54] Even absent fear, groupthink leads to missing important realities. In ordinary politics, this is one key reason why we build institutions devoted to critique and offering contrary positions. It is also an important justification for contested elections: rotation in office, even without more, helps to avoid complacency and corruption. Moreover, it is the strongest argument for giving the vote to

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52. Proposals to bring basic democratic principles to corporate law or at least to emulate German principles of co-determination recur regularly. *See, e.g.*, Grant M. Hayden & Matthew T. Bodie, *A Democratic Participation Model for Corporate Governance*, 109 MINN. L. REV. (forthcoming 2025); *see generally* Kent Greenfield, *The Third Way: Beyond Shareholder or Board Primacy*, 37 SEATTLE U. L. REV. 749 (2014). They seem to have no political traction, however. *See generally* Jens Dammann & Horst Eidenmüller, *Codetermination: A Poor Fit for US Corporations*, 2020 COLUM. BUS. L. REV. 870, 900–01, 905, 912 (2021) (arguing that codetermination, as exemplified by statutory proposals by Elizabeth Warren and Bernie Sanders to have employees elect part of corporate boards, would impose large economic costs in the United States, despite empirical evidence regarding Germany, due to weaker U.S. unions and job security, reduction in board "collegiality" (i.e., commitment to shareholder supremacy), reduced policing of manager's "agency costs" (self-interested exploitation of position), and the need to modify other laws to reduce evasion). Whether or not the weaknesses that Damman & Eidenmuller identify would make codetermination less attractive in the United States, they unquestionably make it highly unlikely that it will be adopted. On the fundamental differences between political democracy and corporations, see Gramitto Ricci, Greenwood & Sautter, *supra* note 43.

53. Letter from John Emerich Edward Dalberg, *supra* note 29.

54. *See, e.g.*, DAVID HALBERSTAM, THE BEST AND THE BRIGHTEST (1972) (ascribing failures of the Vietnam War to yes-man culture within American administration); WILLIAM WHYTE, JR., THE ORGANIZATION MAN (1956) (describing 'groupthink' in corporate culture).

outsiders rather than (or in addition to) employees. To be sure, employees probably will learn of problems before the stock market, but they may be less willing to speak up, given pressures to avoid workplace conflict and to appease higher-ups in charge of promotions and job tenure.

Corporate authoritarianism has long been defended on various grounds. The most common defenses of corporate authoritarianism are rhetorical rather than substantive: metaphorically analogizing corporations to individuals (as the Supreme Court often has done in creating corporate constitutional rights) or, conversely, to property that can be "owned" in a simple sense.[55] These bare assertions increasingly struggle to pass the scrutiny of scholars and jurists.[56]

Another canonical, if ultimately incorrect, defense of the status quo is that corporate governance is largely a technical issue. If, as on the shareholder supremacy view, corporations have only one purpose—to maximize profit—then the only function of voting is to police managerial failure and disloyalty (so-called agency costs). The stock market is imperfect, but it has the potential to hold corporations and their leaders accountable. One-share-one-vote voting comes with monitoring efficiency. Those with more money at stake have more votes and are adequately incentivized to monitor managers.[57]

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55. The primary contributions of the 1980s nexus of contracts view were to dismiss the property analogy and to make clear that shareholders are merely one among many participant roles in an institution with unclear boundaries. Its ideological denial that corporations exist or have coercive power structures and its claim that corporate law is purely voluntary were less persuasive, especially to tort creditors denied compensation and union organizers wondering why a corporation is not a conspiracy in restraint of trade or a violation of the rule against perpetuities. Other observers have rejected the property analogy on the more realistic ground that bureaucracies are not the sort of thing that can be owned in any post-feudal society; property in human beings is unconstitutional under the Thirteenth Amendment. In any event, property rights are creations of law, subject to change as governments deem necessary to pursue the common welfare. Thus, for example, nearly every zoning code in the country requires landowners to provide car parking, regardless of the property owner's views about pedestrian-friendly planning.

56. *See* Daniel J.H. Greenwood, *Introduction to the Metaphors of Corporate Law*, 4 SEATTLE J. SOC. JUST. 273 (2005); Gramitto Ricci, *Archeology, supra* note 13 (arguing that the "legal person" lexicon lends itself to confusion in decisions about corporate rights, as has been the case since Ancient Rome, the civilization that first recorded rules of corporate form); Anello, Arafa & Gramitto Ricci, *Sacred Corporate Law*, *supra* note 13 (discussing corporate entities and non-human ownership of entities in Roman Law, Ecclesiastical Law, and Islamic Law).

57. However, individuals who invest via mutual funds or similar intermediaries have little or no say on issues of purpose and fundamental goals. The funds vote the shares they acquire and hold using the money of these individual investors. This share ownership model raises structural corporate governance issues. *See also* Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493 (2018) (proposing limits to the voting power of passive investors, which have a governance power that outsizes their efforts to gather firm-specific information and vote accordingly). The current share ownership model and governance mechanics raise several issues, not only for a sound corporate sector but also for society at large. *See* JOHN COATES, THE PROBLEM OF 12: WHEN A FEW FINANCIAL INSTITUTIONS CONTROL EVERYTHING 88–93 (2023); Zohar Goshen & Doron Levit, *Agents of Inequality: Common Ownership and the Decline of the American Worker*, 72 DUKE L.J. 1, 12–16, 50 (2022); Statement of Robert J. Jackson, Jr., SEC Comm'r, Common Ownership: The Investor Protection Challenge of the 21st Century, Testimony Before the Federal Trade Commission Hearing on Competition and Consumer Protection (Dec. 6, 2018), https://www.sec.gov/news/testimony/jackson-testimony-ftc-120618#.ZSMHCJGidrM [https://perma.cc/MA6K-CZ56]; Lund, *supra* note 57 (discussing risks for our economy rooted in passive investors' share ownership and voting practices). On the evolution of share ownership models and shareholder power, see generally Harwell Wells, *A Long View of Shareholder Power: From the Antebellum Corporation to the Twenty-First Century*, 67 FLA. L. REV. 1033 (2016).

On this view, the potentially controversial policy and moral issues of corporate governance are decided elsewhere. To the extent that markets generate results that we aren't happy with, ordinary politics and regulation are the remedy. It is ordinary politics, for example, that determines that automobile parking and highways are highly subsidized, nuclear power plants and gun manufacturers are exempt from ordinary tort law, the military is not funded by its sales or a special purpose tax, drug manufacturers are permitted to profit from patent monopolies even when research is publicly funded, and automobiles are required to have seat belts and other safety devices.

But regulation and ordinary politics are inadequate to achieve the goal of using market forces to better our lives. Our politics are fossilized, so even popular and needed regulations get caught up in partisan attempts to cripple agencies or minority vetoes in our anti-democratic Senate. Even if regulations are enacted, generally it is easier for profit-seeking businesses to adapt to regulations than for regulators to predict how economic actors will evade them. And the profit motive, at least sometimes, will prevail over patriotism: the powerful incentives of private enterprise may overcome the softer ones of public service. Rather than relying purely on outside regulators, we need corporate insiders to act appropriately even when they are not required to. Profit at the expense of all else is a choice, not an inevitability; corporate management necessarily includes moral and political choices, not mere technocratic tactics.

But corporate governance matters not merely for limiting looting by insiders. It is an effective device to debate and determine critical issues on which Americans can be expected to disagree. Persuasive data support the intuitive notion that the views of the broad spectrum of Americans who directly and (mostly) indirectly own stock—about half the population—are different from the views of fund employees who decide how to vote institutionally held stock or of the managers who run public companies.[58] For example, many Americans likely would be willing to pay a small amount to bring mineral mining back on-shore, rather than rely on unpoliced foreign mines that use slave labor and cause environmental depredation. Mining company managers and the institutional investors to whom they answer, on the other hand, respond to incentive models that prioritize maximizing private profit despite unreliable supply lines, foreign policy dangers, and the actual—partly unmonetizable—human and environmental costs that current markets conceal.[59]

A. *Corporate Governance Beyond Profits and Monitoring & the Tech-Enabled Opportunity*

The development and diffusion of new technologies that facilitate access to share ownership, such as mobile-first, commission-free investing apps, and communications among individuals on a global scale, generate new opportunities.[60] Human investors can

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58. Griffin, *supra* note 4, at 696.

59. *See, e.g.*, Stephen Lezak, *This Dirty Industry is Better Off Operating in America*, N.Y. TIMES (July 23, 2024), https://www.nytimes.com/2024/07/23/opinion/lithium-copper-minerals-mining.html (on file with the *Journal of Corporation Law*) (advocating for on-shoring to promote less profitable but socially cheaper ethical mining).

60. Gramitto Ricci & Sautter, *supra* note 35, at 1659–60 (discussing how mobile-first, commission-free investing apps decrease frictions typically associated with engagement and collective action).

coordinate online with other stakeholders to tap into the power that individuals have when they engage with corporations adopting a crowd-based approach.[61] Now, add that other stakeholders can harness the power of technology and online communication to participate as employees and consumers, or with their voices as community members. Total governance brings a wider group of stakeholders to bear and mitigates the effects of the plutocratic one-share-one-vote model. As more individuals become engaged in the governance of business corporations, those corporations, the leviathans of our society, become more likely to mirror human values as they operate. As individuals who engage with corporations in multiple roles—for example, as employees, shareholders and customers—participate in corporate governance, their intersectionalities can reduce the hegemony of the stock-market's emphasis on monotonic, role-bound, share-value maximization.

As firms get larger and systemic economic issues influence our ordinary lives well beyond issues of goods and services, wages, or wealth distribution, it is harder to pretend that multinational corporations are passive market-takers simply responding to pre-existing consumer demand. More and more consumers demand action to ameliorate global climate change, yet our major corporations contribute to it overtly and covertly—even while insisting, via greenwashing advertising, that they are solving the problem rather than worsening it.

Even fifty years ago, Blumberg reported that the public already was pressuring corporations to weigh in on social, political, environmental, and governance matters.[62] Advocates called this "corporate social responsibility" and demanded that the polity take seriously the *politicalization* of corporations.[63] Today, after a long hiatus, citizens are again demanding that business corporations take a positive leading role in social and environmental issues, instead of profiting at the cost of our collective future.[64] *Politicization* also refers to the involvement of corporations in public concerns, whether by lobbying behind closed doors, influencing appointed or elected officials, or by making public statements through media.[65]

The diffusion of social media, investing via mobile-first, commission-free apps, and online communities that discuss investing and corporate behavior can transform societal passivity vis-à-vis corporations into diffuse engagement.[66] Social media and a wired society have increased the level of public awareness of the extensive political action of

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61. Sergio Alberto Gramitto Ricci & Christina M. Sautter, *The Wireless Investor Movement*, U. CHI. BUS. L. REV.: ONLINE ED. (2022), https://businesslawreview.uchicago.edu/online-archive/wireless-investors-movement [https://perma.cc/84XB-QZ67].

