

## Good Corporate Citizenship We Can All Get Behind? Toward a Principled, Non-Ideological Approach to Making Money the Right Way

By Leo E. Strine, Jr.\*

*A rancorous debate is raging. Must for-profit corporations just seek profits for stockholders? Or may they pursue not just the best interests of all stakeholders, but influence public policy on controversial political issues and tilt the election process toward candidates and causes they favor?*

*This debate has historical antecedents, as both the left and the right have long been concerned about the legitimacy of corporations using other people's capital for political and social causes. Each understands that stockholders share only one purpose—a solid return—and have diverse political beliefs. Each understands freedom is imperiled if workplaces become subject to dictated orthodoxies. Each asks: who are CEOs to use other people's money to advance their own idiosyncratic views of the good?*

*But, rather than come together to forge constructive solutions, the right and left praise corporations that take policy positions they like, while condemning as illegitimate corporations that disagree with them. That's natural but unhelpful.*

*This article seeks to ameliorate this fractious debate threatening to politicize a business world that ought to be open to all Americans of good faith. To this end, the article maps out a non-partisan, principled conception of good corporate citizenship drawing on shared assumptions of the right and the left about the place of corporations in our society and the realities of corporate governance.*

*That conception concentrates on how corporations' own conduct affects the best interests of their stockholders, workers, communities of operation, consumers, taxpayers, and the environment. Seeking profit by selling quality products and services, treating all stakeholders with respect, and without externalizing costs. Supporting the basic institutions of the society upon which the corporation depends. Leaving debatable issues of politics and faith largely to their human investors, workers, and consumers to decide for themselves. Showing respect for the freedom of belief by not imposing the beliefs*

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of corporate management on any stakeholder group. And, if taking stands on political or social issues not intrinsically connected to the company's business, employing guardrails like approval by not just the full board, but stockholders, that create greater legitimacy and increase the likelihood that decisions will reflect consideration of all reasonable perspectives and embody a consensus view of their investors.

No approach can end all controversy, but corporate citizenship of this kind will channel corporations toward exemplifying their values through their treatment of the people their business operations directly affect and thus toward shared values held by most Americans. Focusing our corporate governance accountability system on the issue over which corporate leaders and institutional investors have the most responsibility—making money the right way—is one all Americans can get behind.

## I. INTRODUCTION

In this article, I venture some thoughts on this key question: are there principled, non-ideological methods by which corporate leaders and institutional investors can ameliorate the controversy about the appropriate ends of for-profit governance? Put more simply, is there a conception of good corporate citizenship that we can all get behind?

These broad questions implicate intrinsically related topics: (i) to what extent can corporate boards impose their religious, social, and ideological values on the company's workforce and other stakeholders, and (ii) what are the guardrails that should be in place before corporate boards deploy their corporation's treasury funds to fund political candidates and social causes or to exert similar pressure on society?

These inquiries are important to an animating cause of our nation's creation: a desire for freedom of conscience. Americans cherish the freedom to have different religious, social, and political values.<sup>1</sup> Just because we have to work for a large corporation<sup>2</sup> and give our money to institutional investors to save for

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1. There is evidence that political beliefs are more deeply held by many than religious beliefs, demonstrating their importance to human identity. E.g., DONALD GREEN, BRADLEY PALMQUIST & ERIC SCHICKLER, *PARTISAN HEARTS AND MINDS* (2002) (arguing that partisan identification is a critical force in American politics, that individuals form their partisan identities early in their lives (much like religion), and that these identities change only slowly over time); Sean J. Westwood et al., *The Tie that Divides: Cross-National Evidence of the Primacy of Partyism*, 57 EUR. J. POL. RES. 333 (2018) (concluding, based on a cross-national empirical analysis, that party identification is even stronger than attachments to other social groups, including religious ones).

2. See Frederik P. Schlingemann & René M. Stulz, *Have Exchange-Listed Firms Become Less Important for the Economy?* 2 (Nat'l Bureau Econ. Res., Working Paper No. 27942, Oct. 2020), <http://www.nber.org/papers/w27942>; *Table B-1, Employees on Nonfarm Payrolls by Industry Sector and Selected Industry Detail*, U.S. BUREAU LAB. STAT. (2019) (in 2019, 29 percent of the ~129 million non-farm workers in the private sector worked for public firms); see also Alma Cohen, Moshe Hazan, Roberto Tallarita & David Weiss, *The Politics of CEOs*, 11 J. LEGAL ANALYSIS 1, 6 (2019), <https://academic.oup.com/jla/article/doi/10.1093/jla/laz002/5552028> (citing John Asker, Joan Farre-Mensa & Alexander Ljungqvist, *Corporate Investment and Stockmarket Listing: A Puzzle?*, 28 REV. FIN. STUD. 342 (2015), for the proposition that as of 2010 public companies accounted for 31.3 percent of private sector employment).

college and retirement<sup>3</sup> does not mean that we share the same belief system as the CEO, or implicitly consent to having the same belief system, or to the use of our entrusted capital for political purposes by the corporations in our mutual fund portfolios.<sup>4</sup>

How do we balance those realities with others? Don't we want ethical companies that seek profits in a way that does not harm their workers, their creditors, their communities of operation, their consumers, or the environment? And precisely because large corporations are such leading players in our society, don't we want corporate leaders to speak up if they perceive injustice in the communities and societies in which their companies operate?

But do we want companies to take stands when they disagree with us? Or, to fear that you risk your family's future if you dare as an employee to voice a view contrary to the CEO on an issue of public debate? Are we comfortable with corporate leaders from a privileged sliver of our nation's populace using corporate resources to advance their views on controversial issues on which their company's investors and workforce are divided? Doesn't that risk the many being subjected to too much power by the few—power that comes from managing other people's money?

These are challenging topics to address in a principled way.<sup>5</sup> You cannot get everything you want, or ignore your own biases. In addressing the difficult questions at the core of the current debate about the ends of corporate governance, I will therefore try to be candid about my own biases.

The central goal of this article is to identify some methods by which corporations and institutional investors might improve the ability of the corporate sector to “make money the right way,” and to make a positive contribution to their stakeholders and society, but in a manner consistent with the reality that for-profit

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3. U.S. BUREAU OF LABOR STATISTICS, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES 191 (Mar. 2021), <https://www.bls.gov/ncs/ebs/benefits/2021/employee-benefits-in-the-united-states-march-2021.pdf> (Up until the 1980s, defined-benefit pensions were the most popular retirement plan offered by employers. Today, only 15 percent of private-sector workers have access to one, whereas 65 percent of such workers have access to a defined-contribution plan.).

4. Even investors affiliated with faith communities understand they have to confront these realities. E.g., U.S. CONF. OF CATHOLIC BISHOPS, SOCIALLY RESPONSIBLE INVESTMENT GUIDELINES FOR THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS (Nov. 2021); Ana Casilda Apacible & William Cowper, *Seeking Impact: New Catholic Investing Guidelines Break the Mold*, ISS INSIGHTS (Feb. 10, 2022), <https://insights.issgovernance.com/posts/seeking-impact-new-catholic-investing-guidelines-break-the-mold/>.

5. Reading the 2022 version of the Edelman Trust Barometer reveals these tensions. See EDELMAN TRUST BAROMETER (2022), [https://www.edelman.com/sites/g/files/aatuss191/files/2022-01/2022%20Edelman%20Trust%20Barometer%20FINAL\\_Jan25.pdf](https://www.edelman.com/sites/g/files/aatuss191/files/2022-01/2022%20Edelman%20Trust%20Barometer%20FINAL_Jan25.pdf). Business is regarded with more trust than other societal institutions, but all institutions are declining in trust. *Id.* at 14–15, 27–28. There is strong support from employees and others who want business leaders to address important issues like workforce training, climate, and inequality, and to speak out on issues the respondents themselves care about. *Id.* at 29–30, 33. But the barometer reveals huge cleavages in beliefs, growing distrust, and thus an implicit, underlying reality, which is that people tend to want other people to speak out in ways that they agree with, and when that involves issues on which people do not agree, that is not possible. E.g., *id.* at 16–19. Unexamined by the authors of the survey is whether leaders of institutions that are not political or faith-based can instill trust over time if they increasingly become seen as causing the corporations they lead to become partisans in societal discussions about subjects of legitimate disagreement.

corporations are not human beings, they have important rights and power that humans do not have, and should therefore have corresponding limitations on their conduct and influence. In channeling corporate behavior in this way, my hope is to reduce the fractiousness of the current argument about corporate governance by encouraging corporate citizenship supported by a bipartisan consensus of the American people.

I admit that my views are influenced by a personal bias against large companies becoming Republican or Democratic, Catholic or evangelical, or Muslim or atheist. I do not favor a polarized dystopia in which workers are put to a Hobson's choice of either complacent workplace submission to a company belief system or quitting and suffering economic harm. Business entities granted the important secular advantages of corporate status<sup>6</sup> should be ones where Americans, in their full range of religious and political diversity, can work together, so long as they respect each other and labor together productively. Likewise, Americans should not have to fear that their required investments in the stock market will fund political spending that they cannot be deemed to have implicitly approved. And that is especially the case if, as some advocate, corporations should focus on stockholder profits as the sole end of governance and that other stakeholders should have to rely on laws external to corporate law to protect them. Because corporations are intended to be huge aggregators of human wealth, if corporations can turn that wealth—through political contributions—into a weapon against

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6. Some scholars fight the basic reality that without societal law, corporations would not exist at all, much less have the important advantages conferred on them, such as perpetual existence, tax advantages, and the insulation of their equity investors from liability. They bristle at the basic logic of Chief Justice Marshall, who famously said that “[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.” See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). One can admit that society's at one time carefully constrained creation has become ubiquitous and that this has implications for the freedom of those who wish to conduct business through that form without losing sight of the fact that corporations are a creature of statute and that it is legitimate for society to ensure that they do not become more powerful than the polity that created them, to the detriment of the actual human citizens for whose wellbeing the polity exists. Put simply, I understand why academics like to proliferate intricate models explaining corporations on grounds like nexuses of contracts, team production models, aggregate theories, and that these constructs can be useful for certain analytical purposes. It is naïve, obscurantist, and Orwellian, however, to ignore that corporations exist only because of law, that any rights they have derive solely from law and would not exist in a state of nature, and that they are thus the opposite of Lockean–Jeffersonian human beings who are endowed by their creator with inalienable rights that society cannot take away. See *id.* See also *United States v. U.S. Brewers' Ass'n*, 239 F. 163, 168 (W.D. Pa. 1916) (“In the exercise of its prerogatives and to secure greater economy and efficiency, the government has thought best that certain artificial bodies should be created with certain fixed and definite powers, and acting within certain prescribed limitations. These artificial creatures are not citizens of the United States, and, so far as the franchise is concerned, must at all times be held subservient and subordinate to the government and the citizenship of which it is composed.”). Just as it is essential that association with a corporation in some form not override the legitimate constitutional expectations of a human citizen, so too it is essential to recognize that corporations are not human beings and that they only have the rights that society gives to them. Any extension of constitutional standing to corporations must be sensitive to the dangers that empowering corporations may undermine the rights of those for whom our polity exists—its human citizens.

stakeholder protections, they will tend to diminish those protections.<sup>7</sup> Thus, allowing corporations to spend their wealth for political ends affecting stakeholders invites the understandable desire to reform corporate law to require corporations to respect stakeholders as a mandatory obligation. That is, it is more principled to argue that corporations should focus solely on profit and leave stakeholder protections to society, only if corporations cannot act on society to undermine those protections using the entrusted capital of investors with diverse political beliefs without their express permission. In fact, wasn't that the basic position of Milton Friedman and his followers, which is that if the corporation has extra cash for politics or other causes it does not need for business, it should return those funds to

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7. Corporations often oppose laws that protect workers, consumers, or the environment. For recent examples, see Jeffrey Dastin, Chris Kirkham & Aditya Kalra, *Amazon Wages Secret War on Americans' Privacy, Documents Show*, REUTERS (Nov. 19, 2021), <https://www.reuters.com/investigates/special-report/amazon-privacy-lobbying/> (reporting on Amazon Inc.'s legislative fight against consumer data privacy regulations); Sandra Lavielle, *Top Oil Firms Spending Millions Lobbying to Block Climate Change Policies, Says Report*, THE GUARDIAN (Mar. 21, 2019), <https://www.theguardian.com/business/2019/mar/22/top-oil-firms-spending-millions-lobbying-to-block-climate-change-policies-says-report> (reporting on funds spent by oil and gas companies like Chevron, BP, and Exxon to promote political campaigns against climate-change laws); Jennifer Liberto, *Companies Ramp Up Fight Against \$10.10 Wage*, CNN BUS. (May 6, 2014), <https://money.cnn.com/2014/05/06/news/economy/companies-against-minimum-wage/> (reporting on Applebee's, IHOP, Dairy Queen, and other U.S. businesses' resistance to raising the federal minimum wage); Oliver Milman, *Apple and Disney Among Companies Backing Groups Against US Climate Bill*, THE GUARDIAN (Oct. 1, 2021), <https://www.theguardian.com/us-news/2021/oct/01/apple-amazon-microsoft-disney-lobby-groups-climate-bill-analysis> (reporting on Apple, Disney, Microsoft, and other large U.S. corporations' opposition to U.S. climate bill); Marc Rod, *Business Groups Slam House for Passing \$15 Minimum Wage Bill*, CNBC (July 19, 2019), <https://www.cnbc.com/2019/07/18/business-groups-slam-house-for-passing-15-minimum-wage-bill.html> (reporting on restaurant and retail industry opposition to minimum wage bill). And the amount of money spent by corporations on lobbying swamps the funds available to pro-consumer, pro-environment, and pro-worker organizations. Megan R. Wilson, *Lobbying's Top 50: Who's Spending Big*, THE HILL (Feb. 7, 2017), <https://thehill.com/business-a-lobbying/business-a-lobbying/318177-lobbyings-top-50-whos-spending-big> [<https://perma.cc/R4Y7-TQSA>] (showing that the top fifty sources of lobbying spending in 2016 spent \$716 million, and all but one of them, the Association of Retired Persons, was a corporation or business organization); see HEIDI WELSH & ROBIN YOUNG, *CORPORATE GOVERNANCE OF POLITICAL EXPENDITURES: 2011 BENCHMARK REPORT ON S&P 500 COMPANIES 2* (Nov. 10, 2011), <https://perma.cc/R3Z4-PT3P> ("S&P 500 companies allocated \$979.3 million (87 percent) of the \$1.1 billion they gave in 2010 to [federal] lobbying. They spent a further \$112 million (10 percent) on state level candidates, parties and ballot initiatives and \$31 million (3 percent) on federally registered political committees."). Likewise, corporations' corporate political expenditures greatly exceed those of groups who represent workers, consumers, or the environment. For example, in 2014, businesses likely to lobby on environmental issues—such as those in the energy, chemicals, and forestry sectors—outspent pro-environment groups by a factor of 2.5, with businesses spending about \$220 million during that election cycle compared to \$86 million from environmentalists. See *Industries and Interest Groups*, CTR. RESPONSIVE POL., <https://www.opensecrets.org/industries/slist.php> [<https://perma.cc/D5TH-7HMP>] (last visited Oct. 14, 2022) (follow hyperlinks for each sector; then follow hyperlink to "Total"). Business interests also vastly outspend labor. "The broadest classification of political donors separates them into business, labor, or ideological interests. Whatever slice you look at, business interests dominate, with an overall advantage over organized labor of about 16-to-1. Even among PACs—the favored means of delivering funds by labor unions—business has a close to 7-to-1 fundraising advantage." See *Business-Labor Ideology Split in PAC & Individual Donations to Candidates, Parties, Super PACs and Outside Spending Groups*, CTR. RESPONSIVE POL., <https://www.opensecrets.org/elections-overview/business-labor-ideology-split> (last visited Oct. 14, 2022).

stockholders and allow them to use the funds in accord with their own diverse beliefs and desires?<sup>8</sup>

Similarly, it is not without some cognitive dissonance to demand that corporations use their voice to oppose certain public policies, and to even use the huge lever of a boycott of, or migration away from, an American jurisdiction that has those policies, and then simultaneously argue that corporate political spending has some distinct illegitimacy. Both sorts of voice involve using corporate funds and leverage to act on the polity to encourage certain policy ends, about which there is likely no consensus on the part of the company's stockholders, much less its workforce or customers. Encouraging corporations to act on society when you like the policies they support but arguing that they should not act when you oppose the policies is a natural human tendency, of course. But, until the world is comprised solely of people and thus corporations exactly like you,<sup>9</sup> it does not chart a principled path forward.

Building on these admitted preferences, my goal is to map out a conception of good corporate citizenship drawing on shared assumptions of both the right and the left about the place of corporations in our society and the realities of for-profit corporate governance—as well as the concerns both views have about corporate leaders venturing far afield from the difficult enough task of running a profitable, ethical business. To frame my argument that there is a principled concept of good corporate citizenship that most Americans can get behind, I proceed as follows. First, in Section II, I clear away the fog around one question relevant to this debate, which is the statutory basics of what corporate law now provides, identifying the reality of who has primary authority to speak for a corporation, and the broadly enabling statutory framework within which for-profit American corporations operate. In Section III, I identify the fundamental legitimacy issue that persists within corporate law about the permissible ends of for-profit corporate governance, focusing on the two basic schools of thought about the ends of for-profit corporate governance, simplifying them for sure, but presenting their essentials fairly. From there, Section IV builds on that historical context to highlight the tensions in the views of both the left and the right about the legitimacy of for-profit corporations taking positions on contestable public policy issues and using corporate resources to advance those positions. Section V then discusses some principled approaches that tend to reduce these tensions, a goal made even more important by the reality that expanding the ability of for-profit corporations to pursue religious or social values not only affects society as a whole, but has a potentially freedom-constricting effect on those who most have to live under the corporation's dominion—their workers.

Finally, Section VI identifies a possible path forward that involves a more principled, and less controversial, approach to the for-profit corporate purpose debate.

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8. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 135 (40th ann. ed. 2002) [hereinafter *FRIEDMAN, CAPITALISM*] (“The corporation is an instrument of the stockholders who own it. If the corporation makes a contribution, it prevents the individual stockholder from himself deciding how he should dispose of his funds.”).

9. How boring!

That conception concentrates on how corporations' own conduct affects the best interests of their workers, their communities of operation, their consumers, taxpayers, and the environment. Making money the right way, by seeking profit without externalizing their costs. Supporting the basic institutions of the society upon which the corporation depends. Leaving debatable issues of politics and faith largely to their human investors, workers, and consumers to decide for themselves. Showing respect for the freedom of belief by not imposing the beliefs of corporate management on any stakeholder group. And if taking stands on political or social issues not intrinsically connected to the company's business, employing guardrails like stockholder approval that require the support of the most legitimate sources of authority under corporate law and thus increasing the likelihood that resulting decisions will reflect consideration of all reasonable perspectives and embody a consensus view of their investors, and not just personally driven decisions by the CEO. To make clear that this approach leaves great room for corporations and investors to make sure corporations are responsible citizens and make a positive social impact, I give specific examples of actions investors can encourage that are uncontroversial as a matter of corporate law and, equally important, are less likely to enmesh corporations in taking sides on closely contested public policy issues that do not directly implicate the corporation's own behavior.

## II. WHO DECIDES CORPORATE SOCIAL AND POLITICAL POLICIES? AND WHAT ARE THE CORPORATE STATUTORY LAW BOUNDARIES ON CORPORATE ACTION? THE CORPORATE LAW ANSWERS ARE NOT CONTROVERSIAL.

To isolate what the real issues are in the debate over the ends of for-profit corporate governance, two substantive corporate law issues that sometimes get obscured in the debate over the ends of for-profit governance must be understood: (1) who gets to determine corporate policy; and (2) what are the typical statutory boundaries on the ends of corporate governance.

Let's start with an issue that is not controversial among American corporate law scholars: namely, that the board of directors has the primary authority to set all corporate policy, including on social and religious issues, and to oversee management's implementation of it. However confusing the ongoing debate over corporate purpose is, and however much the U.S. Supreme Court's understandably shaky grasp of corporate law<sup>10</sup> has contributed to that confusion,<sup>11</sup> the

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10. The U.S. Supreme Court is a generalist court that, like state supreme courts, must deal with an incredible breadth of legal issues that renders its ability to be equally expert in every distinct legal subject impossible. That is not a criticism, it is just a reality of the limits of human capacity, and as a former appellate judge, I admit to having acted under the same condition.

11. For example, the Supreme Court's *Hobby Lobby* decision seems to suggest that stockholders get to dictate corporate policy and thus equates a founding family with the corporation. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 717 (2014). And *Citizens United* seems to suggest that if a large corporation has to form a subsidiary to conduct certain affairs, in that case a political action committee under McCain-Feingold, that is unusual and unduly inhibiting, *Citizens United v. Federal Election Commission*, 558 U.S. 310, 321 (2010), when most large for-profit corporations in fact conduct their affairs through multiple, wholly owned subsidiaries.

basic question of who gets to decide what corporate policy is toward social or religious issues does not really vary in any of the American states.

Within whatever limits set by corporate statutes and corporate common law, and any constraining corporate charter and bylaws provisions, the board of directors sets corporate policy and oversees management's implementation of it.<sup>12</sup> As we shall see, this broad grant of authority has inspired a long-standing debate between two principal schools of thought about for-profit governance, one that turns in many ways on the extent to which this grant of authority is premised on an implicit assumption that stockholders of for-profit corporations invest in the expectation that the board of directors will seek, as their end, to sustainably increase the value of the company.

This leads to the second uncontroversial corporate statutory law point. Early in the history of corporations, corporations were specifically chartered by the legislature, had detailed purposes, and were bound by the *ultra vires* doctrine to confine themselves to acting within the purposes stated in the charter.<sup>13</sup> As so-called "general incorporation statutes" began to take hold, the early forms still required relatively specific statements of the business lines or other endeavors the corporation could undertake, and the *ultra vires* doctrine policed fidelity.<sup>14</sup> Over time, however, corporate law statutes became broadly enabling, with flexibility to change business lines and directions so long as corporations exercised their statutory authority to adopt a broad corporate charter authorizing what increasingly became the bottom line, which is that the corporation could pursue any lawful line of business. This evolution is embodied in the nation's two leading corporate law statutes, the Delaware General Corporation Law and the Model Business Corporation Act, which allow for-profit corporations to conduct any lawful business by any lawful means and to engage in any lawful activities.<sup>15</sup>

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12. DEL. CODE ANN. tit. 8, § 141 (2022); MODEL BUS. CORP. ACT ANN. § 8.01 (5th ed. 2020); see also Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1, 9 (2015) ("The board of directors is the primary locus of governance authority. The board acts for the corporation, sometimes in its own human capacity and more often through delegation to other humans, namely the corporation's senior officers . . ."); Elizabeth Pollman, *Corporate Law and Theory in Hobby Lobby*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY 157, 165 (Micah Schwartzman et al. eds., 2016) ("Shareholders do not have the authority to direct the business and affairs for the corporation. The board acts for the corporation, in its capacity as a collective body, or through the delegation of authority to officers and other individuals.").

13. Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 TEX. L. REV. 1423, 1426 (2021) ("For most of this history, the grant of a corporate charter has required a special act by a sovereign power. Under this system of special chartering, corporate charters were granted one by one, and each charter was tailored to the specific activity contemplated by the corporation's organizers. Particular corporate powers and privileges were explicitly enumerated in the charter.").

14. *Id.* at 1433 ("The charter provisions setting out these privileges and powers functioned as an articulation of the corporation's purpose, which investors relied upon and could enforce through the developing *ultra vires* doctrine.").

15. DEL. CODE ANN. tit. 8, § 101 (2022) ("A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or other law of this State." (emphasis added)); MODEL BUS. CORP. ACT ANN. § 3.01 (5th ed. 2020) ("Every corporation incorporated under this Act has the purpose of engaging in



These broadly enabling statutes also provide the board with expansive discretion, subject only to the requirement to obtain stockholder approval for actions like charter changes and mergers, and to cleanse certain conflict transactions or risk them being set aside in an equitable action. These statutes were designed to work in concert with equitable fiduciary duty review<sup>16</sup>—with fiduciary duty review having teeth typically only when a corporate decision involved a conflict of interest.<sup>17</sup> Over time, the concept of the business judgment rule grew and instructed courts not to second-guess business decisions made by boards with no motive to harm the corporation.<sup>18</sup> The weakness of this constraint has, as we will see, influenced the debate, because it could be seen as giving strong corporate leaders the ability to put softer, non-financial motivations (iconically, the tradition of day baseball at Wrigley Field)<sup>19</sup> over the best interests of stockholders.<sup>20</sup> Outside of the realm where the entire fairness doctrine polices financial conflicts and where stockholders' votes are required for certain fundamental corporate actions such as charter changes or mergers, corporate common law imposes weak restraints on boards, even in strong stockholder protective states like Delaware, by simply requiring that any policy by the board be rationally

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any lawful business unless a more limited purpose is set forth in the articles of incorporation.”); Larry D. Soderquist, *Theory of the Firm: What a Corporation Is*, 25 J. CORP. L. 375, 376 (2000).

16. This reality was the subject of Adolf Berle's by now iconic statement that “in every case, corporate action must be twice tested: first, by the technical rules having to do with the existence and proper exercise of the power; second, by equitable rules somewhat analogous to those which apply in favor of a cestui que trust to the trustee's exercise of wide powers granted to him in the instrument making him a fiduciary.” See *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931).

17. See William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function Over Form: Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1290 (2001) (“[D]uty of loyalty claims—ha[ve] the longest pedigree. That category addresses primarily (but not exclusively) situations involving self-dealing, wherein the duty of loyalty is rigorously enforced by requiring the directors to justify as intrinsically fair any transaction in which they had a financial interest.”); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (1983) (“A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty . . .”).

18. See *Shlensky v. Wrigley*, 237 N.E.2d 776 (Ill. App. Ct. 1968) (finding that in a purely business corporation the authority of the directors in the conduct of the business of the corporation must be regarded as absolute when they act within the law, and the court is without authority to substitute its judgment for that of the directors).

19. *Id.*

20. I have noted in previous work that the only cases in which courts have struck down business decisions on the grounds that an otherwise disinterested board has made a judgment to be other-regarding to some stakeholder group are “confession” cases where the CEO-founder trumpeted the fact that he was sacrificing stockholder welfare to advance an end he viewed as more societally worthy. See Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 777 (2015) [hereinafter Strine, *Dangers of Denial*] (discussing *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919), and *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 35 (Del. Ch. 2010)), noting that they are hornbook law because they make clear that if a fiduciary admits that he is treating an interest other than stockholder wealth as an end in itself, rather than an instrument to stockholder wealth, he is committing a breach of fiduciary duty).

related to the best interests of stockholders, a business judgment the board itself is entitled to make and any doubt resolved in its favor.<sup>21</sup>

The reason I raise the two subjects is that the idea sometimes surfaces that it is more legitimate—as a matter of statutory corporate law for a corporation with a controlling stockholder—such as, say, the company that gave its name to an eponymous case, *Hobby Lobby*—to have strong social or religious values, because the stockholder is seen as setting the policies.<sup>22</sup> Whereas, by contrast, in a corporation with diverse stockholders, a question of corporate law legitimacy supposedly arises because, if the board acts on one vision of the good, there are likely to be stockholders who disagree.<sup>23</sup>

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21. *Revlon v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1985); see also Edward B. Rock, *For Whom Is the Corporation Managed in 2020? The Debate Over Corporate Purpose*, 76 *BUS. LAW.* 364, 379 (2021) (directors can manage with the interests of society and stakeholders in mind when they believe that doing so is rationally related to shareholder value); Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy—A Reply to Professor Rock*, 76 *BUS. LAW.* 397, 402 (2021) (business judgment rule provides wide discretion for corporate directors to balance stakeholder interests, even in Delaware); Strine, *Dangers of Denial*, *supra* note 20, at 773 (“When the corporation is not engaging in a sale of control transaction, the directors have wide leeway to pursue the best interests of stockholders as they perceive them, and need not put any specific weight on maximizing current share value.”); Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 *WAKE FOREST L. REV.* 135, 147 (2012) (under the business judgment rule, “the judiciary does not second-guess the decision of a well-motivated, non-conflicted fiduciary”).

22. See Stephen M. Bainbridge, *Does Hobby Lobby Sound a Death Knell for Dodge v. Ford Motor Co.?*, PROFESSORBAINBRIDGE.COM (July 3, 2014), <https://www.professorbainbridge.com/professorbainbridgecom/2014/07/does-hobby-lobby-sound-a-death-knell-for-dodge-v-ford-motor-co.html> (“[I]t’s critical to remember that *Hobby Lobby* is very explicitly a case about closely held corporations . . . . *Hobby Lobby*’s meaning will be contested on many levels for a long time to come, but I think it is best understood as recognizing the well-established principle that shareholders of a closely held corporation can alter the default rules of corporate law, including the issue of corporate purpose.”); Amy J. Sepinwall, *Corporate Piety and Impropriety: Hobby Lobby’s Extension of RFRA Rights to the For-Profit Corporation*, 5 *HARV. BUS. L. REV.* 173, 177 (2015) (“the [*Hobby Lobby*] Court ruled that owners of a closely-held for-profit corporation can claim a religious exemption from the ACA’s contraceptive mandate if they can establish that the mandate imposes a ‘substantial burden’ on their religious exercise and the government fails to show that the burden is motivated by a ‘compelling interest’ served in the ‘least restrictive’ way”).

23. See, e.g., Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 *STAN. L. REV.* 923, 961 (1984) (noting that the pursuit of ends other than profit maximization is “especially disturbing because profit maximization is the only goal for which we can at least theoretically posit shareholder unanimity”); Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 *YALE L.J. ONLINE* 53, 58 (2009), [http://yalelawjournal.org/pdf/823\\_pa5w1bp2.pdf](http://yalelawjournal.org/pdf/823_pa5w1bp2.pdf) (“Stockholders likely lack information on political spending and are diverse in their preferences. At best, in the context of large publicly-held corporations, the majority view would rule and some stockholders would have corporate funds used for political speech they oppose.”); Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 *IOWA L. REV.* 995, 1004 (1998) (“Both the law and the market force corporate actors to run the corporation on behalf of the interests of fictional shareholders . . . . Fictional shareholders, thus, will sacrifice almost anything in the interests of higher profit . . . ; in contrast, the citizens behind the fiction can be expected to have far more diverse and conflicted opinions on these important political struggles.”); HENRY G. MANNE & HENRY C. WALLICH, *THE MODERN CORPORATION AND SOCIAL RESPONSIBILITY: A RATIONAL DEBATE* 30 (1972) (“[W]e have no definition of a social welfare function that is universally acceptable. This strongly suggests that any effort to maximize public good by private effort or otherwise is doomed to failure.”); Henry G. Manne, *The “Higher Criticism” of the Modern Corporation*, 62 *COLUM. L. REV.* 399, 402, 411 (1962) (“Shareholders are primarily and basically interested in having their corporations maximize profits . . . .”) (“In the

But, as a matter of statutory corporate law, in both cases, all stockholders have limited rights, and agree to invest subject to the authority of the board's primacy over policy.<sup>24</sup> And in both cases, the stockholders, be they a family founder with a huge bloc or smaller holders, accept these limited rights, in exchange for being afforded the benefits of limited liability, tax advantages, and other economic positives that come from the corporate form. Those who invest in companies with a controlling stockholder accept that their influence over the direction of the company will be even more limited.

As a matter of strictly statutory corporate law as opposed to larger considerations of republican democracy, there is no less legitimacy for the board of General Electric, Alphabet, or Disney to take positions on religious or social matters than for the board of Hobby Lobby.<sup>25</sup> And from the standpoint of a stockholder with a non-influential bloc in either a controlled or non-controlled company, it is a constant that the stockholder base will have diverse views on religious and social matters that are not identical to the board members of the company.

As a practical matter, it may be that investors in controlled companies with controllers with vocal social or religious views can be seen, at first blush, as buying distinctly into that risk in exchange for the economic upside. But, that is, upon second thought, no more or less true than is the case in any investment in any corporation, because it is ultimately the elected board and its selected management whose policies the stockholder agrees to accept as a condition for continuing investment, a reality that does not change just because there is no one dominant stockholder. And with the rational and useful rise of mutual fund investing as the preferred method for 401(k) plans, and the rise of index investing, it is not easy for ordinary investors to "select out" of companies, be they controlled or not controlled, on the basis of particular policies.<sup>26</sup>

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corporation, unlike the political state, the interested electorate is attempting to maximize only one utility or value, and that is financial.”)

24. Lynn A. Stout, *Bad and Not-so-Bad Argument for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1192 (2002) (pointing out that as a matter of basic corporate law, stockholders do not own the corporation, they own shares of stock with limited rights). This is a reality of corporate law that is not new. See, e.g., ADOLF A. BERLE, JR., *THE 20TH CENTURY CAPITALIST REVOLUTION* 30 (1954) (“In effect, when an individual invests capital in the large corporation, he grants to the corporate management all power to use that capital to create, produce, and develop, and he abandons all control of the product. He keeps a modified right to receive a portion of the profits, usually in the form of money, and a highly enhanced right to sell his participation for cash. He is an almost completely inactive recipient. He can spend his dividends or sell his shares for cash, taking care of his needs for consumption or enjoyment. But he must look elsewhere for opportunity to produce or create.”).