62. Phillip I. Blumberg, *The Politicalization of the Corporation*, 51 B.U. L. REV. 425 (1971).

63. *Id.*

64. For a historical account of the use of shareholder proposals to advance social justice, see Harwell Wells, *Shareholder Meetings and Freedom Rides: The Story of* Peck v. Greyhound, 45 SEATTLE U. L. REV. 1 (2021).

65. Blumberg, *supra* note 62, at 425–26. On corporations' engagement with political matters, Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495, 1501 (2005). On corporations and social matters, Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1541–42 (2018).

66. Gramitto Ricci & Sautter, *supra* note 35, at 1659–60 (discussing how a shift in social norms would skyrocket the engagement of retail investors).

large public companies.[67] Viral videos, pictures, and hashtag campaigns create awareness of social and environmental issues and public demand for improvement.[68] Individuals can inform their decisions as investors, employees, consumers, and members of society almost effortlessly. They can coordinate their decisions with other individuals who hold similar or different stakes and are driven by similar or different values but aim at a common goal. This is, in essence, the disruptive power of total governance. Corporations cannot ignore the pressure that is created by millions of views accompanied by coordinated actions.[69]

B. Plurality in Corporate Governance

The internet, online communications, and social media play a disruptive role in reshaping the role of everyday individuals in the governance of the large public corporations. First, they increase public awareness of corporate actions, practices, polices, and behaviors (along with opportunities to misinform the public about those matters).[70] Second, they facilitate communication by people located anywhere around the world. This tech-enabled infrastructure allows human investors, including the so-called *wireless investors*,[71] to overcome traditional collective action hurdles, to share investing information, and to coordinate their collective endeavors.[72] But the ramifications of crowd participation in corporate governance that technology enables reach much further. Employees, consumers, members of the communities in which a corporation has its headquarters, production plants, and offices, and the general public have much easier access to information about the corporation, and they can coordinate online their collective actions to engage with it. In short, this tech-enabled infrastructure facilitates the

67. Corporations are so wary of the ramifications of public opinion that they engage in hypocritical behaviors to fit stakeholders' expectations. Although problematic, corporations' hypocrisy reveals what standards corporations consider aspirational, so it could generate a positive governance effect in the long run. Lisa M. Fairfax, *For Corporate Hypocrisy*, 50 J. CORP. L. 287, 340 (2025) [hereinafter Fairfax, *For Corporate Hypocrisy*]. On the relationship between corporate rhetoric and corporate behavior, Lisa M. Fairfax, *Easier Said than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771, 774 (2007).

68. Lin, *supra* note 65, at 1545–46; Akshaya Kamalnath, *Hashtag Capitalism: An Introduction*, 49 ALT. L.J. 188 (2024).

69. Lin, *supra* note 65, at 1545–46; *see also* Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Corporate Lawyers as Reputation Gatekeepers*, ACCT. ECON. & L. (forthcoming); Gramitto Ricci, *Corporate Governance & Public Opinion*, *supra* note 13; Fairfax, *For Corporate Hypocrisy*, *supra* note 67, at [].

70. Given the large quantity of mis- and disinformation on the internet, what people are 'aware' of may not be true. To the extent that we are correct in expecting that public opinion will have a greater influence on corporate decision-making, the power of propaganda and lies on the internet will be a key issue for corporate governance as it is for ordinary politics.

71. The term "wireless investor" was coined by Gramitto Ricci and Sautter. Gramitto Ricci & Sautter, *supra* note 46, at 57. It has since been used widely in corporate governance literature by prominent scholars. *See* Dhruv Aggarwal, Albert H. Choi & Yoon-Ho Alex Lee, *The Meme Stock Frenzy: Origins and Implications*, 96 S. CAL. L. REV. 1387, 1408 (2024); Carliss N. Chatman, *Corporate Family Matters*, 12 U.C. IRVINE L. REV. 1, 27 (2021); Carliss Chatman & Carla L. Reyes, *Uncovering Elon's Data Empire*, 53 STETSON L. REV. 405, 432 (2024); Christine Hurt, *Socially Acceptable Securities Fraud*, 49 J. CORP. L. 785 (2024); Andrew K. Jennings, *The Public's Companies*, 29 FORDHAM J. CORP. & FIN. L. 191, 225–26 (2023); Chaz Brooks, *Gen Y More Black Corporate Directors*, 59 U. RICH. L. REV. (forthcoming 2025); Joan MacLeod Heminway, *Digital Engagement and the Retail Investor*, JOTWELL (Oct. 17, 2024), https://corp.jotwell.com/digital-engagement-and-the-retail-investor/ [https://perma.cc/R993-GHY6] (reviewing Gramitto Ricci & Sautter, *supra* note 35).

72. Gramitto Ricci & Sautter, *supra* note 35, at 1659–60; Gramitto Ricci & Sautter, *supra* note 61.

engagement of human beings with corporations, regardless of the particular stake they have in the firms. In crowd-based corporate governance, shareholders are only *primi inter pares*.

Millennials and GenZ'ers may drive a paradigm shift towards bottom-up crowd-inputs in corporate governance: new generations of stakeholders can more easily coordinate online on a global scale and, therefore, are more powerful.[73] A new wave of social or popularly responsive politicization of corporations may follow. In fact, about half of Millennials believe that CEOs and other company leaders have a responsibility to take a public stand on issues and debates society is concerned about.[74] When stakeholders from different roles, including shareholders, employees, consumers, and members of communities involved with corporations, engage with governance, they can bring an enduring change in the way corporations are run.

This crowd-oriented governance approach has several advantages compared to mere reliance on shareholders to monitor the decisions, policies, and practices of corporate directors and top executives. Most importantly, it increases the quantum of humanity in corporate governance by bringing human diversity to corporate decision-making in a way that the current model of share ownership and share voting cannot. While some theorists have claimed that uniformity is a prerequisite to voting,[75] we think it more plausible to see diversity of opinion, disagreement, and debate as vital protections against groupthink, hubris, and the blinders of preconceptions and prejudice.[76]

C. The Limits of Relying Exclusively on Shareholder Franchise

A crowd-oriented governance approach that harnesses the diversity of stakeholders best bridges the gap between society and the corporate sector. It also overcomes the limits of exclusively focusing on shareholders. In fact, two reasons limit the benefits of relying only on shareholders. The first is inherent in their nature: shareholder power is plutocratic rather than democratic. The second is contingent: if company shares were diffused across the whole population and virtually everyone could partake in the governance of corporations, shareholding could be a strong—albeit imperfect—pathway to a plurality of views. But today the vast majority of shares are held and voted by institutional investors.[77]

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73. On coordination and governance of companies, see Gramitto Ricci & Christina M. Sautter, *Corporate Lawyers as Reputation Gatekeepers, supra* note 69. On the coordination of retail investors online, see Gramitto Ricci & Sautter, *supra* note 46, at 57 (coining the term "wireless investors" to reference shareholders who invest through mobile-first, commission-free investing apps and gather information for their investments online); Gramitto Ricci & Sautter, *supra* note 35 (discussing wireless investors' collective potential to create fundamental changes through the stock market and corporate governance); *id.* at 1663–64 (arguing that retail investors have broken free of the prisoner's dilemma through online coordination).

74. Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 HARV. BUS. L. REV. 441, 454–55 (2019). Presumably, this indicates a rising awareness that corporate CEOs are, in fact, major political powers in our increasingly neo-feudal society, and therefore we ought to know what position they are taking even if we have little ability to influence its content.

75. *See* HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE (2000) (arguing that corporate voting is restricted to shareholders precisely because they do not disagree).

76. *See, e.g.*, MILL, *supra* note 31 (pointing out that disagreement compels individuals to grapple with the strengths and weaknesses of their views).

77. STOUT, GRAMITTO & BELINFANTI, *supra* note 10. On the importance of promoting granular ownership of company shares, see Gramitto Ricci, *Vitruvian*, *supra* note 4; Gramitto Ricci, Greenwood & Sautter, *supra*

Shareholder "democracy" is mere ideological rhetoric.[78] Frequently, it has been framed as a clash between managers and the stock market: whether corporate leaders should be insulated from shareholder pressure—without much discussion of who (or what) holds and votes shares; how they vote; or even whether a system in which voting is not per person and, in any event, votes are effectively for sale, can even be called democratic.[79]

To begin with, the standard "shareholder democracy" frame fails to account either for the heterogeneity of shareholders or the homogeneity of shareholder voting.[80] Commentators and courts regularly discuss the degree to which directors should be insulated from uber-powerful and vocal institutional investors willing to dictate corporate decisions in the interest of particular investors at the expense of other shareholders, other stakeholders, the corporation as a whole, or even the broader system.[81] However, a very different question is whether individuals with granular equity interests in a company should be allowed to engage with the issuer and, more generally, with the corporate sector, rather than being disenfranchised. As the late Lynn Stout argued, insulating boards of directors from aggressive shareholders is entirely compatible with crowd-oriented corporate governance.[82]

Any analysis should start with two undeniable realities. First, absent an outsider offering to buy shares (or the company) in connection with the vote, shareholder votes usually are overwhelmingly in support of incumbent management. This is for two key reasons.

On the one hand, is the 'Wall Street Rule': active shareholders unhappy with management often prefer to sell their stock. Voting is slow—shareholders typically must wait for the next annual meeting to vote and in the meantime are exposed to the risk that the market as a whole will come to share their negative views of incumbent management and drive the stock price down. Moreover, the Wall Street Rule itself means that voting is usually ineffective: shareholders unhappy with management generally sell their stock, so eligible voters typically are those who support the incumbents. Even if voting leads to a

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note 43. For a proposal to limit the impact of underlying gross inequality, see, e.g., INGRID ROBEYNS, LIMITARIANISM: THE CASE AGAINST EXTREME WEALTH (2024). On the divergence of retail investors' views and voting from fund managers' views and voting, see Robert J. Jackson, Jr. & Jonathon Zytnick, *Individual Investor Ideology* (unpublished manuscript) (on file with authors). *See also* Alon Brav, Matthew Cain & Jonathon Zytnick, *Retail Shareholder Participation in the Proxy Process: Monitoring, Engagement, and Voting*, 144 J. FIN. ECON. 492, 497 (2022) (detailing retail investors voting trends). On the differences between how human investors and institutional investors vote, see Ben Carlson, *The Difference Between Institutional & Individual Investors*, A WEALTH OF COMMON SENSE (Feb. 9, 2016), https://awealthofcommonsense.com/2016/02/the-difference-between-institutional-individual-investors/ [https://perma.cc/HCR3-NW3N].

78. Gramitto Ricci, Greenwood & Sautter, *supra* note 43 (arguing that "shareholder democracy" is merely rhetoric to appease people and avoid legislative reforms).

79. *Id.*

80. *Id.*

81. *See, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 958–59 (Del. 1985) (upholding directors' discriminatory treatment of a shareholder, where shareholder's tactics seemingly threatened the systemic integrity of the stock market, even though directors' actions potentially precluded short-term gains by other shareholders); Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1155 (Del. 1989) (upholding directors use of extreme measures to prevent takeover even in face of widespread shareholder support).