25. The respected conservative corporate law scholar, Bayless Manning, worried both about corporate overreach and its effect on society, and the adverse effect that could be had if society overreacted to that potential. Bayless Manning, *Corporate Power and Individual Freedom: Some General Analysis and Particular Reservations*, 55 NW. U. L. REV. 38 (1960). But to the extent corporations posed a problem for society, Manning saw no more reason to fear corporate management not tightly constrained by dispersed stockholders than corporations under the sway of a controlling stockholder. *Id.* at 41. As he saw it, the comparative weakness of non-control stockholders at that time was no problem for workers, consumers, or society as a whole given that there was no basis to assume “a substantial community of interest between the shareholders and the other groups affected by the corporation’s actions.” *Id.*

26. See Ian Ayres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and Dominated Funds in 401(k) Plans*, 124 YALE L.J. 1476, 1485 (2015) (“The most common type of

For present purposes, though, clarity about two things that corporate law says suffices. First, it is not about the views of any stockholder or any other stakeholder—or even the CEO!—unless those views are accepted by the authority entrusted by corporate law with policy-making authority: the board of directors.<sup>27</sup> Second, as a matter of statutory corporate law, corporations are typically empowered to conduct their affairs toward any lawful end by any lawful means. And the business judgment rule provides great discretion for boards to justifying actions that are not directly profit-creating (e.g., charitable or political donations) as rational and immune from judicial review. In a majority of American states, moreover, specific statutes empower boards to take action benefiting certain corporate constituencies, and thus enhance board discretion even further.<sup>28</sup> For these reasons, there is no right-left divide among corporate law scholars that statutory corporate law itself is not a tool that was designed to constrain corporate boards from using their power to cause their corporations to embrace certain values using corporate funds.<sup>29</sup> Rather, the question on which scholars have been

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investment options in 401(k) plans are mutual funds or similar investment vehicles that pool funds . . . the menu of mutual funds from which employees choose is ultimately constructed by the employer.”); Anne Tucker, *Flawed Assumptions*, 61 CASE W. RES. L. REV. 497, 535–36 (2010) (Under the 401(k) approach to retirement saving “[s]tock ownership is no longer a voluntary activity . . . . Consequently, a significant portion of the voting population is at risk of being put in a double-bind as a result of the [Citizens United] Court’s sanctioning of corporate political speech. Citizen-shareholders may have to choose between fidelity to a political ideal and pursuit of economic advancement.”); see also Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1878 (2017) (“The workers’ version of the Wall Street rule involves not being able to sell one stock in the Russell 3000 and buy another, or to move into particular bonds. Instead, it involves being able to move from one fund to another, often of the same fund family.” (footnote omitted)); Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 4 (2007) (“The actual human beings whose capital is invested by intermediaries do not directly vote on who sits on corporate boards, do not have the option to buy and sell the securities of particular companies on any basis, and only retain very limited rights of exit from the market without facing expropriatory levels of taxation.”).

27. In a thought-provoking essay, the avowedly Christian corporate law scholar David Skeel makes plain that the grounds on which social or religious policy can be adopted as a matter of corporate policy are not controversial as a matter of corporate law, and that there are a variety of means, including inclusion in a certificate of incorporation, bylaw, or the board adoption of a policy to legitimize such a position in corporate law terms. David Skeel, *The Corporation as Trinity*, 45 SEATTLE U. L. REV. 155 (2021). Professor Skeel rightly contrasts these means with “the CEO’s views, [which] are simply the views of a corporate officer—a powerful officer, to be sure, but one who lacks the authority to make major decisions unilaterally on behalf of the firm.” *Id.* at 179.

28. Lucian Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 94 S. CAL. L. REV. 1467, 1489 (2021) (finding thirty-three states with constituency statutes in force during the period from 2000 to 2019). A constituency statute is a term for a state framework that includes a provision that requires a board of directors to pay regard to the interests of all corporate stakeholders in decision making. A constituency statute is intended to give directors of corporations the discretion to balance the interests of stakeholders, rather than solely focusing on maximizing shareholder value in a way that could damage the long-term sustainability of the enterprise or a stakeholder group.

29. The Berle-Dodd debate continues to confuse as it enlightens. Conservatives continue to embrace one key piece of Berle’s reasoning. Berle’s argument that the equitable law of corporations should require directors to make decisions for the best interests of stockholders was expressly based on his view that corporate law constraints on directors were already too weak, and that if corporate managers were freed from accountability to stockholders, they would be subject to no constraints. See Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049,

long divided is whether such expansive board discretion is a good or bad thing, and the extent to which the common law of corporations should constrain such conduct even though corporate law statutes do not. To that traditional divide, we now turn.

### III. THE TWO BASIC VISIONS OF AMERICAN FOR-PROFIT CORPORATE GOVERNANCE

Thirty years ago, in an article entitled *Our Schizophrenic Conception of the Business Corporation*,<sup>30</sup> my much missed friend, Chancellor (and later Professor) William T. Allen, distilled into plain English the basic to and fro of the American debate about the appropriate ends of for-profit governance.

The tussle has not much changed in the generation and a half since. On the one side is the school now often referred to as stockholder primacy. This school argues that within the limits of law and the board's basic sense of business ethics, the end of corporate governance should be the best interests of stockholders, and that other stakeholders like employees, consumers, communities of operation, and society itself should primarily look to external protections like contracts

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1050 (1931) [hereinafter Berle, *Corporate Powers*] ("All powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears . . . . [W]here no showing of benefit can be made, and where one group within the corporation is to be sacrificed for the benefit of another, it would, equally, circumscribe the use of certain apparently absolute powers. In this latter aspect it is noteworthy that for years corporate papers and general corporation laws have multiplied powers and made them increasingly absolute; that charters have to an increasing extent included immunity clauses and waivers of 'rights.' It seems not to have occurred to draftsmen that, through the very nature of the corporate entity, responsibility goes with power."); Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932) ("When the fiduciary obligation of the corporate management and 'control' to stockholders is weakened or eliminated, the management and 'control' become for all practical purposes absolute."). Oft-forgotten is that Berle was a key Brain Trustee for Franklin Roosevelt and a key architect of the New Deal. In his reply to Dodd—who criticized him for being narrowly focused on stockholders and not on the larger responsibilities of larger businesses to society—Berle noted that his support for maintaining a rigorous focus on stockholder best interests within corporate law was to ensure that some system of accountability was in place until a larger framework (think of the coming New Deal) emerged to constrain the managers of large, public corporations. See Berle, *Corporate Powers*, *supra*, at 1367 ("You cannot abandon emphasis on 'the view that business corporations exist for the sole purpose of making profits for their stockholders' until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else."). Fairly read through his long career, Berle was a realist, who was skeptical about any source of unaccountable power, and believed that internal corporate law constraints requiring fidelity to stockholders, and external law constraints requiring corporations to be good to their other stakeholders and society, were complementary and useful in encouraging responsible wealth creation in a dynamic market economy. See generally ADOLF A. BERLE, JR., *THE 20TH CENTURY CAPITALIST REVOLUTION* (1954). For my take on the larger arc of Berle's thoughts supporting this conclusion, see Leo E. Strine, Jr., *Made for This Moment: The Enduring Relevance of Adolf Berle's Belief in a Global New Deal*, 42 SEATTLE U. L. REV. 267 (2019). For another perspective on Berle arguing that he viewed public corporations as having the responsibility to shape their conduct around what the authors describe as a public consensus and would have likely opposed corporations taking on a religious or other identity that operated to intrude on the freedom of workers who disagreed, see Elizabeth Sepper & James D. Nelson, *Adolf Berle's Corporate Conscience*, 45 SEATTLE U. L. REV. 97 (2021).

30. William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261 (1992).

and statutes to protect them.<sup>31</sup> Their justification for this contention rests on a few basic grounds. First, they argue that corporate law is designed as a broadly enabling contract law between corporate managers and stockholders, and that the managers will be too unconstrained if they do not have to at least justify all their actions in terms of advancing the best interests of stockholders. Second, they argue that the interests of other stakeholders, such as workers, are protected by different bodies of law and that corporations will accomplish the most for society (and even other corporate stakeholders) if they stick to seeking profit within the bounds of law and ethics. As the foundation for this point, this school often points to what happens when a company is subject to dissolution, where stakeholders like creditors and workers must be paid their contractual due before stockholders get anything. They argue from this viewpoint that it is best for all stakeholders that directors focus on maximizing the value of the firm for the stockholders as residual claimants, because an expanding pie will also give the firm more pie to share with its contractual stakeholders and pay more in taxes for the government to use for social purposes. This focus on increasing profitability is one they see as efficient, because it gives a reasoned focus to corporate governance rules that fits with the capacity of corporate managers and the reasons why they exist and are elected by stockholders under corporate law statutes, leaving to other bodies of law, like contract and external statutes, to address the rights and expectations of stakeholders with different needs, such as workers, consumers, lenders, and suppliers. Given the loose constraints of the business judgment rule, however, even this school recognizes that boards have broad discretion to chart a long-term direction pursuing stockholder welfare, and to view the respectful treatment of key stakeholders as important to the company's ability to generate profits.<sup>32</sup> But this school has historically had more suspicion when a corporation goes beyond being other-regarding toward a key direct stakeholder group—such as the company's workers or supporting basic institutions like hospitals in their communities of operation—to have its board and CEO use the corporation's wealth and influence to advance social or political causes not directly related to the corporation's own business affairs. Milton Friedman, of course, is famously associated with this viewpoint, and he and other conservatives<sup>33</sup> often argued that if companies have spare cash for politics or causes,

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31. One of the leading proponents of this viewpoint has been Lucian Bebchuk. *E.g.*, Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 *CORNELL L. REV.* 91, 168 (2020).

32. For example, Stephen Bainbridge, Lucian Bebchuk, and David Ruder all could be said to be scholars who advocate profit seeking for stockholders within the bounds of law and ethics as the proper end of for-profit corporate governance, but who would likely accept this statement. *E.g.*, Stephen Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 *VAND. L. REV.* 83, 129–30 (2004); Lucian Bebchuk, Kobi Kastiel & Roberto Tallarita, *Does Enlightened Shareholder Value Add Value?*, 77 *BUS. LAW.* 731, 735–36, 751–52 (2022); David S. Ruder, *Public Obligations of Private Corporations*, 114 *U. PA. L. REV.* 209, 222–23 (1965).

33. In an interesting article, Professor Bainbridge takes nuanced issue with the idea that Milton Friedman was a conservative, or that Hayek was. Stephen M. Bainbridge, *Corporate Social Responsibility in the Night-Watchman State*, 115 *COLUM. L. REV. SIDEBAR* 39, 41 (2015). For present purposes, suffice it to say that it is scholars and public officials of the political right, and decidedly not the

they should return it to their stockholders and allow them to choose how and whether to spend it for those purposes.<sup>34</sup> In support of this viewpoint, they argued, with strong empirical basis, that stockholders typically have only one shared interest—in a good return on their investment—and do not entrust their capital to allow corporate boards to use it for political and social purposes about which diverse stockholders were likely to hold diverse views.<sup>35</sup>

The other school—now commonly associated with the term “stakeholder governance”—takes a broader view of corporate purpose, but one that has historically been only incrementally different. This other school holds that stockholders are just one of the corporation’s stakeholders, and that the stockholders’ superior power position under corporate law does not mean that the board itself must subordinate other stakeholders’ welfare to them. Rather, this school underscores that stockholders have limited, if potent rights, and they are not owners of the corporation in either a strict legal sense or in the same moral sense as a sole proprietor who is personally responsible for any damages the business causes. Thus, the board is permitted to use its judgment in good faith to determine the company’s strategy, and may treat workers or consumers or communities as an equal end of for-profit governance.<sup>36</sup> In tough times, a board may consider it more important to preserve worker pay than maintain the stock dividends, and may do so even if there is a trade-off to be made.<sup>37</sup> Under this view, the board is not

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left, who find Friedman and Hayek a wellspring of wisdom. Friedman himself identified with the political direction of Barry Goldwater and Ronald Reagan, who adopted the moniker “conservative” as their political banner. By stating this, I do not deny the legitimate and real distinctions among strands of the conservative and liberal traditions, and, as a person who never was cowed during the Reagan-Bush years into abandoning the much-savaged term “liberal,” a fear that fueled in large measure this century’s resurgence of the term “progressive”—I understand and accept my friend’s point that my own form of FDR/MLK/LBJ liberalism is distinct from the form of economic liberalism that Friedman and others espoused.

34. See *supra* note 8.

35. See sources cited at *supra* note 12. As a distinguished conservative scholar has put it:

[I]t is difficult to describe the large public corporation as a community of shared values. Such corporations in fact resemble the nanny state—a large, impersonal bureaucracy with the power to terrorize, but no ability to nurture.

Stephen M. Bainbridge, *Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 896 (1997). For a similar perspective from a different part of the political spectrum, see Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 942 (2013) (“Shareholders do not sort themselves among companies according to their political preferences.”).

36. Allen, *supra* note 30, at 265 (“The second conception sees the corporation not as the private property of stockholders, but as a social institution. According to this view, the corporation is not strictly private; it is tinged with a public purpose. . . . Thus, corporate purpose can be seen as including the advancement of the general welfare. The board of directors’ duties extend beyond assuring investors a fair return, to include a duty of loyalty, in some sense, to all those interested in or affected by the corporation.”).

37. Leading proponents of this viewpoint in recent generations were Martin Lipton, whose iconic 1979 article “Takeover Bids in the Target’s Boardroom” was a full-throated defense of stakeholder capitalism, and Professors Blair and Stout, whose important 1999 article on their team production model was at the forefront of the current debates. See Martin Lipton, *Takeover Bids in the Target’s Boardroom*, 35 BUS. LAW. 101 (1979); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999). In an exchange with Professor Bebchuk, Lipton (with Bill Savitt) and Professor Stout exemplified the focus of most of the recent debate, and its more limited

required to contort itself in order to justify other-regarding behavior toward the workers. It could straightforwardly say, “[w]e seek to make profit but in a way that is fair to our stakeholders, and sometimes stockholders must accept less profit for us to do business the way we think is right.” Under this model, the board gets to balance stakeholder interests and, so long as it is doing so impartially—that is, not to advance any personal interests of their own—it can decide to generate a non-maximal profit to stockholders in order to treat its workers, consumers, creditors, and communities of operation with fairness. As to the risk of corporate managers overplaying their hands, this school would note that all stakeholders need the company to be profitable if they are to benefit from their relationship with it, and that the voting and other rights statutory corporate law gives to stockholders makes it impossible for boards, as a practical matter, to ignore their interests.<sup>38</sup>

What is notable in the vast literature about these two schools is how narrow the differences between them can seem in terms of the broader, more rancorous debate now raging.<sup>39</sup> The historical debate reignited in the last part of the twentieth century, mostly because of the takeover phenomenon, and the stark pressure it put on the ability of corporate boards to balance interests and to argue that their actions in doing so were, in the long run, good for investors. As Chancellor Allen recognized, a premium bid in the here and now for stockholders called the question in a way that could not be rationalized away on that basis.<sup>40</sup>

But little to nothing in this debate in the late twentieth century turned on some of the questions arising today.<sup>41</sup> From a debate about whether stockholders were

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focus on stockholders versus stakeholders, as opposed to larger issues of political engagement by corporations. See Bebczuk, *supra* note 31; see also Lucian A. Bebczuk, *The Mythical Benefits of the Shareholder Control*, 93 VA. L. REV. 790 (2007); Martin Lipton & William Savitt, *The Many Myths of Lucian Bebczuk*, 93 VA. L. REV. 733 (2007).

38. Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy—A Reply to Professor Rock*, 76 BUS. LAW. 397, 431 (2021) (“The continued entrustment of the only voting rights to stockholders, and their ability to throw out management, plus the disciplining effect of product markets, acts as a powerful check on frolics and detours by managers of public companies.”).

39. By way of a pertinent example, even faith-based investors realize that for companies to do right by all their stakeholders, they must be profitable and generate a solid return for their stockholders, including the faith-based investors who require a return to advance the interests they protect as fiduciaries. See, e.g., U.S. Conf. of Catholic Bishops (USCCB) Statement, *Socially Responsible Investment Guidelines for the United States Conference of Catholic Bishops* (Nov. 2021).

40. Allen, *supra* note 30, at 274–75.

41. A reading of the diverse essays in an important volume compiling the views of self-described progressives illustrates that the debate at that time was centered on the extent to which corporations could be other-regarding toward stakeholders, such as workers and communities of operation, as opposed to just stockholders. See generally PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995). And in an influential article with a decidedly realist bent, Robert Reich took the view that it was difficult for corporations, given the predominant emphasis corporate law gave to stockholders, to be other-regarding toward other stakeholders, and thus gave priority to corporations doing no harm in two ways—the first by not externalizing costs to stakeholders or society and the second and related way of not using corporate power to tilt the political process. Robert Reich, *The New Meaning of Corporate Social Responsibility*, CAL. MGMT. REV., Jan. 1998, at 8. In fact, Reich linked the reality that corporate law gave certain rights and privileges to corporations and channels corporate behavior toward profit seeking for stockholders to what he saw as a corresponding “social responsibility to refrain from politics.”



primary among other corporate stakeholders has now emerged a much broader debate. To what extent may and should corporations use their resources to influence who gets elected to office? To swing the control of a state legislature from one party to another?<sup>42</sup> To boycott a state that adopts public policies that do not directly regulate the business, but that the corporation's board believes are wrong? And, to what extent can a corporation's board adopt views of the good on issues with no direct relationship to the company's own conduct or industry? Is it appropriate for a corporate entity to adopt an agenda about abortion or reproductive choice? About religious observance? About sexuality? If adopted, is it appropriate to impose the board's view on the entity's workforce and use its resources to make those views public policy?

These larger concerns about corporate power and its use resurface worries that conservatives voiced in the 1950s and 1960s, which were less about harm to stockholders, and more about the massive wealth and influence corporations might deploy to influence society toward liberal ends that they opposed.<sup>43</sup> It

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It is not possible to have it both ways. The modern corporation cannot simultaneously claim, as a matter of public morality and public policy, that its only legitimate social mission is to maximize stockholder returns, while at the time actively seek to influence social policies intended to achieve all the other things a society may wish to do. It must respect the boundary between the two different sets of laws—the one governing its fiduciary responsibilities and the other reflecting political judgments about its social responsibilities.

*Id.* at 16.