82. *See generally* Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1194, 1197 (2002); STOUT, GRAMITTO & BELINFANTI, *supra* note 10; Stout & Gramitto, *supra* note 37.

change in company policies, the gains, if any, must be shared with all other stockholders. Most active shareholders, therefore, will prefer to sell their stock and invest in a company where they have confidence in management.

On the other hand, the large institutional shareholders that dominate the stock market have strong financial incentives to value relationships with incumbent management more than any incremental gains they might obtain from independent voting.[83] For active traders, access to corporate managers may give them valuable information, or vibes, not as easily obtained from public sources. Moreover, corporate managers determine who manages the corporation's pension accounts and where the corporation obtains its own financing; winning these assignments is likely to be more lucrative for institutional money managers (if not their clients) than running large, low-margin investment funds.

If these were not reason enough for institutional shareholders to avoid voting against management, the personal interests of the individuals running institutional investors add yet another motive.[84] Money managers are easily graded based on their financial returns and far less likely to be personally successful (or not) based on their advocacy (or silence) concerning more granular and potentially controversial ESG or political matters. Thus, ordinary bureaucratic incentives suggest that most money managers will avoid controversy and stick to the most easily measured yardsticks of success.

Second, as a theoretical matter, shareholder voting defies ordinary democratic norms.[85] Corporate shareholder voting is wealth-based: ordinarily, one vote per share, with shares (in publicly traded corporations) and their associated votes freely bought and sold.[86] This, combined with the unequal American distribution of wealth, means that any share-ownership-based governance will be plutocratic rather than democratic.[87]

The American wealth distribution is extraordinarily unequal, far more so than our income distribution. Most of us have little or no wealth—almost one-third of households have negative or zero wealth; the bottom half of Americans control only 2.5% of total net worth and even 90% of us control only 30.1%.[88] At the other end, however, a fortunate few individuals and families have wealth in quantities that are more often associated with sovereign states.[89] One-tenth of 1% of households own more than 23% of equities and mutual funds, while the poorer half of us owns only 1%.[90] A handful of plutocrats who may not share our interests can buy securities that carry all the votes they want. In addition, according to the Tax Policy Center, about 40% of US equities are held by or for

83. Gramitto Ricci, Greenwood & Sautter, *supra* note 43.

84. *Id*.

85. *Id*.

86. *Id.*

87. *Id.*

88. *Distribution of Household Wealth in the U.S. Since 1989*, BD. GOVERNORS FED. RSRV. SYS., https://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/table/#quarter:135;series:Net%20worth;demographic:networth;population:1,3,5,7,9;units:shares;range:2008.2,2023.2 [https://perma.cc/W3D9-WFQ5] (under the heading "Table"). Investable assets are more unequally distributed than wealth, since even in the upper middle class, most households have much of their net worth tied up in their homes.

89. Rob LaFranco, Grace Chung & Chase Peterson-Withorn, *World's Billionaires List*, FORBES (Mar. 8, 2024), https://www.forbes.com/billionaires/ (on file with the *Journal of Corporation Law*) (reporting that there were 817 American billionaires 2021. Since foreign investors hold a large part of the US stock market, this understates the number of extremely wealthy large holders of US stock).

90. BD. GOVERNORS FED. RSRV. SYS., *supra* note 88 (Under the heading "Distribution").

foreigners.[91] These wealthy foreign investors may not share even those values widely shared among Americans or care about the health of American society.[92] Some, for example, may not care about American wages, Americans' access to health care, or even the long-term success of the American economy.

Democracy advocates must look elsewhere: transforming the franchise to enfranchise other corporate participants and stakeholders.[93] We propose a new corporate governance paradigm that relies on a crowd-based approach, the use of online communications, coordination across different types of stakeholders, and the recognition that the corporate sector should serve—and not exploit—human beings.[94] Human stakeholders can coordinate on a global level with innumerable other human stakeholders.[95] For instance, shareholders can team up with consumers; some are even simultaneously consumers and investors—the so-called *investomers*.[96] Skilled employees can choose corporations with values and practices that resonate with them. Investors and consumers can do the same. The result will not be theoretically satisfying to anyone committed to full-fledged corporate democracy. Nonetheless, it could be a material step towards a corporate governance system designed to consider, not suppress, our widely shared sense that money is not everything and our disagreements over precisely when and where we should give priority or relevance to more important values.

III. NEW GENERATIONS AND STAKEHOLDER ENGAGEMENT: A PATH TOWARD TOTAL GOVERNANCE

The shareholder value maximization mantra is a myth both at a firm level and in investing. Most human shareholders have other commitments and other restraints on their

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91. Steven Rosenthal & Theo Burke, *TaxVox: Business Taxes*, TAX POL'Y CTR. (Oct. 20, 2020), https://www.taxpolicycenter.org/taxvox/who-owns-us-stock-foreigners-and-rich-americans [https://perma.cc/3KFM-RZ6Q].

92. Our society and economy rely heavily on large business corporations. This makes the values of the corporate sector and the decisions generated by corporate governance essential for a healthy social, economic, and political system. Gramitto Ricci, Greenwood & Sautter, *supra* note 43 (arguing that antidemocratic corporate governance and share ownership exacerbate social, economic, and political divides with consequential negative ramifications to the health of the nation). On the importance of inclusive corporate governance, *see* STOUT, GRAMITTO & BELINFANTI, *supra* note 10, at 107–18 (arguing that Citizen Capitalism and the Universal Fund described in the proposal uphold American values and ameliorate equality).

93. One-share-one-vote has not always been the corporate law paradigm, even in the United States. In the 1800s, some American corporations featured forms of restricted voting that limited the influence of single shareholders. Sarah C. Haan, *Voting Rights in Corporate Governance: History and Political Economy*, 96 S. CAL. L. REV. 881, 906–08 (2024) (describing models of restricted voting).

94. A more fully democratic corporate governance system would go much further, including measures that make voting per person instead of per share, reviving unions or creating countervailing powers within the corporation to make shared governance a possibility, creating entirely new institutions to hire and fire executives, limit their unanswerable control, or set corporate priorities and norms, and strengthening political democracy and the regulatory system of the public sector.

95. Gramitto Ricci & Sautter, *Wireless Investors*, *supra* note 35, at 1665.

96. Gramitto Ricci & Sautter, *supra* note 12, at 207; Sergio Alberto Gramitto Ricci & Christina Sautter, *Millennials and GenZ'ers Have Only One Lifetime to Change the World with their Investments*, FINREG BLOG (Sept. 23, 2022), https://sites.duke.edu/thefinregblog/2022/09/23/millennials-and-genzers-have-only-one-lifetime-to-change-the-world-with-their-investments/ [https://perma.cc/6JH2-R9X2].

willingness to profit at any cost to society, strangers, or the ecosphere.[97] The same is true for other human stakeholders.[98] Few human shareholders think of themselves as pure investors.[99] Few of us take maximizing the size of our retirement accounts as our key life goal, notwithstanding the occasional T-shirt proclaiming that "he who dies with the most toys, wins." Even of those who do, the overwhelming majority have a greater financial interest in their careers (or the careers of their children) than in stock market returns. Few of us are wealthy enough to generate most of our income from shareholding. More to the point, most of us are invested in other projects entirely, ranging from a decent work-life balance to the future viability of human life on earth.[100] These non-financial concerns may be even stronger for younger generations, especially those who see that unsustainable current trends make it impossible to plan as if the future will be more of the same. Human shareholders are indeed human beings who obey their values and are answerable to their conscience.

Human shareholders and other human stakeholders can increase the quantum of humanity in corporate governance. The degree to which they succeed in this endeavor depends on whether they can exert consequential influence on corporations. Many stakeholders rely on corporate reputation in deciding whether or not to interact with certain companies.[101] Reputation affects a firm's capacity to impose premium prices, attract and retain employees, and nurture consumer loyalty.[102] Stakeholders respond to firms' reputation.

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97. Daniel J.H. Greenwood, *Fictional Shareholder: For Whom Are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021, 1072 (1996); Gramitto Ricci, *Vitruvian*, *supra* note 4, at 118–22; Gramitto Ricci & Sautter, *supra* note 12; Sarah C. Haan, *Is American Shareholder Activism a Social Movement?*, 2021 INT'L J. FIN. SERVS., 21 n. 4 (characterizing certain forms of shareholder activism as social movements); Gramitto Ricci & Sautter, *Wireless Investors*, *supra* note 35 (discussing how wireless investors can coordinate online to engage with corporations as social movements); Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247, 248 (2017).

98. Cathy Hwang and Yaron Nili argue that shareholders have pursued ESG goals typically attributed to stakeholders, effectively bridging the gap between shareholder primacy and stakeholder governance, Cathy Hwang & Yaron Nili, *Shareholder-Driven Stakeholderism*, 2020 U. CHI. L. REV. ONLINE 1, 4 (2020); *but see* Anat Alon-Beck, Sergio Alberto Gramitto Ricci & Christina Sautter, *Is the Debate on Shareholders and Stakeholders Obsolete?*, FINREG BLOG (Mar. 28, 2022), https://sites.duke.edu/thefinregblog/2022/03/28/is-the-debate-on-shareholders-and-stakeholders-obsolete/ [https://perma.cc/2RED-XCUG] (suggesting that a convergence of interest and values among shareholders and other stakeholders is contingent upon the *weltanschauung* of a specific era, not a structural trait).

99. *See* Griffin, *supra* note 4, at 705 ("[T]he vast majority of human investors of every generation are willing to sacrifice profits in the pursuit of social causes.").

100. Gramitto Ricci, *Vitruvian*, *supra* note 4.

101. Kishanthi Parella, *Reputational Regulation*, 67 DUKE L.J. 907, 921 (2018). Of course, a large part of the economy consists of business-to-business transactions. Company employees deciding whether to do business with a given company may feel more constrained to focus on factors directly affecting profit or other measurable aspects of their own jobs, rather than the more free-wheeling ethical or political concerns that might motivate individuals acting as principals rather than agents. Still, even company agents may take reputational concerns into account, particularly if their employer's business reputation might be affected, second hand, by its business associates. Consumers, suppliers or employees who don't want to do business with a firm they perceive to be a quasi-criminal enterprise may not want to do business with its business partners either.

102. *Id. See also* Gramitto Ricci & Sautter, *supra* note 69 (arguing that filing to nurture reputation can negatively affect the value of a firm).

The influence of stakeholders is contingent upon three factors: power, legitimacy, and urgency.[103] Power refers to the relationships across social actors: whether a social actor can make another social actor do something.[104] Legitimacy is the degree to which society accepts that such action would be appropriate and desirable.[105] Urgency describes the degree to which immediate action is needed.[106] Stakeholders of particular types, operating without a coalition—such as stand-alone shareholders, lenders, rank-and-file employees, or customers—are unlikely to have enough power to determine corporate decisions. However, when different types of stakeholders operate in coalition, they significantly increase their odds of securing enough power to succeed in their endeavors.[107] This is the essence of effective crowd-based corporate governance.

Top corporate managers, the directors who supervise them, and the large stock market investors which alone have enough financial weight to eject directors, taken together, have a near monopoly on hard or formal power in corporate law. But soft power matters as well. Top managers of corporations need to consider the potential ramifications for their reputation from actions that they unquestionably have formal authority to take.