42. I acknowledge that it is possible that corporations do not have the purpose or intent, say in the way that the Model Penal Code would use words of that kind, MODEL PENAL CODE § 202 (Am. L. Inst. 1985), necessarily that a contribution to a partisan political committee bent on electing a certain party to the majority achieve that effect, but certainly they “know,” see *id.*, that the party seeking that contribution will use the funds for that end. That is, they give to the “committee to elect an X majority,” not because they want it to succeed, but to curry favor with its members. But, in a society that is split nearly in thirds among Republicans, Democrats, and independents, *Political Independents: Who They Are and What They Think*, PEW RESEARCH CTR. (Mar. 14, 2019), <https://www.pewresearch.org/politics/2019/03/14/political-independents-who-they-are-what-they-think/> (“Among the public overall, 38% describe themselves as independents, while 31% are Democrats and 26% call themselves Republicans, according to Pew Research Center surveys conducted in 2018.”), and where Democrats tend to have more adherents than Republicans, the tilt of corporate political spending so decisively in one direction is difficult to explain in neutral terms that relate simply to pursuit of profit or influence for the corporations. CTR. FOR POL. ACCOUNTABILITY, *CONFLICTED CONSEQUENCES: A GRAPHIC STUDY ON HOW PUBLIC COMPANY POLITICAL MONEY HAS RESHAPED STATE AND NATIONAL POLITICS FROM 2010 TO TODAY* 5, 8–27 (July 13, 2021) (documenting the overwhelming tilt of corporate political spending toward Republican committees and candidates in comparison to Democrats, despite the reality that Republicans are less common than either Democrats or independents among the American public). In this regard, it is also noticeable to recognize the empirical reality, which is that if one is to judge partisan governance in terms of its relation to investor welfare, the stock market has tended to do better under Democratic administrations than Republican ones. Sergei Klebnikov & Halah Touryalai, *We Looked at How The Stock Market Performed Under Every U.S. President Since Truman—And the Results Will Surprise You*, FORBES (July 23, 2020). Put simply, if corporations are amorally donating to causes and candidates they largely disdain, but view that as a method to obtain rents that will raise profits, that itself has quite disturbing implications for all Americans, including those who are diversified investors in both the sense that they invest in a wide range of companies who track the whole economy but who are also diverse in their political values.

43. See, e.g., Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> (“Whether blameworthy or not, the use of

can be curious for Americans today to read articles suggesting that the corporate managerial class was pushing our nation toward a statist form of socialism, but those articles exist. Milton Friedman's famous views to that effect are emblematic of the worries of conservative thinkers from that era, and have echoes in the growing stridency of the current conversation. So does rhetoric from liberals of that era, like Ralph Nader, who fought to constrain corporate influence on the political process.<sup>44</sup> Both raised this legitimacy question—who are you, privileged elite class of CEOs—to use other people's money to advance your own idiosyncratic views of the good?

In 2022, these concerns are at the forefront of today's strident corporate governance debate. Voices from the right and the left question the wisdom and legitimacy of corporate leaders using their corporation's clout to advance public policy ends that have no direct connection to the corporation's operations or its relationship to its stakeholders. Although some of the debate still involves the more prosaic questions of the late twentieth century—whether boards should put stockholders first at all times or whether boards may treat all stakeholders with equal respect in running the business—the most heated part of the debate addresses the intersection of corporate power and voice and controversial issues of general social and political policy. By general, I mean issues of general social and political policy that would exist regardless of what the corporation or its industry did, and that have no intrinsic link to the corporation's business operations.

#### **IV. TENSIONS TO THE FAR LEFT OF US, CONTRADICTIONS TO THE FAR RIGHT, IS THERE HOPE FOR THOSE OF US STUCK IN THE MIDDLE?**

But, despite sharing concerns over the use of corporate power for social or political ends, the left and the right have not joined forces to forge constructive solutions. Instead, each side just illustrates the tendency of people to like corporate conduct that echoes their beliefs and to call corporate conduct discordant with their beliefs illegitimate.

Let's start with politicians of the left. Left-wing politicians applaud when corporations use their considerable power and influence to encourage government policymakers to, among other things: repeal laws that they view as harmful to the LGBT community,<sup>45</sup> such as the so-called North Carolina "bathroom bill";

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the cloak of social responsibility, and the nonsense spoken in its name by influential and prestigious businessmen, does clearly harm the foundations of a free society."); FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE* 82 (1979) ("... once the management of a big enterprise is regarded as ... obliged to consider in its decisions whatever is regarded as the public or social interest, or to support good causes and generally to act for the public benefit, it gains indeed an uncontrollable power—a power which could not long be left in the hands of private managers but would inevitably be made the subject of increasing public control").

44. See generally RALPH NADER & MARK J. GREEN, *CORPORATE POWER IN AMERICA* (1973); RALPH NADER, MARK J. GREEN & JOEL SELIGMAN, *TAMING THE GIANT CORPORATION* (1976).

45. See, e.g., Henry Berg-Brousseau, *200+ Major U.S. Companies Oppose Anti-LGBTQ+ State Legislation*, HUM. RTS. CAMPAIGN (Mar. 31, 2022), <https://www.hrc.org/press-releases/200-major-u-s-companies-oppose-anti-lgbtq-state-legislation> ("more than 200 major companies" signed a statement "opposing the

support laws protecting the right to have an abortion;<sup>46</sup> restrict the types of and circumstances under which guns can be purchased and carried;<sup>47</sup> reform policing and voting procedures they consider harmful to black people;<sup>48</sup> and oppose President Trump's refugee ban.<sup>49</sup> But the left criticized the decision in *Hobby Lobby*<sup>50</sup> and argued that it was improper for a corporation to be able to hold religious views about abortion and to limit its health care plans to be consistent

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wave of anti-LGBTQ+ legislation"). *But see, e.g.,* Tessa Stuart, *Companies Tout Gay Rights During Pride, Give to Anti-LGBT Politicians*, ROLLING STONE (June 11, 2021), <https://www.rollingstone.com/politics/politics-news/companies-tout-gay-rights-during-pride-give-to-anti-lgbt-politicians-1181006> ("It's pride month, which means corporations are tripping over themselves to come out as allies of the LGBT community—even those corporations that are actively standing in the way of legislation that would expand protections for the members of that community."). *See also* James Surowiecki, *Unlikely Alliances: When North Carolina's Legislators Tried to Limit LGBT Rights, Business Was Their Toughest Opponent*, NEW YORKER (Apr. 18, 2016) (discussing how influential the opposition of big business, and willingness of businesses to use their muscle in terms of deciding whether to locate operations, was on opposing the North Carolina bathroom law, and the tensions that created between corporations and conservatives who typically had supported them).

46. Jeffrey Sonnenfeld et al., *A List of Companies Supporting Abortion Rights After the Roe v. Wade Ruling Shows Which Firms Are Stepping Up, and Why*, FORTUNE (June 30, 2022), <https://fortune.com/2022/06/30/companies-supporting-abortion-rights-roe-v-wade-first-movers/>.

47. *See, e.g.,* Tiffany Hsu, *Big and Small, N.R.A. Boycott Efforts Come Together in Gun Debate*, N.Y. TIMES (Feb. 27, 2018), <https://www.nytimes.com/2018/02/27/business/nra-boycotts.html>; Avi Selk, *NRA Lashes Out at Boycott Movement as United, Delta and Other Corporations Cut Ties*, WASH. POST (Feb. 25, 2018), <https://www.washingtonpost.com/news/morning-mix/wp/2018/02/24/united-and-delta-cut-ties-to-nra-as-boycott-movement-spreads-to-global-corporations/>; *American Businesses Are Taking a Stand on Gun Violence*, EVERYTOWN FOR GUN SAFETY, <https://everytownsupportfund.org/initiatives/business-leaders/businesses-taking-a-stand/> (last visited Nov. 3, 2022). *But see, e.g.,* Matt Egan, *CEOs Are Silent on Guns. They Must Speak Up in a "Loud Chorus," Yale's Jeff Sonnenfeld Says*, CNN BUS. (May 27, 2022), <https://www.cnn.com/2022/05/27/business/sonnenfeld-yale-corporate-responsibility-ualde/index.html> ("Corporate America has said very little following this week's Texas school shooting that left 21 people dead.").

48. *See, e.g.,* Jordan Valkinsky, *More than 100 Business Leaders Speak Out Against Voting Restrictions*, CNN BUS. (Apr. 2, 2021), <https://www.cnn.com/2021/04/02/business/voting-restrictions-ceo-letter/index.html> ("Chief executives and other high-ranking leaders from more than 100 companies including Target, Snapchat[,] and Uber issued a public statement Friday opposing any measures that deny eligible voters the right to cast ballots."); David Gelles & Andrew Ross Sorkin, *Hundreds of Companies Unite to Oppose Voting Limits, but Others Abstain*, N.Y. TIMES (May 27, 2021), <https://www.nytimes.com/2021/04/14/business/ceos-corporate-america-voting-rights.html> ("Amazon, BlackRock, Google, Warren Buffett[,] and hundreds of other companies and executives signed on to a new statement released on Wednesday opposing 'any discriminatory legislation' that would make it harder for people to vote."); Tiffany Hsu, *Corporate Voices Get Behind "Black Lives Matter" Cause*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/05/31/business/media/companies-marketing-black-lives-matter-george-floyd.html> ("Companies like Nike, Twitter[,] and Citigroup have aligned themselves with the Black Lives Matter movement."). *But see, e.g., id.* (adding that there were some notable corporations that declined to sign the statement, including Coca-Cola, Delta, and Home Depot); David Gelles, *Corporations, Vocal About Racial Justice, Go Quiet on Voting Rights*, N.Y. TIMES (Apr. 5, 2021), <https://www.nytimes.com/2021/03/29/business/corporate-america-voting-rights.html> (noting the juxtaposition between corporate solidarity with racial justice and corporate silence on restrictive voting rights bills).

49. *See, e.g.,* Kate Taylor, *Starbucks Has Become a Target of Trump-loving Conservatives—and That's Great News for the Brand*, BUS. INSIDER (Feb. 5, 2017), <https://www.businessinsider.com/why-trump-supporters-boycott-starbucks-2017-2> (reporting on right-wing Americans boycotting Starbucks, after the company announced plan to hire over 10,000 refugees in response to President Trump's refugee ban).

50. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

with those views.<sup>51</sup> Likewise, although left politicians have encouraged corporations to use the huge clubs of boycotts, threats to relocate or downsize operations, or to take out ads targeting opponents of policy they oppose,<sup>52</sup> those same individuals take the position that corporate political spending is illegitimate and ought to be prohibited.<sup>53</sup>

Right-wing politicians display no more principle. They decry “woke capitalism” and argue that business leaders have no proper basis to talk about issues like climate change, reproductive choice, voting rights, or equality.<sup>54</sup> Businesses

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51. See, e.g., Senator Warren’s and others’ opposition. Senator Elizabeth Warren, Remarks on the Senate Floor (July 15, 2014), <https://www.warren.senate.gov/files/documents/2014-7-15%20Hobby%20Lobby%20Speech.pdf> (critiquing the Supreme Court’s decision in *Hobby Lobby* that essentially classifies corporations as “people” that yield more power and thus weakening women’s fundamental rights); Editorial, *Limiting Rights: Imposing Religion on Workers*, N.Y. TIMES (June 30, 2014), <https://www.nytimes.com/2014/07/01/opinion/the-supreme-court-imposing-religion-on-workers.html> (calling the decision “deeply dismaying”); Tina Nguyen, “I Feel Sick”: Liberal Pundits React to SCOTUS Hobby Lobby Ruling, MEDIAITE (June 30, 2014), <https://www.mediaite.com/online/i-feel-sick-liberal-pundits-react-to-scotus-hobby-lobby-ruling/> (“[w]hile conservatives celebrated, liberal pundits were outraged and thunderstruck”); Carmel Martin & Joshua Field, *Re-Establishing Religious Liberty Post-Hobby Lobby*, CTR. AM. PROGRESS (June 30, 2014), <https://www.americanprogress.org/article/re-establishing-religious-liberty-post-hobby-lobby/> (criticizing the Court for “misinterpret[ing] the free exercise of religion to the point of absurdity”); Samuel Jones, *Hobby Lobby and the Rage of the Liberal Machine*, CHRISTIAN POST (July 11, 2014), <https://www.christianpost.com/news/hobby-lobby-and-the-rage-of-the-liberal-machine.html> (“The Left has been declaring scorched earth since the decision, from Justice Ginsburg’s apocalyptic dissent to various expressions of unbridled outrage across the blogosphere.”).

52. McKeon Writes Letters to Major Organizations Urging Boycott of States Limiting Women’s Reproductive Rights, INSIDER NJ (Sept. 1, 2022); James Walker, *AOC Says NBA Boycott Should Be Called “Strike” Action, Praises Player Courage*, NEWSWEEK (Aug. 27, 2022). The left has also advocated that consumers boycott companies whose leaders embrace political views the left does not favor. E.g., Steve Gorman, *Goya Chief Executive Sparks Backlash Over Praise for Trump*, REUTERS (Aug. 27, 2022) (reporting on Goya Foods CEO Robert Unanue’s support for President Trump over social media, which sparked controversy, with the left calling for boycotts of the Hispanic food distributor and the right responding in ways typical of U.S. Senator Ted Cruz, by saying “now the Left is trying to cancel Hispanic culture and silence free speech”); Brittany Bernstein, *AOC, Julian Castro Lead Calls to Boycott Goya Foods After CEO Praises Trump*, NAT’L REV. (July 10, 2020).

53. Press Release, Senator Elizabeth Warren, Getting Big Money Out of Politics (Oct. 15, 2019), <https://elizabethwarren.com/plans/campaign-finance-reform> (noting that: “[W]e can take immediate legislative action and make big, structural changes to how campaigns are financed. But to truly end the corruption of our democracy, we must also pass a constitutional amendment to overturn the Supreme Court’s disastrous decisions in *Citizens United* and *Buckley v. Valeo*.”); Press Release, President Barack Obama, Remarks by the President on the DISCLOSE Act (July 26, 2010), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-disclose-act> (“[Americans] voices shouldn’t be drowned out by millions of dollars in secret, special interest advertising. The American people’s voices should be heard.”).

54. See also Jonathan Swan, *House GOP’s War on “Woke” Business*, AXIOS (June 15, 2022), <https://www.axios.com/2022/06/16/us-chamber-commerce-house-republicans> (reporting that House Republicans welcomed to the Capitol a new self-described “anti-woke” business lobbying group, amplifying their hostility toward the U.S. Chamber of Commerce and broader “environmental, social and corporate governance” (ESG) movement); Press Release, Senator Marco Rubio, New Rubio Bill Helps Shareholders Fight Back Against Woke Corporations (Sept. 23, 2021), <https://www.rubio.senate.gov/public/index.cfm/2021/9/new-rubio-bill-helps-shareholders-fight-back-against-woke-corporations> (“U.S. Senator Marco Rubio (R-FL) introduced the Mind Your Own Business Act . . . which would . . . incentivize corporate management to stop abusing their positions to advance left-wing social policies by increasing their personal liability to shareholders for breaches of fiduciary duty resulting from those policies.”); D. Hunter Schwarz, *Big Business Is Seeing What Happens When “Woke Corporations”*

reducing lending or investing into climate-harming projects have been met with excommunications by right-wing state treasurers.<sup>55</sup> These actions might be easier to explain away if they were based on the idea that corporations should just stick to business and leave values and politics to human beings. But, when corporations like Hobby Lobby imposed their religious belief on their employees and denied them access to federally guaranteed reproductive health services, these same voices applauded.<sup>56</sup> These politicians also adamantly oppose restrictions on corporate political spending<sup>57</sup> and are voracious devourers of corporate

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Meet “Cancel Culture,” DESERT NEWS (June 30, 2021), <https://www.deseret.com/2021/6/30/22545784/big-business-politics-when-woke-corporations-meet-cancel-culture-good-unite-us-republicans-democrats> (reporting on Texas Rep. Dan Crenshaw pointing a finger at Major League Baseball for succumbing to the polarization by stating they are “bowing to the work mob” after the organization moved its Midsummer Classic game from Atlanta to Denver after Georgia’s passing of restrictive voting laws); Letter from Republican U.S. Senators to Hon. Karen Gibson, U.S. Senate, Re: Citibank and abortion (Apr. 28, 2021) (Republican Senators asking that the Senate “immediately terminate [its] existing contracts with Citi and refrain from entering into any new contractual agreements with Citi” following Citi’s recent announcement that it would pay for its employees to travel out of state for abortions); Senator Marco Rubio, *Corporations that Undermine American Values Don’t Deserve GOP Support*, N.Y. POST (Apr. 25, 2021), <https://nypost.com/2021/04/25/corporations-that-undermine-american-values-dont-deserve-gop-support> (“No policymaker would allow a company to dump toxic waste into a river upstream of a thriving town he is charged with governing. Yet corporate America eagerly dumps woke, toxic nonsense into our culture, and it’s only gotten more destructive with time.”); Philip Klein, *Republicans Should Oppose Corporate Favors in General, Not Just as Retribution Against Woke Capitalism*, NAT’L REV. (Apr. 8, 2021), <https://www.nationalreview.com/corner/republicans-should-oppose-corporate-favors-in-general-not-just-as-retribution-against-woke-capitalism/> (“Senate minority leader Mitch McConnell also released a statement ominously warning that, ‘Corporations will invite serious consequences if they become a vehicle for far-left mobs to hijack our country from outside the constitutional order.’”).