A. Who Are Millennials and GenZ'ers?

Millennials and GenZ are moving corporations towards a crowd-oriented governance paradigm. This is particularly true for large American publicly traded companies characterized by a significant degree of 'publicness'. Publicness is a characteristic of a business corporation and a decision-making model as well.[108] Publicness recognizes that decision-making mechanisms extend beyond formal decision protocols.[109] The diffusion of social media, smartphones, and apps has drastically increased the degree of publicness of large American public companies, facilitating the engagement of a larger and larger number of stakeholders.[110] Bringing human shareholders and stakeholders to the center of the corporate governance universe means bringing human values to the core of corporate governance. When this happens, human values trickle down onto the corporate sector and increase the quantum of humanity in corporations.

103. Kishanthi Parella, *Enforcing International Law Against Corporations, A Stakeholder Management Approach*, 65 HARV. INT'L L.J. 283, 289 (2024).

104. *Id.*

105. *Id.*

106. *Id.*

107. Massimilano Vatiero insightfully emphasizes how large public business corporations "compete in financial capital, human capital, and product markets, and exploit their corporate governance structure to attract investors, talents, and consumers, including those with attention to prosocial corporate purposes." Massimiliano Vatiero, *Varieties of Capitalism, Competition, and Prosocial Corporate Purposes*, *in* RESEARCH HANDBOOK ON COMPETITION AND CORPORATE LAW (Florence Thépot & Ana Tzanaki eds., 2023).

108. Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1013, 1032 (2013).

109. *Id.* at 1032–34.

110. Gramitto Ricci, *Corporate Governance & Public Opinion*, *supra* note 13 (discussing how social media and online communication require corporations to deal with an accountability paradigm shift from a guilt culture archetype to a more complex archetype in which guilt culture is intertwined with shame culture).

Millennials make up 23% of the global population.[111] GenZ makes up 32% of the world population, about two billion people.[112] Millennials are set to inherit over $68 trillion by 2030 in what has been dubbed the "Great Wealth Transfer."[113] Within another decade, GenZ's income is projected to grow past $70 trillion.[114] In the United States, Millennials and GenZ combined make up more than 140 million people.[115] GenZ's spending in the United States is just shy of $100 billion, with Millennials at more than $65 billion.[116] While generational divisions are useful only to a limited degree—differences of opinion and outlook within generations arguably are greater than those between them—generations do matter for some key issues. Most obviously, Millennials and GenZ are digital natives, having grown up with the internet as an integral part of their lives in the way that TV was for their elders. Another key difference also matters for ESG: gender identification and sexual orientation have radically changed in the younger cohorts. 10% of Millennials and 21% of GenZ identify as LGBTQ+ and this number is set to increase.[117]

B. New Generations and Career Choices

Millennials and GenZ will make up 72% of the global workforce by 2029.[118] Both generations are seemingly searching for a sense of fulfillment to be achieved through their professional careers in a way that we have not seen since the strong labor markets of the

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111. Dorothy Neufeld, *There Are 1.8 Billion Millennials on Earth. Here's Where They* Live, WORLD ECON. F. (Nov. 8, 2021), https://www.weforum.org/agenda/2021/11/millennials-world-regional-breakdown/ [https://perma.cc/J4A4-UBCT].

112. *Millennials vs Gen Z: How Are They Different*, TALKATIVE (Nov. 21, 2022), https://gettalkative.com/info/millennials-vs-gen-z-infographic [https://perma.cc/XMB8-K9J8].

113. COLDWELL BANKER GLOB. LUXURY, A LOOK AT WEALTH 2019: MILLENNIAL MILLIONAIRES 3 (2019), https://blog.coldwellbankerluxury.com/wp-content/uploads/2019/10/CBGL-Millennial-Report_SEP19_FINAL-4a.1-1-1.pdf [https://perma.cc/XBA5-GUH3]; BANK AM. SEC., OK ZOOMER: GEN Z PRIMER 7 (2020), https://business.bofa.com/content/dam/boamlimages/documents/articles/ID21_0026/GenZ_redacted.pdf [https://web.archive.org/web/20211005115742/https://business.bofa.com/content/dam/boamlimages/documents/articles/ID21_0026/GenZ_redacted.pdf]; Kate Dore, *The Great Wealth Transfer Is Underway. Here's How to Prepare*, CNBC (Oct. 24, 2024), https://www.cnbc.com/2024/10/24/great-wealth-transfer.html [https://perma.cc/788P-HNS8] (reporting that $84 trillion will be inherited by 2045, with the majority going to Millennials and GenZ.)

114. COLDWELL BANKER GLOB. LUXURY, *supra* note 113, at 7; BANK AM. SEC., *supra* note 113.

115. Veera Korhonen, *Resident Population in the United States in 2022, By Generation*, STATISTA (Aug. 29, 2023), https://www.statista.com/statistics/797321/us-population-by-generation/ [https://web.archive.org/web/20231205162551/https://www.statista.com/statistics/797321/us-population-by-generation/].

116. Naji El Arifi, *The Purchasing Power of Millenials and Generation Z*, WUNDERMAN THOMPSON, https://www.wundermanthompson.com/insight/the-purchasing-power-of-millennials-and-generation-z [https://web.archive.org/web/20230520192818/https://www.wundermanthompson.com/insight/the-purchasing-power-of-millennials-and-generation-z].

117. Sarah Kate Ellis, *The Challenge Facing Companies When Dealing with LGBTQ Issues*, WALL ST. J. (Dec. 10, 2023), https://www.wsj.com/business/lgbtq-challenges-business-2024-868cc7d1# (on file with the *Journal of Corporation Law*).

118. LINGJUN JIANG ET AL., ESG AS A WORKFORCE STRATEGY 11 (2020), https://www.marshmclennan.com/content/dam/mmc-web/insights/publications/2020/may/ESG-as-a-workforce-strategy_Part%20I.pdf [https://perma.cc/7D5P-QVT3].

1960s.[119] Their members consider values in making career choices.[120] Four out of five Millennials report that they view a positive work environment (including diversity) as a significant job factor.[121] Almost half of Millennials and GenZ'ers responding to a Deloitte survey reported that their "personal ethics" were factored into their professional decisions.[122]

Astonishingly, about 17% of Millennials and GenZ'ers have changed employment based on environmental concerns.[123] Before accepting a job offer, most Millennials and 55% of GenZ'ers research the prospective employer's environmental impact and policies, factoring the company's ESG charity and community outreach history into their decision.[124] Many Millennials and GenZ'ers prefer employers that tackle environmental issues in tangible ways, such as by providing employee subsidies for sustainable choices, sustainability education, bans on single-use plastics, and renovating offices to become greener.[125] To be sure, these individual actions can be no more than supplements to—not substitutes for—structural changes such as shifting to renewable energy or building mass transit. Nonetheless, these poll results suggest powerful environmental concerns among the American workforce and consumers, which will lead to more meaningful interventions. More importantly, in the economy of total governance, these individuals can team up with other stakeholders to make their voices significantly louder.[126] For example, they can act along with shareholders, consumers, and community members,[127] coordinating collective efforts online on a global scale.[128]

Engaged employees can be a source of first-hand information for conscious shareholders and consumers. For example, Boeing employees have long complained about managerial failures stemming from a culture that emphasizes short-term shareholder returns, moved production to non-union plants and abroad, took design shortcuts, and failed to respond to engineers' quality concerns. Had shareholders and Boeing customers been more aware of these internal Boeing concerns, Boeing's problems might have come to light before the airplane disasters. If investors had learned the full extent of internal discontent; they might have driven stock prices down to the point where even managers concerned

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119. CHRIS TUFF, THE MILLENNIAL WHISPERER: THE PRACTICAL PROFIT-FOCUSED PLAYBOOK FOR WORKING WITH AND MOTIVATING THE WORLD'S LARGEST GENERATION (2019).

120. DELOITTE, 2024 GEN Z AND MILLENNIAL SURVEY: LIVING AND WORKING WITH PURPOSE IN A TRANSFORMING WORLD 10 (2024), https://www.deloitte.com/content/dam/assets-shared/docs/campaigns/2024/deloitte-2024-genz-millennial-survey.pdf [https://perma.cc/JQ9P-SGE3].

121. Shilpa Coorg, *Millennials Demand More Diversity in the Profession*, L.A. LAW., Jan. 2022, at 10, 11 (claiming 78% of millennials link firm performance with environment and diversity).

122. DELOITTE, *supra* note 120, at 10.

123. Andy Marks, *Gen Zs and Millennials Look to Employers to Address Climate Concerns*, WALL ST. J.: SUSTAINABLE BUS. (July 26, 2023), https://deloitte.wsj.com/sustainable-business/gen-zs-and-millennials-look-to-employers-to-address-climate-concerns-c1cddbe8 [https://perma.cc/EX7D-2SS9].

124. *Id.*; TUFF, *supra* note 119.

125. Marks, *supra* note 123.

126. *See infra* Part IV.C.

127. *See infra* Part IV.C.

128. *See infra* Part IV.B–C.

with short-term stock prices could recognize that their purportedly money-saving efforts were counterproductive.[129]

Many GenZ'ers also value good relationships with co-workers and employers, including both diversity and basic fairness.[130] This impacts whether GenZ workers decide to stay at their workplace or look for another job with a better work culture and environment (six out of ten GenZ'ers report that they have experienced discrimination at work).[131] Millennials and GenZ'ers also advocate for LGBTQ+ equity and inclusion, with 56% of Millennials and 67% of GenZ demanding corporations support real equity and inclusion in the workplace.[132] While that leaves plenty of younger workers available for companies that choose to ignore diversity or equity, companies that take the antisocial position will be limiting their access to talent.

C. New Generations as Corporate Consumers

In the United States, GenZ consumers are expected to make up about 40% of the consumer market.[133] Their impact is probably larger; marketers historically have focused on younger consumers, assuming that people set brand loyalties when young and become less flexible in their choices as they grow older. Businesses perceive Millennials and GenZ to be actively aware in their consumption decisions. Their expectations go further than product price and quality, demanding that brands reflect their social and environmental

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129. *See, e.g.*, Bill George, *Why Boeing's Problems With the 737 MAX Began More Than 25 Years Ago*, HARV. BUS. SCH.: WORKING KNOWLEDGE (Jan. 24, 2024), https://hbswk.hbs.edu/item/why-boeings-problems-with-737-max-began-more-than-25-years-ago [https://web.archive.org/web/20240205195507/https://hbswk.hbs.edu/item/why-boeings-problems-with-737-max-began-more-than-25-years-ago]; PETER ROBISON, FLYING BLIND – THE 737 MAX TRAGEDY AND THE FALL OF BOEING (2022); Jerry Useem, *The Long Forgotten Flight that Sent Boeing Off Course: A Company Once Driven By Engineers Became Driven By Finance*, THE ATLANTIC (Nov. 20, 2019), https://www.theatlantic.com/ideas/archive/2019/11/how-boeing-lost-its-bearings/602188/ [https://perma.cc/Y7NW-HN53].