55. See, e.g., David Gelles, *How Republicans Are “Weaponizing” Public Office Against Climate Action*, N.Y. TIMES (Aug. 5, 2022), <https://www.nytimes.com/2022/08/05/climate/republican-treasurers-climate-change.html> (reporting on Republicans’ efforts to punish companies trying to reduce greenhouse-gas emissions); David Benoit, *West Virginia Penalizes Banks Including JPMorgan, Goldman for Coal “Boycotts,”* WALL ST. J. (July 28, 2022), <https://www.wsj.com/articles/west-virginia-penalizes-banks-including-jpmorgan-goldman-for-coal-boycotts-11659029203> (reporting that the State of West Virginia is cutting ties with four banks, including JPMorgan, Goldman, and asset manager BlackRock, saying their stance on coal is harming its economy).

56. Kyle Cheney, *GOP Govs: Scant Hobby Lobby Political Fallout*, POLITICO (July 13, 2014), <https://www.politico.com/story/2014/07/hobby-lobby-supreme-court-ruling-108858> (“Republicans contend that the Supreme Court’s June 30 ruling in *Hobby Lobby v. Burwell*—simply that family-owned companies can’t be forced to include free contraception in employee health plans in violation of their religious beliefs—is a win for religious freedom.”); Ferdous Al-Faruque, *Republicans Hail Hobby Lobby Decision as Religious Victory*, THE HILL (June 30, 2014), <https://thehill.com/policy/healthcare/210963-gop-hails-hobby-lobby-decision-as-religious-victory/> (“Sen. Rand Paul (R-Ky.) said Monday’s ruling means Americans won’t have to worry about ‘big government intervention and punishment,’ for following their religious conscience.”).

57. E.g., Alyce McFadden, *McConnell and His Allies Lead Opposition to S1*, OPEN SECRETS (May 13, 2021), <https://www.opensecrets.org/news/2021/05/mcconnell-allies-lead-s1-opposition/> (reporting on Senate Minority Leader Mitch McConnell (R-Ky.) opposing campaign finance reform to address, among other things, corporate political spending); Alexander Bolton, *McConnell Works to Freeze Support for Dem Campaign Finance Effort*, THE HILL (Mar. 8, 2019), <https://thehill.com/homenews/senate/433154-mcconnell-works-to-freeze-support-for-dem-campaign-finance-effort/> (Minority Leader Mitch McConnell pulling out “all the stops to make sure not a single Republican senator backs the campaign finance . . . bill that House Democrats are set to pass”); Hans A. von Spakovsky, *Senator McConnell on the Perils of Campaign Finance “Reform,”* HERITAGE FOUND. (June 22, 2012), <https://www.heritage.org/commentary/senator-mcconnell-the-perils-campaign-finance-reform> (reporting on Minority Leader McConnell’s speech last Friday giving a “stirring defense of political

political spending.<sup>58</sup> Indeed, about one thing there can be no rational debate: candidates and the party of the right receive the biggest benefit from corporate political spending and oppose any efforts to constrain it.<sup>59</sup>

Although there is much to question about the Supreme Court's equation of money and speech, and about its discovery in *Citizens United*—some 221 years after the founding—that the First Amendment extends to for-profit corporations an unlimited right to make expenditures to influence our political system,<sup>60</sup> there is no rational way to deny that conduct like boycotts and threats to relocate from entire states, on the one hand, and corporate political donations, on the other, all involve uses of corporate wealth and power for the purpose of influence. If it is an illegitimate “woke” exercise to boycott an entire state over an issue of social policy, then it is equally an illegitimate “unwoke” exercise to give millions of corporate dollars over which you are a fiduciary for investors with diverse views to partisan political committees. Because of corporate wealth, both activities have an outsized influence on our political system.

Applauding corporate influence when you like what it's used for is understandable. And, if you then accept that, while you will not always like what certain corporations do, such pluralism is the price of freedom, you have arrived at a principled position, but one that gives little weight to certain realities of how our system of corporate governance and retirement and college savings works.<sup>61</sup>

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free speech” and “on the perils of campaign finance ‘reform’”); Todd Ruger, *Supreme Court to Hear Ted Cruz Challenge to Campaign Finance Law*, ROLL CALL (Jan. 18, 2022), <https://rollcall.com/2022/01/18/supreme-court-to-hear-ted-cruz-challenge-to-campaign-finance-law/> (reporting on Sen. Ted Cruz's challenge before the Supreme Court to campaign finance law).

58. Marco Rubio's Top 20 Contributors to Campaign Committee from 2017–2022, OPEN SECRETS, <https://www.opensecrets.org/members-of-congress/marco-rubio/contributors?cid=N00030612&cycle=2022> (last updated Oct. 28, 2022) (corporate and business sources predominate in top twenty contributors to campaign committee and the senator's political action committee).

59. For evidence to this point, see *supra* note 7. Notably, the Disney company has found itself at odds with a Republican Governor and legislature in Florida, despite giving Republicans in Florida many multiples of what the company gave Democrats. Andrew Atterbury, *Disney Pledges to Stop Florida Campaign Donations over “Don’t Say Gay” Bill*, POLITICO (Mar. 11, 2022), <https://www.politico.com/news/2022/03/11/disney-pledges-to-stop-florida-campaign-donations-dont-say-gay-00016705> (“Disney during the 2020 election cycle donated \$913,000 to the Republican Party of Florida and another \$586,000 to GOP Senate campaigns, records show. The company also donated \$313,000 to the Florida Democratic Party and \$50,000 directly to DeSantis.”). See also Andrew Atterbury, *Disney Pledges to Stop Florida Campaign Donations over “Don’t Say Gay” Bill*, POLITICO (Mar. 11, 2022), <https://www.politico.com/news/2022/03/11/disney-pledges-to-stop-florida-campaign-donations-dont-say-gay-00016705> (“Our Employees see the power of this great company as an opportunity to do good. I agree,” Chapek wrote in a memo that Disney provided to Politico. “Yes, we need to use our influence to promote that good by telling inclusive stories, but also by standing up for the rights of all.”).

60. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). For my own thoughts on *Citizens United*, see, for example, Jonathan Macey & Leo E. Strine, Jr., *Citizens United as Bad Corporate Law*, 2019 WIS. L. REV. 451; Leo E. Strine, Jr., *Fiduciary Blind Spot: The Failure of Institutional Investors to Prevent the Illegitimate Use of Working Americans’ Savings for Corporate Political Spending*, 97 WASH. U. L. REV. 1007 (2020); Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling Citizens United with Corporate Law History*, 91 NOTRE DAME L. REV. 877 (2016); Leo E. Strine, Jr., *Corporate Power Ratchet: The Courts’ Role in Eroding “We the People’s” Ability to Constrain Our Corporate Creations*, HARV. C.R.-C.L. L. REV. 423 (2016).

61. Professors McDonnell, Johnson, Millon, and Skeel can all fairly be described in this general school and as recognizing that a commitment to pluralism in this space involves accepting that corporations will embrace social, religious, and political views different from your own, even if you are a stockholder. Brett

It involves accepting that there will be a range of corporate approaches, and that corporate power will tend to be exercised by people far richer, more elite and privileged in background, than most in society and still more likely to be Republican-leaning, and that the overall tilt of corporate political involvement generally is likely to be directionally right-wing, but on social policies influenced by what is deemed standard and acceptable to a certain social class, which might differ in substantial ways from, for example, working class voters of any party who do not have college degrees.<sup>62</sup> It is also a position that gives little weight to corporate governance problems that scholars of both the left and right agree upon, in particular that neither stockholders nor corporate law statutes are well-positioned to monitor corporate boards over their political or social value–influence activities, and that there is no reason to believe that investors hold monolithic political or social beliefs or that they invest to express those beliefs.<sup>63</sup> But this commitment to letting the red and blue corporate flowers bloom is nevertheless a principled

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H. McDonnell, *The Liberal Case for Hobby Lobby*, 57 ARIZ. L. REV. 777, 811 (2015) (adopting a pluralistic view and arguing that if liberals opposed *Hobby Lobby* just because they are pro-choice, they are repudiating “some of the core values of the liberal tradition”); see Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1 (2015) (taking an optimistic view of *Hobby Lobby* and viewing it as validation of the idea that companies may pursue a variety of lawful purposes beyond mere stockholder profit); David Skeel, *The Corporation as Trinity*, 45 SEATTLE U. L. REV. 155 (2021) (arguing that as voluntary participants in a system of republican, not direct democracy, stockholders accept the board’s authority over company policy, the provisions of the charter and bylaws, and that their heterogeneity is no basis to question corporate social, political, or religious policies as illegitimate as a matter of corporate law).

62. By way of example, it seems likely that although most C-Suite executives are Republicans, their views on issues like reproductive rights do not track with Republicans generally. For scholarly work demonstrating both that the politics of C-Suite officials is not representative of the overall American public, and that the political leanings of C-Suite officials have an influence on corporate political spending and the level of transparency about political behavior, see, for example, Alma Cohen et al., *The Politics of CEOs*, 11 J. LEGAL ANALYSIS 1 (2019); J. Yu-Jod Cheng & Boris Groysberg, *7 Charts Show How Political Affiliations Shape U.S. Boards*, HARV. BUS. REV. (Aug. 23, 2016); Megan Batchelor, *Democrats or Republicans: Here’s What America’s Top 30 CEOs Donated to the Midterm Elections*, CEO WORLD (Oct. 26, 2018).

63. It has long concerned corporate law scholars of both the left and right that most investments in corporate stock are motivated solely by economic needs and desires unconnected to political, religious, or social beliefs, that corporate law is not designed to monitor corporate managers in areas unrelated to business itself, and that there is no basis to presume that corporate stockholders have monolithic, as opposed to widely diverse political, religious, and social beliefs. Scholars voicing these concerns include Stephen Bainbridge, Roberta Romano, Elizabeth Pollman, Daniel J.H. Greenwood, Lucian Bebchuk, Robert Jackson, and Henry G. Manne; see *supra* note 23; Victor Brudney, *Business Corps and Stockholders’ Rights Under the First Amendment*, 91 YALE L.J. 235, 237 (1981) (arguing that the heterogeneity of stockholders delegitimizes corporate speech); Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 942 (2013); Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53, 56 (2009); Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 495, 533 (2005) (noting that this is especially a concern for shareholders of mutual funds). In addition, mainstream corporate lawyers have long voiced concern that the multi-stakeholder view leaves corporate fiduciaries without an adequate focus for accountability and decision making. E.g., ABA Section of Bus. Law Comm. on Corporate Laws, *Other Constituencies Statutes: Potential for Confusion*, 45 BUS. LAW. 2253 (1990) (“The confusion of directors in trying to comply with such statutes . . . [that] . . . require directors to balance the interests of various constituencies without according primacy to shareholder interests, would be profoundly troubling.”); Bus. Roundtable, *Statement on Corporate Governance* (Sept. 1997), <http://www.ralphgomory.com/wp-content/uploads/2018/05/Business-Roundtable-1997.pdf>. For a thoughtful article by a respected conservative corporate

position, and one that recognizes that there are other, less wealthy, countervailing forces in society that help balance out corporate influence.

A less edifying and consistent perspective comes from those who bemoan corporate conduct as illegitimate when that conduct advances a cause they oppose, while supporting functionally identical conduct that is consistent with their own beliefs. This approach does not accept pluralism or diversity in belief, it just involves a determination by the left that corporations that are right wing should not exist or get to act on their board's beliefs, and a similar determination by the right that left-wing corporations should not exist. This is not a principled position about corporate power. It is just partisan-driven rhetoric, natural for passionate political types, but unhelpful.

Are we stuck with accepting these increasingly divisive consequences resulting from the current default to a hodge-podge pluralism whose basic legitimacy is denounced by conservatives and liberals whenever it produces situational results they do not favor? Or, is there another principled path forward that is not of the left or of the right, but grounded in a centrist understanding of for-profit corporate governance? That moves toward a more channeling and a more legitimizing approach to corporate conduct, that is in the best interests of all stakeholders of corporations and society? A way that better respects the freedom of all human Americans?

I now will attempt to cut out a trail of that kind, moving in a direction supported by principles that are widely shared by thinkers of all political and social persuasions.

## V. TOWARD A PRINCIPLED, NON-IDEOLOGICAL, NON-PARTISAN VISION OF THE GOOD CORPORATE CITIZEN

To begin our route-planning, I reiterate a foundational subject on which conservative and liberal legal and economic thinkers agree: statutory corporate law was not designed to constrain corporate leaders from engaging in social or political activity.<sup>64</sup> The main concern of corporate law constraints is making sure that corporate leaders do not engage in self-dealing at the expense of other stockholders,<sup>65</sup> and that there is an ability for stockholders to have a say on who

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scholar to this effect, see Robert T. Miller, *How Would Directors Make Business Decisions Under a Stakeholder Model*, 77 BUS. LAW. 773 (2022).

64. An excellent discussion of this reality can be found at Elizabeth Pollman, *Corporate Law and Theory in Hobby Lobby*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 149 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016); see also David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 29–30 (1979) (“corporate management as now structured lacks both the legitimacy and ability to help choose among social priorities”).

65. E.g., DEL. CODE ANN. tit. 8, § 144 (2022) (“No contract or transaction between a corporation and one or more of its directors or officers, or between a corporation and any other corporation . . . in which one or more of its directors . . . are directors . . . or have a financial interest, shall be void or voidable solely for this reason . . . [t]he material facts as to the director’s . . . relationship or interest and as to the contract or transaction are disclosed or are known to the board of directors . . . and the board or committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors, even though the disinterested directors be less than a quorum.”); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (1983) (“A public policy, existing through the years, and derived from a



governs the company and on big transactions.<sup>66</sup> Likewise, the whole idea of the business judgment rule is that it is unwise to have courts second-guess impartial board decisions because, although boards will make mistakes, it is better to encourage responsible risk-taking, because that fuels profits for investors, and usually growth of the company means good things for the company's workers and communities of operation.<sup>67</sup> This intuition is, importantly, premised on a convergence between the corporate leaders' interests and those of the stockholders in only one sense: both wanted the business to be profitable and deliver a good return. When, rather than making a decision based on profit, a board uses the corporation's resources to advance a social or a political cause, conservative thinkers balk, as has been discussed, because there is no basis on which to presume a convergence of social and political beliefs on the part of investors, or that they invested to advance those beliefs.<sup>68</sup> On purely corporate law grounds, these thinkers viewed corporate leaders as lacking legitimacy and that they should hew

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profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty . . .").

66. MODEL BUS. CORP. ACT. ANN. §§ 11.01, 12.01 (5th ed. 2020) (requiring votes on certain mergers and large sales of assets); DEL. CODE ANN. tit. 8, §§ 251, 271 (2022) (same).

67. See, e.g., *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 126 (Del. Ch. 2009) (citing Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 90, 114–15 (2004)) ("If liability from bad outcomes, without regard to the ex ante quality of the decision or the decision-making process, however, managers will be discouraged from taking risks."); PRINCIPLES OF THE LAW: ANALYSIS AND RECOMMENDATIONS pt. IV Intro. Note (Am. L. Inst. 1994) ("The basic policy underpinning of the business judgment rule is that corporate law should encourage, and afford broad protection to, informed business judgments (whether subsequent events prove the judgments right or wrong) in order to stimulate risk taking, innovation, and other creative entrepreneurial activities."); William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and Its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449, 450, 455 (2002) (noting that Delaware's long-standing policy of deferring to business decisions made by well-motivated fiduciaries furthers important public policy values and underscores the social utility of encouraging corporate directors to make decisions that may create corporate wealth but that are also risky); E. Norman Veasey & William E. Manning, *Codified Standard—Safe Harbor or Unchartered Reef?*, 35 BUS. LAW. 919, 931–32 (1980) (courts have been careful not to second-guess good-faith corporate decision-making so as not to undercut the benefits that come from society's encouragement of risk-taking enterprises).

68. "If businessmen do have a social responsibility other than making maximum profits for stockholders, how are they to know what it is? Can self-selected private individuals decide what the social interest is? Can they decide how great a burden they are justified in placing on themselves or their stockholders to serve that social interest? Is it tolerable that these public functions of taxation, expenditure, and control be exercised by the people who happen at the moment to be in charge of particular enterprises, chosen for those posts by strictly private groups? If businessmen are civil servants rather than employees of their stockholders then in a democracy, they will sooner or later, be chose by the public techniques of election and appointment." FRIEDMAN, *CAPITALISM*, *supra* note 7, at 133–34. See also David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 29–30 (1979) ("the opponents of 'more' corporate social responsibility have made a persuasive case . . . that corporate management . . . lacks both the legitimacy and ability to help us choose among social priorities"); HENRY G. MANNE & HENRY C. WALLICH, *THE MODERN CORPORATION AND SOCIAL RESPONSIBILITY: A RATIONAL DEBATE* (1972) (exploring the meaning of corporate social responsibility and implications for public policy).

to seeking profit within the bounds of the law and of their concept of proper ethical standards. If there was “surplus” in the firm for use for social or political purposes, that should be returned to the stockholders in the form of a dividend, with stockholders free to make their own decisions about what to do with that money.<sup>69</sup>

If a person of the left opens her mind to these arguments, she will find much to agree with. Human investors put their savings, through mutual funds controlled by institutional investors participating in their company 401(k) plans, into many companies, primarily to gain a return for use in paying for things like college for kids and retirement for themselves. They have little influence on corporate policies, and in fact have to invest through intermediaries for the most part.<sup>70</sup> It is one thing to think these intermediaries can monitor corporate boards for their ability to deliver good financial returns; quite another to think they have any capacity under ordinary corporate law to hold corporate leaders accountable for taking positions on social values and politics that somehow represents a consensus among investors with views nearly as diverse as society as a whole.<sup>71</sup> Moreover, the left recognizes, perhaps even more than conservative thinkers have, that corporate leaders are hardly representative of society as a whole, and come from more privileged, more male, and more white backgrounds than the rest of us, and that this influences how they think about issues.<sup>72</sup> As concerning, a person of the left realizes that precisely because corporations are a primary tool for wealth creation, they have the accumulated capital of many; if such capital can be used to act on society, corporations will have resources that often far outstrip those of human beings. Much human wealth is in fact entrapped in corporations and institutional investors and out of the direct control of human investors. For all these reasons,

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69. See *supra* note 8.

70. See *supra* note 26.

71. See Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 341 (2015) (“ . . . institutional investors . . . employ proxy advisory firms to help them deal with an ever-growing number of votes each year. The idea that a mutual fund that invests on a broad indexed basis or funds like the Vanguard Dividend Growth Fund will be legitimately positioned to provide effective oversight over corporate political spending or find it rational to try is strained. Indeed, prominent mutual fund complexes like Vanguard and Fidelity do not see it as their job to even vote on social proposals put forward by stockholders and thus typically abstain.”). For a provocative argument that institutional investors have no capacity or legitimacy to do other than focus on increasing the profitability of specific companies in their portfolios, see generally Sean J. Griffith, *Opt-in Stewardship: Toward an Optimal Delegation of Mutual Fund Voting Authority*, 98 TEX. L. REV. 983 (2020) (arguing that mutual funds have no legitimate basis for voting on issues unrelated to stockholder profit, and even that index funds should focus only on company specific profits and not take a portfolio-wide perspective supporting corporate governance changes that reduce externality risk).

72. See Jill Fisch, *The “Bad Man” Goes to Washington*, 75 FORD. L. REV. 1593, 1603 (2006) (“As for officers and directors, those with the authority to make corporate decisions, there is little reason to believe their ethical views mirror those of society. Moreover, to the extent that corporate officials impose their personal moral views on the corporation, they abuse their fiduciary obligations as agents. Finally, various corporate stakeholders may have differing moral perspectives.”); Adam Bonica, *Avenues of Influence: On the Political Expenditures of Corporations and Their Directors and Executives*, 18 BUS. & POL. 367 (2016) (finding that corporate elites donate in a way consistent with advancing their personal ideological preferences); Alma Cohen et al., *The Politics of CEOs*, 11 J. LEGAL ANALYSIS 1, 1 (2019) (finding that CEOs show a “substantial preference for Republican candidates”).

many of the concerns of conservatives like Milton Friedman about corporations acting to advance social and political causes also motivate left-wing opposition to corporate political spending. And with good reason.

There is another important issue that cannot be forgotten. Americans spend more waking time under the domain of their employer than in the company of family and friends. This has been a concern of thinkers on both the left and the right. The current cries about woke capitalism<sup>73</sup> draw on fears that, if politically correct CEOs can push their left-coast values on their companies, a left-wing social orthodoxy will be imposed on the company and its workers, who will feel inhibited from expressing any contrary opinion at the risk of cancellation. Should the freedom to be who you are have to give way if you want to keep your job? This right-wing concern is not isolated to the right. In her important work, *Private Government*, Professor Elizabeth Anderson<sup>74</sup> highlights the dangers of a society where employers are not required to respect the diversity of their employees' beliefs and to foster workplaces where people of different views can work side by side so long as they are mutually respectful and tolerant. She rightly stresses that for many, there are few economic options and that in a choice between feeding the family and lacking freedom for most of your waking hours, freedom will tend to give way. In important ways, Anderson was anticipated by Adolph Berle, who argued nearly seventy years ago that, unless large corporations honor the constitutional rights of their employees, Americans could not truly be free, because as an economic reality, tens of millions had to work for them.<sup>75</sup>

Neither the left nor the right can responsibly avoid the “whose freedom” question in considering the extent to which they believe corporations should get to advance social and political purposes. To the extent that a corporation takes a stand and promotes that stand within the workforce, it will affect employees who disagree and may feel subjected to a corporate orthodoxy on an issue that may have no direct relationship to the company's own operations.<sup>76</sup> If the

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73. Always, of course, be careful when a term is coined by those wishing to disparage the beliefs of others. The right invented “woke capitalism,” not the left, and it involves an intentional distortion and contextual exploitation of a term that has its origins in concerns about the continuing effects of discrimination and being cognizant of that reality.

74. See generally ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT)* (2017). For a thoughtful review of Anderson's work and considerations of the critiques made of it, see Chetan Cetty, *Talking About Private Government: A Review of the Argument and Its Critiques*, ECON. POL. INST. (Sept. 23, 2021).

75. See ADOLF A. BERLE, JR., *THE 20TH CENTURY CAPITALIST REVOLUTION* 61–114 (1954). Conservative scholars have voiced the same concerns. See Bayless Manning, *Corporate Power and Individual Freedom: Some General Analysis and Particular Reservations*, 55 NW. U. L. REV. 38, 45 (1960) (“As for the protection of the individual, history yields small ground for confidence that the interests of an individual member of an organization will be at one with that of the organizational bureaucracy controlling the uses to which the organization's Power is put.”); Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law*, 82 CORNELL L. REV. 856, 896 (1997) (public corporations “resemble the nanny state—a large, impersonal bureaucracy with the power to terrorize, but no ability to nurture”).

76. This concern may be even more important now that many corporations engage in intrusive video- and audio-recording of their workers, with some literally watching and listening and recording

corporation goes further and claims, as did the employers in *Hobby Lobby*, that its “corporate religious views” require it to refuse to fund otherwise legally required health care as part of the company’s health insurance plan, employees can find themselves losing their own secular rights. In all cases, if the infusion of social and political values into the corporation’s culture becomes intensive, the potential to divide the workforce grows. Only those high-end workers with mobility and economic choice can look for companies that suit their preferred orthodoxy. And lest the left say—well, haven’t workers driven corporations to take stands in some cases—well, yes they have. But what kinds of workers? Typically, highly paid workers with lots of economic options.<sup>77</sup> And what kinds of issues? Typically, social issues of specific interest to them, often having little to do with core issues of worker economic well-being for the company’s entire workforce (direct and contracted). When workers with less economic leverage have spoken up to seek better pay and more voice, they have faced more resistance.<sup>78</sup> That is, social and political policies pushed by an elite segment of the workforce have their own representativeness problems, and may alienate the most powerless segments of the workforce, or subordinate their most pressing concerns to those of the already most privileged segments of the workforce.

Viewed from a Rawlsian perspective, the lot of American workers in a system where corporate leaders are free to use corporate resources to drive social and political change is worrisome.<sup>79</sup> It is doubtful that corporate belief systems will be pushed externally only with no effect on the workplace itself. Workers are, on average, likely to have constrained options for re-employment; most

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everything the employees do. See Zephyr Teachout, *The Boss Will See You Now*, N.Y. REV. BOOKS 28–31 (Aug. 18, 2022) (reviewing several books documenting this practice and the implications it has for worker freedom and well-being).

77. Kate Conger & Noam Scheiber, *Employee Activism Is Alive in Tech. It Stops Short Organizing Unions*, N.Y. TIMES (July 8, 2019), <https://www.nytimes.com/2019/07/08/technology/tech-companies-union-organizing.html> (discussing reality that, in the tech industry, the efforts of well-compensated employees to urge their companies to take positions on social policy have been more successful than the efforts of industry workers to seek union status to bargain for better wages and working conditions).

78. For example, although companies like Walmart, Amazon, and Starbucks have been responsive to workers on some social issues like guns, inclusiveness for the LGBT+ community, or voting rights, they have been steadfast in opposing efforts at unionization by their workers. Compare, e.g., *American Businesses Are Taking a Stand on Gun Violence*, EVERYTOWN GUN SAFETY SUPPORT FUND, <https://everytown-supportfund.org/initiatives/business-leaders/businesses-taking-a-stand/> (last updated Feb. 3, 2022); Noah Manskar, *Amazon Joins Major Companies Slamming GOP-led Voting Laws*, N.Y. POST (Apr. 2, 2021), <https://nypost.com/2021/04/02/amazon-joins-major-companies-slamming-gop-led-voting-laws/>; and *Starbucks Celebrates Pride and Embraces All LGBTQIA2+ Identities*, STARBUCKS (May 31, 2022), <https://stories.starbucks.com/stories/2022/starbucks-celebrates-pride-and-embraces-all-lgbtqia2-identities/>; with David Streitfeld, *How Amazon Crushes Unions*, N.Y. TIMES (Mar. 16, 2021), <https://www.nytimes.com/2021/03/16/technology/amazon-unions-virginia.html>; Steven Greenhouse, *How Walmart Persuades Its Workers Not to Unionize*, THE ATLANTIC (June 8, 2015), <https://www.theatlantic.com/business/archive/2015/06/how-walmart-convinces-its-employees-not-to-unionize/395051/>; and Nick Bowlin, *Pure Propaganda: Inside Starbucks’ Anti-union Tactics*, THE GUARDIAN (May 4, 2022), <https://www.theguardian.com/business/2022/may/04/starbucks-anti-union-tactics>.

79. Among other things, Rawls’ work argued that it was important in thinking through the design of a rule for the governance of a polity, to imagine it from the perspective of those least advantaged, and whether the rule would be considered fair if you occupied that position. JOHN RAWLS, A THEORY OF JUSTICE: JUSTICE AS FAIRNESS 450–516 (1971).

of the options will require family and economic disruption, and none will typically give the worker any meaningful ability to influence the corporate workplace.<sup>80</sup> As a result, a system that facilitates corporate inculcation of certain political and social values is disadvantageous for workers, because it could make them have to shop for red or blue companies, or just endure working hours in an atmosphere that lacks the pluralism and freedom that represents a key part of being an American. Both the right and the left seem to get this, as both cry foul when they see a company they view as pushing an orthodoxy they do not favor.

As we have seen, though, the implications of these arguments are accepted by each side in selective and contradictory ways that are in tension with each other. A reconciliation, however, is possible, but it is one that leaves each side having to give up something.

For the left, it requires recognizing that using corporate power to push for left-wing policies and belief systems has an outsized effect on the communities in which they operate, and perhaps most importantly, the company's employees. Calling on companies to boycott doing business in an entire state is calling on companies to use their vast resources to bend public policy to their direction. Likewise, if the left is going to be true to its principles, if a CEO or board is permitted to speak about public policy, so must their employees. It is problematic to let the flowers of expression bloom only for the few, and not the many. If CEOs and boards are going to use company communications systems to talk about political issues, such as legislation, are employees allowed to respond? Or is only one viewpoint okay? And if that is so, and if it is the unspoken rule that you can't voice an "incorrect" view without running afoul of management's political beliefs, what incursion does that have on the workforce's freedoms as Americans?

For the right, it requires facing the corresponding reality, which is that there is a contradiction between telling corporations to shut up about social and political issues, and then putting constant pressure on them to fill their campaign coffers. It is inconsistent to try to stifle corporate voice when it says things you don't like, while demanding that corporations fund the coffers of candidates and campaigns, so that huge corporate wealth can be used to advance causes like voting access restrictions, bans on abortion, gun rights, and limitations on the rights of workers. Money matters, and these corporate funds are being used for purposes that are not based on any consensus of the diverse stockholders of the companies, much less their other stakeholders.<sup>81</sup>

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80. It is worth remembering that the median family income in the United States is only about \$71,000. U.S. Census Bureau, Households by Total Money Income, Race, and Hispanic Origin of Householder: 1967 to 2021 G23 (2022), <https://www2.census.gov/programs-surveys/cps/techdocs/cpsmar22.pdf>.

81. I acknowledge that corporations may argue that they are giving in to the "Committee to Make State Y's Legislature a Chartreuse Party Majority" to curry favor for business ends. That evidently subjects the corporation to criticism for hypocrisy if that party advances policies inconsistent with express corporate views on certain issues. Examples of that abound. Rob Garver, *Florida Battles Disney World Over "Don't Say Gay" Bill*, VOA News (Apr. 22, 2022), <https://www.voanews.com/a/florida-battles-disney-world-over-don-t-say-gay-bill/6541446.html> (reporting on Disney's legal dispute with

For both sides, it requires recognizing that freedom of conscience means freedom for all, not just those who agree with you. Unless either side wishes to confess its desire for a nation where one political and religious orthodoxy reigns and those with other beliefs are expected to shut up and go along, then each has to admit that a failure to constrain corporate efforts to advance social and political values will have implications for the freedom of others subject to corporate power.<sup>82</sup>

Or, are we stuck with corporations that callously seek profit in a manner wholly abstracted from social context, and with none of the real world heart and soul concerns that animate sole proprietors or ordinary workers in their conduct? The good news is that I think that the answer to that is a decisive no. If you recall my description of the two basic schools of thought in American corporate governance, you will note that the differences between them are not nearly as stark as the public debate suggests.<sup>83</sup>

Consider this. Imagine a public company whose board adopts the following policy direction:

Make no doubt, we know our job is to deliver solid profits for our investors in a sustainable way. But also recognize that by sustainable, we mean sustainable. We are not going to seek profit the wrong way. Our stockholders don't just invest in us, they invest in the entire economy, and they pay taxes and need jobs. They live in the real world, and breathe air, drink water, and consume products and services. Their lives are not better off if companies make money by shifting costs from the corporate books to taxpayers, workers, communities of operation, or consumers. Our investors

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Florida's Republican governor Ron DeSantis over the passing of the "Parental Rights in Education" bill and how the company's expressed opposition to the new policy led to the state revoking their long-standing special tax status); see also Zeeshan Aleem, *Republicans Mission to Cancel Ben and Jerry's Is Comically Hypocritical*, MSNBC (Aug. 2, 2021) (reporting on Florida's Republican Gov. Ron DeSantis's announcement that he was taking steps to punish ice cream company Ben & Jerry's for its high-profile decision to stop selling its products in the Israeli-occupied Palestinian territories); Emma Goldberg, *Match Group Suspends Some Political Donations After Abortion Ruling*, N.Y. TIMES (July 7, 2022), <https://www.nytimes.com/2022/07/07/business/match-group-donations-dobbs-roe.html> (reporting on Match Group's announcement to stop all political donations to both Republican and Democratic state attorneys general organizations). And the empirical tilt of spending is so profound that more than profit would seem to be at issue. The bottom line is that you can't have it both ways and argue that when corporations influence the political process through spending, that is legitimate and proper, and when they influence it through actual speech, it is somehow not.

82. In the tumultuous 1960s, prominent universities were pushed to take sides on controversial issues. The University of Chicago responded with a report through distinguished faculty that recognized that if the university itself took sides and sought to adopt a specific perspective on society, it would be undermining its own ability to foster the freedom and diversity of thought of its faculty and students. UNIV. OF CHI. KALVEN COMM., REPORT ON THE UNIVERSITY'S ROLE IN POLITICAL AND SOCIAL ACTION (Nov. 11, 1967), [https://provost.uchicago.edu/sites/default/files/documents/reports/KalvenRprt\\_0.pdf](https://provost.uchicago.edu/sites/default/files/documents/reports/KalvenRprt_0.pdf). I thank Professor Edward Rock for this reminder of a historical analogy that has remaining resonance.

83. For a good example of this reality, see this incisive paper by Professor Gordon reconciling the profit motive of institutional investors holding broad portfolios and responsible corporate behavior toward society and stakeholders. See Jeffrey N. Gordon, *Systematic Stewardship*, 47 J. CORP. L. 627 (2022). For a more skeptical view on this subject, see Marcel Kahan & Edward B. Rock, *Systemic Stewardship with Tradeoffs* (NYU Law & Econ. Research Paper No. 22-01, Nov. 30, 2021), <https://ssrn.com/abstract=3974697>.

will bear these costs, and if each company tends to operate that way, every company will be forced to do so.

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We think that is wrong, and in pursuing long-term profit, we intend to treat all our stakeholders with respect. We will pay a living wage and benefits, not only to our direct workforce but require that our contractors do the same, and do so in all nations and regions where we operate. We will support our communities of operation, by paying our share of school taxes, and contributing to the key charities like hospitals, community colleges, the Red Cross, and local fire departments upon which our company and our workers depend. We will focus on safety and quality so our products help our customers live better lives. We will try not to harm the environment or contribute to climate change that endangers our economy and well-being. We will try to be a fair employer, provide equal opportunities to all who work for us and who might want to work for us, and to foster a spirit of genuine tolerance for diversity—including diversity of viewpoint—in the workplace. We believe that by doing business the right way, all of our stakeholders will benefit and so will our bottom line.

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We also know this. You don't buy our stock so we can use your capital for political purposes. You have diverse political, religious, and social beliefs, and so do our employees. The freedom to have those different beliefs is important to all of us. For that reason, we will not make political expenditures except under a plan you as stockholders have approved. The entire board will approve any corporate positions on political or social issues and will only address those directly important to the company. Whenever we do so, we will make clear that we don't expect our employees to hew to the company's views, and that we want a company where Americans of all viewpoints feel welcome to work and be a consumer.

Neither of the two major strands in American corporate law—the stockholder and stakeholder schools—can really take issue with this corporation's policy. Sure, there will be trade-offs to be made, but even Milton Friedman would likely not have questioned that a well-motivated board could embrace this company's policy.