130. *See* Khalil M Dirani & Bhagyashree Barhate, *Career Aspirations of Generation Z: A Systematic Literature Review*, 46 EUR. J. TRAINING & DEV. 139 (2022) (analyzing intrinsic and extrinsic factors important to GenZ employees, including diversity and relationships with co-workers).

131. Lara Americo, *Two-Thirds of LGBTQ+ Gen Z Would Leave Their Job if They Can't be Out at Work, Reveals New Research Study by MyGwork*, CAMPUS PRIDE (Oct. 19, 2022), https://www.campuspride.org/two-thirds-of-lgbtq-gen-z-would-leave-their-job-if-they-cant-be-out-at-work-reveals-new-research-study-by-mygwork/ [https://perma.cc/84YZ-SX7A].

132. BROADENING THE SPECTRUM OF INVESTING: OPPORTUNITIES AND DEMAND FOR INVESTING IN LGBTQ+ EQUITY & INCLUSION, MORGAN STANLEY (2023), https://www.morganstanley.com/content/dam/msdotcom/en/assets/pdfs/Morgan_Stanley_Broadening_the_Spectrum_of_Investing_LGBTQ_Investing.pdf [https://perma.cc/3QTX-6VAA].

133. Branka, *Generation Z Statistics* 2023, TRUELIST (Jan. 7, 2023), https://truelist.co/blog/generation-z-statistics/ [https://perma.cc/BY2G-VCXW].

values.[134] For example, reports show that 43% of GenZ are more than happy to participate in product reviews to voice their opinions and start conversations about brand activities.[135]

Of course, there is no reason to think that values will be uniform across the generation; companies should be able to carve out consumer niches catering to almost any set of values managers wish to pursue. Nonetheless, large sectors of the economy have diminishing costs with scale, including most of the areas in which publicly traded firms are active. In these sectors, the largest firms are likely to be the lowest-cost producers and the best able to negotiate good deals with their suppliers, business consumers, and governments. At a minimum, companies in this part of the economy will be under intense competitive pressure to attract a broad spectrum of potential consumers. Given the consumerist activism of Millennials and GenZ, companies should seek to reflect broadly popular political views, such as reducing the threat of global warming, avoiding the worst forms of employee exploitation, and supporting non-discrimination, diversity, and equity in the workplace.

What is true with respect to employees in the rising generations is also true with respect to consumers. In a survey conducted by Francis and Hoefel in 2018, an extraordinary 8 out of 10 GenZ'ers reported that they would stop buying products from brands with racist or homophobic advertising campaigns.[136] More broadly, "if the company takes a stance on a social issue they don't agree with," 55% of GenZ respondents stated they would "stop using a product or service."[137] In a similar consumer research study conducted on the GenZ generation, 59% of respondents stated that they might begin consuming a product merely because "the company takes a stance on a social issue they are passionate about."[138] A 2020 survey found that corporations that attempt to address or alleviate social issues attract GenZ consumers 72% more than those that do not.[139]

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134. Rasa Smaliukiene, Elena Kocai & Angele Tamuleviciute, *Generation Z and Consumption: How Communication Environment Shapes Youth Choices*, 11 MEDIA STUD. 24, 25 (2022). For a representative example, consider the attempts of Pittsburgh activists to learn where local universities are investing their endowments. Emma Folts, *Pitt and CMU Have Grown Wealthier Through Private, Offshore Investments. We Followed the Money,* PUBLICSOURCE (Feb. 26, 2024), https://www.publicsource.org/pitt-cmu-fossil-fuels-offshore-investments-transperancy-divestment/ [https://perma.cc/J4TH-7LL8].

135. Branka, *supra* note 133.

136. Dalton Alexis Courtney, Exploring Generation Z's Environmental Concerns and Its Effects on Their Purchasing Behaviors (May 2020) (Honors thesis, Texas State University), https://digital.library.txst.edu/server/api/core/bitstreams/0f61a467-fbd7-4c8e-abb8-1e2a94a341f8/content [https://perma.cc/G7PZ-ULVW].

137. THE CTR. FOR GENERATIONAL KINETICS, GEN Z AS CONSUMERS, SAVERS, AND INFLUENCING PERSONAL FINANCE 19 (2022), https://genhq.com/wp-content/uploads/2022/07/State-of-Gen-Z-2021-2022-Consumers.pdf [https://perma.cc/6QNY-2F9T].

138. THE CTR. FOR GENERATIONAL KINETICS, THE STATE OF GENZ 2021-2022: GEN Z AS CONSUMERS, SAVERS, AND INFLUENCING PERSONAL FINANCE (2022), https://genhq.com/generation-z-consumer-research-2021-2022/ [https://perma.cc/UG9P-6Z47].

139. Abe Selig, *Generation Influence: Reaching Gen Z in the New Digital Paradigm*, WPENGINE (Aug. 31, 2020), https://wpengine.com/resources/gen-z-2020-full-report/#Generation_Influence_An_International_Study_Comparing_Gen_Z_With_Other_Generations [https://perma.cc/5A92-JTQV]; *see also* ERNST & YOUNG, IS GEN Z THE SPARK WE NEED TO SEE THE LIGHT? 51 (2021), https://assets.ey.com/content/dam/ey-sites/ey-com/en_us/topics/consulting/ey-is-gen-z-the-spark-we-need-to-see-the-light-full-report.pdf [https://perma.cc/XZ9Z-9TNB].

Similarly, Millennials value a company's contribution to the "broader community it serves" in making their consumption decisions.[140]

In short, while younger generations, like their elders, disagree on political questions of how to pursue the common welfare or define serving the community, most Millennials and GenZ'ers want to purchase products from brands with good ESG standing.[141] According to self-reporting, GenZ'ers and Millennials tend to "put their wallets where their values are, stopping or initiating relationships based on how companies treat the environment, protect personal data, and position themselves on social and political issues."[142]

Although self-reporting does not perfectly reflect the actual behavior of consumers, strong evidence indicates that large numbers of desirable consumers *do* care about corporate behavior. This means that consumer-facing corporations need to nurture their ESG reputation if they want to attract and retain a large segment of their customer base.[143] This is particularly relevant in light of the imminent generational wealth transfer, which will massively increase the purchasing power of Millennials and GenZ. In competitive markets, failing to appeal to values-driven consumers can put firms at a disadvantage or even out of business.[144]

D. New Generations and Investing

Human investor sentiments track employee and consumer views, as well.[145] Just as many Millennials and GenZ'ers make consumption and employment decisions based on their values, they also keep their values in mind when making decisions as retail investors.[146] Seeking companies that mirror their social and environmental values, 89% of Millennials assume their financial advisors will consider the company's previous and present ESG values when recommending investments.[147] More than 80% of GenZ'ers consider ESG when investing.[148] These younger generations prefer to invest in companies that provide products or services that prioritize the ESG issues that resonate with their values.[149] For example, it is predicted that $73 trillion will shift toward Millennial and GenZ investors focused on the promotion of LGBTQ+ equity.[150] The generational wealth

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140. Kira Karapetian, *The Path to Millennial Spend is Paved with Transparency*, FORBES (Aug. 8, 2017), https://www.forbes.com/sites/forbescommunicationscouncil/2017/08/08/the-path-to-millennial-spend-is-paved-with-transparency (on file with the *Journal of Corporation Law*).

141. MORGAN STANLEY, *supra* note 132.

142. DELOITTE, *supra* note 120, at 28.

143. Gramitto Ricci, *Corporate Governance & Public Opinion*, *supra* note 13.

144. *See infra* Part IV.B.

145. Griffin, *supra* note 4, at 704, 705; Gramitto Ricci, *Vitruvian*, *supra* note 4, at 120–23.

146. Alicia Adamczyk, *Millennials Spurred Growth in Sustainable Investing for Years. Now All Generations are Interested in ESG Options*, CNBC (May 21, 2021), https://www.cnbc.com/2021/05/21/millennials-spurred-growth-in-esg-investing-now-all-ages-are-on-board.html [https://perma.cc/CK6K-B36C].

147. MSCI ESG RSCH., SWIPE TO INVEST: THE STORY BEHIND MILLENNIALS AND ESG INVESTING 7 (2020), https://www.msci.com/documents/10199/07e7a7d3-59c3-4d0b-b0b5-029e8fd3974b [https://perma.cc/KH8U-MFM5].

148. BANK AM. SEC., *supra* note 113, at 4.

149. DELOITTE, *supra* note 120, at 28.

150. MORGAN STANLEY, *supra* note 132.

that these two generations are inheriting may grow LGBTQ+ equity investments by 40%.[151]

New generations of shareholders want to use their investments to access corporate governance in order to promote their ESG and ethical values, not merely to increase shareholder returns.[152] Exerting leverage on the corporate sector is arguably the most consequential strategy to bring change.[153] Institutional Shareholder Services observes that Millennial and Gen Z investors want their ESG concerns "heard" by the companies in which they invest.[154] This is consistent with a broader retail investor trend: according to the founder of Urvin Finance, retail investors generally are now seeking to directly participate and engage with the companies they're invested in, more so than in the past.[155]

Millennials and GenZ'ers largely inform themselves on corporate matters through the Internet.[156] The rapid dissemination of information (accurate or otherwise) via the internet and social media, is causing qualitative, not merely quantitative, change in what investors know and how they act upon it. Advisory firms believe that retail investors can obtain an increasingly broad amount of information autonomously, so voting shares is becoming easier; as technology advances, this trend may accelerate.[157] In an effort to allow retail investors to directly engage with the companies in which they invest, advisory firms are seeking ways to develop alert systems to inform investors when there are votes pertaining to issues they indicate are important to them.[158]

Whether enough socially conscious investors actually follow through to affect stock prices remains an open question. Standard 'rational' finance theory predicts that if socially conscious investors were to drive the price of profitable but 'unwoke' stocks down below the price that their expected returns would otherwise command, one would expect pure profit-maximizers would see that stock as a bargain, and drive the price back up again.[159]

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151. *Id.*

152. *See* EQUINITI, SHAREHOLDER VOICE 2021 26 (2021), https://equiniti.com/media/11237/eq-shareholder-voice-2021-report.pdf [https://perma.cc/4UV4-MUNU] (discussing how corporations that adhere to loyal customers, shareholders, and employees will receive loyal advocates and customers).

153. STOUT, GRAMITTO & BELINFANTI, *supra* note 10, at 24–25 (arguing that inclusive capitalism and societal engagement with the corporate sector is an unrivaled opportunity to bring change).

154. Eric Rosenbaum, *A New BlackRock Shareholder Power that May Tilt Proxy Battles of the Future*, CNBC (Mar. 1, 2022), https://www.cnbc.com/2022/03/01/a-blackrock-shareholder-vote-that-may-control-future-proxy-battles.html [https:/perma.cc/7P6M-39VJ].

155. Luc Olinga, *The Retail Investor Spring Continues a Year After Reddit Played Wall Street*, THESTREET (Mar. 3, 2022), https://www.thestreet.com/investing/the-retail-investor-spring-continues-a-year-after-reddit-played-wall-street [https://perma.cc/F794-FX6L].