And this lack of discord makes sense. There is no blue-red divide about whether corporations are entitled to pay their workers fairly and provide them with a safe, tolerant workplace.<sup>84</sup> There is no blue-red divide about whether corporations should make their products and services safe, non-fraudulent, and

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84. For example, poll data from JUST Capital and The Harris Poll indicate that respondents of all political persuasions tended to rank issues relevant to the fair treatment of workers at the forefront of what was important for corporations in their treatment of stakeholders. See Press Release, JUST Capital, Key Findings from JUST Capital's 2021 Survey (May 19, 2021), <https://justcapital.com/news/key-findings-from-just-capitals-2021-focus-groups>.

useful. There is no blue-red divide that corporations should avoid polluting the communities in which they operate and pay their fair share of taxes.

Americans embrace Hippocrates-influenced corporate governance: do no harm in pursuing profit. Americans of all beliefs are not just stockholders, but workers, taxpayers, and consumers who live in the environment. Most of them have friends and family who do not share all their own views about anything, or their skin color, ethnic origins, or gender. They can get behind businesses that show their values by treating their workers, consumers, communities, and the environment well—that is, by doing what matters most—conducting its business in the respectful and ethical manner that a good corporate citizen who cares about its stakeholders and nation should.<sup>85</sup>

This consensus breaks down, however, when corporations seek to tilt the social and political value system. Voting eligibility policies, reproductive rights, guns, policing procedures and tactics, criminal codes, and the like are the subject of passionate and legitimate disagreement in our society. When corporations act to advance their management's views about controversial issues of this kind, they generate discord because there is no shared consensus among their workers, consumers, or stockholders about these issues. And because corporate boards are not elected for these purposes and lack any comparative expertise in them, they are poorly positioned to chart a sensible or coherent direction. Speaking out about one thing leads to a demand to speak out about another. An ad in *The New York Times* by a company about an issue that costs five figures turns out to pale in comparison to the millions of dollars a company spent funding candidates and committees on the other side of the issue who have been behind the very policies the company now supposedly opposes. Charting a consistent course risks the company becoming identifiably a red or blue one. Behaving episodically and combining a principled involvement in issues and politics with the cynical use of political spending to curry favor risks evident hypocrisy.<sup>86</sup> Neither seems that attractive.

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85. In encouraging corporations and institutional investors to center their values and conduct in ways that build on a consensus of the public, I echo earlier thinkers. In a still relevant article, David L. Engel argued that any "act of corporate voluntarism should be based on a broad, and clearly signaled, social consensus." David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 4 (1979). Engel viewed there to be few situations where that standard could be met, and he distilled them down to three: (1) obedience to the law; (2) situational sacrifices of some profits for stockholders when the gain to third parties far exceed the loss to stockholders; and (3) making appropriate public disclosure about corporate conduct while refraining from interfering with the lawmaking processes of society. *Id.* And in important writings, Adolph Berle took the view that corporate managers should hew to running their corporations in accord with a public consensus about how large corporations should behave, and that by responsibly seeking profit in ways that benefit their stakeholders and communities of operation, they limit the need for government regulation. *E.g.*, Adolph Berle, *Functions of the Corporate System*, 62 COLUM. L. REV. 433, 442-45 (1962).

86. CTR. FOR POL. ACCOUNTABILITY, CONFLICTED CONSEQUENCES: A GRAPHIC STUDY ON HOW PUBLIC COMPANY POLITICAL MONEY HAS RESHAPED STATE AND NATIONAL POLITICS FROM 2010 TO TODAY 5, 8-27 (July 13, 2021) (documenting how corporations funded partisan political committees supporting state elected officials who have pursued legislative and litigation strategies to restrict voting rights, increase gerrymandering, undermine the Affordable Care Act, prevent action to address climate change, oppose LGBT equality, and limit women's access to abortion, even though the corporations purported



The model company policy speaks directly to these concerns, by employing the traditional tools of legitimization that corporate law has used when concerns about conflicts of interest on the part of corporate leaders exist. The policy thus responds in a measured and traditional way to the concerns that scholars, politicians, and citizens of all political stripes have voiced that business leaders might misuse the wealth and influence entrusted to them by pursuing policies more reflective of their own biases and personal beliefs than of a consensus of their investors or other stakeholders. By way of example, corporate law has long encouraged that decisions about transactions involving self-dealing be approved by directors lacking any conflict or by the disinterested stockholders themselves.<sup>87</sup> Even when there is no direct self-dealing conflict, such as when a board addresses a takeover bid, the law has encouraged boards to shift power to the independent directors to ameliorate the potential that management's interest might taint the board's response.<sup>88</sup> And of course, it is traditional for corporate law statutes to require that certain decisions of importance be approved not just by the board, but by the stockholders themselves,<sup>89</sup> sometimes with the requirement that more than a simple majority of stockholders approve.<sup>90</sup> By using these tools drawn from direct and republican democracy, the potential for self-interest to infect corporate policy at the expense of the company and its stockholders is reduced, because the process requirements both pressure the board to explain its actions on proper grounds, and to convince the stockholders themselves to support their proposed action. Moreover, when boards are required to evaluate and adopt a resolution to act that is then subject to scrutiny and approval by stockholders, they are more likely to ask hard questions of top management and to think carefully, because their decision will be subject to searching public examination and a stockholder plebiscite.<sup>91</sup> This process of accountability influences boards even when stockholder input is

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to disfavor these policies); Andrew Ross Sorkin, *A Company Backs a Cause. It Funds a Politician Who Doesn't. What Gives?*, N.Y. TIMES DEALBOOK (July 21, 2020), <https://www.nytimes.com/2020/07/21/business/dealbook/corporate-political-donations.html> (noting that corporate "money can have an outsize influence on state-level politics . . . . The result is the election of politicians who can change the rules for everyone in a state, including on the issues about which companies say they care about. At minimum, this risks undermining the time, effort and money that companies devote to the environment, working conditions or other issues. Even worse, it raises questions about how genuinely those companies value the issues they say they do."); Judd Legum & Rebecca Crosby, *These Corporations Wrote 6-figure Checks to Elect Governors Who Will Ban Abortion*, POPULAR INFO. (July 11, 2022), <https://popular.info/p/these-corporations-wrote-6-figure> (citing to large corporations who had denounced the Supreme Court's decision in *Dobbs*, but who had contributed large sums to the Republican Governors Association and governors who were taking action to restrict women's access to abortions); Judd Legum et al., *These 25 Rainbow-flag Waving Companies Donated \$13 Million to Anti-gay Politicians*, POPULAR INFO. (June 2, 2022), <https://popular.info/p/lgbtq2022>.

87. E.g., DEL. CODE ANN. tit. 8, § 144 (2022); Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).

88. This was a crucial part of the move made by the iconic decision in *Unocal v. Mesa Petroleum, Inc.*, 493 A.2d 946 (Del. 1985).

89. For this reason, charter changes, mergers, and substantial asset sales are subject to required votes. E.g., DEL. CODE ANN. tit 8, §§ 242(b), 251, 271 (2022).

90. *Id.* § 215(c).

91. This was a premise behind the decisions in *In re MFW Shareholders Litigation*, 67 A.3d 496 (Del. Ch. 2013), and *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

provided on a precatory basis, as the success of 14a-8 proposals have had in profoundly changing corporate governance policies and the prevalence of classified boards demonstrates.<sup>92</sup> For these reasons, there is a rational basis, and respected scholars have thus argued, for using these same legitimizing techniques to provide guardrails to better ensure that corporate involvement in social and political issues is representative of what a majority of their investors can support, or at the very least tolerate.<sup>93</sup>

To wit, if investors of all kinds were to act on the recommendation of John Bogle, the late founder of Vanguard, and to propose that corporations could only engage in corporate political spending under a plan approved by a super-majority of stockholders,<sup>94</sup> they could temper the politicization of the corporate sector. Companies that wished to continue to influence the political process by contributions would have to shape credible plans for doing so that identified how and when the corporation would make contributions, and how the corporation would take into account the difficulties involved in reconciling corporate giving with the company's stated values. This would, Bogle knew, likely lead to a sharp reduction in corporate entanglement in the sordid business of campaign funding. But that he viewed as a good thing and thought those entanglements were injurious for the corporate sector's reputation and effectiveness. His approach also allowed those corporations that could obtain consensus support to proceed on a much more legitimate basis. A policy of demanding that corporations obtain stockholder support is not a right-wing or left-wing one—it accords with the thinking of Milton Friedman, Elizabeth Warren, and majorities of both political parties.<sup>95</sup> The same principled approach, grounded in traditional corporate law tools, could and should be applied to similar actions like boycotts of certain American communities.

To be sure, guardrails of this kind will not eliminate the need for boards and management to make difficult judgments. Nor will it mean that the decisions that result are necessarily universally embraced by stockholders or other stakeholders.

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92. See Leo E. Strine, Jr., *The Soviet Constitution Problem in Comparative Corporate Law: Testing the Proposition that European Corporate Law Is More Stockholder-Focused than U.S. Corporate Law*, 89 S. CAL. L. REV. 1239, 1271 (2016) (summarizing scholarship and data demonstrating the influence precatory proposals had in diminishing the prevalence of classified boards, poison pills, and other takeover defenses and increasing use of majority voting rules helping activist investors).

93. Professors Bebchuk and Jackson have taken this position in their important work, Lucian A. Bebchuk & Robert J. Jackson Jr., *Corporate Political Speech: Who Decides*, 124 HARV. L. REV. 83 (2010), and, for what it is worth, I have made this point in my earlier work. E.g., *Fiduciary Blind Spot: The Failure of Institutional Investors to Prevent the Illegitimate Use of Working Americans' Savings for Corporate Political Spending*, 97 WASH. U. L. REV. 1007, 1044 (2020).

94. John Bogle, *The Supreme Court Had Its Say. Now Let Shareholders Decide*, N.Y. TIMES (May 14, 2011), <https://www.nytimes.com/2011/05/15/opinion/15bogle.html> ("I believe that, in the wake of the Supreme Court case, known as *Citizens United*, the institutional investor community has an obligation to act. Institutional investors should insist that the proxy statement of each company in which they invest contain the following: 'Resolved: That the corporation shall make no political contributions without the approval of the holders of at least 75 percent of its shares outstanding.'").

95. As a matter of effective action, there is another reality. After *Citizens United* took the ability to improve election financing out of democracy's hands, it is institutional investors, not Congress or state legislatures, who are in the best position to seek positive change.

But the deliberative process these techniques facilitate, and the approval they require from the full board, and in some cases stockholders themselves, will better ensure that all reasonable perspectives are considered in corporate decision-making about these sensitive issues in which directors and management have no comparative advantage or natural alignment with stockholders or other corporate stakeholders. The resulting decisions are more likely to be ones supported by a strong, diverse base of the company's stakeholders.

Put somewhat differently, if this path were taken, it might not end all controversy about corporate involvement in social and political issues, but it could channel corporate behavior in a way that would be more consistent with the shared values of the American public and reduce the unhealthy pressure to enmesh businesses in partisan politics. This more nuanced path would avoid making workers and investors victims of politicizing a space of societal activity that is impossible for them to avoid and that should be open to everyone of good faith, regardless of their political, religious, or social beliefs.

## **VI. ENCOURAGING CORPORATIONS TO TREAT THEIR STAKEHOLDERS WITH RESPECT, AND TO LEAVE SOCIAL AND POLITICAL POLICY LARGELY TO THEIR STOCKHOLDERS, EMPLOYEES, AND CUSTOMERS TO DECIDE FOR THEMSELVES**

### **A. A MODEL OF GOOD, NON-IDEOLOGICAL CORPORATE CITIZENSHIP**

To map out this path in clearer directional terms, this non-partisan, non-ideological approach to corporate social and political involvement can be distilled into these basic components:

- Corporations should focus on how their behavior affects their stockholders, workforce, customers, creditors, and communities of operation. Before a corporation focuses on external issues of general concern that have no connection, the corporation should be sure that it is treating all of its stakeholders and society with appropriate respect.<sup>96</sup>
- Examples of policies to this effect would be:
  - a. Commitments to pay a living wage to the workforce writ large (including contracted workers) and close the wealth gap through savings help for employees;

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96. For a new study of public opinion that indicates that both Republicans and Democrats support companies being respectful toward their communities of operation, stakeholders, and the environment, want them to be careful to match what they say about issues with what they do, and oppose companies enmeshing themselves in political issues unrelated to their businesses, see ROKK SOLUTIONS & PENN STATE UNIV. CTR. FOR THE BUS. OF SUSTAINABILITY, *NAVIGATING ESG IN THE NEW CONGRESS* (2022), <https://rokkolutions.com/wp-content/uploads/2022/12/Navigating-ESG-in-the-new-Congress.pdf>; see also Sarah Murray, *When Should Businesses Take a Stand*, *FIN. TIMES*, Mar. 8, 2022, at 7 (citing poll data showing that fewer than 40 percent of voters polled supported “companies speaking out on social issues in American life” generally, but that 80 percent supported them speaking out if the issue was “directly related to the core business of the company”).

- b. Making an effort to implement practices so that the company's employee ranks are open fully to everyone, regardless of race, ethnicity, gender, or sexual preference or orientation, and to serve all communities on a non-discriminatory basis;
- c. Ensuring that the workplace is as tolerant, safe, and harassment-free as possible, so that employees of diverse backgrounds and beliefs can enjoy being together to help the company succeed;
- d. Guaranteeing all employees access to benefits under their company-provided benefits and pay packages, for example, by facilitating reproductive choice by providing subsidies for travel or other assistance necessary to help employees secure care, but being sure not to make employees feel that they must embrace any particular view about reproductive choice or abortion;<sup>97</sup>
- e. Paying expected taxes and refusing to engage in tax arbitrage and the avoidance of school and other taxes as a condition to keeping or locating operations;<sup>98</sup>

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97. To point to something that influences my views on this subject, I served on the Delaware Court of Chancery for many years. During that time, I regularly heard emergency injunction proceedings, as did my colleagues, to grant temporary guardianship to our state's internationally recognized children's hospital to give it the right to administer life-saving blood transfusions to children who were injured in accidents or shootings, or who needed surgery. The need for an injunction was because the sincere religious faith of the parents prevented them, even though they supported the hospital treating their children, from authorizing a blood transfusion of any kind. It is easy for all of us to forget that our own faith may have its own confusing aspects to others, and that we would not necessarily want to labor in a workplace where our own personal liberties were subordinated to others' belief—a requirement that only kosher or halal food could be eaten on company premises where you have to be for the majority of your waking hours?—much less that our right to use our paycheck and benefits for lawful purposes can be constricted by our employer.

98. One comment liberal friends of mine have given me on this draft is their skepticism that environmental responsibility is a shared value. I part company from them on this. I think most Americans want safe drinking water, clean air, and an environment they can enjoy. Our partisan politics have become so savage that basic realities of science and basic shared interests are obscured. I know of no Americans who want a stream or the air in their neighborhood polluted. It would of course be unrealistic to deny that in a choice between the need for a job and a clean environment, the former tends to win out. See Press Release, JUST Capital, Key Findings from JUST Capital's 2021 Survey (May 19, 2021), <https://justcapital.com/news/key-findings-from-just-capitals-2021-focus-groups/> (investors of all ideologies ranking issues about worker well-being above environmental concerns); see also EDELMAN TRUST BAROMETER 11 (2022) (85 percent of people worry about job loss, 75 percent worry about climate change). It would, however, be equally unrealistic to think that most Americans do not value a clean environment. To this point, the Republican Party has long marketed itself as the party most in tune with Americans who hunt and fish. But, Americans who hunt and fish are attentive to the value of good environmental practices, and the damage that bad ones do to the natural world in which they pursue their passions. Thus, polls show they appreciate the need to protect the environment—an appreciation that extends to acknowledging that human-influenced climate change is a genuine threat. NEW BRIDGE STRATEGY, KEY FINDINGS FROM A SURVEY OF HUNTERS AND ANGLERS (Apr. 2022) (finding that almost three quarters of sportsmen and sportswomen say that climate change is happening and conservation strategies such as restoring wetlands and forests, water conservation, and provision of financial incentives encouraging farmers to adopt regenerative practices are "widely embraced" by them); Paul A. Smith, *Poll Shows Sportsmen Prefer Conservation Over Fossil*

- f. Committing to high standards for product/services reliability, safety, and fairness;
- g. Avoiding environmental harm or any other harm that might unfairly shift costs from the company to company stakeholders or society;
- h. Supporting backbone institutions of the kind Benjamin Franklin believed were essential to civil society,<sup>99</sup> such as schools, the Red Cross, hospitals,<sup>100</sup> etc., in the company's communities of operation, and ensuring that company facilities are attractive, well-kept, and create positive externalities for the surrounding community; and
- i. Refusing to sell certain products or provide certain services if the board believes that the harm caused is not consistent with the company's ethical values or the long-term best interests of investors. This could include decisions not to sell certain firearms, to engage in certain types of lending practices, or to fund industries or projects that they believe generate harmful externalities of the kind the company itself has decided to eliminate. In other words, this is an aspect of the board's decision about the right way to make money, and traditionally, also an aspect of free market freedom.<sup>101</sup>

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*Fuel Production*, MILWAUKEE J. SENTINEL (Sept. 29, 2012) (reporting that American sportsmen view conservation just as important as gun rights and favor protection of public lands over fossil fuel production).

99. Franklin is famous for many things. Not to be lost was his critical role in creating foundational institutions in Philadelphia to provide health care, postal services, and education, many of which still exist today. For information regarding his role in fostering civic institutions, see *Benjamin Franklin*, PENN. MED., <https://www.uphs.upenn.edu/pahare/features/bfranklin.html> (last visited Nov. 3, 2022) (noting that it was Benjamin Franklin's friendship with Dr. Thomas Bond that inspired him to assist in the founding of Pennsylvania Hospital and "Up to the time of his death on April 17, 1790, he remained supportive of the hospital, which owes—to a great extent—its very existence to his efforts."); *Benjamin Franklin, Postmaster General*, U.S. POSTAL SERV. (July 2021), <https://about.usps.com/who-we-are/postal-history/pmg-franklin.pdf> (discussing Benjamin Franklin's role as a postal pioneer); *About Benjamin Franklin*, YALE COLL., <https://benjaminfranklin.yalecollege.yale.edu/about-us/about-benjamin-franklin> (last visited Nov. 4, 2022) ("As Franklin grew older, he developed into a community leader. He played an instrumental role in the establishment of notable Philadelphia institutions, including a library and the school that would later become the University of Pennsylvania.").

100. Illustrating our polarization is the fact that some distinguished commentators immediately saw supporting local hospitals as divisive, and did not focus on the need for good emergency room access, but on the fact that some hospitals of religious faiths might not choose to deliver all services and some hospitals might deliver services that some religious faiths oppose. A corporation's decisions to support effective non-profit health care institutions that provide high-quality care to all on a non-discriminatory basis in the communities where the company operates for the benefit of its employees, customers, and those who need access and cannot afford it remains, to my mind, an area where a broad consensus exists that corporate support is legitimate. Likewise, it is difficult to see why support for the Red Cross, the public schools, food and blood banks, fire companies, or law enforcement—that is, the basic institutions all community members need when it counts—in the company's communities of operation should be controversial, if the corporation believes those functions are being performed in good faith and are beneficial to its employees and customers.

101. I recognize that businesses that engage in their free market choice, for example, to reduce their carbon impact are now facing legislative and regulatory action to punish them. See, e.g., *supra* notes 46–50. That retaliation seems clearly problematic under the First Amendment, and a

- If the company purports to take positions on external public policy, its positions should result from a deliberative process of the board of directors based on the direct relevance of the policy question to the company,<sup>102</sup> and not just reflect the personal view of the CEO without board backing.<sup>103</sup> The full board should have to weigh and bear responsibility for any corporate position, as that somewhat improves the likelihood that the position will be one more likely to accord with a broader consensus of company stockholders and workers<sup>104</sup> and increases the accountability of the board.<sup>105</sup>

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rejection of traditional conservative values that accord businesses wide discretion, within the bounds of law, to choose with whom to do business and what type of business to conduct.

102. Microsoft's management has decided to ask a "three-pronged question" as a gating matter: Does the "issue affect the interests of its customers, or its employees, or of the business itself?" Patrick Temple-West, *Microsoft's Brad Smith on the Cloud, ESG Backlash and Taxes*, FIN. TIMES MORAL MONEY (Sept. 23, 2022), <https://www.ft.com/content/4d6f7c5b-9d20-4c73-ad9a-984c847a4a45>.

103. It has long been a reasonable fear that corporate political spending and activism are largely driven by the CEO and top management without adequate board oversight. E.g., Charles O'Kelly, *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation After First National Bank v. Bellotti*, 67 GEO. L.J. 1347, 1372 (1979) (arguing that political speech of a corporation is inevitably that of their top managers). Moreover, scholarly studies document that the directional tilt of corporate giving is influenced by the political views of the CEO. E.g., Alma Cohen et al., *The Politics of CEOs*, 11 J. LEGAL ANALYSIS 1 (2019) (finding that that more than 57 percent of CEOs of S&P 1500 companies are Republicans, 19 percent are Democrats, and the rest are neutral, and firms led by Republican CEOs tend to be less transparent about their political spending, and noting that CEOs, both individually and through the Business Roundtable—their most prominent association—express policy views and provide policy advice, and their expertise and leadership positions enable such views and advice to have significant influence). Thus, it is not surprising that corporate donations are much more heavily tilted in favor of republicans. E.g., CTR. FOR POLITICAL ACCOUNTABILITY, CONFLICTED CONSEQUENCES: A GRAPHIC STUDY ON HOW PUBLIC COMPANY POLITICAL MONEY HAS RESHAPED STATE AND NATIONAL POLITICS FROM 2010 TO TODAY 5–7, 32–35 (July 13, 2021) (demonstrating that public corporations are the largest contributors to partisan 527 committees and that corporations donate much more heavily to Republican than Democratic committees, with Democrats receiving about half as much); CTR. FOR POLITICAL ACCOUNTABILITY, PRACTICAL STAKE: CORPORATIONS, POLITICAL SPENDING & DEMOCRACY (2022) (citing additional evidence that corporate contributions trend strongly in one partisan direction). Indeed, the realistic danger that corporate political spending will be motivated by personal ideological or otherwise self-interested conduct by corporate management has led to the suggestion that corporate political spending should be policed by the duty of loyalty's entire fairness doctrine, because the presumptions that warrant typical business judgment do not pertain. David Rosenberg, *Goodwill and the Excesses of Corporate Political Spending*, 11 HASTINGS BUS. L.J. 29 (2015).

104. Corporate general counsel have told me that they have been surprised at the diversity in viewpoints that board members have expressed when they have suggested that their CEOs consult with the board before taking a position on a political or social issue. Of course, that makes sense if we think on the Thanksgiving rule for American family harmony: we have a better time talking about how the family is doing, who will win the game, and how great the sides are, than if we talk politics. People of profoundly different political and social beliefs can work together productively by being respectful to each other, focusing on the job at hand, enjoying small talk, and not using the workplace as a place to force political or social values on fellow employees. Per the issue of board engagement—or not—with these critical issues, a recent survey of public company directors indicated that a minority of the responding directors' boards had discussed the company's corporate political spending practices and stances on social issues in the last year. PWC'S 2022 ANNUAL CORPORATE DIRECTORS SURVEY: CHARTING THE COURSE THROUGH A CHANGING GOVERNANCE LANDSCAPE 18 (Oct. 2022) (indicating that only 39 percent had discussed the company's stance on social issues and only 30 percent had discussed the company's corporate political activity).

105. This is not to stifle the views of CEOs as individuals. If they wish to spend their own money and personal time expressing their views, that is America. But if they wish to speak using corporate resources and their official title as leverage, they should have the backing of the board and the board

- It should also be clear that no employee or customer is expected to share that belief and that all people of good faith are welcome to work for and patronize the company.
- As an ideal, corporate political spending should be voluntarily eliminated, leaving the company's human stockholders, workers, and customers to be the ones whose voices matter in the political process.<sup>106</sup> In the alternative, any corporate political spending should only occur based on a plan approved by a supermajority of stockholders, and that only allows for contributions to candidates and committees consistent with the company's stated values. The company could only give to candidates based on a specific determination that their overall views were consistent with company policy, in the sense that there is no marked departure on any issue that the company has deemed fundamentally important. This, of course, is not easy in an age of greater polarization, but is necessary for the corporation to try to do if it wishes to avoid legitimate criticism for being hypocritical.
- If the company gives only through a PAC comprised of voluntary contributions by stockholders<sup>107</sup> and management, it could do so as long as a committee of independent directors oversees giving on the same basis.<sup>108</sup>

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should bear responsibility too. And, I underscore, freedom for the CEO to pop off should extend to the workforce too, or freedom for the many will be undercut.

106. Some may argue that corporate political spending might be justified as increasing firm value. Some distinguished corporate law scholars cast doubt on that. E.g., John C. Coates IV, *Corporate Politics, Governance, and Value Before and After Citizens United*, 9 J. EMPIRICAL LEGAL STUD. 657, 658 (2012) ("In the majority of industries . . . political activity is common but varied, and it correlates negatively with . . . shareholder value . . ."). And the evidence that it is positive for companies, is at best mixed. See Lucian A. Bebchuk, Robert J. Jackson, Jr., James D. Nelson & Roberto Tallarita, *The Untenable Case for Keeping Investors in the Dark*, 10 HARV. BUS. L. REV. 1, 8–9 & nn.21 & 22 (2020) (summarizing empirical studies on both sides of the question, and noting that empirical studies of this question are likely to be unreliable until corporations actually have to disclose more completely their full political spending). A further point is important for Americans worried about their overall economic portfolio. If particular companies gain revenues through political spending, that might hurt other industry competitors, and if companies make money through regulatory short-cuts, and not in a fundamentally sound way, diversified investors who are long many companies—and the whole economy—will suffer lower overall growth, and also have to endure the externality costs as taxpayers and consumers.

107. Note that it was possible before *Citizens United* for corporations to raise unlimited funds from stockholders for use by their corporate PACs. Stockholders, however, do not donate to such PACs and companies would be considered insane if they asked. Corporate PACs therefore mostly operate on "voluntary" contributions from top and middle management. Voluntary is in quotes for a reason.

108. A respected source for corporations to consider in this regard is the CPA–Wharton Zicklin Model Code of Conduct for Corporate Political Spending, developed in 2020 by the Center for Political Responsibility and the Wharton School's Zicklin Center for Business Ethics Research: <https://www.politicalaccountability.net/wp-content/uploads/2022/06/CPA-Zicklin-Model-Code-of-Conduct-for-Corporate-Political-Spending.pdf> (last visited Nov. 3, 2022); see also CTR. FOR POLITICAL ACCOUNTABILITY, PRACTICAL STAKE: CORPORATIONS, POLITICAL SPENDING & DEMOCRACY 35–41 (2022) (giving guidance as to how corporations can use the code of conduct to more credibly determine when and whether to give political contributions). For my more extended thoughts on how corporations can put into effect such policies, see Dorothy S. Lund & Leo E. Strine, Jr., *Corporate Political Spending Is Bad Business*, HARV. BUS. REV. (Jan.–Feb. 2022). It is worth observing here that my lack of attention to lobbying is not inadvertent. As Professor Lund and

- Corporate political spending to partisan committees of any kind would be eliminated, full stop. These constraints would not inhibit the corporation from engaging with elected officials of all stripes. To the extent that the company wished to support and be engaged with governors, state legislators, or attorneys general, it would and should give to the non-partisan groups like the National Governor's Association, the National Conference of State Legislatures, and the National Association of Attorney Generals that exist, that promote bipartisan cooperation in the public interest, and that provide forums to engage with these elected officials from all parties.
- If a company wants to stop doing business in or with a particular American state, it would also have to obtain supermajority stockholder approval.<sup>109</sup> To boycott an American state is as coercive as flooding a state with millions of dollars of political spending. It also may involve the company abandoning services and endangering the employment of lots of residents of that state who do not disagree with the state policy that the company opposes. Not everyone in Alabama is pro-life and not everyone in Massachusetts is pro-choice. Thus, companies should commit only to take this kind of drastic action with the assent of a supermajority of stockholders, just as they should with corporate political spending.<sup>110</sup>

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I explain, lobbying involves a specific determination by the company to seek to influence public policy, and business spends way more than any sector of society on that purpose. That reality limits business's need to make political expenditures, as does the leverage that big employers have as a result of the competition among states and nations to be the location for business hubs. Because lobbying is a specific determination, it is more likely to be tied tightly to the company's own business objectives, and although the policy direction taken may be one that causes disagreement, there is far less reason to believe that lobbying implicates the basic legitimacy and accountability concerns that, for example, corporate political spending or boycotts do.

109. Note that these guardrails also would create greater accountability even among companies with controlling stockholders. If those companies are public companies, they must have some independent directors, and the requirement for the entire board to act makes all the directors more accountable. Not only that, companies with publicly listed shares are susceptible to stockholder influence even if they have a controlling stockholder, because the public stockholders often have leverage, under corporate law principles, when there are conflict transactions or votes, such as say-on-pay votes, where it looks bad and puts the controller under pressure if the public stockholders dissent. And, of course, the more that a corporation looks just like an instrument of a single equity owner, the less there is a legitimacy problem at least from a corporate law perspective. In that case, there will remain the same concerns that exist when any wealthy interest can act on society, and, of course, there is the potential for concerns for employees of the kind discussed. But the number of companies wholly owned by a single founder or founding group that have large employee bases is relatively small.

110. In this exploratory article, I do not pretend to solve all problems. For example, American public companies do sometimes boycott other nations, such as is happening right now as to the Russian aggressor state. When a boycott is directionally consistent with clear national government policy—such as would be boycotts of Russia now—but based on a company-specific judgment that the nation's policies are so abhorrent that the company should not operate there, I admit there is an argument for parity of treatment. I separate out, though, the question of a company believing that the business environment in a certain nation is so fraught with danger, risk, and unfairness that operating there makes no business sense for stockholders. Typically, I note, boycotts do not involve that separate question because the company has already determined it can and wants to make money there, and a decision



## B. WHAT INSTITUTIONAL INVESTORS CAN DO TO MAKE THIS CONCEPT OF GOOD CORPORATE CITIZENSHIP A REALITY

This thinking can be translated into a corresponding framework to guide the stewardship role of institutional investors.

For institutional investors who manage mutual funds for retirement and college savers, and pension funds, with the important duty of acting as prudent fiduciaries for human investors with diverse religious, political, or social values, this idea is even more important. Institutional investors of this kind know that their clients only entrust their capital to them for one objective—to get a solid return to use for important reasons like education for their children and retirement for themselves—and not so the institutions can fund political or social spending on their behalf.

If these propositions are true, it seems to me that all institutional investors can build on the principles we have talked about in their own engagement efforts. And most institutional investors can use another simple, but important, overarching consideration to help them—their clients' economic interests are broader than any single portfolio company's narrow profit interest. If, as is true, most institutional investors do not simply invest in one company, but many companies, then institutional investors want for their clients a system where companies make money the right way.<sup>111</sup> If, as is true, most investors invest in debt securities, not just equities, they do not want a system where value is shifted to equity at the expense of bondholders. If, as is true, human investors need good jobs as their primary source of wealth, and their jobs are critical to the soundness of pension funds for retirees, they need companies to make money in a way that is good for American workers. And if, as is true, human investors are taxpayers, consumers, and people who live in the environment, they do not want companies to shift costs to them in the form of taxes, consumer injuries, or health damage. Instead, they need institutional investors to encourage companies to seek to create sustainable profits, by focusing on growth net of externalities. These goals are not partisan, they are not ideological, they are shared by an overwhelming

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to boycott arises because of some other issues (or perhaps one, like apartheid) that the company earlier decided to ignore (or even support), until the political environment changed.

111. Oliver Hart & Luigi Zingales, *The New Corporate Governance*, 1 U. CHI. BUS. L. REV. 195, 197 (2022) ("Investors, especially younger ones, are more sensitive to environmental and social issues. As a result, we think that the paradigm needs to change. This is true even if one accepts, as we do, the idea of shareholder primacy, that is, that companies should act on behalf of shareholders. When externalities are important and at least some investors are prosocial, we argue that shareholders will want companies to pursue shareholder welfare maximization."); Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247, 248 (2017) ("The ultimate shareholders of a company (in the case of institutional investors, those who invest in the institutions) are ordinary people who in their daily lives are concerned about money, but not just about money. They have ethical and social concerns."). See also Frederick Alexander, *From Meta to Twitter, What Everyone Gets Wrong About ESG and Why It Matters*, INSTITUTIONAL INV. (Aug. 24, 2022), <https://www.institutionalinvestor.com/article/b1zh8gsv8hssjh/From-Meta-to-Twitter-What-Everyone-Gets-Wrong-About-ESG-And-Why-It-Matters> (arguing that the economic interests of diversified, universal owners of broad equity portfolios are best served by encouraging companies to make money without externalizing their costs to other companies, taxpayers, or other stakeholders).

percentage of the human investors whose savings are controlled by institutional investors.

Building on that basis, this could translate into a framework for engagement and stewardship efforts of institutional investors like this:

- Identify reasonable expectations for portfolio companies to create sustainable value the right way, and the conduct expected of them toward their workforce writ large (including contracted workers), their communities of operations, their consumers, and the environment.
- Channel engagement efforts toward those inward-facing issues—how is the corporation treating the people its conduct affects?—about which there is less division and over which companies actually have more responsibility.
- Demand corporations use the suggested guardrails over corporate political and social involvement. Use your institutional investor voice and shareholder vote to that end.
- Insist that corporations that take positions on debatable social or political issues accord their workforce the freedom to hold contrary views, and honor the religious and political diversity of their employees and customers, by ensuring an environment and culture of mutual respect that welcomes participation by all Americans of good faith.

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The focus I am recommending is likely to have the most positive impact because it makes business leaders more genuinely accountable for what they can control—the operations of businesses that benefit not just their stockholders, but all the stakeholders. The guardrails requiring greater deliberation by the full board and stockholder approval will better channel corporate policy toward issues on which there is a consensus among the company's investors and stakeholders, and reduce the ability of corporations to use their resources on issues where they are divided.

If all this sounds like I am saying that the focus for corporations and institutional investors ought to be on encouraging respectful treatment of all corporate stakeholders in the pursuit of sustainable profit, you got it right. That bottom-line goal—making money the right way—is one that all Americans can get behind, leaves no one out, and does not divide us.