156. Gramitto Ricci & Sautter, *Wireless Investors*, *supra* note 35, at 63 (discussing how gaming qualities attract Millennials and GenZ); Sergio Alberto Gramitto Ricci & Christina Sautter, *The Corporate Forum*, 102 B.U. L. REV. 1861, 1865 (2022) [hereinafter Gramitto Ricci & Sautter, *Corporate Forum*] ("Young generations of investors rely on social media and then friends, family, podcasts, and traditional investing sites to source investing information.").

157. Rosenbaum, *supra* note 154.

158. *Id.*

159. Philippe van der Beck, *Flow-Driven ESG Returns* (Swiss Fin Inst, Rsch. Paper No. 21-71, 2023). Philippe van der Beck points out that:

> Despite the enormous growth in the ESG investment industry, both the price impact and the expected returns of sustainable investing are widely debated. Academic and practitioner

Casual empiricism, however, suggests the marginal buyer, setting the market price, often is not a profit-maximizer rationally focusing on expected returns. Even leaving aside problems of limited rationality and the difficulty of predicting future returns, stock prices often appear to be set by momentum traders, concerned less with projections of future profit than guesses about the personal values of other stock traders. For momentum traders, reputation-destroying rumors may be a good reason to sell, driving the price down, regardless of whether future profits are affected in any obvious way.

Even the purest profit-maximizing fundamental trader, concerned only with projections of future dividends, must consider the possibility of future consumer rebellion or voter support for more regulatory restrictions. For example, cigarette companies, engaged in a business that has been recognized for decades as having high social disutility, have long traded at a discount to what one might expect given a profitable business selling addictive drugs. That discount might be the result of investors who do not wish to profit from cancer avoiding the stocks. On the other hand, it could also be the result of ethically indifferent profit-maximizers pricing the possibility that cigarettes will be banned, that their manufacturers will be found liable for the cancers they've caused, or that consumption will continue to decline as consumers find ways to overcome addiction. Both stories point in the same direction: stocks of companies perceived to create social harm are likely to sell at lower prices.

IV. TOTAL GOVERNANCE AND THE MULTI-STAKEHOLDER APPROACH'S INTRICACIES

A key social benefit of the stock market is that it converts short-term money into long-term investments. Shareholders are permitted to buy and sell stock freely, thus allowing any individual investor to liquidate its investment at any time if it needs cash or thinks it has found a better investment. From the shareholder's perspective, stock market investments can be for milliseconds in the case of some active traders or permanent for some index funds. On the other hand, once a corporation sells shares, the money it receives is a permanent investment. Stock has neither a fixed term nor fixed interest rates: shareholders have no right to demand that the company return their money or pay for using it. As a formal legal matter, so long as it remains solvent, only the company, by vote of its

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> views on the expected returns from sustainable investments are often diametrically opposed. The pervasive theoretical view is that if investors have a preference for sustainability, the additional utility gained by investing sustainably should be offset by lower expected returns. Investors bid up the price of sustainable companies and risk adjusted expected returns must unambiguously be lower. In other words, investors cannot do well by doing good. Empirically, however, sustainable funds have performed well in recent years suggesting that ESG-concerned investors are in fact doing well by doing good. At the same time, the extent to which sustainable investors can impact prices is highly debated.

Id. at 1. Philippe van der Beck also concludes that demand for ESG stocks lowers firms' costs of capital. *Id.* at 23 (finding that "[w]hile the low aggregate elasticity of substitution is worrying for the overall stability and efficiency of equity markets, it supports the effectiveness of impact investing. Flows towards ESG funds that invest in cross-sectionally inelastic stocks considerably increase the stock price of the firms in the funds' portfolios, thereby lowering the cost of capital.").

board of directors, decides when and whether to declare a dividend, redeem or repurchase stock, or liquidate. This means that most of the time, the company can plan its business without regard to whether its shareholders are long-term or short-term, ESG-driven or profit maximizers, American GenZ'ers, or foreign funds investing on behalf of unborn Norwegian generations or Saudi royals.

Traditionally, small investors often have been hesitant to vote in shareholder meetings. In part, this is because of rational apathy—the time and effort exceed the predictable influence that the everyday individual shareholder may have.[160] For more financially oriented investors, shareholder engagement may result from the so-called Wall Street Rule—shareholders convinced that managers are on the wrong path usually are financially better off selling the stock rather than voting against incumbents. It may also be because American corporate law and the SEC have routinely limited the ability of shareholders to raise non-financial concerns through corporate governance.[161] A plutocratic voting model that rewards investors who can afford large blocks of shares further inhibits everyday people who hold securities.

However, global online coordination allows retail investors to overcome hurdles and makes apathy suboptimal, likely transforming the behavior of investors.[162] First, it is easier than ever to become a shareholder in the first place. Mobile-first commission-free investing apps have lowered the barriers of entry into financial markets, even beyond the vast changes caused by defined contribution plans, mutual funds, and index funds, which vastly increased the proportion of Americans exposed to the stock market over the last half-century.[163] While mutual funds led to disenfranchised indirect investors, today, the diffusion of app-based investing means that more people can own company shares directly and take part in corporate governance.[164]

Standard financial advice is that most investors, absent some special knowledge of a particular industry, will do better financially by diversifying; for small investors, this means owning indexed mutual funds or ETFs rather than individual stocks. Investors who access the equity markets via mutual funds or ETFs generally have no right or ability to

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160. Technology, online communication and coordination, and innovative fintech services have increasingly reduced the costs of keeping informed and voting shares, tilting the tradeoff toward the advantages of voting and engaging. Gramitto Ricci & Sautter, *Wireless Investors*, *supra* note 35 (discussing how communication and collective action make the apathy paradigm obsolete).

161. *See, e.g.*, Carl Gershenson, *Protecting Markets from Society: Non-Pecuniary Claims in American Corporate Democracy*, 43 POL. & SOC'Y 33 (2015) (arguing that state, and SEC in particular, attempts to insulate corporate managers and financial markets from social concerns, inverting Polanyi's claim that society must protect itself from markets).

162. Gramitto Ricci & Sautter, *Wireless Investors*, *supra* note 35, at 1657.

163. Jill E. Fisch, *GameStop and the Resurgence of the Retail Investor*, 102 B.U. L. REV. 1799 (2022); Letter from Sergio Alberto Gramitto Ricci & Christina M. Sautter to Vanessa A. Countryman, Sec'y, SEC, Comment Letter on SEC's Proposed Rule on Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker Dealers and Investment Advisers 8 (October 9, 2023) (File No. S7-12-23).

164. Gramitto Ricci & Sautter, *supra* note 12. A leading expert of shareholder voting dynamics, Bruce Goldfarb, depicts retail shareholders, including *wireless investors*, as needle movers in contested votes and emphasizes the importance of meeting these retail shareholders where they are—online. Bruce Goldfarb, *Activism: Collective Voting Power of Retail Shareholders Could Sway Contested Votes*, IR MAG. (Jan. 22, 2024), https://www.irmagazine.com/activism-ma/activism-collective-voting-power-retail-shareholders-could-sway-contested-votes [https://perma.cc/G9L5-V3W7].

vote since most intermediaries do not pass their votes through to their own investors.[165] But individuals who choose funds over companies lose their governance rights, including the rights to vote, sue, and sell to hold managers accountable. Direct holders of stock, in contrast, can vote directly for board nominees and to approve or disapprove merger-related board resolutions or changes to the Articles, as well as precatory shareholder resolutions.[166] So, many individuals prefer to own stocks directly because they value the influence and power of the vote more than the financial advantages of diversification. Others may reject the received wisdom about the difficulty of beating the market or may seek the thrills of financial markets. More affluent investors with large enough portfolios to diversify, even with direct holdings, may prefer to retain control of when they realize gains and losses for tax purposes.[167]

Direct ownership gives individual shareholders access to the governance power their money can buy when they invest in equities, including their rights to vote, sell, and sue.[168] Eased accessibility to financial markets and corporate governance bridges the gap between society and the corporate sector. As shareholders and other stakeholders increasingly engage with the corporate sector, they will tighten the connection between individuals and corporations, in particular consumer-facing corporations. Individuals often have several stakeholding roles relative to a corporation simultaneously. Remarkably, online communication and social media provide the infrastructure to coordinate across different categories of stakeholders.[169]

165. Several large mutual fund companies, including Blackstone, recently announced experimental methods to allow partial pass-through voting, typically by allowing their retail investors to pick from a limited package of pre-selected positions (such as support for environmentally conscious policies). Jeff Sommer, *Millions of Fund Investors Are Getting a Voice*, N.Y. TIMES (Feb. 23, 2024), https://www.nytimes.com/2024/02/23/business/vanguard-blackrock-state-street-investing-voting.html (on file with the *Journal of Corporation Law*). However, pass-through voting falls short of mirroring the voting effectively. Gramitto Ricci, *Vitruvian*, *supra* note 4, at 114 n.2 (shedding light on the shortcoming of pass-through voting).

166. Gramitto Ricci, *Vitruvian*, *supra* note 4, at 122.

167. Company managers long preferred stable individual investors, who (as humans investing as principals) were thought to be less likely to sell for small incremental returns should a hostile acquiror seek control of the company or pressure for immediate shareholder returns at the expense of management's preferred projects. For wealthy individual investors, much stability likely stems from a reluctance to pay taxes. For equities held in non-retirement accounts, increases in stock price are not classified as taxable income until the investor sells the stock, at which point capital gains taxes are due. Moreover, if the investor dies while holding the investment, the heirs receive the stock with a "step up of basis," meaning that they never pay capital gains taxes on gains during the decedent's lifetime. Our wealthy classes are notoriously tax-a-phobic, undoubtedly leading many wealthy investors to decide to maintain existing stockholdings simply to avoid tax.
In contrast, many institutional investors are tax-exempt (e.g., endowment funds) or pass-throughs (e.g., mutual funds). Mutual funds heavily advertise their returns but are not required to disclose the taxes they generate for their investors, who may have trouble predicting the tax consequences of decisions to invest in specific mutual funds. Mutual fund managers, therefore, have relatively little incentive to avoid realizing capital gains.
However, upper-middle-class investors are far more likely to hold their (indirect) equity holdings in tax-deferred retirement accounts. Sales of equities within these accounts are tax-free. The human investors whom Griffin describes in *Humanizing Corporate Governance*, for example, do not have the tax incentives for stability that the wealthier do. Griffin, *supra* note 4, at 693–94.

168. Gramitto Ricci & Sautter, *Corporate Governance Gaming*, *supra* note 46, at 57.

169. On the use of online communication to coordinate shareholder collective action, see Gramitto Ricci & Sautter, *Wireless Investors*, *supra* note 35, at 1653.

A. The Total Governance Paradigm

Millennial and Gen Z investors seem to be more inclined to invest in companies that produce products and provide services they use over those they do not.[170] This is a relevant finding for consumer-facing corporations, which deal with the public in the form of investors and consumers. These issuers are exposed to the *investomer* phenomenon, which amplifies individuals' opportunities to engage with governance.[171] Regardless of whether retail customers affect stock prices in their stock-trader role, there is no question that they do as consumers. Outside of pandemics, most companies are demand constrained. Investomer behavior, thus, has a direct and immediate effect on sales and therefore profits.

Under total governance, Millennials and Gen Z'ers can hold corporations to a standard that is different than generations before.[172] A total governance approach allows stakeholders to exercise unprecedented governance power on corporations.[173] Moreover, by adopting a total governance approach to corporate governance, individuals can use the multi-stakeholder strategy to steer corporations in a way that adheres to their own ethical values.

Companies may use shareholdings to attract and retain consumers or employees. Employees or consumers who own stock in a company may feel more connected, and thus more likely to remain employed or purchase its products. In their classic, *The Modern Corporation and Private Property*, Berle and Means discussed how consumers and employees of issuers are the driving force for the diffusion of shares in society.[174] More recently, Sarah Haan described how some corporations actively seek out certain types of shareholders, specifically women, because "they are the real purchasers of [a given company]'s product."[175] Since companies rely on their retail investors to consume their products and services, companies are figuratively invested in their own shareholder's purchasing practices.[176]

The multi-stakeholder level decisions made by these individuals often result from biases in favor of the familiar company.[177] Furthermore, along with familiarity, individuals

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170. Matti Keloharju, Samuli Knüpfer & Juhani T. Linnainmaa, *Do Investors Buy What They Know? Product Market Choices and Investment Decisions*, 25 REV. FIN. STUD. 2921, 2937 (2012) ("[I]ndividuals are more likely to invest in companies they frequent as customers.").

171. For a definition of investomers, see *supra* Part II.C.

172. EDELMAN, 2021 EDELMAN TRUST BAROMETER 34 (2021), https://www.edelman.com/sites/g/files/aatuss191/files/2021-01/2021-edelman-trust-barometer.pdf [https://perma.cc/29GQ-CL3J].

173. DELOITTE, *supra* note 120, at 33; *see also* Gramitto Ricci & Sautter, *Wireless Investors*, *supra* note 35 (discussing how Millennials and Gen Z'ers can leverage on the corporate sector to pursue environmental and social causes).

174. ADOLF A. BERLE & GARINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 56 (1932).

175. Sarah Haan, *Corporate Governance and the Feminization of Capital*, 74 STAN. L. REV. 515, 556 (2022).

176. *Id.*

177. Gur Huberman, *Familiarity Breeds Investment*, 14 REV. FIN. STUD. 659, 676 (2001). This is consistent with a 2020 survey of 2200 U.S. adults, representative of the general population conducted by Morning Consult. MORNING CONSULT, THE RISE OF RETAIL INVESTING IN THE U.S. (2020), https://go.morningconsult.com/rs/850-TAA-511/images/MC-Retail-Investor-Report-20201001.pdf [https://web.archive.org/web/20220612193802/https://go.morningconsult.com/rs/850-TAA-511/images/MC-Retail-Investor-Report-20201001.pdf]. Of Americans already investing, 34% said they invest in companies

are more likely to be optimistic about certain companies based on their consumption and pre-existing relationships.[178] This loyalty amongst retail investors who may consume the products or be a part of the workforce of the company they invested in, may make such retail investors follow a long-term investment strategy as their optimism for the company and its goals remains strong.[179] Additionally, research indicates that the longer individuals hold onto stock of a certain company, the more likely they are to use that company's product or service.[180] The relationship between consumption and long-term investment strategies results in Millennial and GenZ investors who base their investment, consumption, and employment choices on values held by the business organizations they're dealing with to only capitalize companies that agree with their ESG values.[181]

B. Total Governance in Competitive Markets

Total governance is likely to work best in reasonably competitive markets for finance, labor, and products and services. This is easily seen by exploring the alternatives. When a company (or an industry moving in lockstep) has oligopoly power, its counterparties correspondingly lack influence. If counterparties have nowhere else to turn, they have no effective threat to refuse to deal.

Thus, for example, air travelers might be unhappy with the delays and discomfort that stem from the airlines' decades-long commitment to ending redundancy in the name of efficiency and higher profit, creating cascading backups with adverse weather or technical difficulties. Under total governance, we might expect that travelers, investors, employees, business travel agents, and even regulators, will be, to some degree, the same people—and that different people in these multiple roles might be able to form intersectional coalitions using social media and related fora to create a perceived market opportunity for a different business model.

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whose products or services they like; 31% said they invest in companies with which they are familiar and know their history; and 31% said they invest in companies when they like what they "have seen, read, or heard about the company". *Id.* at 36. For Americans not yet investing but likely to invest, 21% say they would invest in companies when they like what they "have seen, read, or heard about the company;" 18% said they would invest in companies when they have "seen, read, or heard a lot about the company;" and 16% said they would invest in companies with which they are familiar and are familiar with its history. *Id.* at 37.

178. Huberman, *supra* note 177, at 676.

179. *Id.* at 675.

180. *See generally* Paolina C. Medina, Vrinda Mittal & Michaela Pagel, *The Effect of Stock Ownership on Individual Spending and Loyalty* (Nat'l Bureau of Econ. Rsch., Working Paper No. 28479, 2021). In fact, stock ownership may also result in these individuals shopping "less from the competition . . . or pay[ing] a higher price." *Id.* at 5. In fact, stock ownership may also result in these individuals shopping "less from the competition, or pay[ing] a higher price." *Id.* at 5.

181. Standard theory suggests that such behavior will have only a composition effect, changing who owns the corporation's stock but not the stock price or the company's access to financial capital. However, the standard theory appears to underemphasize the power of momentum traders, who may amplify the effects of values-driven trading. If values traders drive the price down and momentum traders pile on, bargain-seeking fundamental traders may fear to buy even if they recognize that the stock price is a bargain relative to projected future earnings. As the Wall Street maxim puts it, 'the market can stay irrational longer than you can stay solvent.' Thus, values-based trading may result in a depressed stock price over extended periods, which will, in turn, make it more expensive for the company to raise outside capital. To raise equity capital, the firm would have to sell more stock, thus diluting the existing shareholders' claim on votes and dividends. Alternatively, if it seeks to borrow, lenders are likely to demand higher interest in order to compensate for the increased risk of a smaller equity cushion.

But much of the inconvenience of air travel is out of the control of individual airlines—for example, poor ground transit connections and security theater delays. And even with respect to factors within an airline's control, such as planning for bad weather, it is difficult for an airline to adopt more expensive redundancies when its competitors do not and can, therefore, offer lower prices. When every airline adopts a similar business plan, it is hard for even organized consumer/investor groups, let alone less organized social media fads, to press for change. In a country with long distances and no train service, consumers have no choice but to fly or stay home, and investors seeking exposure to business or pleasure travel have no alternative to airlines.

Full monopolies are even more disempowering: if there is only one electric, cable, or internet provider in a region, total governance will be ineffective unless consumers and investors can switch to an entirely different system.

Conversely, fully competitive markets also reduce the effectiveness of total governance. At the extreme, this is easy to see: in a fully competitive commodity market, each company must prioritize keeping its (quality-adjusted) price as low as possible, or it will lose its customers. That means paying employees as little as possible, spending as little as possible on regulatory and environmental compliance, and so on. A company that voluntarily spends more in the public interest (or pays shareholders or top managers more than it must) will have higher expenses than its competitors; it will either lose money or raise prices and lose its customers.

In this type of competitive market, companies, employees, customers, suppliers, and finance sources are all price-takers. No participant can change its behavior without suffering immediate economic punishment; the only way to influence a company's behavior or the market's results is via governmental regulation changing the terms of market trade. For example, in a fully competitive market, pressuring any single company to reduce pollution will be ineffective; any company that does so will be driven out of business.

Market rules, however, are entirely a function of law. The law can, for example, require companies to pay for resources—such as labor, inventions, garbage and pollution produced, infrastructure, and war—or allow them to use common resources without or with low cost. If patent law allows patent owners to charge any price they wish, we will have very different competitive market results than if innovators are restricted to the profits they can make before imitators learn to duplicate—the former leads to prices far above costs of production for pharmaceuticals, while the latter requires elite law firms to remake themselves every few years. If pollution, accidents, or deceptive pricing are cost-free to the producer, any producer that spends money to avoid them will be unable to compete with less scrupulous companies, but if the law succeeds in internalizing the cost of such externalities, market pressures will reverse. In short, in competitive markets, total governance might encourage a corporation to spend (minimal) resources encouraging the government to change market rules, or to quickly consolidate with competitors or counterparties to suppress competition, but it will be ineffectual at changing the behavior of individual firms absent legal change.

The strength of total governance lies between these extremes. When employees have potential alternative jobs with different working conditions, their views of what constitutes an attractive workplace carry more economic weight. The same is true for consumers, suppliers, and other constituents. Companies seeking the marginal customer, employee, or

investor should pay attention to the concerns of these individuals even if many others are indifferent or time constrained.

C. Cross-Category Collective Action

Although intuitive, it is worth pointing out that stakeholders within a category, for example, shareholders, consumers, or employees, only rarely will reach consensus on any given issue. Disagreement is part of the human condition. This is not only natural but desirable; healthy, free communities strike an appropriate decisional balance through disagreement and debate.

So, some shareholders might be profit-maximizers and other shareholders view profit as simply a tool to maximize welfare or promote a particular product or service.[182] Some shareholders might view employees as simply a means to the company's success; others, especially if they themselves are employees, might consider the company's ability to provide good jobs the key measure of its success. Some shareholders might be long-term oriented and other shareholders might be focused on short-term returns or the next quarter's results. Some shareholders might be happy to externalize as many costs as possible; other shareholders will prefer to restrain externalities that would affect the environment, society, and future generations of human beings.

Similarly, some employees might prefer to work for employers that offer faster career opportunities, while other employees might prefer an employer committed to maintaining a safe, healthy, enjoyable, and collaborative workspace or to funding social and environmental initiatives. Some consumers might care about obtaining products and services at the lowest price possible, and other consumers might care about sustainable sourcing of raw materials and fair labor conditions for the employees of the firms they buy from and their suppliers. Further, within each category of stakeholders, individuals and institutions have different political views as well as different opinions with respect to matters such as LGBTQ+ rights, reproductive rights, gun control, healthcare systems, socio-economic inequality, and climate warming. Some are Republicans and others, Democrats.

On the other hand, stakeholders having different or overlapping roles as consumers, employees, shareholders, and bondholders may also share political and social opinions, values, hopes, fears, and visions of the world. We should not essentialize the different stakeholder roles, assuming that all shareholders (for example) necessarily oppose the interests of employees or bondholders in a zero-sum game. After all, they may be the same people. Moreover, even when shareholders are not also consumers, they may be citizens feeling an obligation to promote the viability and success of the system or even simply moral beings who empathize with their fellow creatures. When the values or idiosyncratic preferences of individual and institutional stakeholders trump generalized incentive structures that characterize a typology or category of stakeholders, total governance implies that stakeholders may engage with corporations to uphold their values or idiosyncratic preferences, rather than advancing role-defined interests of a specific sub-group of stakeholders. Stakeholders of a specific category do not always have a common view of their interests.

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182. Hart & Zingales, *supra* note 97, at 248; Gramitto Ricci & Sautter, *Wireless Investors*, *supra* note 35, at 1656; Gramitto Ricci & Sautter, *supra* note 12, at 207; Eccles & Fisch, *supra* note 4.

The unified shareholder of corporate imagination, seeking only profit, is a legal fiction.[183] Shareholders are individuals or institutions. Individuals are carriers of values, emotions, hopes, and desires.[184] Institutions often commit to specific values or value-driven initiatives. They are also run by individuals required to comply with rules and standards, but typically with some degree of discretion that can be informed by values. So, values trickle through institutions, too.

When stakeholders of different categories share similar values, their collective action is not limited by the size and influence of their categories or the tools they have as stakeholders in a particular role. This can affect not only the scale of collective action but also the methods at stakeholders' disposal to be as effective as they can. So, shareholders can team up with consumers and employees to increase their firepower by extending the pack, but also by supplementing their voting, selling, or suing initiatives with the pressure that consumer choices can exert on corporations as well as by leveraging on employees' threats to leave on a large scale. These multifaceted governance efforts will be reinforced by online communities praising, questioning, or deprecating corporations, their policies, their practices, and their actions.[185]

Total governance describes both the governance efforts of one individual who deploys different governance tools, leveraging intersectional multi-stakeholder status, and the governance efforts of those who coordinate their actions across different stakeholder categories. So, Joanna might be a shareholder, a consumer, and an employee of a corporation, while also being a member of a community where the corporation has its production plant. Joanna can vote, threaten to leave her job, boycott the firm's products, and join community initiatives to steer the actions of the corporation. She can also coordinate her actions with other stakeholders across the various stakeholder categories. When this happens, shareholders team up with employees, consumers, members of communities, and other stakeholders to steer corporations, using all the governance tools at their disposal. Total governance brings together stakeholders of different categories to uphold the values they have in common and exert leverage on the corporate sector to advance their real shared values, not based on homogenous interests that are customarily imputed to particular roles.[186]

D. The Limits of Total Governance

Total governance does not fully depart from wealth-based influence in the corporate sector. Even though all Americans are consumers and over half of us are directly or indirectly invested in the equity markets, we do not have equal influence. In both consumer and equity markets, power is distributed based on a principle of rough equality of dollars—not of people. As described above, the American income distribution is highly unequal, and our wealth distribution is even more so; a startlingly small number of people control a startlingly large proportion of investable wealth.

Counter-intuitively, increasing the power of *investomers* might ameliorate the influence divide between the most privileged socio-economics demographics and less

183. *See* Greenwood, *supra* note 56, at 273–74 (arguing that the shareholder as a prototype is a myth).
184. *See generally* Gramitto Ricci, *Vitruvian*, *supra* note 4, at 114.
185. Sautter, *supra* note 14, at 91–92.
186. Gramitto Ricci, *Vitruvian*, *supra* note 4, at 120–23.

privileged ones. While existing corporate governance gives virtually no power even to the moderately wealthy, all consumers need consumer products and services in roughly comparable volumes. To be sure, only a tiny percentage of the American population purchase super-luxury items, fly private jets, or build high-end homes. But the amount of food that a household can eat or the amount of electric power and gas it can consume is somewhat similar regardless of wealth. Almost everyone has a smartphone, drinks coffee or tea, and drives a car. So, the power that people exert on corporations with their purchases is more equally distributed than the influence people obtain through investments in company shares.

Moreover, employees, social media communities, and influencers may have power that is largely independent of disparities in wealth. Online communication and collective action, for example, give more individuals new abilities to aggregate, with associated influence, much as unions allow united employees to exercise more authority than they could if dispersed. In particular, public opinion generated by social media is quite powerful.[187] Just as the rise of the coffee house and salon restrained the absolutist monarchs of Europe and began to transfer power from courtiers to a broader bourgeoisie, so too the open debate of a newly enlarged twenty-first-century public able to find each other over the internet places new limits on the more plutocratic influences on corporations.[188]

Total governance, even in the absence of more significant moves to correct the upward income and wealth redistribution of the last several decades, is a material step in the right direction. Combined with revitalizing the unions; creating an adequate minimum standard of living through universal health care, retirement plans, and higher minimum wages; and restraints on excessive executive pay and unearned income, it would be more influential still.

E. Risks & Guardrails

Total governance does not come without risks. The risks and advantages have different natures; a simple cost-benefit analysis would fall short of addressing the issues that total governance raises. Policies and private ordering will be needed to mitigate the risks and boost its advantages.

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187. Gramitto Ricci, *Corporate Governance & Public Opinion*, *supra* note 13 (arguing that social media can expose corporations' practices, behaviors, and actions, allowing society to affect a corporation's reputation, with ramifications to its relationships with stakeholders).

188. On the coffee house as an equalizing factor in public discussion, see e.g., AYTOUN ELLIS, THE PENNY UNIVERSITIES; A HISTORY OF THE COFFEE-HOUSES 46 (1956) (describing commoners conversing with aristocrats); *cf.* JURGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE (1989) (arguing that Enlightenment rise of a public realm of debate was a liberatory space). The degree to which social media can perform a similar enlightening function depends largely on whether we can find ways to restrain the flood of misinformation, propaganda, and algorithms promoting rage over truth which increasingly characterize the internet. It also depends on the societal level of investing education. *See* Sergio Alberto Gramitto Ricci & Christina M. Sautter, *The Educated Retail Investor: A Response to 'Regulating Democratized Investing'*, 83 OHIO. ST. L.J. 205, 209–11 (2022) [hereinafter Gramitto Ricci & Sautter, *Educated Retail Investor*] (suggesting that investing education is the best toolkit against misinformation). Last, it depends on private-ordering initiatives that facilitate fact-checking and possibilities to seek clarifications from issuers, too. Gramitto Ricci & Sautter, *Corporate Forum*, *supra* note 156, at 1872–75 (discussing issuers hosting for a on their website to allow investors to fact-check information and establish communication channels with investor relations functions and corporate management).

The first risk concerns the quality of information on which people base their consumption, employment, and investing decisions. Almost half of the GenZ respondents to a 2023 FINRA Foundation and CFA Institute report gather information about investing and finance primarily on social media.[189] One solution is proposed in Sergio Alberto Gramitto Ricci & Christina Sautter's *The Corporate Forum*, which advocates providing everyday people with a means to verify the information they obtain on the internet or from family, friends, and peers, by fora hosted on issuer websites.[190] Although *The Corporate Forum* is concerned principally with providing investors information beyond SEC disclosures, total governance suggests that a forum to fact-check information about corporations and their products and services is critical for other stakeholders as well. An additional critical guardrail is just-in-time investing education, as Jill Fisch advocates: broker-dealers that appeal to everyday citizens should nurture retail investors' education.[191]

Moreover, if everyday people become more involved in finance and corporate governance, investing education becomes essential both to protect individual investors and to protect the system as a whole.[192] Investing education should not be understood as confined to informed finance allocation. Rather, adequate education is also vital with respect to corporate governance.[193] When individuals understand what makes corporations tick, they can better navigate their investing decisions as well as their employment and consumption decisions. A curriculum of investing education that includes corporate governance would allow ordinary individuals to unleash unprecedented influence on the corporate sector. An understanding of the corporate machinery coupled with an infrastructure that allows everybody to gather accurate information about corporations becomes exponentially important as individuals tackle the corporate sector with a multi-stakeholder approach. Individuals exert power by coordinating their voting endeavors online.[194] When people supplement the influence they exert through voting with their consumer and employment choices, corporations become exponentially more accountable.

CONCLUSION

This Article brings to the surface ways in which the current corporate governance paradigm fails to adequately mirror human values, diversity, and plurality. Younger generations increasingly can use the internet, apps, and online communication to overcome

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189. *See* FINRA, GEN Z AND INVESTING 4 (2023), https://www.finrafoundation.org/sites/finrafoundation/files/Gen-Z-and-Investing.pdf [https://perma.cc/5GZH-47BB]. A 2018 study reveals that the level of financial literacy in the United States raises serious concerns. JILL E. FISCH ET AL., NEW EVIDENCE ON THE FINANCIAL KNOWLEDGE AND CHARACTERISTICS OF INVESTORS (2019), https://gflec.org/wp-content/uploads/2019/10/FINRA_GFLEC_Investor_FinancialIlliteracy_Report_FINAL.pdf [https://perma.cc/37DQ-GLK5].

190. *See* Gramitto Ricci & Sautter, *Corporate Forum*, *supra* note 156, at 1864–67. Bruce Goldfarb recently warned issuers that private-ordering strategies to inform retail shareholders who operate online are becoming increasingly crucial in proxy-fights. Goldfarb, *supra* note 164.

191. Fisch, *supra* note 163, at 1858–60.

192. *See* Gramitto Ricci & Sautter, *Educated Retail Investor*, *supra* note 188, at 212–14 (advocating broadly provided investing education starting in high school).

193. *Id.*

194. Gramitto Ricci & Sautter, *Wireless Investors*, *supra* note 35, at 1671–75.

traditional collective action problems, shifting the corporate governance paradigm. The new paradigm, which we dub total governance, is characterized by a multi-stakeholder approach. Total governance recognizes the multitude of roles that individuals play or can play vis-à-vis issuers, particularly consumer-facing public companies. Role-based thinking is simpler, but as students of intersectionality in other contexts have pointed out, it hides the more complicated reality. Individuals inhabit multiple roles and identities and hold different stakes in a firm: they can be investors, consumers, employees, members of the communities where the production plants or the headquarters are located, and citizens of a broader nation or ecosphere with interests well beyond firm profit.

Human stakeholders can share information and coordinate with others who fill identical or similar roles—for example, consumers with other consumers. But they can also share information and coordinate their collective actions with human stakeholders of different categories—for example, employees can share information and coordinate with shareholders. This allows human stakeholders to aggregate power *infra-* and *intra-*stakeholder identities, online on a global scale. Paradigmatically, communication and coordination may allow stakeholders to leverage specific information and governance tools associated with different stakeholder roles: employees can provide first-hand information to shareholders who can use it to approve shareholders' resolutions or elect directors.

We expect total governance to have a disruptive effect on the machinery that governs corporations, especially consumer-facing, large public companies. This paradigm shift is set to have lasting effects on business corporations and their relations with society, future generations, and the planet. Online communication and social media both expose corporate behaviors to virtually everyone and facilitate cross-category stakeholder engagement with issuers. Individuals who hold multiple stakeholder roles can engage with issuers exerting leverage on their multangular approach. Individuals and institutions who belong to one category of stakeholders can act collectively with individuals and institutions who belong to other categories of stakeholders. So, shareholders, consumers, employees, and members of communities who share common values can tackle corporations by engaging with them on different levels and from different angles. Online communication and social media make coordinating across stakeholders consequential and effectively frictionless.